VENICE COMMISSION
30TH ANNIVERSARY
1990 - 2020

COMMISSION DE VENISE
30E ANNIVERSAIRE
1990 - 2020

Venice Commission

Thirty-year quest for democracy through law

1990 – 2020

Commission de Venise

Trente ans à la recherche de la démocratie par le droit

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Foreword

« Il n'est pas indifférent que le peuple soit éclairé. Les préjugés des magistrats ont commencé par être les préjugés de la nation. Dans un temps d'ignorance on n'a aucun doute, même lorsqu'on fait les plus grands maux; dans un temps de lumière, on tremble encore lorsque l'on fait les plus grands biens. On sent les abus anciens, on en voit la correction ; mais on voit encore les abus de la correction même. On laisse le mal, si l'on craint le pire; on laisse le bien, si on est en doute du mieux. On ne regarde les parties que pour juger du tout ensemble ; on examine toutes les causes pour voir tous les résultats. »

Montesquieu, De l'esprit des lois

On 10 May 2020, the Venice Commission celebrated its 30th anniversary amidst a terrifying pandemic that prompted governments to declare a state of emergency and order lockdowns. Entire populations found themselves at home, afraid to die of this unknown disease. With the lockdown came extraordinary human rights restrictions, growing inequalities, inflated executive powers, diminished parliamentary oversight and a looming economic crisis. Democracy as we knew it, suddenly became unrecognisable. In its 30 years of existence, the Venice Commission regularly pondered whether its work was done and its 62 member States no longer needed its assistance. But new challenges keep emerging and the Commission's ultimate quest for democracy through law will continue to keep it busy.

Simona Granata-Menghini,
Acting Secretary of the Venice Commission, September 2020

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Statement by Gianni Buquicchio
President of the Venice Commission

on the occasion of the
30th Anniversary
of the establishment of the Commission

On 10 May 1990, eighteen ambassadors of Council of Europe member States took the decision to establish the European Commission for Democracy through Law, better known as the Venice Commission. What looked at the time like the creation of just another technical advisory body proved to be an event of major significance for the development of the rule of law and democracy in Europe and beyond.

In the 30 years of its existence, the Venice Commission:

- Played a major role in the preparation of the constitutions of the new democracies in Central and Eastern Europe, ensuring their compliance with international standards;
- Accompanied these and many other countries during their constitutional and legislative reforms;
- Has become a main reference with respect to the development of international standards on the rule of law, democracy and the respect for human rights;
- Has acquired a capital of trust in many societies, making its support crucial for public confidence in reforms;
- Assisted a large number of countries in fulfilling membership requirements of the Council of Europe and the European Union;

- Contributed to the establishment of constitutional courts in many countries and established a worldwide network of constitutional courts with 117 member courts;
- Reviewed a large number of laws, ensuring their compliance with international standards and, in particular, the European Convention on Human Rights;
- Developed standards for the holding of democratic elections and contributed to electoral reforms;
- Has become a partner of the countries in the Southern Mediterranean and Central Asia in their constitutional and legal reforms;
- Increased its membership to 62 countries, thus becoming a forum for worldwide constitutional dialogue.

Despite this success, many challenges remain and the current Covid-19 crisis reminds us that progress is never irreversible. We must safeguard pluralistic democracy and prevent its degeneration into an authoritarian regime, where the winner takes all.

In my view, the Commission is needed now more than ever before, to defend and promote, in partnership with the organs of the Council of Europe and the European Union:

- Respect for the rule of law and, in particular, the independence of the judiciary;
- Checks and balances within a functioning democratic system;
- Free and fair elections;
- Respect for human rights, including in emergency situations.

30TH ANNIVERSARY OF THE VENICE COMMISSION 1990–2020

SECTION I
CONTRIBUTIONS
MEMBERS AND FORMER MEMBERS[1]

[1] The articles in this book were prepared by the authors in their personal capacity and do not necessarily reflect the official position of the Venice Commission or the Council of Europe.

Aurela Anastas[1]

Constitutional Issues on the Protection of Gender Equality - Reflections from The Venice Commission Opinions Review

General Overview

The activity of the Venice Commission of the Council of Europe on the protection of the principle of gender equality stands out for the constitutionalisation of guarantees and standards, in order to implement this principle effectively. The contribution in this area has a long history dating back to its inception. A review of the documents drafted by the Venice Commission helps us identify several issues about a fair understanding and effective implementation of this principle. The first contributions from 1992 influenced the process of drafting classical articles on equality, when writing the first constitutions after the fall of the one-party regimes in Europe. Moreover, we can mention the assistance for drafting legislation that implements the principle of equality and the prohibition of discrimination. The electoral legislation and the one for the prohibition of discrimination stand out among them. However, we can highlight the contributions to combating gender-based violence and domestic violence. Geographically, the Venice Commission is not limited to Europe. There is a wide intercontinental map, where it has extended its assistance in this field.

The relevant documents in order to carry out this work can be categorized into several types. The soft law acts of the Commission, such as codes or guidelines, have been of particular importance. However, the largest part is undoubtedly the opinions of the Venice Commission experts. Among them, we can mention the joint opinions of the Venice Commission with other international organizations specialized in the field, such as OSCE-ODHIR, etc. There are also explanatory reports, particularly those related to the case law of constitutional courts in different countries. Generally, these papers are presented in the form of policy papers, but an important contribution is also given by academic papers, presented in international conferences or roundtables organized by the Commission.

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[1] Former Member of the Venice Commission in respect of Albania (2016-2020).

We aim to analyse the conclusions stemming from all the documents mentioned above, as well as the impact that the recommendations of the Venice Commission have had on the Constitutional and International law, with regards to the principle of gender equality and protection against gender discrimination. Being unable to address all the aspects, we will dwell on some issues of significant impact on the standards originally set by this Commission. Thus, we will analyse the constitutionalisation of the principle of gender equality and the prohibition of discrimination, special measures in electoral legislation that guarantee gender balance in decision-making, as well as the mechanism of bodies that guarantee an effective implementation of equality in general and of gender equality in particular.

Through the constitutionalisation of the principle of gender equality, the opinions of the Commission teach us that the implementation of the law in accordance with the Constitution, widely affects the transformation of the Constitution into a living and active document. To this end, the Venice Commission's documents have built or complemented international standards in this field.

1. The constitutionalisation of the principle of gender equality and its impact

The Venice Commission has designed gender equality as a constitutional principle. The constitutionalisation of this principle is seen as necessary to guarantee the reforms undertaken by states, in the field of gender equality and prohibition of discrimination. Through sanctioning, it helps strengthen this principle, as a basis for the effective development and implementation of the legislation in this field.

This request has been pretty evident since the beginning of its activity, aiming for the principle of equality along with non-discrimination to be expressly sanctioned in the Constitution.[2] Firstly, this standard is accomplished through the affirmation of the classic article of equality and non-discrimination. "*The explicit recognition of the principle of equality and non-discrimination is important and deserves to be welcomed.*"[3] However, special attention has been given to the gender equality, especially with regard to special measures in the electoral legislation. This affirmation in the Constitution includes some standards that are identified

[2] Venice Commission, CDL(1992)033, Equality between Women and Men in the new constitutions of Central and Eastern European Countries.
[3] Venice Commission, CDL-AD(2013)032, Opinion on the final draft Constitution of the republic of Tunisia.

on a case-by-case basis in the opinions and ensure an effective application of the principle of equality in general and gender equality in particular. Thus, we underline the following standards, which will also be the subject of our analysis:

- Constitutionalisation of "gender" or "sex" as a protected ground from discrimination;
- Constitutionalisation of protected grounds in an "open list";
- Gender equality, as a constitutional principle of equal opportunities;
- Constitutional promotion of equality of results.

1.1 Constitutionalisation of "gender" or "sex" as a prohibited ground of discrimination

Constitutional sanctioning of a detailed list of protected grounds from discrimination is a standard promoted by the Venice Commission. Thus, in one of its opinions, it is stated that: "…*Although the expression "without any discrimination" is very broad, a reference in Article 20 to the different causes of discrimination would strengthen the impact and scope of the prohibition of discrimination. Still on this point, it is recommended that the text of Article 20 be harmonized with international instruments*".[4]

The constitutions of different countries list gender or sex among the causes, protected under the principle of non-discrimination. However, there are some concerns that are being discussed in this regard. For instance, several countries have questioned whether "sex" or "gender" should be the ground that is protected by the Constitution. The Venice Commission responded to this matter, when it analysed the constitutional implications of the "Convention on preventing and combating violence against women and domestic violence" (Istanbul Convention).[5] There is certainly a difference between the concepts of "sex" and "gender", which the Venice Commission Opinion summarizes as follows: "*Whereas the former term relates to a biological reality, the latter, in accordance with the definition quoted above, relates to the social expectations linked to this reality*".[6] However, the concept that "gender" excludes the natural and biological differences that exist between women and men is unacceptable. If that were the case, the Commission argues: "*The Istanbul Convention would allegedly contravene national constitutions that recognise the existence of two sexes (men and women). This interpretation, however, is not warranted*".[7]

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[4] *Ibidem*, para. 46.
[5] Venice Commission, CDL-AD(2019)018, Armenia - Opinion on the constitutional implications of the ratification of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention).
[6] *Ibidem*, para. 58.
[7] *Ibidem*, para. 57.

Currently, national constitutions have adopted different definitions in terms of gender equality and gender cause. Thus, in addition to the constitutions that sanction gender as such, there are many constitutions that affirm gender equality and list sex as a protected ground from discrimination. Moreover, there are countries that do not distinguish one term from the other, due to the characteristics of their national languages. Despite the terminology used, the Venice Commission considers both standards set by national constitutions to be valid. Thus, for example, in the aforementioned opinion dedicated to Armenia, the Commission finds that: "*The Constitution of Armenia does not refer to the concept of gender. However, it guarantees equality between men and women (Article 30)*".[8]

1.2 The constitutionalisation of prohibited grounds in an "open list"

The constitutionality of the "open list" of protected grounds in national constitutions is a standard set by the Venice Commission. The debate over whether the protected list of grounds in the Constitution should be "closed" or "open" has received this answer. This question is posed specifically with regard to the constitutions of countries that have listed protected grounds in a "closed list", or countries where the wording of the principle of equality is general and does not detail protected grounds or does not authorize the law to give further details. However, currently in special laws prohibiting discrimination, the list of protected grounds is longer than the one sanctioned in the Constitution. This was also stated by the Venice Commission in the Opinion dedicated to Malta, where it argued that "*Article 45 of the Constitution of Malta contains a closed list of "protected characteristics", which is shorter than the one contained in the Draft Equality Act. Thus, on its face, the Draft Equality Act seems to establish a more "generous" anti-discrimination regime as the one required by the Constitution*".[9] In this case, it highlights that: …*this may create a tension with the constitutional rights of the latter*".[10] A similar debate was raised in other countries as well. For instance, the doctrine in Albania has mentioned this issue.[11] The Constitution of Albania, drafted in 1998, provides for protected grounds in a closed list, while the Albanian law on protection from discrimination (2010) explicitly mentions more grounds, therefore setting an open list. The

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[8] *Ibidem*, para. 63.

[9] Venice Commission, CDL-AD(2018)014, Malta - Opinion on the Draft Act amending the Constitution, on the Draft Act on the Human Rights and Equality Commission, and on the Draft Act on Equality (para. 69).

[10] *Ibidem*, para. 70.

[11] Shih: SADUSHI S, *"Developing Constitutional Justice"*, Tirana 2012, p.537-538.

concern for unconstitutionality does not arise in this case, as long as the European Convention on Human Rights is ratified and directly convened by the Constitution of Albania. However, national constitutions have mechanisms that allow interpretations, which go beyond the closed lists set by the constitution itself, considering the protected grounds as an important block of the constitutional level. "This does not mean that the constitutional and legislative texts should be identical. The Constitution may identify the most important types of discrimination, as a guidance for the legislator and to the courts which will have to subject them to particularly exacting scrutiny".[12] This is why the Venice Commission has given a clear answer to this question. "*In principle, the legislator may raise the level of protection of basic rights and freedoms, the Constitution serving only as a bottom-line.*[13]" Therefore, the law may provide for other protected grounds.

In other cases, there might be conflicts between grounds protected by international conventions and those protected by the Constitution, when the latter does not provide for an open list. This debate was also encountered in the case of protecting certain categories from gender-based violence and domestic violence, within the framework of the Istanbul Convention. Some countries have suspended the ratification of the Istanbul Convention (including EU member States), raising concerns about the discrepancy of this convention with their national constitutions.[14] One of the issues raised is that the ratification would force states to recognize categories such as gender, or "gender identity", since they are provided for as a protected ground by this convention.[15] In fact, it was not the case of promoting these categories with special measures with regard to non-discrimination, but protecting them from gender-based and child violence, which is the basic duty of every state in protecting life and securing the human treatment of individuals. Therefore, in the opinion addressed to Armenia on this issue, the response of the Venice Commission was: "…The Istanbul Convention does not require States Parties to take any measures to recognise these various categories of persons or to grant them any special legal status, but

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[12] Venice Commission, CDL-AD(2018)014, *op. cit.*, para. 80.

[13] *Ibidem,* note 70.

[14] Venice Commission, CDL-AD(2019)018;, *op. cit.*, "*In two countries, Bulgaria and Slovakia, the ratification process was suspended recently. In Bulgaria, the suspension resulted from the CDL-AD(2019)018 decision of the Constitutional Court finding a contradiction between the Istanbul Convention and the Constitution of Bulgaria, which was referred to in Armenia as an argument against the ratification of this Convention. In Slovakia, on 29 March 2019, the National Council voted by a large majority against the ratification of the Istanbul Convention requesting the government to discontinue the ratification process*"; para. 14.

[15] *Ibidem*, para. 54.

simply confirms that gender identity ranks among the prohibited grounds of discrimination."[16] The opinion argues that this protection is a fundamental right - "...an individual may not be denied the protection against violence or the status of victim, and the rights stemming from this status, because of his or her gender identity. Non-binary, transgender, transsexual and other persons have the same right in this respect as anyone else (not more or fewer rights).[17]

In this context, we can discuss another issue, which has been raised during the examination of various acts by the Council of Ministers: Is there a hierarchy between protected grounds and should they be explicitly provided for in the Constitution or laws? The Venice Commission expressed a concern *"…that adding too many grounds of discrimination (there were 17 of them in the Draft Act under examination) may entail the risk that the concept of discrimination may become diluted in a way which could weaken the protection against more serious discriminatory actions"*[18]. Meanwhile, the doctrinal stance regarding this question is divided. "*Thus, there are various theories explaining why some categories should be "protected" while others are not*…".[19] For instance, in one of its opinions, Venice Commission referred to the concept of "*discrete and insular minorities*" in the American constitutional theory, which explains why some particular minorities should enjoy special protection of the law and, in cases of alleged discrimination, receive special attention from the courts.[20]

Regarding the above, the Venice Commission has provided optimal solutions, accepting the role of judicial interpretation as a standard for the protection of social groups from discrimination. This way, the Commission has met the standards set by the European Court of Human Rights regarding the application of Article 14 of the ECHR, as well as the recommendations of the European Commission against Racism and Intolerance (ECRI), which have served as an important basis in its analysis of the field. Specifically, the Commission clarifies that "…*where a tension between new rules on discrimination and the constitutional freedoms arise, it may be solved through judicial interpretation.*[21] The aforementioned opinion for Armenia held the same position on the constitutional implication of the Ratification of Istanbul Convention, where

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[16] *Ibidem*, para. 104.
[17] *Ibidem*, para. 65.
[18] Venice Commission, CDL-AD(2008)042, Opinion on the Draft law on Protection against Discrimination of "the former Yugoslav Republic of Macedonia", (para. 41).
[19] Venice Commission, CDL-AD(2018)014, *op. cit.,* note 9, para. 72.
[20] *Ibidem.*
[21] *Ibidem*, para. 71.

the Commission emphasizes: "*Although gender identity is not explicitly mentioned among the prohibited grounds, the Constitutional Court of Armenia could reasonably consider it to fall under 'other personal circumstances'.*"[22] Another example is the one related to judging grounds based on "strict scrutiny",[23] to which Venice Commission refers when it comes to protected grounds. In the opinion for North Macedonia, it states that "*race remains a suspect classification even when it is used for good purposes, and must hence be subject to strict scrutiny*".[24]

In addition to this complementary solution, the Venice Commission recommends a unifying constitutional standard when emphasizing that the Constitution should establish an open list of protected grounds from discrimination. Venice Commission "….*notes that all those complex questions would not arise if the Constitution contained an open list of "protected characteristics…*".[25]

The Commission also argues that "*even… an "open list" may raise other questions".*[26] However, even the issues stemming from the application of an open list may be subject to review by the courts. This means that an open list by the Constitution guarantees the protection of grounds through a legal guarantee, even when it is not explicitly provided for by the law.

1.3 Gender equality as a constitutional principle of equal opportunities

The Venice Commission has demanded that the principle of equality be sanctioned in the Constitution as a principle of equal opportunity. This was expressed in the Opinion dedicated to the constitutional changes of Luxembourg in 2009: "*In parallel to the provision on non-discrimination, a constitutional provision on equal opportunities might be added, in view of the development of constitutional law on this point.*"[27] The Commission reiterated the same logic 10 years later, in the opinion dedicated to Malta, arguing that *The Venice Commission recalls its recommendations …that "in parallel to the provision on non-discrimination, a constitutional provision on equal opportunities might be added, in view of the development of constitutional law on this point."*[28]

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[22] Venice Commission, CDL-AD(2019)018, *op. cit.,* para. 66.
[23] See for "strict scrutiny", Chemerinksy E, *"Constitutional Law. Principles and Policies"*, Fifth Edition, Wolters Kluwer, 2015, p. 699.
[24] Venice Commission, CDL-AD(2018)014, *op. cit.,* para. 82.
[25] *Ibidem*, para. 72.
[26] *Ibidem.*
[27] Venice Commission, CDL-AD(2009)057, Interim Opinion on the Draft Constitutional Amendments of Luxembourg, para. 51.
[28] Venice Commission, CDL-AD(2018)014, *op. cit.*, para. 72.

Furthermore, regarding the principle of gender equality, the Venice Commission has recommended that equal opportunities sanctioned in the Constitution, cover the entire range of state responsibilities and are not limited to just a few of them. Specifically, in the Opinion on Tunisia (2013), the Commission recommended changing the wording of the constitutional provision: "*The state shall ensure equality of opportunity between women and men in assuming different responsibilities*."[29] In this case, the Commission assessed that "*…this sentence is ambiguous and could be interpreted in a restrictive way, with equal opportunities being limited to certain responsibilities, whereas Article 20 provides for no limitation ratione materiae on the principle of equality"*. Thus, it recommended that *"It would be preferable to delete the words "in assuming different responsibilities*".[30]

This position represents a significant development in the field of Constitutional law. The Commission has also paid special attention to positive measures, in order to constitutionally guarantee equality not only as "equal opportunities", but also as "equality in fact" or "equality of results".

1.4 Constitutional promotion for equality of results

The purpose of the Venice Commission was not only to sanction the equality of opportunities in the Constitution, but also to achieve the equality of results. This was clearly expressed through two directions of its activity:

- creating a constitutional basis for positive measures,
- constitutional promotion for equality of results;

One of the most important standards that the Venice Commission has set with regard to the design of the principle of equality in the Constitution has been the creation of a constitutional basis, allowing state institutions to take positive measures, in order to effectively implement this principle. Thus, in the opinion directed to the constitutional changes in Tunisia (mentioned above), Venice Commission noted that these provisions lacked a basis that allowed the undertaking of positive measures. "*It will however be noted that the principle allowing for positive action to eliminate any discrimination is not expressly provided for*".[31]

The legitimacy of positive action recognised by the Venice Commission is in line with the Convention on the Elimination of all Forms of Discrimination Against Women, which emphasises that the "*adoption by*

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[29] Venice Commission, CDL-AD(2013)032, *op. cit.,* para. 44-46.
[30] *Ibidem.*
[31] *Ibidem,* Venice Commission, CDL-AD(2013)032, *op. cit.*.

States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination" (Article 4).[32] Moreover, the Venice Commission recommendations are in accordance with the approach adopted by the ECHR and some other jurisdictions.[33] The positive measures' issue is also closely related to ECRI's recommendations and EC Directives.[34]

The soft law acts approved by the Venice Commission are of particular value. In this context, we can mention the Code of Good Practice in Electoral Matters (2002),[35] the Declaration on women's participation in elections (2006),[36] the Guidelines on political party regulation (2010),[37] as well as several joint opinions between the Venice Commission and other international organisations, such as OSCE-ODHIR, etc.

The Venice Commission has recently argued in its opinions that the requirements for positive measures taken by the States should find reference in the Constitution. This way, the Venice Commission has expressed concern that without this constitutional basis, there is a possibility that certain provisions will be considered contrary to the principle of equality.[38] Positive obligations of the State and positive measures of their legislation are also very important. In presenting constitutional issues, the Commission makes a distinctly different treatment between positive measures aimed at overcoming discrimination and granting privileges for women. The Commission considers the latter as unreasonable, "*especially if they are based on a traditional conception of the different roles of men and women*".[39] However, the Venice Commission has considered acceptable the fact that the legislation mentions a clause, which generally provides for exceptional cases of equal treatment of subjects. Non-discrimination on the grounds of gender may also require exemptions from equal treatment. "*Under the ECtHR case-law, argues Venice Commission, justified differential treatment would not constitute discrimination. Certain characteristics ("race", for example, or ethnic origin)*

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[32] Venice Commission, CDL-AD(2011)043, Joint opinion on the Draft Election Code of Georgia, adopted by the Council for Democratic Elections, para. 33.
[33] Venice Commission, CDL-AD(2018)014, *op. cit.*, paras. 72-73.
[34] Venice Commission, CDL-AD(2008)042, *op. cit.*.
[35] Venice Commission, CDL-AD(2002)023rev, Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report
[36] Venice Commission, CDL-AD(2006)020, Declaration on Women's Participation in Elections.
[37] Venice Commission, CDL-AD(2010)024, Guidelines on Political Party Regulation, by OSCE/ODIHR and Venice Commission.
[38] Venice Commission, CDL-AD(2013)032, *op. cit.*, paras. 44-46.
[39] Venice Commission, CDL-AD(2008)015, Opinion on the Draft Constitution of Ukraine, para. 24.

can rarely, if ever, justify a difference in treatment. For other characteristics differential treatment is more defensible: for example, gender…".[40] Thus, "*…adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination*".[41] Venice Commission opinions teach us how to understand that not every different treatment constitutes discrimination: "*…a positive action puts one group in a position of advantage vis-à-vis some others, in order to achieve substantive equality. If this advantage is not well-justified, those other groups may complain of discrimination*".[42]

Specifically, the Venice Commission links the compatibility between positive measures and the constitution, with two factors: the purpose of the positive measure is to eliminate discrimination and it is temporary. The Commission has explicitly stated*"…that "affirmative measures" are not contrary to the principle of equality as long as they are temporary and aim to overcome an existing discrimination.*[43]

The constitutionalisation of positive measures has been analysed by the Commission in relation to the social objectives and positive obligations of the state, established in the Constitution. The role of the national constitution in "promoting *de facto* equality between women and men" is considered "...as an objective of the state policy". "*The Constitution of Armenia does not refer to gender. However, it guarantees the equality of men and women (Article 30) and provides for "the promotion of factual equality between women and men" (Article 86(4)) as one of the objectives of State policy*".[44]

The promotion of the principle of equality in the Constitution, as well as gender equality in particular, has been seen as an opportunity for their effective implementation, from an equality of opportunities to equality of results. It has served as a sound foundation for the enactment of special anti-discrimination laws in Europe. Thus, special anti-discrimination legislation *"…constitutes a further important step in the fight against discrimination"*.[45] The constitutionalisation of the basic and most important components of the principle of equality has been a tangible development for the principle of gender equality and has served as a foundation for the elaboration of necessary instruments in the laws of this field, in order to achieve equality

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[40] Venice Commission, CDL-AD(2018)014, *op. cit.*, para. 76 (author's highlight).
[41] Venice Commission, CDL-AD(2011)043, Joint opinion on the Draft Election Code of Georgia… *op. cit.*, para. 33.
[42] Venice Commission, CDL-AD(2018)014, *op. cit.*, para. 82.
[43] Venice Commission, CDL-AD(2008)042, *op. cit.*, para. 51.
[44] Armenia 63.
[45] Venice Commission, CDL-AD(2009)045, Opinion on the Draft law on Prohibition of Discrimination of Montenegro, (paras. 10-19).

of results. From this point of view, we can explain the special dedication on the gender quota in the electoral legislation,[46] but also other positive measures taken through special laws.

In this context, we can summarize the standards set by the Venice Commission recently or in addition to the international ones, regarding the special measures as follows:

- Firstly, the Venice Commission requires that special measures be positive measures, i.e. aimed at eliminating discrimination.
- Secondly, special positive measures must be temporary. Their temporariness is not necessarily related to any deadline set by law, but their temporary character must be explicitly stated.
- Thirdly, such measures need periodic reassessment in the light of the changing circumstances.
- Fourthly, the principle of proportionality should be embodied here as a guiding principle for the legislature and administration in determining necessary positive measures. I think that this intersection between the test of equality and that of proportionality is necessary to assess the constitutionality of positive measures.[47]
- Fifthly, the judicial review of positive measures must be subject to "strict scrutiny". The Venice Commission recalls in this respect that the CJEU subjects positive action based on certain protected characteristics to strict scrutiny.[48] 74 US Supreme Court does the same,[49] 70 Positive action measures are subjected by the Luxemburg Court to a strict scrutiny.[50]

II. The principle of equality and Gender Quota System

1. Why a quota on gender representation?

The Venice Commission has seen the "gender quota" as a tool for the proper functioning and strengthening of democratic processes. The drafted documents aim at creating a close link between these processes and increasing women's participation in decision-making. According to Venice Commission, "*The small number of women in politics remains a critical issue which*

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[46] Venice Commission, CDL-AD(2010)024, *op. cit.*, (para. 101).
[47] See for more information: Vicki C Jackson *Proportionality and equality*, at "Proportionality. New Frontiers, New Challenges", Edited by Vicky C. Jackson and Mark Tushnet, Cambridge University Press, 2017, pg. 171-197.
[48] Venice Commission, CDL-AD(2008)042, *op. cit.*, para. 74.
[49] *Ibidem*, para. 70.
[50] Venice Commission, CDL-AD(2018)014, *op. cit.*, para. 74.

undermines the full functioning of democratic processes."[51] Thus, firstly it considers that "…*electoral gender quotas can be considered an appropriate and legitimate measure to increase women's parliamentary representation*[52]. Secondly, the Commission has estimated that the gender quota provided by law will enable access for women and new inflows to the representative bodies, thus combating the recycling of the same people over and over. *"Recognizing that candidate selection and determination of ranking order on electoral lists is often dominated by closed entities and old networks of established politicians, clear and transparent criteria for candidate selection is needed, in order for new members (including women, and minorities) to get access to decision-making positions."*[53] The documents have extended their analysis to several systems, which guarantee balanced gender representation not only in the central representative bodies, but also in the local ones, as well as in other bodies of public administration, including those of election administration.

Taking special measures to increase women's participation in decision-making becomes necessary in the conditions when a series of factual obstacles make this participation difficult, thus keeping it at very low levels. The analysis of the Venice Commission emphasizes the fact that "…, *domestic responsibilities are usually identified as the most important deterrent for women to enter politics*".[54] However, the barriers are seen to be particularly related to gender stereotypes created in society. Namely, they relate to *pervasive cultural and historical factors which create inequalities which are not easily combated by quotas and list requirements alone*. The Commission draws attention to political parties, as these obstacles are exacerbated if they are not identified by the political parties themselves where women militate and no action is taken. Thus, "*Party meetings at inconvenient times, as well as a lack of childcare facilities, deter many candidates with family responsibilities. Moreover, women often receive less support and funding from their parties throughout the campaign period, or are even expected to give up their mandates to male counterparts after the election*"[55]. The Venice Commission recommends that "*States should take necessary measures to ensure such practices are prevented, as well as enacting positive measures to help promote the candidacy of women*."[56]

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[51] Venice Commission, CDL-AD(2010)024 (*op. cit.*) para. 99; See: "In many states women still represent a single-digit minority in parliament and the European average is only 18%", Compilation, CDL-PI(2016)007, First Opinion on the draft amendments to the Constitution (Chapters 1 To 7 And 10) of the Republic of Armenia.
[52] Venice Commission, CDL-AD(2010)024, *op. cit.*, para. 102.
[53] *Ibidem,* para. 113.
[54] *Ibidem*, para. 135.
[55] *Ibidem.*
[56] *Ibidem.*

Gender quotas are not the only special measures recommended by the Venice Commission. A number of other measures that serve this purpose are mentioned in the documents drafted by it. A question naturally arises: Is gender quota the most important special measure in legislation?

We do not see any differentiation or hierarchy between particular measures. However, we find that the Commission has not only considered the quota as an appropriate and legitimate measure, but has also designed it, turning it into a system of measures. Gender quota design has been one of the most important contributions of the Venice Commission. Looking at the documents of the latter, it is not only a separate measure, but an effective structure that promotes equal gender opportunities in decision-making bodies. This design has been in the context of the effectiveness of special measures and has taught us several lessons. Special positive measures can be effective, not only if they are in accordance with the Constitution, but also if they fit well with the system, such as the quota in the electoral system. Moreover, another lesson relates to the fact that a positive measure becomes effective, if it is well adapted to other positive measures. The latter can be independent or auxiliary. Thus, the Venice Commission has recommended a number of other measures that should and may accompany the quota. Besides provisions such as the adoption of quotas for representation, other special measures should be taken, which might include, requirements for gender-balance on boards tasked with selecting candidates, introduction of gender neutral selection criteria, specialized training programs, etc.

In the light of the above, we can categorize these contributions into two main aspects:

- Constitutionality for constructing the gender quota and
- The effectiveness of the quota mechanism.

The identification of the Constitutional basis for the gender quota in the documents of the Commission has aimed at the constitutionalisation of the quota mechanism and its design in accordance with the Constitution. Whereas the principle of effectiveness of the gender quota has been the main goal of the recommendations for its design and integration in the electoral systems of the states.

1.1 Constitutional basis for constructing the gender quota

When the Venice Commission drafted the Code of Good Practice in Electoral Matters, in 2002, the gender quota system had been introduced in many countries. Originally known only as a political target or as a quota set in political parties, the 2000s would spread it widely as a legislative

measure in European countries. But at the same time, the quota was facing scepticism, due to voices calling it an unconstitutional measure. To make matters worse, these assessments also took place in national court decisions. The 1995 decision of the Italian Constitutional Court deemed gender quotas unconstitutional in regional elections legislation. The Constitutional Council in France, in similar cases in the field of economic and social rights, had followed the same logic. Hence the doctrine in France believed that even the Constitutional Council "…*n'hesiterant pas a faire application de la jurisprudence "Quotas par sexe" at, ainsi a annuler ces measures*".[57] Perhaps this was the reason why the French lawmaker chose the path of constitutional change, instead of the legislative one, for measures aimed at increasing women's participation in decision-making.[58]

The Code of Good Practice in Electoral Matters set out one of the most important guidelines, which had a considerable impact on quota legitimacy. According to it, "*Legal rules requiring a minimum percentage of persons of each gender among candidates should not be considered as contrary to the principle of equal suffrage if they have a constitutional basis*"[59]. This greatly influenced the attitude towards the legislative gender quotas. In a number of Council of Europe member States, a minimum percentage of women in the list of candidates was required by law. Moreover, in some EU countries quotas were set in the legislation, (Greece, Spain, Belgium, Portugal, etc.), while in many others quotas were set in political parties' regulations (Italy, Austria, Netherlands, etc.).[60]

The Commission promotes a constitutional basis for establishing the quota through a legislative act. In its opinion dedicated to constitutional changes, the Commission has urged states to have a constitutional basis for this issue, hence "*In the absence of such a constitutional basis, such provisions could be considered contrary to the principle of equality*….[61] This paved the way for the constitutional reasoning that considers the gender quota a measure compatible with the constitution, as stated by the Constitutional Court in Spain.[62] The Spanish Constitutional Court Decision of 29 January 2008 put forward a series of arguments for legitimating the quota system as fully

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[57] Luis Favoreau, *"Droit Constitutionel"*, 2e editon, Dalloz, Paris 1999, p. 892.
[58] *Ibidem.*
[59] Venice Commission, CDL-AD(2002)023rev2-cor, *op. cit.*, para. 2.5.
[60] See: Electoral Gender Quota Systems and their Implementation in Europe, Update 2013, IPOL-FEMM_NT(2013)493011_EN.pdf.
[61] Venice Commission, CDL-AD(2002)023rev, *op. cit.*, para. 2.5/24.
[62] See: Constitutional Court of Spain, Judgment no. 12/2008, 29 January 2008, Elections: Gender equality in the lists of candidates.

constitutional. It contradicted the decisions previously issued by the Courts of France and Italy, which had considered the quotas as discriminatory.

The Venice Commission faced controversial issues with the following quota regime and had the opportunity to recommend further solutions to their constitutional legitimacy and access to state electoral legislation. However, the Commission has insisted on the need for a constitutional basis for quotas established by law.[63]

One can argue: What would be the sufficient constitutional basis for the provision of gender quotas in the law? It seems that a general sanctioning of the principle of gender equality is sufficient as a minimum constitutional basis that legitimizes the establishment of gender quotas in electoral law or other laws. "*It would seem also important to add the principle of "parity of sexes", so that the electoral legislation may provide for legal rules requiring a minimum percentage of persons of each gender among candidates.*"[64] However, there is a need for a combination of this principle with the principle of equal suffrage, which is explicitly affirmed in democratic constitutions. Moreover, the models of formulas expressed in the Constitution vary in different countries.

In addition to the constitutional basis, the Venice Commission has linked the legitimacy of the gender quota in the legislation with its temporariness, as with special measures in general. Only by being conceived as a temporary measure, the quota can be considered a special measure in accordance with the Constitution. In this context, it has referred to the Convention for the Elimination of Discrimination against Women, in which "*…a state has a positive obligation to take special, temporary measures to ensure the de facto equality of men and women, including in political and public life*".[65] The Venice Commission has not associated the duration of the quota to any deadline that should be explicitly defined in the law, but to a periodic assessment of them based on the circumstances. In fact, the experience so far does not foresee any pre-set duration. We have not seen this in the legislation of different countries. Even the Venice Commission does not recommend any set deadline. However, the state must anticipate the review of quotas in certain periods, taking into account the incoming changes. "*Such measures, by their very nature, are temporary and need periodic reassessment in the light of the changing circumstances.*"[66] The need

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[63] Venice Commission, CDL-AD(2015)020, Report on the Method of Nomination of Candidates within Political Parties.
[64] Venice Commission, CDL-PI(2016)007, *op. cit.*, para. 27.
[65] Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (Articles 4 and 7) www.un.org/womenwatch/daw/cedaw/cedaw27/tun3-4.pdf.
[66] Compilation, *op. cit.*, para. 70.

for such a review in particular has been particularly emphasized in *low-levels of governance*. "*It is a good practice to periodically review quotas to assess whether they should be maintained at the same level or whether their number should be increased, particularly at low-levels of governance*."[67]

1.2 The effectiveness of the gender quota mechanism

All documents drafted by the Venice Commission are based on the principle of effectiveness, as a basic principle for the construction of gender quotas and other special measures. The quota built as a system contains procedural and institutional guarantees that will fulfil its purpose, increase the representation of women in decision-making bodies and establish gender balance in representative bodies, as well as in other state bodies. Regarding the above, the construction of the quota mechanism is based on a main set of rules, which are briefly analysed below:

1.2.1 Rules for determining a certain percentage
1.2.2 Rules about rank order
1.2.3 Sanctions for non-compliance

1.2.1 Rules for determining a certain percentage

The quota system is done through the establishment of a certain percentage threshold for gender representation in decision-making. This percentage has been different in different periods and countries, varying in different values that went up to 40%.[68] The issue here is related to the adequacy of the percentage in the context of a given electoral system. Electoral systems are built in different countries, however they are mainly grouped into three classical systems: majority, proportional and mixed. Of course, the proportional electoral system in terms of its construction favours the placement of a pre-set percentage quota in the electoral lists. Hence the Venice Commission noted that "*Countries with a proportional representation list system are encouraged to (consider) introduce a mandatory quota which provides not only for a high proportion of female candidates (ideally at least 40%)*…".[69] Even in majority systems with single-member constituencies, the Venice Commission encourages the establishment of a certain percentage. "*Even with elections in*

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[67] Venice Commission, CDL-AD(2010)024, *op. cit.*, para. 134.
[68] Drude Dahlerup * &Lenita Freidenvall, "*Why Scandinavia is no longer the model*", International Feminist Journal of Politics, Volume 5, 2005, Issue 1 - www.tandfonline.com/doi/abs/10.1080/1461674042000324673?src=recsys&journalCode=rfjp20.
[69] Venice Commission, CDL-AD(2010)024, *op. cit.*, paras. 132-134.

single-member constituencies, a minimal percentage of members of each gender among candidates might be possible".[70]

The Venice Commission stances have also promoted voluntary quotas among political parties, since they have been assessed as effective measures. "*Voluntary quotas which are not legally mandated but included in party constitutions have also proven effective to ensure the representation of women*".[71] This way, the successful practice of some countries has been promoted, in which, although the system of mandatory quotas in the legislation is not foreseen at all, voluntary quotas within the regulations of political parties have had effective results.

The Venice Commission does not see any unconstitutional indication in the gender quota, aimed at establishing a balance between the two genders for participation in decision-making bodies. However, in its opinions we find the formulation of the neutral gender quota. It includes the percentage rule for setting the balance for the least represented gender, regardless of what that gender is. We can accept that Venice Commission is committed to guaranteeing a gender-neutral quota, in order to not only comply with the principle of equality, but also to appear as such.

1.2.2 Rules about rank order and others

Although gender quotas are an effective tool for increasing women's presence in political bodies, they do not automatically result in an equal representation of women and men. Setting a quota in the form of a percentage threshold ensures that women candidates are placed on the lists, but neither the percentage itself nor simply the listing are sufficient to ensure real women's representation in decision-making bodies, or balanced gender representation. "*Being placed on an electoral list as a candidate is no guarantee of women's representation*". *Gender quotas may play an important role for women being elected to parliament if they contain provisions for the ranking order on the parties' lists*."[72] Thus the Commission recommends that "*Quotas must include rules about rank order and sanctions for non-compliance*. […]".[73]

The drafted documents provide a variety of formulas for rank order rules and ways to make a certain percentage effective. The Commission has taken care that the processed formulas be also adapted to the respective

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[70] See: Venice Commission, CDL-AD(2006)018, Report on Electoral law and electoral administration in Europe.
[71] See: Venice Commission, CDL-AD(2010)024, *op. cit.*, paras. 99-105.
[72] Venice Commission, CDL-AD(2009)029, Report on the Impact of Electoral Systems on Women's Representation in Politics), para. 40.
[73] Venice Commission, CDL-AD(2015)020, *op. cit.*, para. 50.

electoral system. Thus, the recommendations vary according to the electoral systems and models selected by the states themselves in the drafts. We can say that the rank order rules that have been proposed are diverse and take into account the needs of different states. Often, they are also presented as strong and solid rules, in order to be effective.

We can summarize some of them as follows:

- The election law may stipulate a detailed order to ensure balance throughout the list;
- The candidates of each gender are ranked high enough on the list to have a realistic opportunity for receiving a mandate;
- A composition of the candidates' lists with alternating men and women might be considered;
- The law could stipulate that every fifth candidate on the list of candidates should be of a different gender;
- Every group of three candidates on the list …consists of at least one candidate of the less represented sex.[74]

The most demanding system is the zipper list, because in this case men and women must alternate. A *"zipper"* system of alternating male/female candidates is welcome, since this kind of list seems to be the most effective for securing the representation of women.

The Commission has demanded that rank order rules be functional and promote the real representation of women. For instance, analysing the Albanian Electoral Code, it found that one of the provisions that sanctioned the rank order rules in this Code, did not actually achieve the purpose for which they were set. Specifically, the Commission states that:

> "*…Article 67(5) requires that in Assembly elections, for each electoral zone, "at least thirty percent of the multi-name list and/or one of the first three names in the multi-name list should be from each sex". This wording gives the list presenter one of two options:*
> *(1) one woman in the top three candidates or*
> *(2) thirty percent (30%) of the candidates must be women, who can appear anywhere on the list, including being placed as the very last names on the bottom of the list*".

The Venice Commission considered this formula as a non-effective measure. "*Thus, as written, this article might not be equivalent to an "effective measure" promoting the representation of women in the Assembly*".[75]

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[74] See: Venice Commission, CDL-AD(2010)024, *op. cit.*, (paras. 132-134).
[75] Venice Commission, CDL-AD(2009)005, Joint Opinion on the Electoral Code of the Republic of Albania by the Venice Commission and the OSCE/ODIHR, para. 20.

In conclusion, it argues that "…*with rank order rules, such as these, women candidates do not risk being placed too low on the list to have a real chance to be elected*".

Good adaptation according to the electoral system is also an important factor in achieving an effective quota, because electoral systems differ on the voters' possibilities to choose not only among political parties, but among individual candidates as well. This may have an impact on the election of women. The Venice Commission has found that "...*somewhat larger numbers of women tend to be elected under proportional systems than under "first-past-the-post" majority or plurality systems, or under mixed systems.*"[76] Therefore, Venice Commission in its documents has paid attention to rules for other electoral systems, in addition to the proportional one. In another opinion (2018), the Venice Commission emphasizes: "*The revised Code maintains the provision that required either gender to be represented with a minimum of 40% of candidates on each list. However, the introduction of a mixed system reduces the applicability of this provision to those lists for the proportional component, and thus includes only half of the seats.*[77] It has recommended that countries with majority or plurality systems are encouraged to introduce the principle of each party choosing a candidate amongst at least one female and one male nominee in each party district or find other ways of ensuring increased representation of women in politics.

In conclusion, The Commission has consistently encouraged the innovation of formulas in order for the quota system to provide not only formal guarantees for equal opportunities, but also real guarantees for effective quota results.

1.2.3 Measures for implementing the quota: Sanctions

The issue of sanctions has been closely associated to increasing the effectiveness of the quota and its results. In this respect, the position of the Venice Commission has been adapted to the models of countries, in order to find the most effective means. There have been cases where the Commission has linked the quota and its implementation with the strengthening of mechanisms that help the implementation, especially with the participation of women in the internal life of political parties. "*It is important to ensure such quotas effectively allow women the ability to progress to positions of leadership rather than*

[76] Venice Commission and OSCE/ODIHR, CDL-AD(2018)008, Joint Opinion on the Law for amending and completing certain legislative acts of Moldova.
[77] *Ibidem.*

creating de facto restrictions on their progression…."[78] It has recommended that draft-acts should contain provisions on the promotion of gender equality within internal party structures or in the wider electoral process.

Based on the principle of quota effectiveness, it has also delved in the effectiveness of sanctions imposed by law. Thus, for example, it has deemed some sanctions with a different margin as effective, depending on the effective and proportionate sanctions with the nature of the violation. "*Sanctions may range from financial sanctions, such as the denial or reduction of public funding, to stronger legal sanctions, such as removal of the party's electoral list from the ballot. In all cases, sanctions should be proportionate to the nature of the violation*".[79] However, quite consistent is its attitude towards fines, which are considered ineffective, as they turn the quota into an unattainable tool with an unattainable goal. In this context, the Commission recommends effective sanctions, even removal from the list for political parties that do not respect the gender quota. "*The Venice Commission …recommends that … a political party cannot 'purchase' an exemption from the law. A political party list of candidates that does not meet legal requirements should not be registered.*"[80]

Another measure recommended by the Venice Commission, in order to increase the effectiveness of the quota, is related to the control mechanisms for the implementation of the quota. The Venice Commission recommends that states establish oversight and control mechanisms, further strengthening the quota mechanism. "*Furthermore, the effectiveness of quota provisions depends on the existence of institutional bodies that supervise the application of quotas and impose sanctions for noncompliance.*"[81] The Commission deems the balanced gender representation appropriate in the electoral administration bodies as well. This is directly related not only to the democratization of these bodies and increasing the effectiveness of the election administration, but also to the bodies that supervise the application of quotas. It recommends that "*the law provides a mechanism for ensuring that women are represented in the election administration, including senior decision-making roles.*"[82]

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[78] See for more: Venice Commission, CDL-AD(2010)024, *op. cit.*, paras. 132-134.
[79] *Ibidem*, paras. 136.
[80] Venice Commission, CDL-AD(2009)005, *op. cit.*, para. 21.
[81] Venice Commission, CDL-AD(2015)020, *op. cit.*, para. 51.
[82] Venice Commission and OSCE/ODIHR, CDL-AD(2014)019, Joint Opinion the on the Draft Election Law of the Kyrgyz Republic, para. 67.

Conclusion

By influencing the constitutionalisation of the principle of gender equality in different countries, the Venice Commission has contributed to the advancement of guarantees and constitutional means for the effective implementation of this principle. Its analysis and documents are the most important basis for a proper understanding and establishment of constitutional guarantees of gender equality. The Commission has consistently promoted the constitutionality of equality of outcome. This is evident in the attitude taken towards special measures, among which the innovation of regulatory formulas stands out, in order for the quota system to provide, not only formal guarantees for equal opportunities, but also real guarantees for effective quota results. While keeping this stance in terms of gender, there may be other differentiated treatments. The Venice Commission has recalled the standards set by international courts for its interpretation, as well as a *strict scrutiny*.

Alexander Baramidze[1]

My Experience with the Venice Commission

My experience with the Venice Commission is a threefold one. First, as a regular citizen, at times opposing to the government's legislative initiatives which I considered being in conflict with the Rule of Law and/or the human rights standards, I regarded myself an ordinary beneficiary of the Venice Commission's products who hoped the Venice Commission would level to the ground the government's 'wrong' plans. Second, during my tenure in the office of the first deputy justice minister in Georgia from 2012 to 2018, responsible for drafting reforms in the legal system, my objective was to justify – in terms of both the need and legitimacy – our 'good' legislative projects looking forward to obtaining from the Venice Commission as much support as in our view was necessary to push reforms forward. And third, as a legal expert who had the honour to be a substitute member in respect of my country, Georgia, I looked at things from the perspective that had to be detached from both of the above-described.

As one can tell the third approach is the most sophisticated one. However, that is a regular job of lawyers when they sit on judicial panels or international forums like the Venice Commission. The difference is that the people in the first two positions usually look at things *sub specie aetatis* that is from the standpoint of times they live in, from the perspective of their own interests and objectives. The Venice Commission has to make judgements *sub specie aeternitatis,* from the standpoint of eternity, from a universal perspective. Eternity resides in the well-established standards which have been developed in the area of the constitutionalism, Rule of Law and the human rights.

On the other, the word 'detached' should not be understood as to be 'indifferent' or 'unconcerned' relative to the subject matter of the discussion. Legislative steps are often associated with much political debate which especially in new democracies may threaten with turning into a political crisis and instability. In such situations, the responses to the questions apart from being in line with the established standards should nevertheless be flexible enough to meet the specific needs of the local context.

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[1] Former Substitute Member of the Venice Commission in respect of Georgia (2015-2019).

Where necessary the Venice Commission has always demonstrated adequate flexibility to address the contextual needs. One of the best examples is its reasoning concerning the 'paradox' that the 'constitutionalisation of the standards on the independence of the judiciary resulted in some post-communist countries' which warranted and legitimised an extraordinary response such the vetting of the sitting judges and prosecutors to 'reboot' the whole system.[2] A similar approach was demonstrated earlier in one of the Venice Commission's opinions on Ukraine[3] and to a degree later in that on Moldova.[4] I had an honour to be a part of the joint team that had presented a draft of the latter opinion.

One unique and a very irregular dilemma the Venice Commission came to encounter was in the fall of 2018 when the Venice Commission was called to comment on the adopted amendments to the Criminal Code and the Criminal Procedure Code of Romania. The delicacy of the situation was that the Venice Commission, as the body that has commonly been known as the champion of the human-rights-approach, was requested to come up with a critical review of the amendments which had been wrapped up by the proponents of this legislation under the label of 'necessary measures to strengthen certain aspects of the presumption of innocence and the right to be present at the trial in criminal proceedings', ones aimed 'to protect fundamental rights' from the 'abusive' justice system. However, having done a very thorough analysis of the amendments, the Venice Commission came to a conclusion that 'they could significantly impact the criminal justice system and its effective and efficient operation, namely the investigation into, the prosecution and adjudication of various other forms of crime, in particular serious and complex crimes.'[5]

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[2] Venice Commission, CDL-AD(2015)045, Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania, paras. 8-9; CDL-AD(2016)009, Final Opinion on the Revised Draft Constitutional Amendments on the Judiciary of Albania, para. 52.

[3] Venice Commission, CDL-AD(2015)007, Joint Opinion of The Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Law on the Judicial System and the Status of Judges and Amendments to the Law on the High Council of Justice of Ukraine, paras. 72-74.

[4] Venice Commission, CDL-AD(2019)020, Interim Joint Opinion of The Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Draft Law on the Reform of the Supreme Court of Justice and the Prosecutor's Office, para. 46.

[5] Venice Commission, CDL-AD(2018)021, Opinion on Amendments to the Criminal Code and the Criminal Procedure Code, para. 11.

Indeed, disarming in the name of human rights the law enforcement vis-à-vis the persons and groups that are defiant of the law and the order may eventually lead to the state's failure to protect human rights and the failure of the state itself.

I am proud that I was on board of the Venice Commission team that prepared this very important opinion for Romania. There were some others too where I also participated, but this is my favourite one.

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25 Years in Reforming the Georgian Judiciary and the Venice Commission

Introduction

As a country which after the invasion of the Red Army in 1921 had been annexed to the Former Soviet Union for seven decades, Georgia inherited from the 'evil empire' all evils that were commonly associated with the Communist rule. Not surprisingly, judiciary was not an exception. Since the restoration of national independence in 1991, the country has been struggling for rooting out the Soviet-style judicial mentality, organization and practices. This struggle started in mid-1990s with the adoption of the Constitution and still goes on in these days being still far away from the final destination.

The reason why this process has been dragged out for so long is self-evident. Every new government that came to power with pretences to establish independent judiciary eventually ended up with the submission to the temptation to keep control over the judiciary. In every political epoch that Georgia has gone through over the past quarter of century, the phrases like "politically motivated judicial decisions", "selective justice", "persecution of political opposition", etc. have been mostly often heard accusations against the Georgian justice system. And often they came not only from the domestic interlocutors – political parties, NGOs, media, other interest groups, but also from the international players – the governments and politicians of other countries, international organizations and international human rights watchdogs. The level of judicial independence may be measured, *inter alia*, by the prevalence of such phrases in the political lexicon.

However, it would be an overstatement to say that Georgia has made no progress over the last quarter of century. The Constitutional regulations, as well as the ordinary legislation governing the judiciary have been

improved, even if the chances of their rather drastic improvement have been missed, and so did the overall quality of judicial decisions. And the Venice Commission's role in those improvements has been immense. Not always the governments were enthusiastic to address the Venice Commission's recommendations, but in most cases, they did.

This paper deals with the landmark judicial reforms that have taken place over the last 25 years. It gives a brief account of most important developments in the organization of judicial power under the Shevardnadze, Saakashvili and Ivanishvili administrations. The paper does not pretend to give a complete history of the judicial reforms in Georgia. It is focused on those most important legislative steps that were taken, or sometimes not taken, by the Georgian authorities under the influence of the Venice Commission.

A. Original Formation of the Judicial Branch under the Constitution of 1995

Georgia declared its independence from the Soviet Union on 9 April 1991. The democratically elected government of President Gamsakhurdia that proclaimed the national independence did not have a chance to implement any systemic reforms in the organization of judiciary. The life of the Gamsakhurdia government turned out to be very brief and tragic. In early January 1992, as a result of a *coup d'état*, the president was ousted and a so-called "Military Council" seized the power. But that was just the start of political turmoil in the country followed up by a civil war. Soon the Military Council invited Eduard Shevardnadze to return to Georgia and take over the country's leadership. In the fall of 1992, the general elections were held and Shevardnadze became the Chairman of the newly elected Parliament.

After the legitimization of power, the Shevardnadze government declared that the country needed a new constitution. A Constitutional Commission was formed which embarked on drafting the constitutional text. Eventually, the new Constitution was adopted in August 1995.

It was during the drafting process of the Constitution that Georgia's relationship with the Venice Commission started. At all times thereafter, whenever numerous amendments were made to the Constitution (the present edition of the Constitution has little, if anything, in common with the originally adopted text) and then whenever most important legislations dealing with the system of government were to be passed, the Venice Commission was involved and not merely involved, but played a leading role in the shaping of final texts of the Georgian government's legislative initiatives.

One of the key dilemmas the drafters of the Constitution of 1995 had to deal with was which organ should have been vested with the power of judicial review when it would come to the constitutionality of laws, government ordinances and other administrative acts. The drafters developed two options. One of those provided for the establishment of a Constitutional Court which would not be part of the normal judicial machinery. The other option suggested that the power of judicial review would be vested in the Supreme Court, a last instance court in Georgia, which along with exercising ordinary judicial functions in civil, administrative and criminal matters, would have a competence to determine whether the normative acts would be compatible with the Constitution. This option was close to the US system as well as those in a few European countries, like Ireland.

The Venice Commission's members that had reviewed the both options recommended that a most shared model in Europe, that of the separate Constitutional Court, be chosen by a Georgian legislator. The reason, in their words, was that:

> *"Investir la Cour suprême de la juridiction constitutionnelle (comme le propose l'art.75, variante II) pourrait rapidement avoir pour conséquence de la surcharger de questions constitutionnelles découlant de la nouvelle Constitution, laquelle modifie radicalement le système politique, économique et constitutionnel que la Géorgie a connu ces dernières décennies (voir le préambule et le chapitre premier du projet de Constitution). De nombreux problèmes constitutionnels d'un genre nouveau se poseront également de ce fait. Comme la Cour suprême ferait simultanément office de tribunal suprême de droit commun, il se pourrait qu'elle n'ait pas le temps de s'acquitter entièrement de sa tâche. Trancher avec diligence des questions constitutionnelles est en général une besogne de longue haleine, aussi conviendrait-il d'en saisir des juges pouvant s'y consacrer et s'y spécialiser."*[6]

Presumably, along with some probable other factors, these words had a great impact on the top decision-makers and legislators in Georgia once at the time of adoption of the Constitution of 1995 they dropped the idea of vesting a power of judicial review in the Supreme Court and opted for the establishment of a separate Constitutional Court which would exclusively deal with the constitutionality of laws and other normative acts. The Constitutional

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[6] Venice Commission, CDL(1994)013, Observations sur le projet de Constitution de la République de Géorgie, Chapitre 6 - Le Pouvoir judiciaire par M. Sergio Bartole (Italie) et M. Helmut Steinberger (Allemagne).

Court would consist of 9 members of whom each – the President, Parliament and the Supreme Court – would appoint/elect 3 members.[7] The establishment of a special Constitutional Court was expressly welcomed by the Venice Commission.[8] However, discussions about the abolition of the Constitutional Court and the transformation of the Supreme Court into a final instance judicial authority empowered to review constitutionality of legal acts were not closed for once and forever.[9]

When it comes to the competences of the Constitutional Court, first of all, the Venice Commission expressed its scepticism regarding the drafters' proposal to have the Constitutional Court give "advisory opinions" on draft laws. As the Venice Commission explained, firstly, it would compel the Constitutional Court to get involved in political controversies; secondly, it was not actually for the courts to issue advisory opinions in the form of "recommendations", instead the courts' role was to settle controversies. The authority of the Court could be compromised if its interpretations were not respected.[10]

The Venice Commission found it regrettable that the draft did not allow the individuals to file complaints with the Constitutional Court when the complainant could demonstrate that his/her fundamental freedoms or rights guaranteed by the Constitution have been violated by one of the powers – legislative, executive or judicial.[11]

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[7] The Constitution of Georgia, as adopted on 24 August 1995, no. 86-ონ, Articles 83, 88-89.
[8] Venice Commission, CDL(1994)065, Meetings on the Draft Constitution of Georgia.
[9] Thus, in November 2004, the Venice Commission was requested to comment on the draft Constitutional amendments prepared by the Liberty Institute, an NGO that had been a sort of training ground for many influential politicians in the wake of the Rose Revolution of November 2003. One of the proposals the draft offered was to abolish the Constitutional Court and to pass its role and functions to the Supreme Court. The Venice Commission's comment was quite straightforward: "It is not clear why it has been decided to abolish the Constitutional Court and confer these functions on the Supreme Court. In principle there is no reason why the functions of Constitutional review should not be exercised by a Supreme Court which also exercises other judicial functions, as is the case in other jurisdictions such as the United States, Canada or Ireland. Clearly each system has both advantages and disadvantages. However, where there is a functioning Constitutional Court it would not seem desirable to abolish it and transfer its functions to the Supreme Court without a clear assessment of the gains expected to arise from such a decision." (Venice Commission, CDL-AD(2005)003, Joint Opinion on a Proposal for a Constitutional Law on Changes and Amendments to the Constitution of Georgia, para. 109). The government of Georgia responded with a silent refusal to initiate the draft law. The idea of the abolition of the Constitutional Court and transferring its powers to the Supreme Court has been advocated by some influential political groups in the present days too.
[10] Venice Commission, CDL(1994)013 *op. cit.*
[11] *Ibidem*.

Both of the above Venice Commission recommendations were taken on board by the government of Georgia and the appropriate provisions were incorporated in the adopted text of the Constitution.[12]

The draft Constitution provided little guidance about the organization of general courts. It stated that justice in Georgia would be carried out by the Supreme Court of Georgia, the Supreme Courts of the two Autonomous Republics, regional courts, and district (city) courts. The Supreme Court would implement the procedural oversight over the administration of justice in the general courts and would hear certain cases in the first instance. The members of the Supreme Court would be elected by Parliament. Their term of office would be 10 years. Other institutional and organizational questions would be dealt with by the law.

Apart from making some technical remarks, the Venice Commission raised a question on the need of establishing a Judicial Council which, like similar bodies operating in other European countries, would provide for ensuring the "autonomy" of the judiciary and would exercise a number of functions relating to appointing, dismissing, transferring and sanctioning the magistrates. At the same time, the Venice Commission noted with understanding: *"Il est possible que la République de Géorgie ne puisse, au stade actuel de son cheminement vers la démocratie et la primauté du droit, faire confiance aux magistrats titularisés par l'ancien régime et leur laisser une autonomie complète."*[13]

The delicacy with which the Venice Commission approached the question of judicial council made the government brave enough to circumvent this issue at that time. The adopted text of the Constitution did not say anything about the judicial council. This fact did not go unnoticed by the Venice Commission.[14]

However, later on such a council was established by virtue of the Organic Law on General Courts.[15] The Law said that the Council of Justice, as it was originally named (later it was renamed as the "Supreme Council of Justice" sometimes translated as "High Council of Justice"), was an advisory body to the President of Georgia and its role was to develop proposals for judicial reforms; to select and nominate candidatures for judges; to organise

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[12] The Constitution of Georgia, as adopted on 24 August 1995, no. 786-რს.
[13] Venice Commission, CDL(1994)013, *op. cit.*
[14] Venice Commission, CDL(1994)065, *op. cit.*, CDL(1995)069, Constitution of Georgia and CDL(1994)066), the Draft Constitution of Georgia.
[15] Organic Law on General Courts, 13 June 1997, no. 767–IIს, Chapter IX. Council of Justice.

qualification exams for judges; and to perform other tasks defined by law.[16] The Council would consist of 12 members, including 3 *ex-officio* members (Chairpersons of the Supreme Court of Georgia and the Supreme Courts of the two Autonomous Republics), 4 members to be appointed by the President, 4 members to be elected by Parliament, and 1 member to be chosen by the Supreme Court of Georgia.[17] The Council meetings were to be presided by the President of Georgia, or at his instruction, by the Chairman of the Supreme Court of Georgia, or any other Council member appointed/elected by the President or Parliament.[18]

The Venice Commission had no chance to comment on the above rules as it was not called to review the draft law. However, in the subsequent years the Venice Commission had several occasions to comment on the composition and competences of the High Council of Justice.

The adopted text of the Constitution dealt with the General Prosecutor's Office. According to the Constitution, the General Prosecutor's Office was "an institution of the judicial branch" and was a "centralised integrated system". The General Prosecutor was to be nominated by the President and approved by Parliament. He/she would be elected for the term of 5 years.[19]

B. Judicial Reforms under the Saakashvili Government

President Shevardnadze managed to overcome the negative effects of the coup d'état and the civil war. Under his rule the Constitution and a basic legislative framework regulating the three branches of the government and various spheres of political, economic and social life were formed. However, Shevardnadze failed to take any more-or-less effective steps against the corruption the country had plunged in. Bribery was a widespread practice across the system of government, including the judiciary. Discontent with his regime grew and in November 2003, after the velvet revolution called "Rose Revolution" Shevardnadze stepped down.

In January 2004, Mikheil Saakashvili, a Western-educated lawyer, the leader of the United National Movement, and a driving force of the Rose Revolution, was elected the president. He promised quick and comprehensive reforms. And in a short period of time he actually succeeded in bringing economy out of shade, drastically increasing fiscal revenues,

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[16] *Ibidem*, Article 60(1).
[17] *Ibidem*, Article 60(2) and 60(3).
[18] *Ibidem*, Article 60(9).
[19] The Constitution of Georgia, as adopted on 24 August 1995, no. 786-რს, Article 91.

easing bureaucratic procedures and practices, implementing the street police reform, and almost eliminating corruption at low and medium levels. However, in the justice sector his reforms led to the consolidation of the executive's control over the judiciary rather than the establishment of the Rule of Law.

In early February 2004, in just a fortnight following his inauguration, President Saakashvili had Parliament pass comprehensive amendments to the Constitution drastically changing the organization of the executive branch. In the judicial sphere, the amendments provided for a few but very consequential additions to the presidential powers.

Under a brand-new subparagraph "ჟ" of Article 73(1) of the Constitution, the President would become empowered to chair the Supreme Council of Justice and to appoint and dismiss judges according to the Constitution and the law".[20] The Venice Commission found this proposal "extremely problematic". In the Commission's opinion, "having the President as the Chair was not necessarily the best solution" even though some Western European Constitutions did provide similar approaches. Then the fact that there was no regulation in the Constitution with respect to the High Council of Justice was a problem itself. Last but not least, the power to appoint and dismiss judges should have been qualified by the Constitution itself (e.g. "...upon the proposal of the High Council of Justice"). Instead, the Constitutional provision allowed such qualifications to be specified at the legislative level.[21] Eventually, the Venice Commission recommendation was not taken on board by the government. And the above provision was incorporated in the adopted Constitutional amendments.[22]

It was also proposed to abolish the Constitutional provision[23] which provided for personal immunity for judges and security of judges and their families and banned prosecution and/or arrest and search of judges, their homes and other property without the consent of the Chairman of the Supreme Court.[24] The Venice Commission said that depriving judges of any protection against criminal proceedings was not satisfactory and that the Constitution should provide guidance to the legislator how to proceed in

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[20] Venice Commission, CDL(2004)003, Draft Constitutional Law on Amendments to the Constitution of Georgia.
[21] Venice Commission, CDL-AD(2004)008, Opinion on the Draft Amendments to the Constitution of Georgia, para. 22.
[22] Constitutional Law on Amendments and Additions to the Constitution of Georgia, no. 3272-რს, 6 February 2004.
[23] Venice Commission, CDL(2004)003, *op. cit.*
[24] The Constitution of Georgia, as adopted on 24 August 1995, no. 786-რს.

such cases.[25] Eventually, the government dropped the idea to abolish judicial immunity and Article 87 was retained in the Constitution.[26]

The draft amendments also provided for the removal of Article 91 which dealt with the General Prosecutor's Office. At the same time, under the proposed new subparagraph "ტ" of Article 73(1) of the Constitution, the President would be entitled to propose to Parliament for their approval a candidature for the General Prosecutor.[27] The Venice Commission commented that the abrogation of this provision required justification and because in former communist countries the Prosecutor's Office tended to be very important, it seemed appropriate to define its tasks in the Constitution.[28] However, the government neither presented any justification, nor accepted the Venice Commission's advice to define the Prosecutor's Office's tasks in the Constitution. Eventually, the General Prosecutor's Office became a powerful instrument in the hands of the executive to ensure that in the majority of criminal cases the courts delivered such verdicts which were very close to the prosecutors' requests.[29]

In December 2004, the government drew up another set of the constitutional amendments. Under the new draft law, the parity principle of appointing/electing the Constitutional Court members by the President, Parliament and the Supreme Court was to be abolished and instead the President would be empowered to nominate all 9 members of the Constitutional Court who then would be approved by Parliament by 3/5 majority. The Constitutional Court's competence to review the constitutionality of "referenda and elections" was to be reduced to the power to review the constitutionality of "appointing/not appointing the referenda and elections." Within 2 weeks following the enactment of these constitutional amendments the President would propose to Parliament the candidatures for the Constitutional Court and the Supreme Court judges following their approval the incumbent members of both courts (except the President of the Supreme Court) would be terminated. In addition, the president of the Supreme Court was to be deprived of a power to waive judge's immunity and Parliament would be empowered to do so. On a

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[25] Venice Commission, CDL-AD(2004)008, *op. cit.*, para. 32.
[26] Constitutional Law on Amendments and Additions to the Constitution of Georgia, no. 272-რს, 6 February 2004.
[27] Venice Commission, CDL(2004)003, *op. cit.*.
[28] Venice Commission, CDL-AD(2004)008, *op. cit.*, para. 33.
[29] Council of Europe, CommDH(2011)022, para. 27, Report by Thomas Hammarberg Commissioner for Human Rights of the Council of Europe Following his visit to Georgia from 18 to 20 April 2011.

positive note, it was suggested that the Constitutional Court be vested with the power to review the constitutionality of the court's judgments, decisions and rulings based on the complaints submitted by the Public Defender and the citizens ("real constitutional complaint"). The Supreme Court would be transformed into a cassation court and would no longer hear the cases in the first instance.[30] Interestingly, the above draft was referred to the Venice Commission not by the drafters, the government, but by the then Chairman of the Constitutional Court.[31]

The proposed amendments triggered a very negative reaction from the Venice Commission. In late January 2005, a Venice Commission delegation headed by the President of the Commission, Mr Buquicchio, visited Georgia. And although the main purpose of the visit was to discuss a very different subject, during the meetings with the high-level officials of the Georgian government, the delegation raised its concern about the above draft constitutional amendments which, in the delegation's view, would be "detrimental to the independence of the judiciary". In reply, the Minister of Justice promised the delegation that these amendments would be revised and that a new version would be submitted to the Commission for its opinion shortly.[32]

In March 2005, a new draft of the Constitutional amendments was actually presented to the Venice Commission. Under the new draft, the President reserved a power to nominate all judges in the Constitutional Court, but the number of judges would be raised to 15 members and instead of replacing all the incumbent judges of the Constitutional Court it was proposed to elect 6 new members in addition to the existing 9 members who would retain their mandate till the end of their term. The provision to replace the incumbent Supreme Court members was dropped. The proposal to transform the Supreme Court into a purely cassation court was maintained as was the individual's right to file a real constitutional complaint.[33]

The Venice Commission's opinion concerned both the December 2004 and the March 2005 drafts. From the very beginning the Commission noted that the previous draft had raised a number of concerns, in particular the proposal to remove and replace the existing members of the Constitutional

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[30] Venice Commission, CDL-AD(2004)003, Draft Amendments to the Constitution of Georgia.

[31] Venice Commission, CDL-AD(2005)005, Opinion on Draft Constitutional Amendments Relating to the Reform of the Judiciary in Georgia, para. 1.

[32] Venice Commission, CDL(2005)012syn., Visit of Venice Commission delegation to Georgia (27-28 January 2005), Synopsis.

[33] Venice Commission, CDL(2005)028, Draft Constitutional Law "On the Changes and Addenda to the Constitution of Georgia" (Reform of the Judiciary).

Court and the Supreme Court (except its President), the reduction of the jurisdiction of the Constitutional Court in relation to electoral matters and the possible reduction of the jurisdiction of the Constitutional Court in relation to normative acts.[34]

With respect to the new rule of appointing all the Constitutional Court members, the Venice Commission pointed out that this approach was not very common in Europe but rather resembled the American system. While the presidential proposal coupled with approval by three-fifths of the Parliament appeared to provide a balance between the two institutions, the exclusive competence of the President to nominate highest judges ensured in fact that only candidates who had the trust of the President could accede to these positions. Given that the President enjoyed an overwhelming majority in Parliament, a diversified system like the existing one would ensure a better balance.[35] As to the size of the Court, the Venice Commission said that the increase could partly be explained by the introduction of the real constitutional complaint.[36]

Concerning a "real" constitutional complaint the Venice Commission said that this provision represented "a substantial increase in the jurisdiction and powers of the Constitutional Court" and created "a powerful new tool for the enforcement of the human rights and fundamental freedoms".[37]

Concerning the transfer of the power to waive judge's immunity from the president of the Supreme Court to Parliament, the Venice Commission said that this would raise the risk of politicizing the Court. As a sort of *obiter dictum* the Commission noted that the Constitution provided judges with total immunity from prosecution, note merely immunity from arrest and detention, which, in the Commission's words, "[was] difficult to justify".[38]

In addition, the Venice Commission drew attention to the lack of constitutional guarantees of independence for the judicial council indicating that the expert body like this could give an opinion on the suitability or qualification of candidates for office.[39]

The amendments were passed in late December 2005. The government dropped all of its controversial proposals. The government refused to dismiss the incumbent members of the Constitutional Court and the

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[34] Venice Commission, CDL-AD(2005)005, *op. cit.*, para. 3.
[35] *Ibidem*, para. 16.
[36] *Ibidem*, para. 19.
[37] *Ibidem*, paras. 23-24.
[38] *Ibidem*, para. 11.
[39] *Ibidem*, para. 9.

Supreme Court. No changes to the composition of or the way of election of judges in the Constitutional Court were enacted. Nor any significant modification of its powers was introduced. Unfortunately, a right of real constitutional complaint was also taken out of the adopted text. Nor did the changes concern the power of waiver of the immunity. In fact, with the exception of the transformation of the Supreme Court into a court of cassation which was finally enacted, nothing was left from what was attempted by the government a year before.[40]

A year later, in December 2006, Parliament enacted another set of amendments to the Constitution which, *inter alia*, with the Venice Commission's insistence,[41] provided some general guidance about the High Council of Justice. Importantly, the President was stripped of the power to preside over the Council and appoint and dismiss judges. Instead, the president of the Supreme Court was endowed with a power to chair the Council.[42]

In October 2006, the Chair of the PACE Monitoring Committee requested the Venice Commission to comment on the Law on "Disciplinary Responsibility and Disciplinary Prosecution of Judges of Common Courts" of Georgia, in particular with regard to the principle of the independence of the judiciary and the scope and application of Article 2.2.a of that Law, which was the basis for disciplinary proceedings brought against a number of judges, including judges of the Supreme Court who were dismissed by decision of the disciplinary board.[43]

Disciplinary proceedings had been brought against a number of Georgian judges for the misinterpretation of two provisions of the Criminal Procedure Code of Georgia. The accusations were based on Article 2 of the Law of Georgia on Disciplinary Responsibility and Disciplinary Prosecution of Judges of Common Courts. This provision provided for sanctions in case of a "gross violation and repeated violation of law in the process of discussion of a case."[44]

The Venice Commission noted that the provision in question was unclear and it could cover a great variety of judicial conduct. Therefore, it

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[40] The Constitutional Law on the Amendments to the Constitution of Georgia, 27 December 2005, no. 2496-რს.
[41] Venice Commission, CDL-AD(2006)040, Opinion on the Draft Constitutional Law of Georgia on Amendments to the Constitution, para 11.
[42] The Constitutional Law on the Amendments to the Constitution of Georgia, 27 December 2005, no 4133–რს.
[43] Venice Commission, CDL-AD(2007)009, Opinion on the Law on Disciplinary Responsibility and Disciplinary Prosecution of Judges of Common Courts of Georgia, para. 1.
[44] *Ibidem*, para. 4.

actually posed a threat to the principle of judicial independence. Furthermore, it applied to the judicial process itself, to the judge's interpretation of the law while considering a case and to the very essence of a judge's function i.e. independent adjudication. "Interpreting the law is an essential part of rendering a decision in a concrete case and it is impossible to decide any case without doing so." "There are no absolutely clear legal provisions that would never necessitate an interpretation. Interpretation may also go beyond the wording of a provision, for instance if the provision has to be interpreted in line with the Constitution or with international law."[45] Thus, a wrong interpretation of the law could not be considered a violation of Article 2.2.a, the latter could not be considered to be sufficiently precise to be compatible with the Rule of Law.[46] The only way to undo the consequences of an offence committed by a judge in the course of the adjudication process was by way of appeal. The correction of an erroneous interpretation of the law should take place solely through the appeal process. Therefore, the Venice Commission concluded that disciplinary violations regulated by the said provision were incompatible with European and international standards.[47] The same applied to another provision under Article 2.2, subparagraph (h) which envisaged disciplinary sanctions for "other kinds of violation of norms of judicial ethics".[48]

It was not without resistance that the government accepted this criticism. The reaction was too slow, but it did follow. In 5 years after the Venice Commission's above opinion, the government repealed the above provisions of the law.[49]

In November 2008, the government presented to the Venice Commission four new draft amendments to the Constitution one of which provided for bringing the Prosecutor's Office under the system of the Ministry of Justice, making the justice minister a top prosecutor in the country. The Chief Prosecutor's Office would be under the direct control of the justice minister and the President would be endowed with the power to dismiss the three key ministers in the government – those of the interior, defence and justice – without asking for the prime minister's approval.[50]

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[45] *Ibidem*, paras. 16-19.
[46] *Ibidem*, para. 21.
[47] *Ibidem*, paras. 22-23.
[48] *Ibidem*, paras. 14 and 22.
[49] Amendments to the Law on Disciplinary Responsibility and Disciplinary Prosecution of Judges of Common Courts of Georgia, 27 March 2012, no. 5922-Ib.
[50] Venice Commission, CDL(2008)121, Four Constitutional Laws Amending the Constitution of Georgia.

While commenting on these changes, the Venice Commission noted that under the Council of Europe standards, a system under which the prosecution is part of, or subordinate to, the executive power was not in itself unacceptable.[51] However, the Commission noted that consequent on the constitutional amendments, the Office of the Prosecutor General, which originally had been established on the constitutional plane, no longer had any constitutional recognition. Thus, the constitutional amendments failed to introduce at the constitutional level any principle about the personal position of the holders of the offices of the prosecution as they do not stated the need for prosecutors to be independent of the Executive.[52] The Commission explained that its concerns focused primarily on two issues. The first was whether there was a sufficient degree of separation between the politically appointed and answerable Minister for Justice and the officers who were responsible for taking prosecution decisions in individual cases. The other one was associated with the actual chain of authority, and in particular on the methods of appointment of dismissal of persons who would be responsible for prosecution decisions.[53] In Georgia, prosecution's service was (and still is) a very hierarchical system[54] and the combination of the inclusion of the Minister of Justice in the definition of a prosecutor in the Law on Prosecution Service, together with the power conferred on him to issue normative and individual legal acts and to abolish illegal orders, instructions and directives, taken in conjunction with the provisions dealing with the relationship between supervising and subordinated prosecutors, could enable the Minister of Justice to give instructions in individual cases, if he is to be regarded as a supervising prosecutor. Thus, the Commission recommended to remove the Minister of Justice from the definition of prosecutor in the law Article 2 of the Law and to make other changes which would not enable the Minister to issue decrees or directives in individual cases.[55]

This recommendation was not fulfilled by the Saakashvili government. It was only in May 2013, after the change of the government in Georgia following the parliamentary elections of October 2012, that the Minister of Justice ceased to be a top prosecutor in the country.[56]

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[51] Venice Commission, CDL-AD(2009)017rev., Opinion on Four Constitutional Laws Amending the Constitution of Georgia, para 22.
[52] *Ibidem*, paras. 27-28.
[53] *Ibidem*, paras. 32-33.
[54] *Ibidem*, para. 37.
[55] *Ibidem*, paras. 42-43.
[56] See *infra* note 81.

In June 2009, President Saakashvili set up a State Constitutional Commission (SCC) with the task of preparing another set of extensive amendments to the Constitution of Georgia. The original draft developed by the SCC and then one adopted by Parliament in two readings were presented to the Venice Commission for review.[57]

The main idea behind the draft amendments was to replace the semi-presidential system of governance into a parliamentary system where the president, as a head of state, would basically have ceremonial powers while the cabinet of ministers led by a prime-minister would take over all duties and responsibilities of the executive branch.

In the judicial sphere, the amendments provided for the life appointment of all judges except those of the Supreme Court. Welcoming this novelty, the Commission expressed its surprise that the new rule did not apply to the Supreme Court judges. In the Commission's words, whereas it was generally accepted to limit the tenure of Constitutional Court judges, this did not apply to Supreme Court judges. The Venice Commission therefore recommended extending life tenure, in unequivocal terms, to Supreme Court judges.[58] The Venice Commission also criticised the mechanism of nominating the Supreme Court judges. In its opinion, it would be preferable to transfer the right to propose candidates to the High Judicial Council.[59]

Particularly expressive was the Commission's criticism of a newly introduced probationary period of "not more than 3 years" for all judges except those of the Supreme Court. Recalling its previous statements that "setting probationary periods [could] undermine the independence of judges, since they might feel under pressure to decide cases in a particular way" and that "despite the laudable aim of ensuring high standards through a system of evaluation, it [was] notoriously difficult to reconcile the independence of the judge with a system of performance appraisal"[60] the Venice Commission recommended removing this proposal for a trial period for judges.[61]

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[57] Venice Commission, CDL(2010)071, Draft Constitutional Law on the Changes and Amendments to the Constitution of Georgia adopted by the State Constitutional Commission; CDL(2010)110, Draft Constitutional Law on the Changes and Amendments to the Constitution of Georgia adopted by the State Constitutional Commission.

[58] Venice Commission, CDL-AD(2010)028, Final Opinion on the Draft Constitutional Law on Amendments and Changes to the Constitution of Georgia, paras. 85-86.

[59] *Ibidem*, para. 87.

[60] Venice Commission, CDL-AD(2010)004, Report on the Independence of the Judiciary, *op. cit.,* para. 37.

[61] *Ibidem*., paras. 88-91.

This recommendation was not fulfilled either by the Saakashvili government[62] or the government that replaced it after the parliamentary elections of October 2012. In fact, the probationary period will stay in effect till the end of 2024.[63]

C. Judicial Reforms under the "Georgia Dream" Government

As a result of parliamentary elections in October 2012, a "Georgian Dream" coalition led by the billionaire Bidzina Ivanishvili came to power to replace Saakashvili-led UNM as a ruling party. The fundamental reform of judiciary was declared to be one of the key priorities in the new government's agenda. The implementation of the judicial reform started immediately. It kept momentum for initial 3-4 years following which the reform pace drastically slowed down.

In November 2012, the Ministry of Justice came up with an initial phase of the judicial reform. The draft law on the amendments to the Law on the Courts of General Jurisdiction provided for the opening of courtrooms for the TV channels, banned by the Saakashvili government back in 2006; the election of non-judge members of the High Council of Justice (hereinafter, "HCJ") from among academics, bar and NGO activists instead of the members of Parliament; the election of the judge members of the Council by the Judicial Conference on a proposal from the judges themselves rather than the chairman of the Supreme Court who at the same time was the chairman of the HCJ and the Judicial Conference; the introduction of the secret ballot for the elections of the HCJ members; the exclusion of the court presidents and vice presidents from the HCJ; early termination of the HCJ members; etc.[64]

The Venice Commission found the intention to open up courtrooms commendable although noted that the draft amendments relating to media coverage should be more precise.[65] It emphasised that in important respects, the amendments represented progress for the independence of the HCJ because they redressed several shortcomings of the existing legislation.

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[62] Constitutional Law on the Amendments and Changes to the Constitution of Georgia, 15 October 2010, no. 3710 – IIს.

[63] The Constitutional Law on Amending the Constitution of Georgia, 13 October 2017, N1324-რს, Article 2(3).

[64] Venice Commission, CDL-REF(2012)045, Draft Amendments to the Organic Law on General Courts and Explanatory Report.

[65] Venice Commission, CDL-AD(2013)007, Opinion on the Draft Amendments to the Organic Law on Courts of General Jurisdiction of Georgia, para. 34.

Therefore, the Commission welcomed the relevant provisions of the draft.[66]

However, the Commission criticised the proposed ban for the court presidents and vice presidents to be elected by the Judicial Conference as judge members of the HCJ. In the Commission's view, it was for the electors to take these arguments into account when deciding whether a colleague deserved to be trusted. Alternatively, the amendments could provide for the resignation of a newly elected member of the HCJ from his or her position as chairman while retaining his or her position as an ordinary judge.[67]

The Venice Commission strongly recommended that elections from the parliamentary component should be by a two-thirds qualified majority, with a mechanism against possible deadlocks or by some proportional method which ensures that the opposition has an influence on the composition of the Council.[68]

The Venice Commission was particularly critical of the idea of early termination of the HCJ members. It noted that when using its legislative power to design the future organisation and functioning of the judiciary, Parliament should have refrained from adopting measures which would jeopardise the continuity in membership of the High Judicial Council. "Removing all members of the Council prematurely would set a precedent whereby any incoming government or any new Parliament, which did not approve of either the composition or the membership of the Council could terminate its existence early and replace it with a new Council."[69]

Finally, the Commission underlined that the amendments would improve many provisions of the Organic Law and would bring this Law closer to European standards.[70]

The Venice Commission's recommendations were accepted by the Government. The two-thirds majority rule for the Parliament-elected members of the HCJ was introduced; owing to a consensus reached with the then President of the Supreme Court, who was also the President of the HCJ, the absolute ban of court presidents and vice-presidents was mitigated by limiting the number of presidents/vice-presidents to 3; and the early termination of the HCJ was dropped.[71]

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[66] *Ibidem*., paras. 38-39.
[67] *Ibidem*., paras. 42-50.
[68] *Ibidem*., para. 34.
[69] *Ibidem*., paras. 71-72.
[70] *Ibidem*., para. 75.
[71] Organic Law on the Amendments to the Organic Law on General Courts, 1 May 2013, N580-IIს.

In May 2013, the Ministry of Justice presented to the Venice Commission for their review a draft law on the Temporary State Commission on Miscarriages of Justice. The idea behind the draft law was to create a Temporary State Commission consisting of reputable lawyers, including former judges, which would deal with the tens of thousands of complaints that had flooded the Prosecutor's Office and other public offices where the complainants claimed to be victims of miscarriages of justice. The Commission would consider the complaints and where it would find that the complaint was justified the complainant would obtain standing to appeal to the appellate court for the reopening of the case.[72]

In their joint opinion the Venice Commission and the Directorate for Justice and Human Dignity of the Directorate General of Human Rights and Rule of Law of the Council of Europe ("DJHD") noted that the very idea of a process of massive examination of possible cases of miscarriage of justice by a non-judicial body raised issues as regards the separation of powers and the independence of the judiciary. It might only be conceived in very exceptional circumstances. The mere re-examination of cases without a profound reform of the judiciary would be insufficient.[73] To the authors of the joint opinion, it seemed difficult to reconcile the Rule of Law imperatives with the extremely polarised political context and the limited size of the judiciary in Georgia.[74]

The draft law was never presented to and adopted by Parliament.

In August 2014, the Ministry of Justice requested the Venice Commission to come up with their opinion on an ambitious set of amendments to a number of laws[75] which, taken together, were generally labelled as the "Third Wave of Judicial Reform". The Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe delivered three joint opinions on the subject matter.

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[72] Venice Commission, CDL-REF(2013)024, Draft Law on the Temporary State Commission on Miscarriages of Justice.

[73] Venice Commission, CDL-AD(2013)013, Joint Opinion of the Venice Commission and the DJHD on the Draft Law on the Temporary State Commission on Miscarriages of Justice of Georgia, para. 11.

[74] *Ibidem*., para. 82.

[75] Venice Commission, CDL-REF(2014)021, Draft Amendments to the Organic Law on General Courts; CDL-REF(2014)022, Draft Law on Making Changes to the Law on Disciplinary Liability and Disciplinary Proceedings of Judges of General Courts of Georgia; CDL-REF(2014)023, Draft Amendments to the Administrative Procedure Code, the Civil Procedure Code and the Criminal Procedure Code of Georgia.

The Venice Commission and the Directorate welcomed the proposed system of election of court presidents by the judges of the same court by secret ballot to replace the system of appointment of the court presidents by the HCJ.[76] They also welcomed the drafters' intention to achieve a higher degree of transparency in the selection of judges.[77] However, they deplored that, despite strong criticism based on the principle of independence of justice, a three-year probationary period for judges was maintained in the Organic Law on General Courts.[78] The Commission and Directorate were very positive on the introduction of the electronic distribution of cases, but they noted that the relevant provision was very short and it was not clear how the electronic system would operate in the practice. They reiterated that the rules should be clear and it should be possible to verify their correct application. The absence of such rules could easily lead to abuse which might jeopardise the internal independence of the judiciary.[79]

When it comes to the disciplinary proceedings law, the Commission and the Directorate welcomed the effort of the Georgian authorities to improve the legal framework and establish higher standards of judicial independence. As a result of the draft amendments, the High Council of Justice would become the unique body enabled to initiate disciplinary proceedings against judges which was assessed as a positive step in terms of ensuring the independence of judges. The suppression of the power of the court chairpersons for initiating disciplinary proceedings was welcome. Also, the proposed system provided for a clear division of tasks between the body in charge of investigating (the High Council of Justice) and the body in charge of deciding on the imposition of disciplinary sanctions (Disciplinary Board) which was found to be in line with international standards.[80]

At the same time, the Commission and the Director called the Georgian authorities to do some additional work, such as reducing the two-thirds majority for the High Council of Justice decisions in disciplinary matters

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[76] Venice Commission, CDL-AD(2014)031, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Draft Law on Amendments to the Organic Law on General Courts of Georgia, para. 84.
[77] *Ibidem*., para. 47.
[78] *Ibidem*., para. 31.
[79] *Ibidem*., paras. 79-80.
[80] Venice Commission, CDL-AD(2014)032, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Draft Law on Making Changes to the Law on Disciplinary Liability and Disciplinary Proceedings of Judges of General Courts of Georgia, paras. 70-71.

to a simple majority; developing more precise provisions concerning the grounds for initiating disciplinary liability and introducing greater procedural guarantees for judges; making disciplinary sessions public as a general rule and not the exception, etc.[81]

The Venice Commission and the Directorate also welcomed the proposed legislative initiatives to improve the system of cassation appeals by broadening and refining the admissibility criteria in the civil, administrative and criminal procedures. They particularly welcomed one of the most important purposes of the amendments – to ensure the conformity of domestic courts' decisions to the case-law of the ECtHR.[82]

The Third Wave of Judicial Reforms package met much resistance from some influential forces in both the country's political leadership and the judiciary. Initiated in Parliament in the spring of 2015, the package was finally adopted almost two years later with a number of progressive steps having fallen victim to "political consensus" between the "Georgian Dream" leadership and the "judicial clan"[83] that has controlled the judiciary. As a most deplorable example, the proposal to elect the court presidents was taken out of the adopted text.[84]

In June 2015, the Ministry of Justice requested the Venice Commission to review the proposed amendments to the Law on Prosecution Service. By then the Justice Minister had ceased to be a top prosecuting officer in the country[85] as was strongly recommended by the Venice Commission back in 2009.[86] The new amendments provided, *inter alia*, for the establishment of a Prosecutorial Council, a pluralistic body chaired by the Minister of Justice, which based on public consultations with the civil society would select a candidate for the Chief Prosecutor, who then would be approved

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[81] *Ibidem*., para. 72.

[82] Venice Commission, CDL-AD(2014)030, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Draft Laws Amending the Administrative, Civil and Criminal Procedure Codes of Georgia, para. 56.

[83] Concerning the "clan" see for example: https://idfi.ge/en/ngos_respond_to_the_information_broadcasted_by_media_on_informal_connections_between_state_authrities_and_judiciary; https://dfwatch.net/evolution-of-clan-based-governance-in-georgian-judiciary-since-2007-53155;https://oc-media.org/the-clan-in-georgia-s-judiciary-re-attempt-lifetime-appointments/; https://osgf.ge/en/assessment-of-the-hearings-of-supreme-court-judicial-candidates-at-the-parliament-legal-committee/.

[84] Organic Law on Amendments to the Organic Law on General Courts, 8 February 2017, N255-IIს.

[85] Law of Georgia on Amendments to the Law on Prosecution Service, 30 May 2013, N659-IIს.

[86] See *supra* note 51.

by the government and eventually elected by Parliament.[87] This system was proposed to replace the then existing rule by which the Prime Minister, "after consultations with the Justice Minister" had an exclusive discretion to appoint the Chief Prosecutor.

In their joint opinion, the Venice Commission, the CCPE, and the OSCE/ODIHR noted that the reform of the Prosecutor's Office "[was going] into the right direction". They encouraged the Georgian authorities to pursue it further, while bearing in mind the recommendations contained in the opinion. At the same time, it was noted that the proposed reform did not yet fully achieve the stated goal of depoliticising the office of the Chief Prosecutor. It was recommended, *inter alia*, that nominations to the position of the Chief Prosecutor should be based on clear qualification/experience criteria; members of the Prosecutorial Council elected by the Parliament should be selected in a more transparent manner; the necessary guarantees for the independence of the Prosecutorial Council should be set forth; the Chairperson of the Prosecutorial Council should be elected by the Council itself, instead of having the Minister of Justice automatically hold this position; etc.[88] The government took on board many, but not all recommendations. As an example, in the finally adopted amendments the Minister of Justice continued to be an *ex-officio* chairperson of the Prosecutorial Council.[89]

In April 2016, Parliament started considering, in a very hasty manner, somewhat controversial draft amendments to the Organic Law on the Constitutional Court and the Law on Constitutional Legal Proceedings.[90] In May, the Venice Commission was called to review the amendments. However, by then the amendments had already been adopted in three readings.[91] On 31 May 2016, the President vetoed the amendments and submitted considered remarks to Parliament. These proposed changes were adopted by Parliament on 3 June 2016.[92]

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[87] Venice Commission, CDL-REF(2015)008, Draft Law on Amendments to the Law on Prosecutor's Office.
[88] Venice Commission, CDL-AD(2015)039, Joint Opinion on the Draft Amendments to the Law on the Prosecutor's Office of Georgia, para. 10.
[89] Law on the Amendments to the Law on Prosecutor's Office, 18 September 2015, N4300-Ib, Article 8^1(2)(a).
[90] Venice Commission, CDL-REF(2016)038, Amendments to the Organic Law on the Constitutional Court and the to the Law on Constitutional Legal Proceedings and Explanatory Note.
[91] Venice Commission, CDL-REF(2016)017, Opinion Amendments to the Organic Law on the Constitutional Court and to the Law on Constitutional Legal Proceedings, para. 2.
[92] *Ibidem*., para. 8.

In the Venice Commission's view, the amendments brought about a number of very positive changes, which were welcome, such as: the new election system for the President of the Court, which ensured a real choice for the judges electing their President; the systematic publication of dissenting and concurring opinions; the introduction of an automatic case-distribution system; and the entry into force of acts of the Constitutional Court upon their publication on the web-site of the Court.[93] However, the Venice Commission called the authorities to amend some other provisions to allow the Constitutional Court exercise its constitutional task without any risks. For example, the requirement of a minimum of six votes for the taking of decisions in the plenary session should be lowered and the provision enabling a single judge to refer a case to the plenary session should be amended.[94]

In December 2016, Parliament set up a State Constitutional Commission with the task of preparing amendments to the Constitution of Georgia. A new addition of the Constitution having very little in common with the original text of the Constitution of 1995 was developed.[95] The Venice Commission was requested to comment on the new edition of the Constitution on three occasions.

In its first Opinion on the revised draft Constitution, commenting on the election of the three Constitutional Court judges by a majority of the total members of Parliament, the Venice Commission noted it would be advisable to have a broad political spectrum included in the nominating procedure and, therefore, recommended to provide for a qualified majority for the appointment of the three judges elected by Parliament, provided a suitable dead-lock breaking mechanism could also be introduced.[96] Following this recommendation in the second draft the requirement of a three-fifths majority of Parliament's full composition was introduced which was welcomed by the Commission.[97]

The Venice Commission noted that the principle of life appointment of judges which applied to all judges of lower courts did not apply to the Supreme Court judges. The Commission, therefore, recommended extending life tenure, in unequivocal terms, to Supreme Court judges.[98]

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[93] *Ibidem*., para. 63.
[94] *Ibidem*., para. 64.
[95] Venice Commission, CDL-REF(2017)027, Draft Revised Constitution of Georgia.
[96] Venice Commission, CDL-AD(2017)013, Opinion on the Draft Revised Constitution, para. 74.
[97] Venice Commission, CDL-AD(2017)023, Opinion on the Draft Revised Constitution as Adopted by the Parliament of Georgia at the Second Reading on 23 June 2017, para. 43.
[98] Venice Commission, CDL-AD(2017)013, Opinion on the Draft Revised Constitution, para. 79.

Referring to its earlier Opinion,[99] the Venice Commission positively commented on the proposal to have the Supreme Court judges elected upon the submission by the High Council of Justice rather than the President.[100] The Venice Commission said it was conscious that the current High Council was subject to a lot of criticism in Georgia. However, as the Commission put it, "this should... not prevent the HCJ from playing its role also as regards the nomination of Supreme Court judges but rather be a reason to reform the legislation on the Council." Having regard to the new more restricted role of the President in the draft Constitution, the Commission also recommended considering to give to the President the power to appoint judges upon the proposal of the High Council of Justice.[101] In the later opinion the Commission once more emphasised that the appointment of Supreme Court judges directly by the High Council of Justice without the involvement of Parliament, or their appointment by the President upon proposal by the High Council of Justice, would better guarantee the independence of those judges.[102] In its third and final Opinion on the new edition if the Constitution, the Commission found it regrettable that the drafters did not take into account the Commission's recommendation and maintained the strong involvement of Parliament in the election process of Supreme Court judges.[103] The Commission welcomed the proposal to apply the probationary period for judges only until the end of 2024.[104]

Commenting on making the Prosecutor's Office accountable to the Parliament rather than the executive, the Venice Commission warned that the risk of politicisation should be avoided and recommended to introduce the requirement of a qualified majority in Parliament for the election of the Prosecutor General.[105] The Commission noted that this recommendation was not followed The previous recommendation concerning the requirement of a qualified majority in Parliament for the election of the Prosecutor General was not followed by the Georgian authorities as the

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[99] See *supra* note 54.
[100] Venice Commission, CDL-AD(2017)013, Opinion on the Draft Revised Constitution, para 80.
[101] *Ibidem*., para. 81.
[102] Venice Commission, CDL-AD(2017)023, Opinion on the Draft Revised Constitution as Adopted by the Parliament of Georgia at the Second Reading on 23 June 2017, para. 45.
[103] Venice Commission, CDL-AD(2018)005, Opinion on the Draft Constitutional Amendments Adopted on 15 December 2017 at the Second Reading by the Parliament of Georgia, para. 37.
[104] Venice Commission, CDL-AD(2017)013, Opinion on the Draft Revised Constitution, para 86.
[105] *Ibidem*., paras. 82-83.

final draft still provided for an election of the Prosecutor General by a majority of the full composition of Parliament. In the Commission's words, a qualified majority could contribute to prevent the politicisation of this institution.[106]

In October 2018, the Commission was requested to review the draft Organic Law on Prosecutor's Office[107] and the amendments to the Organic Law on General Courts concerning the High Council of Justice.[108] Both drafts were developed to bring the legislation into line with the newly adopted edition of the Constitution.

The Venice Commission welcomed the new provisions in both drafts, as well as the relevant provisions in the new Constitution of Georgia.[109] At the same time, the Venice Commission made some important recommendation with respect to the Prosecutor's Office. In particular, the Georgian authorities were called: to raise the civil society's representation in the Prosecutorial Council to enhance public credibility in its independence; to ensure that not only the external independence of the Prosecutor's Office was ensured in relation to the legislative or executive powers, but also that of the internal independence of the prosecutors; regarding the careers of prosecutors, to define shared competences of the Prosecutor General and Prosecutorial Council to achieve a balance between the hierarchical control over and the independence of prosecutors; to give the Prosecutorial Council a power to oversee the activities of the career management, ethics and incentives council, an advisory body headed by the Prosecutor General; to indicate expressly in the law how the Prosecutorial Council's task to guarantee the transparency of the Prosecutor's Office was to be fulfilled.[110] None of these recommendations were addressed properly by the government.

In late December 2018, the High Council of Justice, having exercised their brand new Constitutional power to nominate the Supreme Court judges and having exploited at the same time the fact that no detailed regulations other than the general Constitutional provisions had been in existence, in a very arbitrary

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[106] Venice Commission, CDL-AD(2018)005, Opinion on the Draft Constitutional Amendments, para. 38.
[107] Venice Commission, CDL-REF(2018)055, Draft Organic Law on the Prosecutor's Office and Explanatory Note.
[108] Venice Commission, CDL-REF(2018)056, Provisions on the High Council of Justice in the Organic Law on General Courts.
[109] Venice Commission, CDL-AD(2018)029, Opinion on the Provisions on the Prosecutorial Council in the Draft Organic Law on the Prosecutor's Office and on the Provisions on the High Council of Justice in the Existing Organic Law on General Courts, para. 54.
[110] *Ibidem*. para. 55.

manner, without much discussion and in fact behind the closed door, approved a list of 10 candidates for the Supreme Court judges and presented it to Parliament for their review. The HCJ hoped that on the New Year's Eve Parliament would approve the list without much ado. The person known as one of the leaders of the "judicial clan" was on the list. The controversial list raised big scandal in Parliament, media and society at large. It even prompted a number of deputies that at that time were members of the ruling party to leave the majority. Eventually, the list was withdrawn and the discussions on this matter were postponed until a law regulating the selection of the Supreme Court judges would be adopted.

In March 2019, the relevant draft laws were submitted to the Venice Commission.[111]

In April the Urgent Opinion was delivered[112] which later was endorsed at the plenary session of the Commission.[113]

The Commission took note of the fact that the HCJ enjoyed "a fairly low trust by a large segment of society". Of course, the Venice Commission underlined that it was in no position to evaluate whether this lack of trust was warranted or not. However, in the Commission's view, the very fact that the HCJ would be selecting nearly all the candidates for judges of the Supreme Court (around 18 or 20 out of 28), who would then be appointed by the present political majority in Parliament, "[might] be detrimental to the high level of public trust that an institution such as the Supreme Court must enjoy in a country".[114] The Venice Commission, therefore, called Parliament to only appoint the number of Supreme Court judges which would be absolutely necessary to render the work of the Supreme Court manageable. While the specific number would be subject to consultations with the Supreme Court, the Venice Commission said that it should not exceed half of the 18 to 20 positions that would be vacant. Further appointments might then be made by Parliament elected at the next general elections.[115]

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[111] Venice Commission, CDL-REF(2019)007, (1) Draft Organic Law on the Amendments to the Organic Law on Common Courts; (2) Draft Amendment in the Rules of Procedure of the Parliament; (3) Law on Amendment to the Law on Conflict of Interest and Corruption in Public Institutions.

[112] Venice Commission, CDL-PI(2019)002, Urgent Opinion on the Selection and Appointment of Supreme Court Judges Issued Pursuant to Article 14a of the Venice Commission's Rules of Procedure.

[113] Venice Commission, CDL-AD(2019)009, Urgent Opinion on the Selection and Appointment of Supreme Court Judges.

[114] Venice Commission, CDL-PI(2019)002, Urgent Opinion on the Selection and Appointment of Supreme Court Judges Issued Pursuant to Article 14a of the Venice Commission's Rules of Procedure, para. 14.

[115] *Ibidem*., para. 16.

The Venice Commission recommended removing the requirement for non-judge candidates to have passed the judicial qualification examination. Where a candidate was required to be a *"specialist of distinguished qualification in the field of law"* a person with such qualifications should not be forced to sit an examination to prove that he or she is capable of dealing with points of law.[116]

However, in the Venice Commission's judgment, the principal difficulty was the proposal that the HCJ would conduct a secret ballot to shortlist applicants and would later conduct a second secret ballot for the final list of nominees. The nature of a secret ballot process was to be non-reasoned. It also allowed those voting to be influenced by extraneous considerations – not based on objective criteria. In addition, it would make it impossible for the rationale behind the voting process to be articulated.[117]

The Venice Commission further recommended that the HCJ be obliged to give substantial reasons for its decisions that could be reviewed by a court. This implied that the procedure not be based on secret ballots, but rather on the confirmation of the objective criteria, producing a pool of candidates which would satisfy these criteria. The reasoned opinions would enable losing candidates to file an appeal against this decision. Such appeals would ensure that the HCJ could not take arbitrary decisions, but based its decisions on the merits of each candidate.[118]

To avoid any perception of a conflict of interest, it was also recommended that a member of the HCJ who would be a candidate should be excluded from all procedures pertaining to the selection and nomination of candidates for judges of the Supreme Court.[119]

Very few of the Venice Commission's above and other recommendations were addressed by the government. As an example, the secret ballot procedures, as well as unreasoned nature and non-appealability of the HCJ decisions remained unchanged.[120] Out of the 20 openings in the Supreme Court 14 ones were filled. And the selected candidates lacked trust among domestic and international observers. The EU representative said that "[the] selection procedure did not adhere to all recommendations made by the Venice Commission and was characterised by key shortcomings, including a lack of transparency that undermines a genuinely merit-based nomination

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[116] *Ibidem*., para. 22.
[117] *Ibidem*., para. 33.
[118] *Ibidem*., paras. 39-40.
[119] *Ibidem*., para. 51.
[120] Organic Law on Amendments to the Organic Law on General Courts, 1 May 2019, N4526-IIს.

process. A number of the appointed candidates do not enjoy broad public trust, as was obvious in the course of the selection process."[121] The US Embassy in Georgia noted that the candidate selection process in the High Council of Justice lacked transparency and resulted in a slate of nominees that did not fully represent the best qualified candidates. Although the hearings for the nominees in the Parliament's Legal Committee were open and transparent, those hearings revealed that "a number of candidates were unable to demonstrate sufficiently their legal expertise or a commitment to impartiality".[122]

Conclusion

With the Venice Commission's assistance Georgia has come a long albeit very hard way in reforming its judiciary. It is true that only legislative improvements are not sufficient to ensure true independence and impartiality of judiciary. There must be a genuine motivation and will on the part of the political authorities not to interfere with the judiciary and not to seek any alliances among the judges. Regrettably, in this sense Georgia's progress is far less obvious.

[121] Statement by the EU External Service Spokesperson on the appointment of judges to the Supreme Court of Georgia, at: https://eeas.europa.eu/headquarters/headquarters-homepage_en/72068/Statement%20by%20the%20Spokesperson%20on%20the%20appointment%20of%20judges%20to%20the%20Supreme%20Court%20of%20Georgia.

[122] https://ge.usembassy.gov/u-s-embassys-statement-on-supreme-court-nominees-december-12/.

Jana Baricová[1]

A Personal Testimony

The Constitutional Court of the Slovak Republic was established in early 1993 almost immediately after the Slovak Republic became an independent country on the first day of that year. Those were still the times of democratic transition, as the new state was born, a mere two years after the fall of the 40-year unthreatened rule of the Communist Party of Czechoslovakia, during which time no true form of judicial constitutionality review was even thinkable. And while the very first, pre-war Czechoslovak constitutional court had begun its work already in 1921 and constitutional justice had subsequently been restored in Czechoslovakia in 1991 with the long-overdue founding of its federal constitutional court, the former's experience and legacy had been largely forgotten by 1993 and the latter's activity, albeit formative and foundational in many respects, had been all too brief for a mature democracy to develop. It is therefore perfectly natural that the young democratic state and its young constitutional court sought advice from more experienced peers from Western Europe and North America. And thus, already in the very early days of our Court's existence, my predecessors began the cooperation with the Venice Commission, which has continued to this day and has been a major contributor in consolidating democracy and the rule of law in Slovakia.

Our mutual cooperation takes several forms. I first became a substitute member of the Venice Commission in 2014, shortly after taking the office of judge of the Constitutional Court, and then graduated to a full member in 2019. During that time, like my predecessors, I have participated at countless plenary sessions of the Venice Commission and have always appreciated the highly erudite and fruitful debate there, which time and again succeeded at maintaining a balance between differing points of view and encouraging the search for a common understanding, while at the same time the Commission was able to hold its firm position on key issues.

It may be confidently said that the opinions and reports of the Venice Commission represent the snow-capped summit of common European constitutional jurisprudence and are invaluable not only for countries with a new democracy in developing their official constitutional doctrines

[1] Member of the Venice Commission in respect of Slovakia.

in line with the Council of Europe standards. It is precisely for these reasons that since at least 2010 our translators working at the international relations department have been entrusted with translating selected Venice Commission's documents into the Slovak language, which are then published on the Court's official website, with the clear aim of spreading the supreme European constitutional scholarship among both the specialist and lay public of our country. In addition, the Court has referred to the opinions of the Venice Commissions in numerous of its decisions and the Court's liaison officers regularly make use of the Commission's CODICES database and its other documents in preparing materials for the Court's decision-making.

More recently, the Commission has also been exceedingly helpful in settling constitutional conflicts regarding judicial nominations to the Constitutional Court. The first conflict began in 2014, when the mandate of three judges of the Court expired and the parliament nominated six candidates for the three vacancies. However, the President of the Republic refused to appoint five of them as he deemed them unfit for the position. Two positions thus remained vacant and this number then rose to three in early 2016, when the President again rejected another two candidates newly nominated for another vacancy after the mandate of another judge expired. Three years and several Court decisions later, the conflict was finally settled and the three remaining judges were appointed in December 2017 to a large extent thanks to the Commission's opinion from March 2017. Another crisis occurred in 2019, when after the expiry of nine constitutional judges' mandates in February 2019, this time the parliament was unable to nominate the required number of candidates, which greatly disrupted the Court's functioning for several months until October 2019, when finally, with the required number of candidates nominated, the President could proceed to appoint the remaining judges to the Constitutional Court. This time again, the Commission's President Gianni Buquicchio supported the Court and expressed his readiness to intervene, should the crisis not be resolved in reasonable time.

The Commission not only helped resolve the conflict regarding judicial appointments, but also issued several recommendations aimed at preventing the occurrence of similar conflicts in the future. I am pleased to announce that some of those recommendations have already been implemented. In particular, the new Law on the Constitutional Court passed in late 2018 now explicitly states that the Court announces its decision only after the written version has been prepared. Moreover, the selection procedure has been modified so that the hearings of the candidates before the parliamentary

constitutional committee are streamed live and the representatives of the President of the Republic are routinely invited to participate in the hearings and may ask the candidates questions. Furthermore, there is an ongoing public discussion regarding the raising of the parliamentary majority required for electing candidates to a qualified three-fifths majority of all deputies.

I am proud to have been a part of this expert organisation for six years now and to have been able to share all the valuable experience with its other members in our common striving for maintaining the high level of European constitutionalism. Considering the challenges Europe and the greater world are currently facing in upholding our common values of the rule of law, democracy and human rights, the Commission's mission is as relevant today as ever before. As President Buquicchio rightly reminded us recently, we must safeguard pluralistic democracy and prevent its degeneration into an authoritarian regime, where the winner takes it all. Let me therefore take this opportunity and sincerely congratulate the Venice Commission on this year's jubilee marking its 30th anniversary. I hope I will be part of it for years to come.

Richard Barrett[1]

The Role of the Venice Commission in identifying and tackling the misuse of administrative resources during electoral processes

Introduction

The Venice Commission has been closely involved in the topic of identifying and countering the misuse of administrative resources during electoral processes for one decade. The issue of such misuse is implicit in the Code of Good Practice in Electoral Matters in the context of equality of opportunity and the separate context of the freedom of voters to form an opinion. While the issue is sometimes described by other international bodies as the abuse of state or public resources, the core problem and possible mitigations are the same with either description.

This issue was raised in the Council of Democratic Elections since 2010 as one which often arises in election observation mission reports. The Venice Commission decided to prepare a report and draw up guidelines. After the Fourth Eastern Partnership Seminar (Tbilisi, Georgia April 2013) provided some comparative experience, the report including such guidelines was issued in December 2013. In summary this report gives examples of misuse from observation reports and electoral practice and an overview of caselaw. It emphasises that essentially mitigation of such misuse depends on awareness and motivation within the public service.

In 2014, the Venice Commission brought this issue up for consideration at the EMB conference at Helsinki, and then decided to proceed jointly with OSCE/ODIHR to prepare further guidelines aimed at national lawmakers. Those Joint Guidelines were issued in March 2016. These set out the principles which should be reflected in the legal framework, and emphasise the importance of separating the government from political parties. This involves some restrictions on canvassing by civil servants which constitute a limitation on political rights. It recommends a restraint on major policy announcements or non-essential appointments during the election period and protections for civil servants who disclose misuse or refuse to cooperate

[1] Member of the Venice Commission in respect of Ireland.

with it. Many of such provisions can be outside the election code in media laws, laws on political parties, laws protecting whistle-blowers, civil service laws or indeed in soft law instruments.

Since 2016, the Venice Commission has collaborated in the struggle against the misuse of administrative resources with the Congress of Local and Regional Authorities in its Checklist and Practical Guide for local politicians and officials, and also with the PACE at a series of regional conferences at London, Tirana and Tbilisi aimed at members of parliament and electoral officials.

Rationale

The fair use of public administrative resources is vital in ensuring full and fair democratic elections take place. Misuse by those with power over such resources during an electoral process has the potential to seriously inhibit the full and fair participation of opponents thereby undermining the legitimacy of the results. Moreover, the guarantees and/or spirit of numerous international texts, for example, of Article 25 ICCPR and Article 3 of Protocol No.1 of the ECHR are likely to be breached by a misuse of administrative resources which influences the electorate.

Dilemma

At the same time, it must be recognised that deploying public funds and other administrative resources is absolutely necessary to enable electoral processes take place. Moreover, the use of such resources can benefit the democratic process by putting smaller, less well financed opponents on an equal footing with established political machines in the expensive process of preparing for elections. Thus, while a general statement that administrative resources should not be used to benefit a party to an election appears straightforward, without any public funds and other administrative resources the electoral process would be inherently plutocratic.

This dichotomy illustrates the inherent conflict when looking at the use and misuse of administrative resources during the electoral process. Using public resources is necessary to have full and fair democratic elections but their misuse undermines the very same objective. Determining whether resources have been legitimately used or misused is a difficult task even before one considers legitimate politicking, decisions and actions as part of the normal course of governance, events of happenstance and, of course, the traditions of individual states.

Purpose

The purpose of this article is not to add to the documents introduced above, but rather it aims to define the concepts of administrative resources and misuse, provide an overview of the history of the issue, outline some practical difficulties in application, and conclude with a short comment on the importance of soft law and the civil service in the legal framework to prevent the misuse of administrative resources. In short, it seeks to take stock of the current position.

Defining the concept of administrative resources

The concept of administrative resources, also referred to as state or public resources, goes far beyond public finances and covers those resources deriving from a public position or intended for the benefit of the general public. For example, the prestige of public office can fall within the concept of administrative resources, hence the deployment of incumbent office holders at campaign events is often seen by opponents as abusive. The Venice Commission *Report on the misuse of administrative resources during electoral processes* (CDL-AD(2013)033) defines administrative resources as follows:

> *Administrative resources are human, financial, material, in natura and other immaterial resources enjoyed by both incumbents and civil servants in elections, deriving from their control over public sector staff, finances and allocations, access to public facilities as well as resources enjoyed in the form of prestige or public presence that stem from their position as elected or public officers and which may turn into political endorsements or other forms of support.*

The potential misuse of resources goes beyond incumbents seeking re-election. For example, a well-connected opponent/opposition with access to local government resources could equally misuse such resources in an electoral process. Private organisations such as trade unions, charities and NGOs in receipt of, or with access to, public resources may also have a partial interest in the outcome of an election and occupy an influential position in the minds of the electorate. The OSCE/ODIHR *Handbook for the Observation of Campaign Finance* uses the term 'abuse of state resources' which is defined as the "*undue advantage obtained by certain parties or candidates, through use of their official positions or connections to governmental institutions, in order to influence the outcome of elections*".

For the purposes of this article, administrative/public resources are considered to be all "*human, financial, material, in natura and other immaterial resources*" deriving from a public position or intended for the benefit of the

general public.[2] The use of public buildings/facilities intended for use by legislative representatives, the appointment of individuals to official positions and decisions (indeed even announced intentions) regarding infrastructural/investment programmes may all amount to administrative resources in the context of electoral processes.

Defining the concept of misuse

Public resources are required to have a democratic electoral process. At the most basic level, laws are required to establish electoral areas, electoral periods and the legal conditions of an election. Moreover, buildings are required for polling stations and count centres and these will either be public buildings or financed by public monies. Thus, the use of administrative/public resources during an electoral process is not only legitimate, it is essential.

What is it that turns the use of resources into a misuse? In principle, misuse will be the application of State/public resources for party-political ends. The definition offered by the Congress of Local and Regional Authorities Report is:

> *'Abuse'/'misuse' of such resources can be defined as the 'undue advantage obtained by certain parties or candidates, through use of their official positions or connections to governmental institutions, in order to influence the outcome of elections.' In this sense, the abuse of administrative resources also includes related offences, 'such as forms of pressure or threats exerted by public authorities on civil servants.*

When determining what is a misuse, it is important to understand the rationale for tackling the misuse of administrative resources – the propriety in the expenditure of public resources and the level playing in the democratic process. When considering whether resources have been misused, there will have to be causative link between the (mis)use and the principle of propriety or the level playing field.

It is also important to recognise that the electoral process goes beyond the electoral campaign. National laws generally have a relatively short electoral campaign period. The electoral process, in contrast, covers the

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[2] In this regard, the definition offered by the Congress of Local and Regional Authorities report on *The misuse of administrative resources during electoral processes: the role of local and regional elected representatives and public officials* (CG31 (2016) 07) has much merit: *'Administrative resources' include: 'human, financial, material, in natura and other immaterial resources enjoyed during electoral processes by both elected representatives and representatives of the public sector deriving from their control over public sector staff, finances, allocations and access to public facilities. It entails also resources enjoyed in the form of prestige or public presence that stem from their position as elected representatives or public officers and which may turn into political endorsements or other forms of support.'*

various steps in the election of public officials. In the Venice Commission's 2013 Report, for example, it is described as:

> *An electoral process as understood in the report is a period going beyond the electoral campaign as strictly understood in electoral laws, it covers the various steps of an electoral process as starting from, for example, the territorial set-up of elections, the recruitment of election officials or the registration of candidates or lists of candidates for competing in elections. This whole period leads up to the election of public officials. It includes all activities in support of or against a given candidate, political party or coalition by incumbent government representatives before and during election day.*

Thus, while electoral process incorporates the campaigning period, it is significantly broader in scope.

History of the issue of administrative resources in electoral processes

The Venice Commission found that the misuse of administrative resources was "*an established and widespread phenomenon in many European countries, including countries with a long-standing tradition of democratic elections*".3 Indeed, the Commission commented that the misuse of administrative resources had become so well established that it was seen as a normal part of the electoral process. It might even be said that well established political behaviours such a "pork barrel" / "parish pump" politics amount to the misuse of resources in certain circumstances.

The Venice Commission's 2013 Report concluded that there were inherent weaknesses in a lot of national legislation and in practice that may lead to the misuse of administrative resources, potentially giving an undue advantage to incumbent political parties, thus affecting the equality of electoral processes and the freedom of voters to form an opinion. The Report also emphasised that legislative intervention is not a panacea, any legislative instruments must also be properly used by the executive power, alleged/potential abuses independently investigated/audited and the law must be applied by the relevant enforcement body.

Following from the 2013 Report, the Venice Commission and OSCE/ODIHR agreed *Joint Guidelines for preventing and responding to the misuse of administrative resources during electoral processes* (CDL-AD(2016)004) in March 2016. These guidelines were aimed at national law makers and authorities in light

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[3] Venice Commission, CDL-AD(2013)033, Report on the Misuse of Administrative Resources during Electoral Process, para.1

of the findings of the 2013 Report. In short, the Guidelines recommended that laws and concrete enforcement measures be introduced *viz* administrative resource, the objective of which was to:

- promote neutrality and impartiality in the electoral process;
- promote equality of treatment between different candidates and parties in relation to administrative resources;
- level the playing field between all stakeholders, including incumbent candidates; and
- safeguard against the potential misuse of administrative resources for partisan purposes.

The Congress of Local and Regional Authorities report on *The misuse of administrative resources during electoral processes: the role of local and regional elected representatives and public officials* (CG31(2016)07) developed on the issue with particular focus on local government. Indeed, the report noted that "the intrinsic linkage between local and regional elected representatives and a given community" and the generally close relationship between "incumbents or candidates, civil servants and public officials working for the municipality and the electorate" creates a further layer of complexity when looking at the misuse of administrative resources. The Congress advocated a legal framework which clearly delineated what was permissible with particular focus on the election campaign, campaign and political party finance, and the media sector.

The Congress published its own *Checklist for compliance with international standards and good practices preventing misuse of administrative resources during electoral processes at local and regional level* (CG32 (2017) 12) in 2017. This checklist identifies risk areas of potential misuse of administrative resources, sets outs factors to guide in the assessment of a country's legal framework, provides guidelines for identifying specific instances of misuse, and deals with concrete preventive action in the form of suggested voluntary declarations, codes of conduct and awareness-raising activities.

Difficulties in application

If the misuse of administrative resources is the application of State/public resources for party-political ends, governmental action and political campaigning should be distinct activities.

In the first place there should be an identifiable separation between public funds and political campaign finances. This principle is easy to state but once one scratches the surface it becomes very difficult to apply. Political parties will generally be in receipt of public funds and while the method of

allocation will vary from country to country, often allocations will not be equal. While there is no inherent difficulty with this, provided of course the relevant principles applicable to party funding are complied with, it creates a difficulty when looking at whether public funds are being misused for the purposes of elections. If an incumbent party is in receipt of more public funds that an opposition, does that create an inherent abusive position regarding those funds unless they are excluded from use during the electoral process?[4]

In reality, no hard rule can be set down. There is no inherent problem with the rules on party financing applying *mutatis mutandis* to campaign financing (*Opinion on the need for a code of good practice in the field of funding of electoral campaigns* CDL-AD(2011)020). Whether public funds are being misused as opposed to used will be determined on a case by case basis having regard to the principles of creating equality in the election process. Campaign and party finance laws, and transparency in both, are a central tenet for democratic elections and should operate to prevent the misuse of resources *qua* the complex issue of public funding. Certainly, public funding of political parties should not operate to allow any party to finance an electoral campaign which places opponents at a disadvantage because of their lack of public funding.

Leaving aside the direct use of public funds, politicians in official positions often receive specific public financial support. This may come in various forms such as an allowance to employ staff, publicly funded transport, or access to free facilities such as postage. There is, of course, no inherent difficulty with these public resources being bestowed on such persons. However, these resources may also give that person beneficial electoral position. If, for example, a staff member paid through public funds undertook campaign work during the course of the normal working day, this would put the candidate in a superior position through the use of public funds. Again, however, a simple statement that such party-political work should be prohibited is easier to say than to apply. One can easily envisage situations where the line between official publicly funded business and political campaigning is blurred, for example when does normal constituency work become electoral work?

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[4] It is of note that pursuant to 8A.4 of the Lisbon Treaty (Political parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union), the European Parliament has also established economic support for the political foundations at the European level but excluded funding for electoral campaigns.

What about conducting official public business and decision making during an electoral process? The commencement of a large infrastructure project during or in the immediate run up to an electoral period may have a significant effect on the election but a country must continue to function during an electoral period. The UK Government *General election 2019: guidance for civil servants* refers to a custom where Ministers observe "discretion in initiating any action of a continuing or long term character" and decisions on matters of policy which a new government might want to take a different view upon should be postponed unless detrimental to the national interest or wasteful of public money. That is difficult to disagree with but it is hard to pin down the boundaries of the statement. Moreover, the issue is even more complex in the context of regional elections that do not coincide with national elections. To take the infrastructure project, what of a decision by the national government which will undoubtedly benefit a particular region. Should this decision be postponed, because it is during the electoral process? Does the answer to that question depend on whether the decision had been in the pipeline for a long period? Would the determination on whether this is a misuse of public resources consider the particular needs of the region and, if so, on what basis should this effect the determination?

Turning to the misuse of the prestige of office, a relatively recent decision of the Court of Appeal in the Republic of Moldova provides an example of the complex relationship between legitimate campaigning and misusing the resource of the prestige of a public office. In summary the President of the Republic of Moldova pledged his support for the Party of Socialists of the Republic of Moldova (PSRM). It appears that the President also met with a foreign government to discuss matters directly related to the PSRM electoral programme and, upon his return, attended four PSRM campaigning events. Both the Electoral Court and Court of Appeal found, *inter alia*, that this was a misuse of administrative resources.

Of course, there were issues in the case relevant only to Moldova, in particular the politicly neutral position of the President. However, focusing only the resources issues, the Court of Appeal held that the President's activities should be interpreted as manifesting a political preference and therefore the interests of PSRM were promoted through actions organised by the President with the financial resources of the Presidency. Without commenting on the outcome of the case, one can expand the principles applied by the Electoral Court and Court of Appeal to demonstrate the complex factual circumstances that might arise in a different case. If for

example, the same conduct had been done by a head of state who was permitted to be politically affiliated, would it still have amounted to a misuse of resources? Similarly, if the actions by a supposedly neutral officer, for example a senior civil servant or publicly funded NGO, had been less politicly overt and simply offered support to a particular manifesto policy of a party would that amount to a misuse of resources?

The importance of soft law

The purpose of the above is simply to demonstrate that it is often difficult to pin down exactly when the use of administrative resources will amount to a misuse. Of course, it is vitally important that the misuse of administrative resources is prevented, detected, and rules enforced through an adequate legal framework. As such, there must be adequately resourced, independent, and sufficiently powerful enforcement body such as an Electoral Management Body. However, even a model regulator will face difficult challenges in resolving the types of complex cases which have merely been outlined above. Moreover, if the regulator is required to make a judgment call in a borderline case, accusations of political bias are easily foreseeable regardless of merit. To avoid these difficulties as much as possible, the legal framework should "spell out what is permitted and what is prohibited" (Congress of Local and Regional Authorities report on *The misuse of administrative resources during electoral processes: the role of local and regional elected representatives and public officials* para.81).

The adoption of the types of laws recommended by the Venice Commission and other international organisations can assist but a theme running through this article is that while general statements on the misuse of administrative resource are relatively easy to put forward, in reality the grey area is fair greater than the black or the white. Constitutional and/or legislative provisions, while necessary, can only go so far in spelling out what is permitted and what is prohibited because an overly prescriptive law is as likely to proscribe legitimate conduct given the spectrum of conduct is encompassed.

Soft law in the form of guidelines and established practices are particularly useful in this area. If the legal framework should "spell out what is permitted and what is prohibited", soft law provides the better format to facilitate the margin necessary to determine whether there has been a misuse by reference to principles of propriety in public spending and the level electoral playing field. The Venice Commission and OSCE/ODIHR

Joint guidelines for preventing and responding to the misuse of administrative resources neatly summarise the generally appropriate legal framework as follows:

> *Some of the elements in the Guidelines may require a formal constitutional or legislative basis in national orders, while other elements can be achieved through codes of ethics or public/civil service codes or practice and interpretation of national legislation by competent courts. In all cases, it is important that legislation, regulations and judicial decisions, are well aligned, avoiding gaps, ambiguities and contradictory provisions.*

The importance of the civil service

Finally, a word should be said about public/civil servants. The civil service is an administrative resource in its own right that can be misused for electoral purposes. Further, civil servants are generally the gatekeepers of public resources and, therefore, have a special role in ensuring they are no misused in the electoral process. The above mentioned 2019 guidance for civil servants from the UK Government is admirable for its clarity on the issue. In particular the document provides concrete guidance on the application of the principle that civil servants should not undertake any activity that could give rise to criticism that public resources are being used for party political purposes. The following paragraphs neatly encapsulate the correct role of the civil service and civil servants during the electoral process:

> *Ministers continue to be in charge of departments. It is reasonable for departments to continue to provide support for any necessary government functions, and receive any policy advice or factual briefing necessary to resolve issues that cannot be deferred until after the election.*
>
> *Departments can check statements for factual accuracy and consistency with established government policy. Officials should not, however, be asked to devise new arguments or cost policies for use in the election campaign. Departments should not undertake costings or analysis of Opposition policies during the election campaign.*
>
> *Officials should decline invitations to events where they may be asked to respond on questions about future government policy or on matters of public controversy.*

As with almost every scenario that raises the issue of the misuse of administrative resources, complex factual circumstances will create significant grey areas. That said, the UK guidance and the above statements provide a helpful guide on maintaining the neutrality of the civil service as a resource and on the role of civil servants in respect of the misuse of administrative resources.

Conclusion

Democracy requires that the law develops to identify, detect and take enforcement action against the misuse of administrative resources in the electoral process. Despite the many reports and guidance on the topic, the misuse of administrative resources during the electoral process is a subject that will continue to throw up novel issues. Indeed, the ever-expanding influence of social media on the electoral process, and the alleged interference with same by political actors, will create further issues in respect of administrative resources and the electoral process. That is all to say, the issue of the misuse of administrative resources in the electoral process is far from closed.

Sergio Bartole[1]

Jurisprudence of the Venice Commission

The Venice Commission has always rejected the opinion according to which its nature is the one of a politically oriented monitoring and advisory body. The Commission claims to be a technical body that is especially concerned with the developments of democracy through law. Its technical approach to the matters falling in the area of its competence is a legal one. The criticism of those authors who accuse the Commission to have become a political body is unfounded, but it can perhaps be understood and explained. The members of that body are appointed by member States of the Commission. Each member State appoints one member of the Commission. It is evident that members come from different legal cultures and from Countries of different history and tradition. They are not representatives of the States appointing them: in principle they have a neutral mandate and stay in office in their personal capacity. However, they obviously bring in the exercise of their functions the baggage of the legal culture, where they have earlier worked and where they have been (legally) educated. Europe is characterized by a rich cultural pluralism, also in the field of jurisprudence. Jusnaturalism, analytical jurisprudence, legal positivism, legal realism, freie Rechtsfindung, (new)institutionalism are present in the European legal history. The activities of the Commission are the fruit of the convergence of different theories of law: therefore, it is understandable that the evaluation and the comprehension of these activities are not an easy task for observers who try to frame the Commission in a one-dimensional picture. The process of balancing the different contributions may seem not an exercise of legal reasoning but a matter of political choice. Obviously, the Commission does not state its jurisprudential position in explicit terms. It is a technical body and not a scientific one. Explicit justifications of its choices in the matter are not required, but a juridical technical approach cannot help having the underpinning of a theoretical jurisprudential basis.

Rebus sic stantibus it could be helpful to explore the legal theory behind the shoulders of the Venice Commission that supports the exercise of its functions. If there is a common legal orientation, it has to be the result of the convergence of different contributions. What is that jurisprudence?

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[1] Former Member (1990-2009) and Substitute Member (2010-2017) of the Venice Commission in respect of Italy.

The present paper is aimed at offering a starting point for the research of an answer to this question.

First of all, the different cultural origins of the members of the Commission justify the peculiar attention devoted by this body to a comparative approach to the law. Dealing with the cases submitted to its attention the Commission cannot help taking into consideration the different answers which are given to those cases or to similar cases in the legal orders of its member States. This is not only a matter of practical convenience, but it is also a requirement for the existence of a viable and constructive relation among its components. There is the necessity of finding a common ground of discourse. A basis may be offered by the elaboration of a common parameter in dealing with the considered cases and in finding a convenient solution for them.

If we keep in mind that the Commission is entrusted with the mandate of promoting democracy through law, it is evident that an agreement has to be found to identify the essence of democracy and the best way of connecting it to legal tools.

The instrumental relation between law and democracy justifies the introduction of the doctrines of constitutionalism in the common discourse of the Commission. We can envisage the possibility of such a relation only if the law is adopted in a democratic way. Law is democracy as well as democracy is law. According to the European traditions which supported the establishment of the Council of Europe (the cradle of the Commission), legislation is democratically adopted only in the context of the implementation of the theories of constitutionalism. Therefore, constitutionalism is part and parcel of the jurisprudence of the Commission. In the original conception of its founder Antonio La Pergola, the new institution had to support the spreading of the doctrines of constitutionalism from Europe to South America, where new democratic regimes were taking off in the last decades of the 20th Century. Nevertheless, at that very moment the processes of transition from communism to democracy in the Central Eastern Europe Countries were taking off. These events suggested to the Council of Europe the involvement of the Commission in new important and historical developments and its attention was focused on the connected constitutional problems.

However, the modalities of the implementation of constitutionalism can be different also in the frame of the member States of the Council of Europe. For instance, it happens with regard to the adoption of laws. In the Continental Europe legislation, law is the product of parliamentary

decision – making processes that imply the participation of the political representatives elected by the people, the members of the parliamentary assemblies. Instead in the United Kingdom two different sources of law coexist, the statutes of the Parliament and the case – law of the judges. Civil law and common law are the epiphanies of two different legal cultures and doctrines. The Venice Commission, whose members come from these contexts, had to find a solution that could insure the contemporaneous acceptance of these different orientations in its practice. A process of convergence took place. The Commission drew inspiration from a similar more conspicuous phenomenon that interests the functioning of the European Union, where the production of the law and the enlargement of the role of the judges coexist. Chaim Perelman had predicted the possibility of such a development looking at the common experiences of legal reasoning and judicial justification. As a matter of fact, the Venice Commission paid special attention to both those practical experiences. Its contribution to the elaboration of the new Rule of Law policy of the European Commission gives clear evidence of success of its enterprise.

The lesson of the common law jurisprudence increased the attention of the Commission to the particularities and details of the cases submitted to its examination. Therefore, its reasoning was not limited to strictly legal materials, but also referred to many factual and historical elements. Moreover, growing importance was assigned to the case – law of the European and national constitutional courts, and the national judicial review of the legislation was frequently envisaged as an occasion for the promotion of judicial lawmaking. The choice drew inspiration from actual experiences of the Constitutional Courts and Tribunals, with whom the Commission has established an interesting cooperative relation. In fact, its opinion is frequently required by national constitutional courts and tribunals sub specie of *amicus curiae* briefs.

Notwithstanding its long fidelity to the Kelsenian model of constitutional justice, the Commission does not follow the guidelines of the legal positivism. It is true that it does not privilege doctrines of public morality or natural law, it does not follow the idea that the law has to be oriented according the principles of natural law. However, in the frame of the European tradition, it supports the idea that law has to conform to the principles of constitutionalism. This is not a modern kind of jusnaturalism. It does not have an abstract philosophical foundation. The basic choice of constitutionalism in the practice of the Commission implies an analytical approach to the roots of the historical developments and practices of the

member States. Its results are the product of the operational construction of the principles and values of the contemporary European Constitutions and of their "ancestry". These are especially vivid in the contributions given by the Commission to the internationalization of constitutional law: this is the subject of a book forthcoming for Hart Publishers. Rebus sic stantibus the approach of the Commission to the research of a solution of the cases submitted to its examination has an orientation which cannot be identified with the formalistic precepts of the legal positivism and stays in the middle between legal realism and new institutionalism.

We can conclude, on the basis of a consideration of its activity, that the jurisprudence of the Venice Commission is in the mainstream of the contemporary European jurisprudence. The various and ever-changing experience of the Commission will obviously require a continuous updating of this first conclusion. At the moment it is important to understand the involvement of the Commission in the main waves of the legal developments of the contemporary European society. This feature has to be appreciated in connection with the specific role that the Commission has de facto taken on in the process of the construction of a new European order. It is probably a role that exceeds the purposes and the expectations of its promoters as far as it is the epiphany of a new unknown kind of activity on the stage of the international/transnational law.

Claire Bazy-Malaurie[1]

Au cœur du débat sur l'Europe

Des années 1950 à ce début du 21ième siècle, quels changements en Europe! Voir la Commission de Venise de l'intérieur après une carrière au service de l'État dans des fonctions très diverses, souvent exposées à la vie internationale, m'auront convaincue non pas de ces changements, tellement évidents, mais de l'importance du regard expert et indépendant au service des gardiens institutionnels, nationaux et internationaux, de l'ambition énoncée en 1949 qui allie la nécessité de la protection de la personne et celle de la reconnaissance de l'intérêt public.

Il convient à cet égard de revenir aux principes fondamentaux. La déclaration de principe figurant dans le préambule du traité de Londres du 5 mai 1949 est très claire sur l'idée centrale qui a prévalu :

> « Inébranlablement attachés aux valeurs spirituelles et morales qui sont le patrimoine commun de leurs peuples et qui sont à l'origine des principes de liberté individuelle, de liberté politique et de prééminence du droit, sur lesquels se fondent toute démocratie véritable ».

Mais la nouveauté est au-delà de ces mots. Elle réside dans le fait que l'affirmation du partage de valeurs communes a quitté très vite le seul effet déclamatoire pour celui de la mise en place des instruments de son effectivité. La Convention européenne de sauvegarde des droits de l'homme, signée le 4 novembre 1950, en est bien sûr le premier et elle contient en elle-même la disposition qui permet de veiller à son respect : la création de la Cour européenne des droits de l'homme. L'article 46 de la Convention stipule clairement que les parties contractantes s'engagent à se conformer aux arrêts définitifs de la Cour dans les litiges auxquelles elles sont parties. Les trois piliers du Conseil de l'Europe : démocratie, état de droit, droits fondamentaux disposent dès lors d'un instrument de sanction efficace. Et le pari lancé par la création le 10 mai 1990, il y a tout juste trente ans, de la Commission de Venise, la bien nommée (officiellement) « Commission européenne pour la démocratie par le droit » et son ouverture rapide à ceux qui n'étaient pas alors – encore- membres du Conseil de l'Europe, a permis de compléter, de manière pragmatique, les instruments au service

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[1] Membre de la Commission de Venise au titre de la France. Vice-Présidente de la Commission de Venise (2019-2021).

de l'ambition européenne telle que dessinée en 1949. La Commission offre aujourd'hui l'enceinte juridique d'expertise européenne la plus intéressante au service de ces mêmes finalités, dans le même esprit de volonté de partage de valeurs communes.

S'il est une chose bien connue de tous ceux qui ont une activité qui peut se déployer hors de leurs frontières nationales, c'est cependant que les mots sont traitres. Lorsqu'il s'agit de Constitutions, d'institutions, de législations, il n'est que de lire la jurisprudence des cours et tribunaux pour savoir que tout corpus de base, reposant pourtant sur des mots identiques, ne se décline pas de la même manière d'un pays à l'autre. Rien d'étonnant à cela. L'État de droit, par exemple, mots qui servent aujourd'hui de référence magistrale à bien des débats plus ou moins juridiques, ne relève pas, historiquement, de la même approche.

Il faut se remémorer le préambule de la résolution créant la Commission : ses avis devaient reposer sur la connaissance de leurs systèmes juridiques, la compréhension de leurs systèmes juridiques, l'examen des problèmes posés par le fonctionnement, le renforcement et le développement des institutions démocratiques. C'est dans cet esprit qu'un patient travail de recherche et de discussion a permis en 2016 à la Commission de Venise de publier la liste des critères de l'État de droit impliquant des experts indépendants ayant des cultures juridiques diverses, porteurs d'histoires politiques très variées, dans une Europe d'États nations ou l'art de la confrontation a bien souvent supplanté celui de la coopération. Il faut en faire la publicité sans crainte et sans vergogne car cette liste remplit une fonction essentielle : la pédagogie par l'appel à des notions très précises dont la définition peut, dans chaque pays trouver une déclinaison concrète. Le travail est toujours perfectible, mais tout amendement ne pourra que résulter d'un travail collégial mené de façon aussi scrupuleuse que celui qui lui a donné naissance.

Le recours à l'expertise des membres de la Commission nommés par des États sur tel ou tel projet de Constitution ou de loi, pourrait, dans certains cas, être un piège de ce point de vue, chacun étant marqué par son propre système. Quiconque a été rapporteur pour un de ces travaux sait que la discussion sur certaines notions, parfois sur des détails, des expressions, est, jusqu'au dernier moment, très utile, toujours dans le but d'une meilleure compréhension par tous des conclusions portées par les avis. J'ai personnellement le souvenir d'une conversation avec un autre membre sur l'usage dans un avis de l'expression française « souveraineté parlementaire »: inutile de souligner que la simple traduction littérale de ces mots ne voulait rien dire pour nombre de pays, dans lesquels le Parlement est le souverain.

Le consensus nécessaire entre rapporteurs sur le projet, les relectures successives après échange avec les autorités nationales concernées sur le même sujet sont de ce point de vue le gage de la neutralité indispensable. Neutralité ne veut pas dire que l'avis ne prend pas un parti, mais il sera toujours celui de la mise en œuvre des trois piliers : démocratie, état de droit, droits fondamentaux, tels que déclinés par ce qu'on pourrait appeler ici les précédents, qu'ils soient jurisprudentiels ou issus de rapports (les bien nommés opinions) de la même Commission. Les choix de « détail » ne sont pas non plus négligeables. L'exercice n'est pas toujours évident : l'avis final doit bien souvent se garder de vouloir imposer telle ou telle solution dans le cas où plusieurs permettent de respecter les principes afin de faire la part des choix ouverts au législateur national. C'est d'autant plus nécessaire que chacun sait que les débats nationaux, entre juristes, sur tel ou tel choix sont eux-mêmes souvent très nourris, or passer au niveau international ne peut qu'aviver le débat. La discussion entre juristes d'États monarchiques sur les pouvoirs respectifs du monarque et de son gouvernement restera un des souvenirs les plus illustratif de ce point pour la française que je suis, habituée à la cohabitation d'un Président ayant de grands pouvoirs et d'un chef de Gouvernement dont la légitimité respective repose parfois sur des élections aux résultats politiques contradictoires. Qu'il s'agisse d'institutions ou de législations, très variées au demeurant, sur lesquelles la Commission de Venise est appelée à donner un avis, la même approche doit prévaloir.

De telles considérations générales peuvent apparaître de loin assez théoriques et aujourd'hui largement dépassées par le développement rapide depuis la création de la Commission des régimes démocratiques en Europe, laissant croire que les sujets de critique seraient désormais derrière nous, pour un grand nombre d'entre eux.

Ce serait pourtant oublier que tous les États européens, quelle que soit leur histoire ou leur situation géographique, quelles que soient leurs vertus reconnues ou proclamées, peuvent connaître des tensions, ou s'engager sur des voies qui peuvent à leur tour mettre en risque l'État de droit et les libertés fondamentales. Tout juge constitutionnel en premier lieu, tout juge, tout observateur averti de la vie politique et juridique le sait pour son propre pays. Les périodes de crise, partagées par tous les pays européens en ce début du 21ème siècle en auront offert de multiples exemples. Le terrorisme et la pandémie de Covid19 en sont les manifestations les plus récentes et les plus claires, révélatrices de la difficulté des choix à faire pour assurer la sécurité et la santé de la population tout en limitant au maximum les atteintes aux droits et libertés de chacun. Ces crises qui menacent d'être dans les

faits pérennes, à des degrés divers, auront été, sont et seront des terrains de choix pour les analyses d'adaptation, de nécessité et de proportionnalité, qui sont les éléments de base de toute appréciation des limites aux libertés fondamentales portées par les politiques mises en place.

Toutefois, le thème qui a suscité ces dernières années le plus de controverses et certainement le plus d'incompréhensions, y compris et probablement à l'intérieur des États concernés eux-mêmes, est celui de l'indépendance de la justice. Il s'agit bien d'un des marqueurs de l'État de droit : le justiciable, qu'il soit citoyen ou étranger, doit être sûr que sa situation sera, le cas échéant, examinée et jugée par une ou des personnes qui ne les soumettront pas à une volonté extérieure, souvent une volonté du moment exprimée par des autorités politiques. Or, la confiance sur laquelle repose l'adhésion nécessaire à l'œuvre de justice est facile à détruire, difficile à construire.

La diversité des systèmes et des architectures judiciaires, à commencer par la relation entre autorités de poursuite et organes de jugement oblige les rapporteurs et experts désignés à être très attentifs, quand ils interviennent, à se familiariser de manière étroite avec les règles de fond, mais aussi les règles procédurales applicables, puisque les procédures sont le lieu essentiel des garanties données au justiciable au cours du déroulement du contentieux. Mais plus important encore au regard de ce critère de l'État de droit est le mode de désignation de tous les acteurs de la chaîne judiciaire, étendu d'ailleurs au processus de nomination dans les divers postes au cours de la carrière. Il s'agit certainement, pour les membres de la commission, du domaine où les préceptes énoncés dans le préambule de l'acte de création de la Commission, rappelés ci-dessus, prennent toute leur dimension. Comprendre l'histoire du système, la culture du pays, éviter les inévitables mais encombrantes imitations avouées ou non, mais ne pas céder sur les principes, c'est à cette tâche que doivent s'atteler les rapporteurs. Ce domaine d'avis nombreux de la Commission est un exemple parfait de l'obligation de diversité des origines et des expériences des experts réunis à cette occasion, et de rigueur de la procédure d'adoption des avis de la Commission. L'appartenance du rédacteur de ce papier à un pays dans lequel, de manière régulière, l'indépendance de la justice est mise en cause dans les médias ou par les politiques eux-mêmes, a pu, au-delà de son expérience de juge constitutionnel, lui donner quelques idées des objets et de la mesure de la critique possible, comme à d'autres rapporteurs, venant d'autres pays et d'autres systèmes. Mais l'expérience nationale ne dicte pas de solution et ne dispense pas de l'approche à la fois précautionneuse et rigoureuse dont doit faire preuve tout avis de la Commission.

C'est cette modération qui fait la valeur de ses avis. Les critiques peuvent être ressenties comme acerbes, mais la Commission ne peut pas transiger sur les principes. Ce ne sont cependant que des avis. Ils n'ont aucune force obligatoire. Ils ne peuvent être confondus avec les arrêts de la Cour, ou toute autre injonction. Il est évident que, parfois, les rapporteurs savent que leurs préconisations n'ont guère de chances d'être immédiatement suivies d'effet. Ils auront pu apprécier au cours des entretiens sur place les réticences, voire les obstacles à l'application de ce qui sera inscrit dans les conclusions de l'avis. Mais la Commission aura apporté sa pierre à l'édifice européen souhaité par ses créateurs.

La participation à la Commission permet en outre d'ouvrir l'horizon sur des systèmes extra européens. Le nombre de participants à la Commission dépasse les seuls membres du Conseil de l'Europe. La Commission devient alors en quelque sorte un centre de ressources pour une expertise, le partage d'expériences et la recherche de bonnes pratiques de la part d'États dont les systèmes sont parfois assez différents de ceux qui prévalent en Europe. Participer à ces échanges présente un grand bénéfice : ils permettent de s'assurer de la robustesse des conclusions et préconisations issues des interventions précédentes de la Commission et aussi d'aborder les questions d'un point de vue plus distancié, parfois différent. Les questionnements sur la justice, thème dont l'actualité vient d'être rappelée, ont ainsi été très fréquents ces temps derniers. C'est l'occasion de sérier les questions de manière contradictoire et finalement d'assurer la robustesse des préconisations.

Ceci amène, sous forme de conclusion, à répondre à la question que l'on est en droit de poser à un membre de la Commission au vu du nombre d'avis rendus pendant un mandat sur des textes aussi divers et aussi nombreux : est-on toujours d'accord autour de la table de la Scuola où se tiennent les réunions pleénières ? Il faut avouer que chaque membre peut avoir ses domaines de prédilection, comme il peut porter un intérêt variable à certains domaines. Mais une règle s'impose, comme dans toute collégialité : si vous n'êtes pas d'accord, il faut le dire. Ensuite, c'est le jeu de la procédure qui règle la question. De ce point de vue, l'absence de réunions en présence à Venise et le recours obligatoire à l'écrit pendant les mois de crise au début de 2020 ont été l'occasion de montrer que la Commission fait de la place à tous les membres pour qu'ils puissent s'exprimer au cours de la procédure et en particulier pour énoncer éventuellement leur désaccord. L'avantage de l'écrit étant qu'il laisse des traces, cela devrait rassurer ceux qui avaient pu affirmer il y a quelques années que la Commission n'était pas organisée pour faire une part aux critiques, même internes.

Paloma Biglino Campos[1]

An example of the contribution of the Venice Commission to the European Constitutional Heritage: Transparency of Political Parties' financing

I. The European constitutional heritage and the Venice Commission

On many occasions, critics of the European integration have pointed out that our continent falls short of the structural elements which keep political entities together, because history, culture and languages are too different to support more unity between states and peoples. Perhaps this opinion was true in the nineteenth century, in a Europe divided into sovereign states which were frequently at war with one another. However, the criticism is not appropriate either for the most remote past or for the present.

One of the most recent examples of the links between European countries is the European constitutional heritage. This notion is relatively new, because it began to gain influence during the eighties of the last century. It must be stressed that this is not the first time that Europe has spoken a common juridical language. After the bizarre "rediscovering" of the Justinian's Digest in the twelve century in the Italian city of Amalfi and during many centuries, several countries – from Spain to Germany – shared the old Roman law which was mainly based on opinions and topics made up by jurists from the first century B.C. to the third century A.D. This common law was in use in many parts of Europe until the codification of civil law which began in France only in the aftermath of the French Revolution.

However, there are many differences between these old forms of Roman common law and the new European constitutional heritage. The main distinction is that the European constitutional heritage not only concerns the relationships between citizens, but also the relationship between political power and citizens. Furthermore, the new "common law" regulates these relationships taking into account the values and principles inherent to democracy, Rule of Law and respect for fundamental rights.

Hanna Suchocka has explained that the need to rediscover the common constitutional heritage became a kind of "founding myth" in the

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[1] Substitute Member of the Venice Commission in respect of Spain.

new democracies in Central and Eastern Europe. After the fall of the Berlin wall, the restoration of constitutional tradition led to identify the principles which were inherent to European democracy and the antithesis of those existing under communist rule. The main challenge was to recuperate the original meaning of principles such as human dignity, separation of powers, political pluralism, independence of the judiciary and constitutional justice, which in the systems of real socialism had the same name but a completely different meaning.[2]

Thus, the constitutional heritage is neither an aseptic notion nor the result of the plain comparison between constitutional models. Although the constitutional heritage derives from the comparative experience, it adds strong ideological components. It assumes that the principles and institutions which characterized constitutional states are exigencies linked to human dignity, and the ground and goal of any political organization.

These beliefs are the same which had previously led to the creation of the Council of Europe which emerged for strengthening the unity between its member States and for promoting the ideals and principles that are precisely their common heritage.[3] These convictions later inspired Article 2 of the Treaty of the European Union. This precept is a good example of the difference between the new political integration and the mere economic integration which had characterized the old three Communities. To this end, Article 2 enumerates the values that are the foundations of the Union, values which are "common to the member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail".

It is always possible to argue that these ethical aspects add political components to the constitutional common heritage and limit its juridical force. This criticism can be countered by recognizing that values are general and, for this reason, imprecise on certain occasions. However, values such as the above quoted can be used for the interpretation of national and international law because they give a more precise content to other norms. Furthermore, the European heritage not only serves at the moment of setting up new constitutions, but also as a parameter for evaluating if a state complies with the exigencies of democracy.

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[2] Venice Commission, CDL-PI(2016)017, Constitutional Heritage and the Form of Government, Conference on Global Constitutional Discourse and Transnational Constitutional Activity.

[3] Statute of the Council of Europe, Article 1.

The contribution of the Venice Commission to the construction of the constitutional heritage is beyond dispute. The impact of the work of the Commission comes from different sources. Firstly, it stems from the codes and reports adopted on issues such as independence of the judiciary, Rule of Law, electoral matters and political parties. It is true that, neither in these texts nor in other similar documents, the Venice Commission tries to be exhaustive, because many of them deal with very specific matters as, for example, constituency delineation and seat allocation[4]. It is also true that, in certain cases, these documents contain only minimum standards or principles which are very general. In spite of this appearance, this type of texts contains ideas which can be useful for facing hard cases or taking a position in matters which divide public opinion inside member States. Furthermore, the support of an independent and technical institution such as the Venice Commission can serve as an argument of authority for supporting solutions consistent with the European constitutional heritage.

Secondly, the influence of the Venice Commission comes from the opinions that the institution gives to the states that ask for advice in case of legal or constitutional reforms. On such occasions the work of the Venice Commission is apparently concrete because it results in specific recommendations aimed at improving national norms. However, the Commission also identifies the parameters which lead to its conclusions and, in doing so, it indirectly specifies the principles and the criteria that make up the constitutional heritage.

Frequently the opinions infer those elements from the jurisprudence of the European Court of Human Rights and international treaties or from the comparison of the Constitutions of the member States. It is true that, on certain occasions, the analysis of the Commission concludes that there are no European standards on the issues. Nevertheless, the opinion can face this lacuna thorough considerations of constitutional opportunity.

This was, for example, the case of the opinion on the reform of the Law on the Spanish Constitutional Court, which was very polemic in this country because it granted new powers to the Tribunal for executing its own decisions. The opinions recommended a change of the Law because, although there are no international standards on the issue, "in a system of separation of powers, the division of competences of adjudicating on the one hand, and of executing its results, strengthens the system of checks

[4] Venice Commission, CDL-AD(2017)034, Report on Constituency Delineation and Seat Allocation.

and balances as a whole, and in the end, also the independence of the Constitutional Court as a decisive factor of the Rule of Law".[5]

There are many other examples of the way by which the Venice Commission contributes to the construction of the European constitutional heritage. However, one of the most interesting is its contribution on transparency of political parties' financing. It is true that perhaps the Venice Commission has analysed, in more depth, other matters also related to these political parties, issues such as freedom of association, structure or membership. However, transparency is a burning issue in democracies where cuts of the public spending have coincided with the explosion of major corruption scandals in which political parties or its members are involved.

II. From accountability to transparency

There are arguments for sustaining that the origins of the principle of transparency are as old as the Aristotelian Greece or the Chinese Empire. However, in the case of the financing of political parties, there is no need to go back that far. When analysing this issue, it is convenient to divide the evolution of transparency in two phases.

The first one started at the early 1990's, that is, when countries began to regulate the income and the expenditures of political parties. In those years, the main worry was the "equality of arms" in the electoral contest, which led to establishing forms of public financing and limits to the expenses of political parties, especially during the electoral campaign. It was also the time of spectacular scandals which shook many countries, such as Italy, Germany, France and the United States. According to J. Robert, the previous lack of rules on financing meant that anything was permitted. As funds raised thorough the collection of membership fees were not enough to cover expenses, and no form of public funding was provided, each party had to find its own resources. In several countries the outcome was widespread reliance on dubious, undercover financing practices.[6]

The idea of transparency began to take shape precisely to confront these problems. The Guidelines and report on the financing of political parties adopted by the Venice Commission in 2001[7] is a remarkable document

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[5] Venice Commission, CDL-AD(2017)003, Opinion on the law of 16 October 2015 amending the Organic Law No. 2/1979 on the Constitutional Court, para. 53.

[6] Venice Commission, CDL-INF (2001)008, Report by Mr. Jackes Robert on the Financing of Political Parties.

[7] Venice Commission, CDL-INF(2001)008, Guidelines and Report on the Financing of Political Parties.

on the issue. This text, and the laws which several states began to pass in those years, recommended that political parties disclose their accountability to citizens in order facilitate the knowledge of the internal situation of the parties without intermediaries. However, although these references are significant, they are scarce and quite general. For example, the Guidelines only recommend the publication of campaign accounts in order to achieve the transparency of electoral expenses.[8]

In those early years, the main way to ensure the effectiveness of transparency was the duty of political parties to provide detailed reports on their income and spending to specialized bodies, such as the court of auditors, parliamentary bodies, electoral commissions or even to constitutional courts. These institutions have the obligation of analysing the consistency of these accounts and informing on the result of their audits to parliament, and in certain cases, to citizens. This model of transparency is coherent with the eminently representative character of democracy. According to it, the principal way of accountability is not to inform citizens directly, but to report through institutions that are elected and are responsible to citizens.

This model began to be challenged after the economic crisis that broke out in 2007, which endangered the legitimacy of institutions and called to claim new forms of direct participation. Citizens do not settle for the control carried out in their name by specialized institutions, because they do not trust the independency of their delegates. On the contrary, citizens claim their right to access the information directly in order to personally check the source and the use of funds handled by political parties. In short, citizens not only distrust intermediaries in the ascendant phase of democracy (that is, in the decision making process), but also in the descendant one, that is, in the exigency of responsibility. New technologies and the infinite possibilities offered by the internet play also in favour of these demands.

III. Some exigencies of transparency

The Venice Commission was sensitive to these new challenges and demands.

Firstly, the Plenary approved the Code of Good Practices in the Field of Political Parties[9] in 2009. It was aimed "to reinforce political parties' internal democracy and increase their credibility in the eyes of citizens", and it was directly addressed to political parties, offering a repertoire of principles

[8] *Ibidem*, para. 12.

[9] Venice Commission, CDL-AD(2009)021, Code of Good Practices in the Field of Political Parties and Explanatory Report.

and values that does not have a mandatory character and does not require enforcement from public authorities. As the introduction of the Code says, "the only possible compulsory interpretation derives from what political parties and their members must do in following the law".[10] Secondly, the Venice Commission adopted the Guidelines on Political Parties Regulation[11] in 2010, which was addressed to states, clarifying key issues on the matter and providing examples of potential good practices.

Although these documents have different addressees and aims, both of them depart from the new claims on political participation, and they foresee new forms of transparency.

It must be underlined that the Commission is flexible on the issue, because it recognizes that the obligations imposed by accountability are dissimilar in each state. In fact, still now, certain states (as unlike as Switzerland, Monaco or the Philippines) are very liberal on the financing of political parties. For this reason, these systems do not impose on political parties the duty of informing on the way in which they are financed. Consistently, in these countries, political parties are submitted only to internal control.

Thus, the Venice Commission does not oblige, but only recommends, the reinforcement of public scrutiny of the financing because "transparency of political parties' external activities and internal functioning is a fundamental principle to tackle the current crisis of legitimacy and restore public confidence in political forces and the whole democratic system as well as a precondition for real accountability and responsibility".[12] Transparency is important because it is an essential instrument for fighting illegal corruption and improving the legitimacy of public powers. Furthermore, citizens also have a right to transparency, because the public must have enough information on the financial support given to political parties[13] and on the policies which can be expected from them.

The documents of the Venice Commission not only underline the relevance of the principle, but also specify the exigencies that transparency imposes, in order to avoid that transparency becomes mere propaganda. In addition to the texts mentioned above, it is worth highlighting the compilation of opinions and reports concerning political parties, adopted

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[10] *Ibidem*, paras. 4 and 8.
[11] Venice Commission and OSCE/ODHIR, CDL-AD(2010)024, Guidelines on Political Party Regulation.
[12] Venice Commission, CDL-AD(2009)021, *op. cit.,* para. 104.
[13] Guidelines…, para. 194.

by the Commission when member States require its intervention.[14] This text shows the way in which the institution uses the general principles enunciated in the Code and in the Guidelines at the moment of analysing specific laws.

Although it is not possible to examine in detail each of these requirements, it is worth just identifying them and dealing with the more polemic issues. Speaking in general terms, the requirements imposed by transparency revolve around two main questions: firstly, what to disclose; secondly, how to disclose. Unfortunately, there are many other items, such as the nature and the force of the norm which should impose such exigency that must be set aside.

III. 1. What to disclose

The main idea, which inspires the content of the information that must be disclosed, is comprehensiveness. According to the Venice Commissions, reports must be exhaustive and include disclosure of incoming contributions and an explanation of all the expenditures made by all the organs of the party at national, regional and local level.[15] The information must be organized in standardized categories as defined by relevant regulations.[16] Reports should also include both general party finance and campaign finances.[17] The Commission shows especial attention to the activities carried out during the pre-electoral period and through the use of third persons. For this reason, the Commission requires that electoral accounts must include all these activities[18] and comprehend all the income that political parties have received, including in-kind contributions.[19] Finally, the Venice Commission stresses that not only parties, but also candidates, should report on their incomes and expenses.[20]

The Commission analyses in depth certain issues that are more complex than others. The first one is the loans to political parties and the cancellation of such debts. For the Commission it is important that rules on transparency deal consistently with this form of income in order to avoid debt forgiveness by the banks or third-person payment. In both cases the loan should be considered a form of contribution and be subjected to the limits

[14] Venice Commission, CDL-PI(2016)003, Compilation of Venice Commission Opinions and Reports concerning Political Parties.
[15] Guidelines… para. 202.
[16] Guidelines… para. 203.
[17] Guidelines… para. 204.
[18] Guidelines… para. 205.
[19] Guidelines… para. 198.
[20] Guidelines… para. 200.

and prohibitions established in the rules on financing.[21] The second issue is the complex relationship between transparency and privacy of donors. The Venice Commission requires an equilibrium between both values.[22] Indeed, the disclosure of small contributions could reveal the ideology of donors, and it could limit secrecy of vote and ideological freedom.[23] Lastly, the Commission dedicates special attention to transparency of private financing.

On this matter the Venice Commission follows closely the Recommendation Rec(2003)4 of the Committee of Ministers of the Council of Europe whose Article 1 envisages the financial support to political parties as a right of citizens.[24] In the same line, the Venice Commissions not only does not discourage this type of contribution but even recommends it. The Guidelines considers private funding as a form of political participation and declares that "all individuals should have the right to freely express their support of a political party of their choice thorough financial and in-kind contributions.[25]

Is not difficult to justify the disclosure of incomes and expenditures when funds come from public sources because, in this case, it is necessary to justify the proper use of funds that come from taxpayers. However, it does not mean that private financing is exempted from transparency. In this circumstance, transparency is equally important because it protects against undue influences on the political process. What is more, when financing is partially or solely private, the requirements of transparency should be higher. Comparative systems show that the absence of limits to this type of funding is compensated by reinforcing the disclosure of information about the identity of contributors, even in the case of small amounts.[26]

III. 2. How to disclose

According to the Venice Commission, the information must be yielded in a timely manner in order to be relevant. The institution recommends that the

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[21] Guidelines… para. 171.
[22] Guidelines… para. 206.
[23] Van Biezen, I., *Financing political parties and electoral campaigns-guidelines*, Council of Europe, Strasbourg, 2003, p. 57.
[24] Council of Europe, Recommendation Rec(2003)4 of the Committee of Ministers to member States on Common rules against corruption in the funding of political parties and electoral campaigns, (Adopted by the Committee of Ministers on 8 April 2003), https://rm.coe.int/16806cc1f1.
[25] Guidelines… para. 170.
[26] On this issue: OECD, *Financing democracy. Funding of political parties and election campaigns and the risk of policy capture*, OECD Public Governance Reviews, OECD Publishing, Paris, 2016, p. 74.

accounts be presented annually,[27] and that the reports on campaign finances be turned in to the proper authorities by a deadline of no more than 30 days after the elections.[28] Also the OECD insist on the time requirements, because information that is only available months or years after the election or at the end of the fiscal year is information less relevant for public discussion. Long delays in reporting also make the falsification of information possible.[29]

Furthermore, the information must be comprehensible and accessible. It has been said above that, according to the Code, reports must be comprehensive, because they must contain data in the more exhaustive form. At this point is of interest to add that that the Code also requires that data be readable.[30] Nothing is more contrary to transparency than to overwhelm citizens with a large amount of data published in a disordered and unmanageable way. It is not enough for political parties to merely disclose their account, because data are not always information. The most accurate forms of transparency not only put ciphers at the disposal of citizens but organize the information in a user-friendly way. Reports must allow the public to search, to check, and to make comparisons between political forces.[31]

To follow these recommendations requires substantial human and material resources not only from political parties but also from monitoring bodies. However, this is not a reason to exempt them from the duty of facilitating the right of citizens to accede to an information that is vital for the public and for the effective control of elections.

IV. The complementarity of transparency

As we have seen, the Venice Commission, as well as other international institutions, recommend that political parties report directly to citizens on their incomes and expenditures and, if possible, that this information be disclosed via the internet.[32]

However, following this advice is not enough because transparency imposes other duties. The information delivered directly to the public is necessary for the correct formation of the will of electors, for the creation of a free public opinion by the media, and for the debate between majority

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[27] Venice Commission, CDL-AD(2009)021, *op. cit.*, para. 169.
[28] Guidelines… para. 202.
[29] OECD, Financing democracy…, *op. cit.*,p. 72.
[30] Venice Commission, CDL-AD(2009)021, *op. cit.*, para. 169.
[31] OECD, Financing democracy…, *op. cit.*, p. 72.
[32] Guidelines… para. 200.

and minority. Thus, it is fundamental for the political and social control, but there are other types of requirements.

An example of what has happened in Spain can be useful for explaining this idea. Transparency International published its evaluation of the level of transparency of political parties in 2017 using an assessment with a maximum score of 30 points.[33] Ironically, all political parties reach very good marks, including the party that was condemned for crimes related to corruption a short time later.

Thus, it is necessary to avoid a simplistic vision of transparency: this principle imposes not only the disclosure to citizens, but also the improvement of responsiveness and juridical control.

For this reason, the Venice Commission insists that political parties submit their accounts to specialized institutions that are the only ones able to oversee the consistency and regularity of political parties' incomes and expenses according to juridical parameter and the use of accounting techniques.[34] The Guidelines define some of the requirements that these bodies must meet in order to guarantee a proper supervision of political parties' accounts.

The first one refers to the structure of the supervisory body, and it imposes the independence of the institution and its members as a guarantee of impartiality. The Commission recommends that the law and state practices take effective measures to ensure the freedom of the supervisory body from any political pressure. Furthermore, the Commission strongly recommends that the law carefully draft the procedure for appointing members of the regulatory body in order to avoid any political influence over them.[35]

The second requirement refers to the functions of the monitoring bodies. According to the Commission, they must be provided with sufficient authority, not only for supervising accounts and conducting audits, but also for imposing sanctions in case of violations of the rules on financing.[36] In order to comply with these tasks, states must guarantee that the supervisory bodies are provided with sufficient human and material resources to perform their work in the best possible conditions.

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[33] Evaluación del nivel de transparencia de los partidos políticos (junio 2017) https://transparencia.org.es/wp-content/uploads/2017/06/evaluacion_nivel_transp_partidos-junio-2017.pdf.

[34] For example, Venice Commission, CDL-AD(2009)021, *op. cit.*, para. 168 and especially Guidelines…paras. 211-217.

[35] Guidelines… para. 212.

[36] Guidelines… para. 214.

The Venice Commission has had the opportunity to specify these requirements when it has been required by its member States to issue opinions on laws on political parties' financing. On such occasions, the Commission requires, for example, that the oversight bodies have the ability to investigate and pursue potential violations of rules on the issue. Thus, the European institution recommends giving the supervising bodies the power to call witnesses and the power to ask other institutions (tax authorities, anti-corruption authorities) for assistance in carrying out their work.[37]

Many of the principles and requirements that have been analysed in these pages are "soft law", which does not have any legally binding force. It does not mean that they have no relevance. First of all, the suggestion of the Venice Commission to the States can have high impact on public opinion and on political forces inside the country that has asked for the opinion. However, the criteria stated by the Venice Commission have a more perdurable and general importance because they are gradually incorporated into the European constitutional heritage. Today, the principles on transparency of political parties' financing stated by the Venice Commission can be considered one of the most relevant parameters for measuring the respect shown by States toward a democracy based on openness and citizen participation.

[37] Venice Commission, CDL-PI(2016)003, *op. cit.*, p. 49-50.

Veronika Bílková[1]

The Venice Commission and the State of Emergency

The Venice Commission is probably not a body to which one would turn in search of analyses related to the state of emergency. Primarily known for its expertise in the areas of democratic institutions and fundamental rights, constitutional and ordinary justice, and elections and political parties, the Commission may seem to have rather little to say about exceptional situations. Yet, over the years, it has produced a number of studies and opinions that pertain both to the state of emergency in general and to exceptional measures adopted in various States more specifically.[2] This text first introduces the state of emergency and the legal mechanisms available in this state (Section 1). It then concentrates on general Venice Commission studies on the state of emergency as well as on certain other studies linked to the topic (Section 2). In the third step, it turns to selected Venice Commission opinions that analyse emergency measures enacted in concrete States (Section 3). The final section draws general conclusions on the Venice Commission approach to the state of emergency and on the Venice Commission contribution to the clarification and further development of legal rules applicable in this situation (Section 4).

1. The State of Emergency

The state of emergency (also the state of exception or the state of siege) is an exceptional situation in which States face unconventional threats, such as armed conflicts, massive terrorist attacks, natural disaster or pandemics.[3] To thwart such threats, States may need to temporarily limit or even suspend the application of certain human rights. The declaration of the state of emergency makes it possible to do so, as it introduces a modified, more permissible legal regime that would be hardly acceptable in standard circumstances.[4]

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[1] Member of the Venice Commission in respect of the Czech Republic. Former Vice President of the Venice Commission (2017-2019).

[2] Venice Commission, CDL-PI(2020)003, Compilation of Venice Commission Opinions and Reports on States of Emergency.

[3] Oraá, Jaime, *Human Rights in States of Emergency in International Law,* Clarendon Press, 1992.

[4] As Sheeran notes, *"States of emergency are built on the somewhat artificial dichotomy of norm and exception, which endorses a bifurcated approach to balancing the interests of societal goals and individual rights".* Sheeran, Scott P., Reconceptualizing States of Emergency Under International Human Rights Law: Theory, Legal Doctrine, And Politics, *Michigan Journal of International Law,* Vol. 34, 2013, p. 492.

This regime can thus serve as an instrument for the protection of a society. It can also, however, be misused by authoritarian rulers who may be tempted to keep emergency measures in place for a protracted period of time and to tighten the control over the society through them. As Grossman rightly puts it, *"[t]he increased concentration of governmental power, along with the destruction of societal checks and balances, creates and perpetuates entrenched authoritarian systems"*.[5]

The state of emergency is not an extra-legal institution. The conditions for its declaration and the extent to which human rights may be limited or suspended in its course are laid down both in domestic and in international law. Domestically, the historical origins of the state of emergency are usually traced back to the Roman law and the institution of the dictator who was nominated in exceptional times of external attack or internal rebellion. The modern concept of the state of emergency emerged much later, during the French Revolution, where the state of peace and the state of siege were legally distinguished, with the latter entailing the transfer of competences for maintaining order from the civilian to the military authority. From the mid-19th century, rules pertaining to the state of siege/emergency started to be inserted into national constitutions, culminating with the adoption of Article 48 of the Weimer Constitution. This provision,[6] being applied about 250 times over the short period of 13 years and facilitating the ascension to power of the Nazi party, demonstrated the risks stemming from the emergency clauses and the limits involved in the purely national regulation of the state of emergency.

Consequently, in the aftermath of WWII, it was decided not to leave the regulation of the state of emergency solely at the domestic level[7] but to make it part of international law as well.[8] The regulation, on the one hand, confirms that exceptional times may require exceptional measures

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[5] Grossman, Claudio, A Framework for the Examination of States of Emergency Under the American Convention on Human Rights, *American University International Law Review* Vol. 1, No. 1, 1986, p. 36.

[6] Article 48 of the Weimer Constitution stipulated that *"if public security and order are seriously disturbed or endangered within the German Reich, the President of the Reich may take measures necessary for their restoration, intervening if need be with the assistance of the armed forces. For this purpose he may suspend for a while, in whole or in part, the fundamental rights provided in /several provisions/".*

[7] As an empirical study carried out in 2004 shows, already by mid-1990s, around 150 States had constitutional provisions on the state of emergency. See Keith, Linda Camp, Poe, Steven C., Are Constitutional State of Emergency Clauses Effective? An Empirical Exploration, *Human Rights Quarterly,* Vol. 26, 2004, pp. 111-143.

[8] In his 1955 report on drafting the two covenants, the UN Secretary-General noted: *"It was also important that States parties should not be left free to decide for themselves when and how they would exercise emergency powers because it was necessary to guard against States abusing their obligations under the covenant."* UN Document A/2929, 1 July 1955, p. 66.

and that such measures may involve restrictions of human rights. On the other hand, it lays down strict conditions that such restrictions must meet to remain lawful and establishes international bodies entitled to authoritatively assess this legality. The regulation is enshrined in human rights treaties. In the broadest sense, it encompasses three types of provisions. The first type codifies exceptions to human rights, i.e. it excludes from the scope of these rights certain acts done in time of emergency. For instance, Article 4(3) of the *European Convention on Human Rights* stipulates that the prohibition of forced and compulsory labour, enshrined in Article 4(2) does not extend to *"any service exacted in case of an emergency or calamity threatening the life or well-being of the community"* (par. c)). The second type of regulation consists of limitations imposed on non-absolute human rights, such as freedom of expression, freedom of association or the right to private and family life. Limitations are subject to a triple test of legality (are prescribed by law), legitimacy (pursue a legitimate aim) and necessity (are needed to reach the aim and proportionate to it). They may be used both in normal times and in times of emergency.[9] The third type of regulation is that of derogations. In the narrow sense, the regulation of the state of emergency is often reduced to this third types, which therefore deserves more attention.

Derogation is a temporary suspension of certain human rights guarantees resorted to in the state of emergency.[10] It is a more radical measure than exceptions or limitations and, as such, it can be used only in exceptional circumstances, *"when the state [faces] a challenge so severe that it [has to] violate its own principles to save itself"*.[11] It also, again unlike the other measures, entails certain procedural obligations that make external oversight easier and more robust. Derogation clauses are contained in certain human rights treaties only, for instance in the *UN International Covenant on Civil and Political Rights* (Article 4), the *European Convention on Human Rights* (Article 15) and the *American Convention on Human Rights* (Article 27). They are absent from treaties that concentrate on the protection of absolute human rights. This is the case of the 1984 UN *Convention against Torture and Other Cruel, Inhuman*

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[9] In its General Comment No. 29, the UN Human Rights suggested that limitations should be considered as a softer measure prior from resorting to derogations. UN Doc. CCPR/C/21/Rev.1/Add.11 (2001), General Comment 29, States of Emergency (Article 4), 31 August 2001, para. 5.

[10] Higgins, Rosalyn, Derogations Under Human Rights Treaties, *British Yearbook of International Law,* Vol. 48, 1976-77, pp. 281-320.

[11] Scheppele, Kim Lane, Law in a Time of Emergency: States of Exception and the Temptations of 9/11, *University of Pennsylvania Journal of Constitutional Law,* Vol. 6, 2004, p. 1012.

or Degrading Treatment or Punishment, which explicitly stipulates that *"/n/o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture"* (Article 2(2)). Derogation clauses are also absent from treaties that are drafted in a relatively vague manner, such as the 1966 UN International Covenant on Economic, Social and Cultural Rights.

The derogation clauses contained in the three main human rights treaties differ in details but they follow the same structure. The possibility to derogate is conditioned on the situation of *"public emergency which threatens the life of the nation"* (Article 4(1) ICCPR) or a similar extremely serious situation.[12] The expression, as the European Court of Human Rights (ECtHR) clarified in *Lawless v. Ireland,* refers to *"an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed".*[13] The measures of derogation that States may adopt to counter the threat, have to meet the condition of proportionality. States may thus only derogate *"to the extent strictly required by the exigencies of the situation"* (Article 4(1) of the ICCPR).[14] The 'extent' refers to the severity of measures, the geographical area they cover and the time period for which they stay in place.[15] The measures, moreover, must not involve discrimination[16] and/or be inconsistent with other obligations arising under international law, e.g. obligation under international humanitarian law or international refugee law.

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[12] The ECHR speaks about *"war or other public emergency threatening the life of the nation"* (Article 15(1)), the ACHR about *"war, public danger, or other emergency that threatens the independence or security of a State Party"* (Article 27(1)).

[13] ECtHR, *Lawless v. Ireland,* no. 33257, 01.07.1961, para. 28. More concrete elements of the definition of the exceptional situation were provided by the European Commission on Human Rights in the Greece case, see ECmHR, *Government of Denmark v. the Government of Greece, Government of Norway v. the Government of Greece, Government of Sweden v. the Government of Greece, Government of the Netherlands v. the Government of Greece,* nos 3321/67, 3323/67 and 3344/67, 05.11.1969, para. 153.

[14] The ECHR uses the same formulation, the ACHR uses the formulation *"to the extent and for the period of time strictly required by the exigencies of the situation"* (Article 27(1)).

[15] The UN Human Rights Committee specifies that *"/t/his requirement relates to the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency".* UN Doc. CCPR/C/21/Rev.1/Add.11 (2001), op. cit., para. 4.

[16] The prohibition of discrimination features explicitly in the ICCPR and the ACHR. It is not mentioned in Article 15 of the ECHR but has been read into it by the ECtHR (see, for instance, ECtHR, *A. and Others v. the United Kingdom*, no. 3455/05, Grand Chamber, 19.02.2009, para. 190).

International human rights bodies have traditionally left a large discretion to States to consider whether an exceptional situation exists on their territory and to decide which measures are appropriate in this situation. It was in fact in the context of Article 15 that the ECtHR introduced the well-known doctrine of the margin of appreciation.[17] Under this doctrine, as the ECtHR explained in *Ireland v. the United Kingdom*:

> *It falls in the first place to each Contracting State, with its responsibility for "the life of [its] nation", to determine whether that life is threatened by a "public emergency" and, if so, how far it is necessary to go in attempting to overcome the emergency By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it.*[18]

Other human rights bodies, even if not embracing the doctrine of the margin of appreciation, have also shown deference to national authorities when assessing special measures adopted in the state of emergency.[19]

Derogation may apply to any human rights except for those considered non-derogable. The catalogue of such rights is not completely identical in the three treaties, though the common core remains the same (the right to life, the right to be free from torture and other inhumane or degrading treatment or punishment, the right to be free from slavery or servitude, and the right to be free from retroactive application of penal laws). The catalogue in the ECHR is limited to these four rights. The catalogue in the ICCPR adds the right not to be imprisoned on the grounds of inability to fulfil a contractual obligation, the right to recognition as a person before the law, the right to freedom of thought, conscience and religion and, for State Parties to the 1989 Second Protocol to the ICCPR, the prohibition of the death penalty. The ACHR has an even longer catalogue.[20] The catalogues have been further specified and also extended by human rights bodies.

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[17] More exactly, the doctrine was originally introduced by the European Commission on Human Rights in the *Cyprus case*, see ECmHR, *Greece v. United Kingdom,* no. 176/56, 26.09.1958, p. 176.

[18] ECtHR, *Ireland v. the United Kingdom,* no. 5310/71, 18.01.1978, para. 207.

[19] See Sheeran, Scott P., *op. cit.*, pp. 527-530.

[20] The ACHR catalogue encompasses, in addition to the four core rights, the right to juridical personality, freedom of conscience and religion, the rights of the family, the right to a name, the rights of the child, the right to nationality, the right to participate in government and the judicial guarantees essential for the protection of such rights (Article 27(2)).

For instance, in its General Comment No. 32, the UN Human Rights Committee held that *"/t/he guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights"*.[21] Finally, States derogation from human rights treaties have the obligation to notify this fact, through the Secretary-General of the relevant organization, to the other State Parties. They also have to inform about any changes in the derogation and about its termination.

The practice related to the state of emergency is abundant. We do not have exact data on all measures that States have enacted in these situations over the years, though some partial databases have been set up.[22] The only area which has been relatively consistently monitored and research is that of derogations. In an empirical study published in 2011, Haffner-Burton, Helfer a Fariss show that derogation clauses have been predominantly used by two groups of States:[23] well-established democratic States with a strong tradition of the separation of powers and the protection of human rights on the one hand, and authoritarian or semi-authoritarian States on the other hand. Whereas the former tends to derogate for limited periods of time and their notifications are usually rather specific and concrete, the latter may live under the state of emergency for protracted period of time (permanent emergency) and their notifications are often quite vague. The main grounds on which States derogate are armed conflicts and civil unrest (Azerbaijan 1993, Ukraine 2015), acts of terrorism (France 2015, Turkey 2016), natural disasters (Guatemala 1998) and, more recently, pandemics (Armenia 2020, Latvia 2020).

Some of the instances of derogation and as well as some instances, in which exceptions or limitations have been used by States, have been scrutinized by international human rights bodies. Yet, scholars have argued that the scrutiny has been limited to formal and procedural aspects, that too large discretion has been granted to States and that the jurisprudence

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[21] UN Doc. CCPR/C/GC/32 (2007), General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, 23 August 2007, para. 6.

[22] See, for instance, the *International Disasters Database,* online at https://www.emdat.be/ (visited on 27 March 2020). The database, set in 1988 by the Centre for Research on the Epidemiology of Disasters (CRED) in cooperation with the WHO and Belgium, seeks to compile essential core data on the occurrence and effects of mass disasters in the world since 1900 to the present day. In 1985-1997 the then existing UN Special Rapporteur for States of Emergency sought to collect data on states of emergency.

[23] *Hafner-Burton,* Emilie M., Helfer, Laurence R., Fariss, Christopher, Emergency and Escape: Explaining Derogations from Human Rights Treaties, *International Organizations,* Vol. 5, 2011, pp. 673-707.

of various bodies, and sometimes even of the same body is inconsistent.[24] In 1978, Green wrote that *"a critical onlooker would be justified in concluding that the chances of a state being found guilty of wrongly declaring an emergency are somewhat remote"*.[25] Almost four decades later, this criticism was echoed by Sheeran, who furthermore noted *"a disconnect between the principles cited by international treaty bodies in the relevant international cases, periodic reviews, and general comments and those same bodies' actual practice in determining a state of emergency and assessing the proportionality of emergency measures"*.[26]

Although the criticism is primarily directed against international human rights judicial and quasi-judicial bodies, the Venice Commission is also occasionally mentioned among the organs which have allegedly failed to adequately address human rights challenges stemming from the state of emergency. Sheeran, for instance, suggests that the Venice Commission has, similarly as the ECtHR, *"succumbed to /the/ inherent contradictions"*[27] between the margin of appreciation left to States and legal requirements for derogation under human rights treaties. He suggests that the Commission has largely given up on its role of the protector of human rights and of the Rule of Law, according too much weight to sovereignty concerns and leaving States, once they declare a state of emergency, virtually unconstrained. The remainder of this paper considers whether this suggestion is warranted. Has the Venice Commission addressed the legal challenges arising from the state of emergency in a consistent manner? Is there discrepancy in its general treatment of this state and the approach it adopts with respect to concrete national emergency measures? And does the Venice Commission just vindicate the views reached by other human rights bodies or has it made an original contribution to the clarification and further development of legal rules applicable to the state of emergency?

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[24] See Dyzenhaus, David, *The Constitution of Law: Legality in a Time of Emergency,* Cambridge University Press, 2006, p. 3; Sheeran, Scott P., *op. cit*., p. 493; Scheppele, Kim Lane, *op. cit.* See also Gross, Oren, and Fionnuala Ni Aolain, From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights, *Human Rights Quarterly*, Vol. 23, no. 3, 2001, pp. 625-649. The authors speak about *"deferential attitude towards actions of, and claims made by, a national government that uses its power to derogate"* (p. 633).

[25] Green, L.C., Derogation of Human Rights in Emergency Situations, *Canadian Yearbook of International Law,* Vol. 16, 1978, p. 100.

[26] Sheeran, Scott P., *op. cit*., pp. 547-548.

[27] *Ibidem*, p. 539.

2. The Venice Commission's Studies on the State of Emergency

Over the years, the Venice Commission has produced a series of important outputs related to the state of emergency. They encompass several general studies and a range of country-specific opinions. It might be useful to recall that whereas studies may be drafted at the Venice Commission own initiative, opinions have to be triggered by a request submitted by States, organs of the Council of Europe or international organizations associated to the Venice Commission (OSCE, EU, OAS). The Venice Commission thus has more latitude in the former area which, moreover, allows it to dwell into a topic in a more comprehensive and detailed way. The Commission has repeatedly used this opportunity to issues studies on certain general topics. The protection of human rights in times of emergency has been among them. So far, the Venice Commission has adopted three studies on this topic – the 1995 Report on *Emergency Powers,*[28] the 2006 *Opinion on the Protection of Human Rights in Emergency Situations*[29] and the 2020 *Reflections on Respect for Democracy, Human Rights and the Rule of Law During States of Emergency.*[30] Of relevance are also studies relating to specific threats, such as the 2010 *Report on Counter-Terrorism Measures and Human Rights.*[31]

The three general studies differ quite significantly from each other. The 1995 Report is authored by two members of the Commission. The 2006 Opinion was adopted by the Plenary in the usual procedure. The 2020 Reflections were drafted by five members of the Commission but taken note of by the Venice Commission. The last two studies thus carry more authority. Concerning the methodology and the content, the 1995 Report presents the results of a comparative study of the emergency regimes known in 32 countries of the world, thus focusing on the national legal regulation. The 2006 Opinion describes the legal regime applicable under international law, primarily the ECHR. The 2020 provides a comprehensive overview of the main principles applicable in the state of emergency as well as of more specific rules that pertain to institutional changes that might occur

[28] Venice Commission, CDL-STD(1995)012, Emergency Powers, 1995.
[29] Venice Commission, CDL-AD(2006)015, Opinion on the Protection of Human Rights in Emergency Situations, Opinion No. 359/2005, 4 April 2006. The text is entitled an opinion, as it was prepared on the basis of a request triggered by a concrete event. Yet, by its form, it is closer to a (general) study than to a (country-specific) opinion.
[30] Venice Commission, CDL-PI(2020)005rev, Reflections on Respect for Democracy, Human Rights and the Rule of Law During States of Emergency.
[31] Venice Commission, CDL-AD(2010)022, Report on Counter-Terrorism Measures and Human Rights. See also CDL-AD(2015)011, Update report on the Democratic Oversight of the Security Services.

in times of emergency. The third difference consists in the fact that the second report deals specifically with the impact of the state of emergency on human rights. The other two, conversely, are broader in scope, as they also analyse institutional changes carried out in the state of emergency. The 2010 *Report on Counter-Terrorism* is narrower in scope than the general studies, dealing with one security threat, terrorism, only, though it also contains a more general section on limitations and derogations.

2.1 The Report on Emergency Powers (1995)

Relying on the data from 32 countries[32] collected by means of a questionnaire, the 1995 Report concentrates on seven thematic areas encompassing the concept of public emergency, types of emergency rules, declaration of such rules, competencies in issuing them, emergency measures, legislative control and judicial review. The main findings and lessons learnt from the national regulations can be summed up in the following way.[33]

First, there is no uniformity in the national approaches to the State of emergency. In fact, the very aim of the report was *"to demonstrate the diversity of legal models regulating emergency situations which have been established, a diversity which reflects the complexity of the situations in practice and, consequently, the variety of solutions adopted by different States to deal with the problem"*.[34] Secondly, most States, albeit not all, have specific legislation on the state of emergency. This state brings in an exceptional legal regime which in some ways differs from the regime applicable in times of normalcy. In some countries, there is only one type of the state of emergency foreseen in domestic law. In other countries, two or three types of this state exist in parallel, reserved for various exceptional situations. These situations may be defined by the nature of the threat (armed conflicts, insurgency, natural disasters, etc.), the severity of the threat (alarm, emergency, serious threat to the nation, etc.) or a combination of the two factors. Each type of the state of emergency is linked to a specific regime and entails a different degree of restrictions on human rights.

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[32] These countries were: Albania, Austria, Canada, Croatia, Cyprus, Denmark, Finland, Germany, Greece, Hungary, Kyrgyzstan, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Norway, Poland, Portugal, Romania, Russia, Slovakia, Slovenia, S. Marino, Spain, Sweden, Switzerland, Turkey, and the United States of America.

[33] For a study using a similar approach, see ICJ, *States of Emergency. Their Impact on Human Rights,* ICJ: Geneva, 1983.

[34] Venice Commission, CDL-STD(1995)012, *op. cit.,* pp. 2-3.

Thirdly, the state(s) of emergency as defined at the national level, do(es) not merely mirror the "time of emergency" known at the international level (Article 4 of the ICCPR and Article 15 of the ECHR). Not all the states of emergency declared at the national level thus trigger derogation and not all derogations need to take place in a (national) state of emergency, though the latter scenario will be much less common than the former one. Fourthly, the national state of emergency, whether it involves derogation from human rights or not, has to be formally declared by the competent national organ. In most countries, the competence is divided between the legislative and the executive branches. The declaration is usually not amenable to judicial review because of its political nature, though there is no uniformity in this respect. It should be under parliamentary supervision. The measures taken during the state of emergency, on their turn, shall be subject both to *ex post* parliamentary approval and to judicial scrutiny.

Fifthly, the state of emergency entails two types of measures. One has to do with the transfer of competencies – from the parliament and judiciary to the executive (at the horizontal level) and from local authorities to the central government (at the vertical level). Other institutional changes may take place, for instance the transfer of certain police powers to military authorities or the creation of military tribunal and the transfer of some competences from ordinary courts to these tribunals. The other type of measures involves various limitations on, and derogations from, human rights. These measures are usually subject to the conditions similar to those contained in the ECHR and the ICCPR. In addition to the existence of a properly declared state of emergency, those conditions include proportionality, temporariness and the prohibition to interfere with absolute human rights (the "irreducible core" of these rights usually includes, at the domestic level the right to life, the prohibition of torture, the prohibition of slavery and the principle of non-discrimination).

Based on these findings, the 1995 Report formulates five recommendations:

a. The emergency situations capable of giving rise to the declaration of states of emergency should be clearly defined and delimited by the constitutions;
b. A *de facto* state of emergency should be avoided and emergency rule should be officially declared;
c. The constitution should clearly specify which rights can be suspended and which rights do not permit derogation;

d. The emergency measures and derogations from human rights should be proportionate to the danger and temporary in nature;[35] and
e. Basic judicial guarantees must remain in place even in time of emergency.

Although the recommendations were drafted 25 years ago and although they build on the data which is, in some aspects, already outdated, they are still in line with the standards set in international instruments and in case-law of human rights bodies.

2.4. The Opinion on the Protection of Human Rights in Emergency Situations (2006)

The 2006 Opinion was prepared at the request of the Parliamentary Assembly of the Council of Europe (PACE). The request was made pursuant to the submission of a motion which had *inter alia* reacted to a violent dispersal of a demonstration in Uzbekistan in May 2005. The motion itself aimed at *"clarifying the legal framework in which state security forces have to act in order to deal with difficult situations during mass demonstrations or similar events in an acceptable way"*.[36] The opinion first explains the legal framework applicable in emergency situations (limitations and derogations), then assesses the lawfulness of the use of force in dispersing demonstrations, and finally comments on the relation between the fight against terrorism and human rights. The text is therefore not as comprehensive as its title would suggest and it to some extent overlaps with the 2010 Report. Unlike the 1995 Report, the 2006 Opinion relies primarily on international human rights law, not on national regulations.

The first section provides an overview of the standards applicable under the ECHR. It recalls the triple test of legality, legitimacy and necessity in a democratic society that determines the lawfulness of limitations, stressing that *"/t/he balance that has to be struck between national security and public safety, on the one hand, and the enjoyment of fundamental rights and freedoms, on the other hand, cannot be determined by use of any mathematical calculation or fixed scale"*.[37] It also recalls the conditions of lawful derogation under Article 15 of the ECHR, adding that *"even in genuine cases of emergency situations the Rule of Law must prevail"*.[38] A domestic supervisory mechanism thus must remain

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[35] *Ibidem,* pp. 30-31.
[36] Venice Commission, CDL-AD(2006)015, *op. cit.,* para. 3.
[37] *Ibidem,* para. 8.
[38] *Ibidem,* para. 13.

operational despite the fact that procedural standards are not listed among non-derogable rights in the ECHR. The Opinion highlights the case-specific nature of the assessment of emergency measures.

> *The criteria by which to make the balance, and the weight to be attributed to the various elements, may vary at different times and in different contexts. The assessment /…/ is consequently by necessity dictated by the circumstances of the case, and may also have as a result that a specific situation or specific developments justify more far going restrictions.*[39]

The opinion however also recalls that *"/t/he bottom line /…/ is that the right or freedom concerned may not be curtailed in its essence".*[40]

The second section confirms that the right to demonstrate stems from the right to freedom to peaceful assembly and the right to freedom of expression. Violent measures taken to disperse demonstrations, including the use of force, may be, under the relevant conditions, justified both as a derogation from, and as a limitation to, such non-absolute rights. The opinion stresses that any restrictions imposed on these rights have to have a legal basis and to be strictly construed in such a way as to focus on what is forbidden rather than on what is allowed. States have the negative obligation to refrain from intervening with peaceful demonstrations as well as the positive obligation to protect demonstrations from violence by other private actors. The right to freedom of assembly does not entail the right to hold violent assemblies. States are entitled, and even obliged, to intervene against such assemblies. If force is to be used in such context and/or if demonstrators are detained and arrested, Articles 2 (right to life) and 5 (right to liberty) of the ECHR apply. Article 2 sets a strict test of "no more than absolutely necessary" that *"implies the obligation to plan and implement any measures in such a way as to avoid or minimize, to the greatest extent possible, risks of loss of lives".*[41]

The third section introduces the protection of human rights in the context of the fight against terrorism which is then elaborated upon in detail in the 2010 Report. The Opinion starts from the premise that *"/t/he democratic institutions are bound to take effective steps to fight terrorism, even at the detriment of full enjoyment of human rights, while the human-rights element of the Rule of Law requires that the rights of everyone, also of (alleged) terrorists, are respected within the limits of national and international standards".*[42] The statement, which

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[39] *Ibidem,* para. 8.
[40] *Ibidem,* para. 8.
[41] *Ibidem,* para. 27.
[42] *Ibidem,* para. 28.

might seem somewhat ambiguous, is meant to introduce, again, the idea of balancing which, as already stated, always has to be placed into a concrete context. To avoid confusion, the Opinion stresses that *"/s/tate security and fundamental rights are not competitive values; they are each other's precondition"*.[43] One can thus never be fully sacrificed for the sake of the other. The Opinion further adds that:

a. the existing human rights standards are appropriate to counter terrorism;
b. short-term restrictions of human rights might be warranted in the current counter-terrorist fight; but
c. the best way to fight terrorism in a long run is to strengthen democracy and the Rule of Law.

The 2006 Opinion has been relied on in various country-specific opinions and, as such, it has provided the common starting point for any analysis of emergency measures that the Venice Commission undertakes.

2.3 Report on Counter-Terrorism Measures and Human Rights (2010)

The 2010 Report was also produced at the request of the PACE. Similarly, as for the 2006 Opinion, the request stemmed from a concrete instance of national practice, this time the draft law on 42-day pre-charge detention considered in the UK. The report, however, does not analyse this draft but opts for a broader perspective, dealing with the protection of human rights in the fight against terrorism in general. The original plan, to present a comparative analysis of the compatibility of national counter-terrorism measures with human rights, turned out to be too ambitious and the Commission decided to concentrate solely on the most recurring issues arising at the national level. The opinion identifies nine such issues:

a. terrorist offences and principle of legality,
b. surveillance powers,
c. requiring disclosure of information,
d. arrest, interrogations and length of detention,
e. treatment of detainees,
f. military and special tribunals,
g. modifications of ordinary judicial procedures,
h. targeted sanctions against individuals or groups ("Blacklists"), and
i. asylum, return ("refoulement"), expulsion and extradition.

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[43] *Ibidem,* para. 31.

The analysis of these nine issues is preceded by the repetition of the main ideas expressed in the third section of the 2006 opinion and by another explanation of the limitation and derogation mechanisms under the ECHR.

For the nine issues, the opinion proceeds in a virtually identical way. After restating the standard applicable in the given area, it explains in which ways this standard is challenged in the fight against terrorism. It provides examples of relevant case-law and concludes by a set of recommendations. For the principle of legality, for instance, the prohibition of retroactivity, laid down in Article 7 of the ECHR, is the relevant standard. The absence of a common definition of terrorism puts this standard at risk, as does the broad construction of terrorism-related criminal offences (encouragement to terrorism, membership in terrorist organizations, etc.). Three principles should be respected by States when they enact new criminal provisions in this area, namely respect for the prescribed legislative procedure, clear formulations, and the prohibition of retroactivity. The Report is not so comprehensive and detailed as some other official reports on the same topic.[44] Yet, its merit consists exactly in the concise manner in which it is written, focusing on the main legal problems involved in counter-terrorist practices. The report does not add much to the general analysis of the state of emergency, but it offers examples of concrete measures that are not lawful even if adopted in this state.

2.4. The Reflections on Respect for Democracy, Human Rights and the Rule of Law During States of Emergency (2020)

The most recent general study was produced in the context of the COVID-19 crisis, at the initiative of the Commission itself. Unlike most other similar studies produced in spring 2020,[45] the Reflections do not focus solely on the impact of emergency measures on human rights but deals with institutional changes as well. Moreover, although they take the COVID-19 crisis as the starting point, they *"can be applicable mutatis mutandis to any situation*

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[44] See, for instance, OHCHR, *Human Rights, Terrorism and Counter-Terrorism. Fact Sheet No. 32,* Geneva, sine data; EU Network of Independent Experts in Fundamental Experts, *The balance between freedom and security in the response by the European Union and its member States to the terrorist threats,* Office for Official Publications of the EC, 2003; OSCE/ODIHR, *Countering Terrorism, Protecting Human Rights, A Manual,* Warsaw, 2007.

[45] Council of Europe, *Respecting democracy, Rule of Law and human rights in the framework of the COVID-19 sanitary crisis. A toolkit for member States,* SG/Inf(2020)11, 7 April 2020; FRA, Coronavirus Pandemic in the EU — Fundamental Rights Implications, *Bulletin* No. 1, 2020; IAmCmHR, Pandemia y Derechos Humanos en las Américas, *Resolución* No. 1/2020*,* 10 April 2020.

of emergency".[46] The Reflections consist of eleven sections. The first two sections provide the definition of the state of emergency and enlist the main principles governing this state. The state of emergency is defined as *"a - temporary - situation in which exceptional powers are granted to the executive and exceptional rules apply in response to and with a view to overcoming an extraordinary situation posing a fundamental threat to a country"*.[47] The definition implies that a necessary precondition for declaring a state of emergency is that *"the powers provided by normal legislation do not suffice for overcoming the emergency"*.[48] It also implies that the nature, severity and duration of the exceptional situation determines the type, extent and duration of emergency measures. These measures must follow seven general principles which should moderate their impact. These principles encompass the respect for the Rule of Law guarantees, necessity, proportionality, temporariness, effective scrutiny, predictability and loyal cooperation among state institutions. The principles are cumulative and must be applied at the same time, as they underpin each other.

The subsequent sections deal with the declaration of the state of emergency. Two main forms of the state of emergency may be distinguished: *de jure* (constitutional) emergency, which has an explicit legal, usually constitutional basis and starts with a formal declaration; and *de facto* (extra-constitutional) emergency which lacks this explicit legal basis, at least in a written law, and does not require a formal declaration. The Venice Commission has constantly cautioned against the latter form. It has also repeatedly stressed that the declaration of the state of emergency must be adopted in the procedure and by the organ foreseen by the national regulation. The designated organ may be the parliament or the executive (government, head of the state). In the latter case, the declaration should be subject to the parliamentary approval at the latest convenience or, as a minimum, the parliament should be able to suspend it. The state of emergency may only be declared for a specific period and for a particular territory, though in some situations, such as the COVID-19 crisis, this may be the territory of the whole State. The Reflections make a distinction between the activation of the emergency powers and the actual application of these measures. In the *de jure* emergency, the former prepares the ground for the latter and should thus precede it or, at least, be simultaneous to it.

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[46] Venice Commission, CDL-AD(2020)005, *op. cit.,* para. 3.
[47] *Ibidem,* para. 5.
[48] *Ibidem.*

The remaining sections deal with the emergency measures. Those fall under two main categories – measures restricting human rights and institutional changes affecting the distribution of powers in the domestic legal order. For the former category, the Reflections recall the three instruments of exceptions, limitations and derogations introduced in the first section of this paper, stressing that in the state of emergency, larger discretion (margin of appreciation) is usually granted both to States and, at the domestic level, to the executive. This discretion should however never be unlimited and unchecked. The state of emergency entails restrictions of many human rights. In the COVID-19 crisis, for instance, both civil and political rights (freedom of movement, freedom of assembly, freedom of expression, etc.) and economic, social and cultural rights (right to health, right to work, right to social security, etc.) have been affected. The state of emergency also often triggers various institutional changes, consisting typically in the transfer of powers and competences horizontally (strengthening of the role of the executive) and vertically (strengthening of the powers of the central organs). This aspect of the state of emergency has so far attracted rather limited attention in the legal sphere and the Reflections therefore make a valuable contribution by dwelling upon it.

The document highlights that the principle of loyal cooperation, and of mutual respect, needs to guide State organs in the state of emergency. The transfer of power within the State structure should thus reflects the needs of the exceptional situation and should be used only for the purposes linked to this situation. The functioning of constitutional bodies should remain as close to the state of normalcy as possible. The balance of powers must be safeguarded and the executive, which gets additional powers, must remain under both political and judicial control. The former is exercised by the Parliament, which can never be dissolved during the state of emergency and which has the final word over any emergency measures (and especially over executive acts with legislative effects if those may be adopted). The latter is assumed by courts, mainly the Constitutional (or other higher) court. Other State bodies, such as the ombudsman office, as well as media and the civil society also have an important role to play in ensuring that the state of emergency does not lead to institutional disbalance. The Reflections, furthermore, consider the difficulties of holding elections and referendums in times of emergency, suggesting that whenever the standard conditions ensuring the fairness of the electoral or referendum process may be not granted, postponement is a reasonable option. The document thus provides a comprehensive overview of the legal standards applicable to various measures that might be adopted in the state of emergency.

3. The Venice Commission's Opinions on the State of Emergency

Since the establishment of the Venice Commission in 1990, the state of emergency has been declared in a number of its member States. Moreover, as the 1995 report confirmed, most States have enacted special legislation dealing with the state of emergency. As country-specific opinions are to be triggered by an external request, the Commission has had a somewhat limited opportunity to assess these measures and legislation yet. The two most comprehensive opinions of relevance here are the opinions on *Draft Law on Legal Regime of the State of Emergency*, discussed in Armenia in 2011,[49] and on the various emergency decrees enacted in Turkey following the failed coup of 15 July 2016.[50] The former opinion provides a comment on a draft legislative act regulating the state of emergency. The latter, conversely, assesses measures adopted within an already declared state of emergency involving a suspension of several human rights. There is so far no opinion that would deal with the emergency measures adopted in the course of the COVID-19 crisis in spring 2020, though due to the extent of this crisis and the controversial nature of some of the measures, it is likely that at least some requests for the review of the compatibility of these measures with the international legal standards will reach the Commission in the nearest future.

3.1 The Opinion on Armenia (2011)

The Armenian opinion followed on the *Interim Opinion on the constitutional reform*,[51] adopted seven years earlier, in which the Commission had criticized the draft constitutional provisions on martial law and the state of emergency submitted in Armenia. The Interim Opinion critically noted that the draft provisions failed to clearly distinguish between various types of special regimes (martial law, state of emergency, state of imminent danger), a formal declaration of a state of emergency was not required, the draft provisions did not specify the measures that could be taken in times of emergency and the Parliament was not sufficiently involved in the process of monitoring and supervising emergency measures. In response to the Interim Opinion, the draft provisions were partly revised. Moreover, a legal act implementing the revised text was drafted and submitted for the assessment of the Venice Commission.

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[49] Venice Commission, CDL-AD(2011)049, Opinion on the Draft Law on the Legal Regime of the State of Emergency of Armenia.
[50] Venice Commission, CDL-AD(2016)037, Opinion on Emergency Decree Laws N°s 667-676 adopted following the failed coup of 15 July 2016.
[51] Venice Commission, CDL-AD(2004)044, Interim Opinion on Constitutional Reforms in the Republic of Armenia.

The opinion, containing this assessment, first recalls that the Armenian Constitutions, as amended in 2005, makes a distinction between two emergency regimes (martial law and state of emergency) and between two types of restrictions on human rights regimes (limitations and derogations). The draft law deals with the latter of the regimes, the state of emergency, which is defined as *"a special legal regime regulating activities of public administration and local self-government bodies, legal entities /…/ and their officials, which is declared pursuant to the Constitution /…./ throughout the territory of the Republic of Armenia or in certain territories thereof"* (Article 1(1) of the Draft). The state of emergency may be declared *"only under such circumstances that constitute imminent danger to the constitutional order /…/, in particular, any attempt of violent change or overthrow of the constitutional order /…/, seizure or usurpation of power, armed disturbances, mass disorder, terrorist acts, seizure or blockage of objects of special significance, arrangement and operation of illegal armed groups, national, racial and religious conflicts accompanied by violent actions, imminent threat to human life and health"* (Article 1(2) of the Draft). The state of emergency shall be declared by the president, who shall act in consultation with the Chairperson of the National Assembly and the Prime Minister. Article 7 of the Draft contains an enumeration of human rights which may be suspended in the state of emergency.

The opinion recalls that, generally, *"/t/he concept of emergency rule is founded on the assumption that in certain situations of political, military and economic emergency, the system of limitations of constitutional government has to give way before the increased power of the executive. However, even in a state of public emergency the fundamental principle of the Rule of Law must prevail"*.[52] It then acknowledges several positive elements that the new draft law contains, such as the provision stipulating that the principles of necessity and proportionality need to be respected in all times or the possibility of the Parliament to suspend the declared state of emergency. It also formulates certain reservations. Those relate mainly to the absence of a general right to challenge the emergency measures in courts by individuals effected by their application and the provisions regulating the suspension or termination of political parties in times of emergency. Despite these reservations, the Commission concludes that the draft act is a rather well-written instrument which in principle meets international standards applicable in the state of emergency. In this opinion, thus, the Commission has identified several examples of good practice.

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[52] Venice Commission, CDL-AD(2011)049, *op. cit.,* para. 44.

3.2. The Opinion on Turkey (2016)

After the failed coup of 15 July 2016, Turkey declared the state of emergency and started legislating through emergency decree laws. The primary official aim of these laws was to dismantle the "Gülenist network" which was accused of having been responsible for the coup. In late July and early August 2016, respectively, Turkey derogated from the ECHR[53] and the ICCPR.[54] In the two cases, the derogation was justified by the fact that *"the coup attempt and its aftermath together with other terrorist acts have posed severe dangers to public security and order, amounting to a threat to the life of the nation"*.[55] The derogation to the ECHR was rather unspecific, as the notification letter simply mentioned that *"measures taken may involve derogation from the obligations under the /ECHR/ permissible in Article 15 of the Convention"*.[56] The derogation to the ICCPR, on the contrary, entailed suspension of concrete provisions enumerated in the notification, namely Articles 2(3), 9, 10, 12, 13, 14, 17, 19, 21, 22, 25, 26 and 27 of the ICCPR.[57] The two derogations were both terminated in August 2018. In September 2016, the PACE turned to the Venice Commission, requesting an opinion on the overall compatibility of the implementation of the state of emergency in Turkey, in particular of the decree laws, with Council of Europe standards.[58]

The opinion, one of the longest ever produced by the Venice Commission (49 pages), provides a detailed analysis of the twelve decree laws enacted in the weeks following the failed coup (decrees 667-678) as well as of the state of emergency declared in Turkey more broadly. The opinion first assesses the declaration/notification of the derogation, then gives a general overview of the emergency measures, moving subsequently to the analysis of specific measures, and finally concentrating on the review of these measures. The declaration/notification of the derogation is generally

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[53] Council of Europe, *Declaration contained in a letter from the Permanent Representative of Turkey,* 21 July 2016. See also Council of Europe, *Communication from the Permanent Representation of Turkey, registered at the Secretariat General on 24 July 2016; Communication from the Permanent Representation of Turkey, registered at the Secretariat General on 28 July 2016; Communication transmitted by the Permanent Representative of Turkey and registered by the Secretariat General on 2 August 2016*.

[54] UN Doc. C.N.580.2016. Treaties-IV.4, *Notification under Article 4(3),* 2 August 2016.

[55] Council of Europe, *Declaration contained in a letter, op. cit.***;** UN Doc. C.N.580.2016. Treaties-IV.4, *op. cit.*

[56] Council of Europe, *Declaration contained in a letter, op. cit.*

[57] UN Doc. C.N.580.2016. Treaties-IV.4, *op. cit.*

[58] Venice Commission, CDL-AD(2017)007, Opinion on Measures provided in the recent Emergency Decree-Laws with respect to Freedom of the Media; CDL-AD(2017)021, Opinion on the Provisions of the Emergency Decree law no. 674 of 1 September 2016 which concern the Exercise of Local Democracy in Turkey.

considered as valid. The Commission accepts that the situation in Turkey after the failed coup met the criteria of *"other public emergency threatening the life of the nation"* but warns against excessive prolongation of the state of emergency. Moreover, while confirming that this state was duly declared, the Venice Commission draws attention to the fact that the Parliament was not as involved in the approval of concrete emergency measures as it should and could have been. The unspecific nature of the notification sent to the Council of Europe is also noted, though the Commission leaves the final assessment to the European Court of Human Rights.

The section giving the general overview of the emergency measures identifies several aspects of these measures that deserve criticism. One of them is that although measures enacted in the state of emergency should be temporary in nature, some of the measures adopted by Turkey went beyond the temporary state (dismissal of civil servants, dissolution of private organizations, confiscation of property, etc.). Another problematic aspect consists of the *ad hominem* legislation which was used in the aftermath of the coup. Thus, for instance, the dismissal of civil servants was not based on the application of certain general criteria to individual cases but, rather, relied on lists with names simply appended to the emergency decree laws. The provisions of the emergency decree laws which effectively waive the liability of State institutions and officials for measures taken during the state of emergency are also identified as a source of serious concern.

The subsequent section contains a long analysis of specific emergency measures that do not seem in compliance with the Council of Europe standards. These pertain to the dismissal of civil servants based on their alleged connection to the Gülenist network, modifications of the standards applicable in criminal proceedings (loose definition of criminal offences, extension of the time-limit for pre-trial detention without judicial control up to 30 days, arrests of suspects not based on sufficient grounds, etc.), allegations of ill-treatment and torture, and the dissolution of private associations and companies and confiscation of their assets. Finally, the Commission pays attention to the judicial review of the emergency measures or, rather, to the absence thereof. It notes that the power of the Constitutional Court to review constitutionality of the emergency decree laws *in abstracto* and *in concreto* remains uncertain. It expresses particular concern at *"the apparent absence of access to justice for those public servants who have been dismissed directly by the decree laws, and those legal entities which have been liquidated*

by the decree laws",[59] endorsing the proposal made by the Council of Europe Secretary General for the creation of an independent *ad hoc* body that would examine individual cases of dismissals, subject to subsequent judicial review. Unlike the Armenian draft law scrutinized in 2011, the Turkish emergency decree laws do not provide an example of good (let alone best) practice and the Venice Commission did not shy away from indicating so.

4. The Venice Commission's Approach to the State of Emergency.

Since its creation in 1990, the Venice Commission has repeatedly been confronted with legal questions related to the state of emergency. It has issued a report on emergency powers (1995), based on the comparison of the national regulation in 32 countries, a more general study on the protection of human rights in emergency situations (2006), as a report on counter-terrorism measures and human rights (2010), and a set of reflections on the state of emergency triggered by the COVID-19 crisis (2020). It has also produced country-specific opinions on emergency legislation (e.g. Armenia 2011) and on concrete emergency measures adopted in its member States (e.g. Turkey 2016). When dealing with the topic of the state of emergency the Commission has primarily relied on international human rights instruments (ECHR, ICCPR), relevant case-law of international judicial and quasi-judicial bodies (ECtHR, UN Human Rights Committee), and the comparison of provisions on the state of emergency contained in national constitutions.

The main principles on which the Venice Commission founds its approach are the following. First, the Venice Commission recognizes that the state of emergency is a legal institution recognized both at the national and international level. It also acknowledges that the declaration of the state of emergency may entail temporary restrictions of human rights as well certain institutional changes. Yet, due to the legal (not extra-legal) nature of the state of emergency, these changes and restrictions are subject to strict conditions and limits laid down, again, in both domestic and international law. Secondly, the Venice Commission stresses that States facing emergency have to strive to find a balance between the protection of national security/safety (threatened by wars, terrorism, natural disasters or epidemics) on the one hand and the respect for individual human rights (of all individuals including those who might be seen as security threats or as increasingly

[59] Venice Commission, CDL-AD(2016)037, *op. cit.,* para. 28.

exposed to the threats). This balance is always context-specific and cannot be determined by any general algorithm. It has however to be found through the application of general legal principles (proportionality, necessity) and it remains under the supervision of international bodies. The state of emergency thus does not provide States with any *carte blanche*.

Thirdly, the Commission has shown that although the national regulation of the state of emergency reveals some diversity (typology of the states of emergency, the involvement of the parliament, the transfer of competences, etc.), there are also many important common features (exceptional situation, need of formal declaration, non-derogable rights, judicial review, etc.). These common features correspond to a large extent to the standards enshrined in international human rights instruments, especially those concerning limitations and derogations. Fourthly, the Venice Commission endorses the doctrine of the margin of appreciation (discretion). It also shares the view that the regime applicable in the state of emergency *"significantly extends the Government's margin of appreciation to cope with the emergency"*.[60] It however never fails to add that the domestic/executive margin of appreciation is accompanied by an international/non-executive supervision.[61] In the 2010 Report, the Commission moreover stressed that *"/t/he margin of appreciation left to the national authorities should not be so broad as to make national and international supervision practically meaningless"*.[62] The application of this approach is visible in the opinion Turkey, in which the Venice Commission does not shy away from making very critical comments with respect to the emergency measures actually enacted domestically.

Fifthly, the Venice Commission embraces a purpose-oriented approach to the state of emergency. Since *"the main purpose of the state of emergency is to restore the democratic legal order"*,[63] only measures that contribute to the realisation of this purpose are legitimate and lawful. The regime applicable in the state of emergency is thus by its very nature provisional and temporary. In the long run, the Commission holds, democracy, human rights and the Rule of Law are much better guarantees of national security and safety than emergency measures.[64] While this view might seem utterly optimistic, if not utopian, research into deep roots of such phenomena as terrorism largely

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[60] Venice Commission, CDL-AD(2016)037, *op. cit.,* para. 59.
[61] Venice Commission, CDL-AD(2016)037, *op. cit.,* para. 36; CDL-AD(2011)049, *op. cit.,* para. 11; CDL-AD(2006)015, *op. cit.,* para. 19.
[62] Venice Commission, CDL-AD(2010)022, *op. cit.,* para. 26.
[63] Venice Commission, CDL-AD(2016)037, *op. cit.,* para. 229.
[64] Venice Commission, CDL-AD(2006)015, *op. cit.,* para. 33.

accords with it.[65] Sixthly, the Commission highlights special importance of certain legal standards that have to be fully observed even in the state of emergency. These standards encompass not only respect for the "core" non-derogable human rights (right to life, prohibition of torture, etc.) but also the necessity to safeguard, under any circumstances, some procedural guarantees (access to courts, fair trial, etc.) as well as certain institutional mechanisms (e.g. separation of powers, parliamentary overview, judicial review). These are absolute standards which may not be subject to restrictions. Seventhly, the Commission acknowledges that 'law in books' and 'law in action' are not necessarily the same. Thus, when assessing emergency measures adopted in a certain country, it is not sufficient to look into the national legal acts and international obligations of this country. The actual practice linked to the implementation of the measures has to be taken into account as well.[66]

After the summary of the main principles, on which the Venice Commission relies when dealing with the state of emergency *in abstracto* or *in concreto,* it is time to return to the criticism raised against the Commission and the three questions asked in this context. The first two questions pertained to the consistency of the Venice Commission approach and to the alleged discrepancy between its general treatment of the state of emergency and its analysis of concrete emergency measures. The overview of the Venice Commission studies and opinions has shown that the approach is, indeed, consistent and does not manifest any obvious discrepancies. The principles identified above are applied both in general studies and in country-specific opinions: the former in fact provide the background for the latter, which then serve as the concretization of the former. If there is, as some scholars argue,[67] a tendency of international human rights bodies to be, with respect to the state of emergency, principled and strict *in abstracto* but condoning and lenient *in concreto* (which in itself is open to doubt), then the Venice Commission does not lend itself to this tendency. While accepting that

[65] See, for instance, Bjørgo, Tore, *Root Causes of Terrorism: Myths, Reality and Ways Forward*, Taylor&Francis. 2005; Hudson, Rex, *The Sociology and Psychology of Terrorism: Who Becomes a Terrorist and Why?*, Report prepared by the Federal Research Division of the Library of Congress, 1999.

[66] Venice Commission, CDL-AD(2016)037, In the Turkish opinion, the Commission held that "/t/he provisions of the Turkish Constitution on the declaration of a state of emergency appear to be in line with common European standards in this area. However, the Government interpreted its extraordinary powers too extensively and took measures that went beyond what is permitted by the Turkish Constitution and by international law", *op. cit.,* para. 226.

[67] See Sheeran, Scott P., *op. cit.*

States might need more discretion to decide on measures they take to counter emergency, the Venice Commission incessantly reiterates that this discretion is not unfettered. The Turkish opinion is a good illustration of the constructive but firm critique of national emergency measures which went too far.

The third question asked by scholars inquires about the originality of the Venice Commission approach. The possibility to issue both general studies and country-specific opinions is one of the specific features of the Venice Commission mode of operation.[68] Another is the *ex-ante* control that it is mandated to provide, checking on pieces of legislation and their overall compatibility with international standards rather than (only) on concrete instances of alleged violations on such standards. As noted above, the Venice Commission is not oblivious to, and ignorant of, the risk of a gap between national legal acts and the actual practice related to the implementation of these acts. Yet, again, it primarily focuses on the broader picture stemming from this implementation and not on concrete cases. Due to its mode of operation, the Venice Commission provides an assessment which is not limited to binary options (lawful/unlawful, violation/non-violation) but can be much more nuanced, drawing attention to both serious and less serious deviations from legal standards. It can also suggest several alternative ways in which the deviations could be redressed. These special features make the Venice Commission different from international judicial and quasi-judicial bodies, which primarily concentrate on the *ex post* control based on individual cases.[69]

Complementing the work of these bodies, rather than merely replicating it, the Venice Commission is thus in the position to make an original contribution to the clarification and further development of legal rules applicable to the state of emergency. The paper has shown that the Venice Commission has indeed made such a contribution with respect to the legal rules applicable to the state of emergency. It has identified the

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[68] For more on the Venice Commission, see Hoffmann-Riem, Wolfgang, The Venice Commission of the Council of Europe – Standards and Impact, *European Journal of International Law*, Vol. 25(2), 2014, pp. 579–59; and Хабриева, Талия Ярулловна, *Венецианская комиссия: сто шагов к демократии через право,* Статут, 2014.

[69] The picture, of course, is not so black and white. International judicial and quasi-judicial bodies may be entitled to issue general studies as well (see general comments provided by the UN Human Rights Committee). And even when adjudicating individual cases, they might seek to tackle more systemic problems in their member States (see, for instance, Ulfstein, Geir, The European Court of Human Rights as a Constitutional Court?, *PluriCourts Research Paper* No. 14-08, 2014).

main principles that all legal acts on the state emergency and all emergency measures must respect. It has clarified the content of these principles and has elaborated on some of their aspects in details, providing, through country-specific opinions, concrete examples of the presence or, on the contrary, absence of such respect. It has shown that the relevant legal principles are not imposed on States from above but make part of national constitutional traditions of virtually all countries. And it has demonstrated that when assessing emergency measures adopted in a particular State, it is important to pay attention both to the 'law in books' and 'law in action'. The current pandemics of COVID-19, in response to which the state of emergency has been declared in numerous countries all over the world, will soon provide, and to some extent has already provided, the Venice Commission with another opportunity to re-engage with this topic and use its expertise in the context of new security threats of the 2020s.

Gianni Buquicchio[1]

(Plus de) 30 ans avec et pour la Commission de Venise

Cette année nous célébrons le 30ème anniversaire de la Commission Européenne pour la Démocratie par le Droit, établie le 10 mai 1990 par la Résolution n° (90)6 du Comité des Ministres du Conseil de l'Europe, relative à l'Accord Partiel portant création de la Commission européenne pour la Démocratie par le Droit.

En réalité la Commission est plus ancienne. Voici son histoire.

En 1987, pendant la Perestroïka, mais bien avant l'écroulement du mur de Berlin, Antonio la Pergola, éminent juriste italien, songeait à la création d'un forum international de constitutionnalistes pour le développement de la démocratie et de l'Etat de droit. En 1988, alors qu'il était ministre des Politiques Communautaires, il rencontra Marcelino Oreja, à l'époque Secrétaire Général du Conseil de l'Europe, en visite officielle en Italie. Il lui parla de son idée et - européen de cœur et d'esprit - exprima le souhait de la voir réalisée sous l'égide du Conseil de l'Europe.

Quelques semaines plus tard (20 avril 1988), la Délégation italienne au Conseil de l'Europe présenta un mémorandum pour examen lors de la 82ème session du Comité des Ministres (5 mai 1988). Dans ce document, intitulé « le Conseil de l'Europe et le droit constitutionnel » était préconisée la création au sein du Conseil de l'Europe d'un « comité européen pour la promotion de la démocratie par le droit ». Ce Comité se concentrerait « sur des études et des recherches, mais la possibilité de soumettre des propositions pratiques ne devrait pas être exclue ». Il était noté également que si le Conseil de l'Europe était le cadre le plus approprié pour une telle initiative, des États non-membres intéressés, « en particulier des pays d'Amérique du Nord, Amérique Latine et Europe de l'Est, pourraient être impliqués sur des bases flexibles et pragmatiques ». Le mémorandum suggérait en outre que le Comité devrait avoir la forme d'un organisme intergouvernemental de haut niveau qui pourrait se réunir dans les capitales ou autres villes des États membres qui auraient adhéré à l'initiative. Il marquait enfin sa préférence pour une activité à laquelle tous les États membres se seraient associés, mais, à défaut, d'autres arrangements pouvaient être envisagés, tels que, par exemple, un Accord partiel.

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[1] Président de la Commission de Venise. Membre de la Commission au titre de l'Italie.

La réaction du Comité des Ministres à cette proposition fut très mitigée et aucune décision ne fut prise. Au cours de la 83ème session du Comité des Ministres (16 novembre 1988), La Pergola annonça que le Gouvernement italien avait l'intention de convoquer une Conférence ministérielle à Venise. En réalité le premier choix de La Pergola fut Florence, mais puisque la Conférence aurait été organisée conjointement avec le Ministère des Affaires Étrangères, son ministre, Gianni de Michelis, vénitien, opta pour Venise!

À cette conférence, qui s'était tenue le 31 mars et le 1er avril 1989 à la Fondation Cini, avaient participé environ 200 personnalités parmi lesquelles des ministres des Affaires Étrangères et de la Justice, des Présidents de Cours suprêmes ou constitutionnelles des États membres, ou leurs représentants, ainsi que des observateurs du Saint-Siège, de la Hongrie et de la Yougoslavie. Étaient également représentés le Comité des Ministres et l'Assemblée Parlementaire du Conseil de l'Europe, ainsi que la Cour et la Commission européennes des Droits de l'Homme et la Cour de Justice des Communautés européennes.

Les discussions s'étaient fondées sur un Rapport présenté par La Pergola dans lequel était préconisée la création d'une Commission appelée à stimuler des recherches qui puissent fournir un soutien à l'activité de coopération juridique du Conseil de l'Europe et promouvoir des études, des réflexions et des projets, en particulier sur la technique juridique et institutionnelle qui permet d'organiser les États sur des bases démocratiques. La Commission pourrait être également requise de préparer des rapports et de proposer des schémas de solutions technico-législatives sur des sujets ou des problèmes d'intérêt commun.

À l'issue de ses travaux, la Conférence avait adopté une Déclaration finale (Section II, Annexe 3) contenant une proposition de Statut[2] et invité le Comité des Ministres à examiner la proposition visant à la constitution d'une Commission pour la démocratie par le Droit, à l'occasion de sa réunion solennelle du 5 mai 1989 (40ème anniversaire du Conseil de l'Europe). Lors des débats, les participants avaient estimé très souhaitable que des liens étroits se créent entre la Commission pour la Démocratie par le Droit et le Conseil de l'Europe.

Cependant, conscientes de la réticence de plusieurs États membres à se joindre à l'initiative, les autorités italiennes avaient proposé que les liens préconisés prennent la forme des « auspices du Conseil de l'Europe ».

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[2] La proposition de Statut prévoyait, entre autres, que « les membres de la Commission sont choisis par le Comité des Ministres sur proposition de l'Assemblée, et restent en fonction pour une durée de cinq ans ».

Le 11 mai 1989 un certain nombre de membres de l'Assemblée Parlementaire adoptèrent une déclaration écrite (n°187) dans laquelle ils demandèrent au Comité des Ministres d'inviter tous les États membres à participer aux travaux de la Commission pour la Démocratie par le Droit et de résoudre dans les plus brefs délais les problèmes liés à la Commission pour qu'elle devienne rapidement opérationnelle.

Dans une lettre adressée aux États membres le 26 mai 1989, le Secrétaire Général du Conseil de l'Europe leur demanda d'indiquer avant la fin de l'été leur intention de participer aux activités de la Commission. En septembre 1989, outre l'Italie, l'Autriche, la Belgique, Chypre, le Danemark, l'Espagne, la France, le Luxembourg, Malte, le Portugal et la Suisse donnèrent leur accord. L'Irlande et la Norvège se réservèrent la possibilité de prendre une décision à une date ultérieure. L'Allemagne, la Finlande, la Grèce et la Suède s'interrogèrent sur le financement de la Commission et les modalités d'organisation de ses travaux. Le Royaume-Uni indiqua qu'il n'y participerait pas.

Dans le même temps, les autorités italiennes proposèrent d'organiser à Venise, dans les meilleurs délais, une réunion à laquelle seraient invités les États ayant confirmé leur adhésion à l'initiative ainsi que tous les autres États intéressés, pour discuter de la procédure de nomination des membres, de l'organisation, du financement et du programme de travail.

Le 9 novembre 1989 le mur de Berlin tomba, les hésitations et les réticences de certains États s'atténuèrent; le processus s'accéléra.

La Conférence fut convoquée pour les 19-20 janvier 1990 à Venise dans la Scuola Grande de San Giovanni Evangelista. Les autorités italiennes offrirent l'hospitalité à trois personnes par délégation nationale et suggérèrent qu'elles comprennent un représentant du Gouvernement, un expert en droit constitutionnel et une personnalité susceptible d'être nommée membre de la Commission et de prendre immédiatement ses fonctions. La Communauté européenne fut invitée. Furent aussi invités à titre d'observateur des délégations de Hongrie, Pologne, Yougoslavie et Saint-Siège. Parmi les nombreux participants figuraient plusieurs ministres des Affaires Étrangères et de la Justice, ainsi que des représentants de Bulgarie, Tchécoslovaquie, République démocratique allemande, Hongrie, Pologne, Roumanie, Union soviétique et Yougoslavie.

À l'issue de ses travaux, la Conférence adopta une Résolution portant création de la « Commission pour la Démocratie par le Droit »[3] et contenant la liste des personnalités nommées comme membres (Section II, Annexe 4). La Conférence pria la Commission d'élaborer son statut et invita les organes compétents du Conseil de l'Europe à étudier, en consultation avec la Commission, des propositions visant à préciser et développer les liens institutionnels entre celles-ci et le Conseil de l'Europe.

La Commission ainsi créée se réunit immédiatement après la Conférence pour entamer ses travaux. Deux autres réunions furent organisées en février et mars 1990 dans le Palazzo Canossa (un petit palais sur le Canal Grande), mis à sa disposition par le Gouvernement régional en attendant une solution définitive.

Lors de sa troisième réunion (Venise, 16-17 mars 1990), la Commission proposa certaines modifications à son projet de statut : qu'elle serait un « Accord Partiel du Conseil de l'Europe » et l'ajout de l'adjectif « européenne » à son nom.[4]

En vue de la réunion du Comité des Ministres du 10 mai 1990 qui devait entériner le Statut de la Commission et décider de ses liens institutionnels avec le Conseil de l'Europe, plusieurs réunions d'un groupe de rédaction des Délégués des Ministres eurent lieu pour discuter des questions encore ouvertes- la principale étant de savoir si la Commission devrait être intégrée dans le programme d'activités du Conseil de l'Europe comme d'autres comités intergouvernementaux - proposition de l'Allemagne -, ou constituée comme Accord Partiel - proposition de la Commission elle-même. Le budget de la Commission pour l'année en cours fit aussi l'objet de discussions et fut finalement fixé à FF 288.000 (environs €48.000).

D'autres critiques furent formulées à l'égard des compétences de la Commission que d'aucuns jugeaient trop nombreuses, l'empêchant de fonctionner dans la pratique. Un Gouvernement pointa la qualité des membres, trop hétéroclite, pouvant entraver son fonctionnement optimal, son degré d'indépendance excessif; il suggéra que, pour tous les sujets à étudier (référence est faite aux études déjà entamées sur le fonctionnement des cours constitutionnelles et sur les minorités- thème considéré comme

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[3] L'omission de l'adjectif « européenne » fut volontaire. En effet, La Pergola ne pensait pas seulement aux États de l'Europe de l'Ouest et de l'Est, mais aussi à ceux de l'Amérique du Nord et notamment de l'Amérique latine avec lesquels il entretenait des relations étroites.

[4] En raison de la longueur de sa dénomination, la Commission fut appelée au tout début de sa création « Commission la Pergola ». La dénomination « Commission de Venise » s'imposa spontanément en 1991.

politiquement sensible), un lien plus formel avec le Conseil de l'Europe serait souhaitable. Par conséquent, il proposa d'amender le projet de statut en stipulant que toutes les demandes adressées à la Commission devraient être approuvées par le Comité des Ministres.

Finalement, le 19 avril 1990, un compromis est trouvé au sein du Groupe de rédaction des Délégués des Ministres qui propose au Comité des Ministres de constituer la Commission en tant qu'Accord partiel, mais avec la condition de « réexaminer avant 31 décembre 1992 les liens institutionnels entre la Commission et le Conseil de l'Europe à la lumière de l'expérience acquise, notamment en vue de les resserrer davantage, le cas échéant, par l'incorporation des activités de la Commission dans le programme d'activités intergouvernementales du Conseil de l'Europe »[5]

La conception et la création de la Commission fut une tâche ardue ! Sa réussite, nous la devons à l'opiniâtreté d'Antonio la Pergola et à l'appui du Gouvernement italien et de quelques autres États membres du Conseil de l'Europe, mais aussi à l'évènement historique que fut la chute du mur de Berlin, entrainant avec lui l'effondrement du bloc communiste et la fin – par un incroyable effet de dominos- des régimes qui incarnaient cette idéologie.

Il faut aussi rappeler l'enthousiasme et le désir sincères des États qui venaient de se libérer du joug de la dictature, de partager les idéaux et valeurs démocratiques. Le vibrant appel à l'aide lancé lors de la Conférence d'avril 1989, par un Membre de la délégation hongroise, Tamás Ban, qui reçut une *« standing ovation »*, est encore vif dans ma mémoire.

Ensuite le succès de la Commission nous le devons aux compétences, à l'engagement, au dévouement et à l'esprit de corps de ses membres et de son Secrétariat - qualités qu'il faut à tout prix préserver dans le futur.

Ce futur qui aujourd'hui nous inquiète.

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[5] À la suite de ce réexamen le Comité des Ministres confirme le statut d'Accord Partiel de la Commission. En 2002 le Comité des Ministres décide de transformer l'Accord Partiel en Accord Élargi permettant à des États non-membres du CoE de se joindre à la Commission. A cette occasion d'autres amendements au Statut de la Commission sont adoptés.

L'Europe et le monde traversent des temps difficiles, marqués par une inédite crise sanitaire, économique, financière, sociale et politique.

Des développements complexes et, pour certains, préoccupants sont constatés sur les différents plans – social, économique, financier, culturel, technologique, politique/géopolitique, ainsi que de la participation politique, avec à la fois des nouvelles formes de participation, mais aussi de désaffection vis-à-vis des partis politiques allant jusqu'au rejet du politique dans son ensemble et une montée des tendances nationalistes et xénophobes.

Ce n'est pas la première crise, ni probablement la dernière que nous traversons depuis la Seconde Guerre Mondiale. La défense non seulement des droits de l'homme, mais également de l'Etat de droit et de la démocratie est un processus incessant, une mission à durée indéterminée.

Les droits de l'homme, la démocratie, l'Etat de droit ne sont jamais pleinement acquis, et cela pour plusieurs raisons : tout d'abord, parce qu'ils évoluent sans cesse.

De nouvelles questions se posent, qui appellent à un débat public complexe, inspiré par la tradition, la culture et les valeurs et obligations constitutionnelles et conventionnelles pertinentes.

Des questions essentielles, pour lesquelles l'aiguillage fourni par les standards internationaux et par le patrimoine constitutionnel commun se révèle précieux.

Aujourd'hui, la pandémie, les dérives extrémistes et les attaques terroristes ont exacerbé les problèmes sécuritaires, en posant le problème épineux de l'introduction éventuelle de limitations plus importantes de l'exercice des droits de l'homme, dans le cadre de la marge d'appréciation des États ou même dans le cadre de l'état d'urgence.

De plus, et c'est très important, il ne faut pas oublier que la démocratie, l'Etat de droit et les droits de l'homme ne sont jamais acquis de manière irréversible. Aucun Etat n'est à l'abri de reculs démocratiques, de montées démagogiques, d'abus de majorité selon le triste adage « le gagnant remporte tout ».

Malheureusement, nous constatons aujourd'hui des tendances vers des « démocraties autoritaires » (*illiberal democracies*), des incursions dans la liberté des media, des attaques envers les journalistes, les ONG, le pouvoir judiciaire…

Le risque d'une dégradation du niveau de protection des droits de l'homme est, par conséquent, réel et constamment présent. Le rôle de la communauté internationale - et encore plus du Conseil de l'Europe et de la Commission de Venise qui expriment les valeurs communes de cette

communauté indépendamment des intérêts géopolitiques du moment – est primordial et irremplaçable. C'est un rôle de conseil mais aussi de gardien. C'est aussi une responsabilité.

La volonté politique de certains Etats membres de soutenir le Conseil de l'Europe et la Commission de Venise semble vaciller face au risque que leurs intérêts particuliers ne soient compromis, et l'opinion publique, sur des questions difficiles telles que la lutte contre le terrorisme, la lutte contre l'extrémisme ou encore l'accueil et l'intégration des migrants, ne penche pas toujours du côté de la défense des valeurs et idéaux européens.

Face aux échecs et aux problèmes que rencontrent nos idéaux dans le monde d'aujourd'hui, il me semble essentiel que nous ajustions et adaptions notre stratégie et notre arsenal.

La Commission de Venise existe depuis plus de 30 ans. J'ai contribué à sa création ou, mieux, à sa conception.

À plusieurs reprises, dans l'histoire de la Commission, je me suis posé la question de l'avenir qu'elle pouvait avoir, quand elle semblait avoir atteint ses objectifs d'origine, notamment lorsque les « nouvelles démocraties » se seraient enfin dotées de constitutions démocratiques, inspirées par les standards internationaux.

Nous avons réussi à trouver des solutions, mais des nouveaux défis ont surgi et nous avons dû développer des nouvelles stratégies pour les affronter. Nul ne doute aujourd'hui que la Commission ait gardé toute son utilité. La Commission de Venise a donc réussi, jusqu'à présent, à s'adapter aux changements.

Grâce à ses méthodes de travail et à ses bonnes pratiques, la Commission est en mesure de **réagir très rapidement aux demandes d'avis et d'assistance urgentes et prioritaires.**

Nous avons parfois rendu des avis urgents en quelques jours seulement, lorsque la situation dans l'État concerné nous imposait d'intervenir dans de tels délais. Une procédure d'urgence a été créée. Les ressources financières et humaines du Secrétariat peuvent être très rapidement adaptées et redirigées. Les activités moins urgentes peuvent être reportées, les moins importantes peuvent être annulées. Les démarches administratives et bureaucratiques sont réduites au minimum.

La Commission a **abordé les questions qui lui ont été soumises sans tabous**. Elle a développé depuis sa création une riche doctrine, qui est le résultat de l'identification des standards, de leur développement, de l'analyse comparée de l'expérience des pays membres. La Commission a maintenu sa cohérence par rapport à cette doctrine.

Cependant, elle n'a pas hésité à poursuivre et à rouvrir ses réflexions lorsque les circonstances l'imposaient. Par exemple, tout en étant extrêmement attachée à l'indépendance du système judiciaire et à l'inamovibilité des juges, au fil des années la Commission a reconnu la nécessité d'une approche pragmatique et a accepté des procédures de filtrage *(« vetting »)* des juges quand le système judiciaire est atteint d'un niveau grave et généralisé de corruption. En même temps, la Commission a exigé que ces procédures soient assorties de fortes garanties procédurales. Une attitude d'ouverture aux préoccupations des États permet de renforcer les liens de confiance.

La Commission de Venise a reconnu que, si les standards sont généraux et identiques pour tous, les exigences relatives à la manière de les atteindre peuvent ne pas être les mêmes dans les démocraties plus récentes par rapport aux plus anciennes.

L'absence d'une culture juridique et politique mûre et démocratique, par exemple, appelle à imposer des garanties structurelles additionnelles.

Les obligations qui découlent des standards internationaux sont des obligations de résultat, et pas de moyens. Si de telles garanties structurelles sont nécessaires dans un État donné, l'insistance sur leur mise en place ne peut être considérée comme un « double standard ».

La Commission a néanmoins recommandé aussi à des « anciennes démocraties » de remettre en question des situations juridiques acquises et à réfléchir à des réformes, par exemple en instituant un Conseil supérieur de la Magistrature dans des États où une telle instance n'existe pas. Cette position claire a permis à la Commission de contrer la critique récurrente de « doubles standards ».

Dans ses avis juridiques, la Commission distingue désormais **les recommandations qui lui semblent essentielles des recommandations moins importantes, de détail**. Les recommandations essentielles sont celles qui découlent des standards démocratiques ou du « hard law », ou qui, de l'avis de la Commission, affectent la viabilité des réformes en question.

Cette distinction permet éventuellement de parvenir à la conclusion, lorsqu'il n'y a que des recommandations secondaires, que le texte juridique examiné est globalement conforme aux standards, même s'il reste beaucoup de détails à régler.

Il s'agit d'une conclusion juste, qui n'existerait pas en présence d'une multitude de recommandations toutes sur le même niveau. De plus, l'identification claire de recommandations-clé permet de concentrer les efforts, d'insister sur la mise en œuvre de celles-ci et d'évaluer plus aisément les suites données aux avis.

La Commission de Venise a établi **une pratique d'intervention publique systématique en défense des cours constitutionnelles et, plus récemment, des tribunaux ordinaires.** Cela est fait à travers des séminaires, des lettres, ou des déclarations publiques rendues par la Commission ou son Président, lorsque dans un État membre ces cours sont soumises à des attaques, à des pressions, à des réductions arbitraires de budget, au refus d'exécuter leurs arrêts, à toute autre perturbation délibérée de leur fonctionnement.

Depuis 1998, nous sommes intervenus par rapport à la situation en Albanie, en Bosnie-Herzégovine, en Croatie, en Géorgie, en Hongrie, au Kirghizistan, en République de Moldova, en Pologne, en Roumanie, Ukraine, en Turquie…

La Commission estime en effet que les cours constitutionnelles et les tribunaux ordinaires jouent un rôle tellement essentiel dans une démocratie, qu'il est impératif de réagir immédiatement et publiquement par une déclaration pour protéger leur fonctionnement. On peut parler quasiment d'un automatisme d'intervention : ce qui a l'avantage de protéger la Commission contre des pressions politiques qui pourraient viser à justifier la situation et à empêcher une telle déclaration.

La Commission de Venise a établi **des pratiques de coopération systématique avec d'autres organisations internationales,** notamment l'OSCE/BIDDH. Tous les avis en matière électorale et ceux portant sur les thèmes pour qui la Commission de Venise et l'OSCE/BIDDH ont préparé des lignes directrices conjointes (liberté d'association, liberté de religion, liberté de réunion, partis politiques) sont préparés conjointement.

Cette systématisation présente plusieurs avantages : tout d'abord, elle renforce la cohérence des positions internationales sur l'interprétation des standards. Le message est également, forcément, plus fort quand il est commun. De surcroît, travailler avec une autre organisation porte à rationaliser et à améliorer ses méthodes de travail, à s'ouvrir à d'autres perspectives et à approfondir et développer ses arguments. La coopération avec d'autres organisations internationales éveille des synergies ; elle n'affaiblit pas, mais renforce la réputation de la Commission de Venise.

La question de savoir si la Commission de Venise est un organe de « monitoring » est posée de manière récurrente. Elle n'en est pas un, dans le sens où elle n'a pas mandat de surveiller de manière systématique la mise en œuvre d'un traité spécifique ou d'autres obligations. Ses avis juridiques fournissent néanmoins aux Etats et aux organes du Conseil de l'Europe,

ainsi qu'à l'Union européenne, des éléments utiles afin d'évaluer le respect des droits de l'homme, de la démocratie et l'Etat de droit dans ses Etats membres. Dans ce sens, elle contribue donc au « monitoring » (suivi) des valeurs du Conseil de l'Europe.

Enfin, l'action de la Commission de Venise a souvent été empreinte de **clairvoyance.**

Dès sa création, elle a décidé d'aborder la question de la protection des minorités nationales. Dès 1992, elle a étudié les questions liées à l'état d'urgence et, en 1995, elle a publié un rapport sur ce sujet qui s'est révélé utile lorsqu'elle s'est penchée sur l'état d'urgence dans le contexte de l'actuelle pandémie.

La clairvoyance est une indéniable clé de succès et de survie. Le cardinal de Richelieu disait que

> « *Rien n'est plus nécessaire au gouvernement d'un État que la prévoyance, puisque par son moyen, on peut aisément prévenir beaucoup de maux, qui ne se peuvent guérir qu'avec de grandes difficultés quand ils sont arrivés* ».

C'est seulement en devançant les défis qui l'attendent, que la Commission de Venise a une chance de les surmonter avec succès. Encore faut-il qu'elle continue de faire usage de l'agilité et de la flexibilité nécessaires pour réagir et agir sans délai.

Peter Bussjäger[1]

Opinion 227/2002 on the Amendments to the Constitution of Liechtenstein proposed by the Princely House and its follow-up in Liechtenstein

Introduction

In a referendum on 14 and 16 March 2003, the people of the Principality of Liechtenstein approved a revision of the Constitution of 1921, which never had found the consent of the Parliament of the small country, the *Landtag*, with large majority. The referendum was held because the instrument of the People´s initiative on ground of Article 64 para. 4 of the Constitution (LV) was launched, after which an initiative concerning a modification of the Constitution supported by 1.500 Liechtenstein citizens eligible to vote has to be brought before the *Landtag*. If the *Landtag* does not give its consent to an initiative, a referendum has to take place.

In the particular case it was remarkable that the initiative was not only supported by the necessary number of citizens but also by the Reigning Prince *Hans Adam II.* and the Successor of the Throne, Hereditary Prince *Aloi*s, who were actually its proponents.

This referendum solved a long and exhausting *"Verfassungsstreit"* ("constitutional dispute") a general revision of Liechtenstein´s Constitution.[2] The dispute had led the small country to the edge of a considerable state crisis. In the end, the Princely proposals were subject of the revision and the result of the referendum was doubtless his personal victory.

In the following, I will describe the background of the amendment of the Constitution of Liechtenstein in 2003 (1), leading to Opinion no. 227 of the Venice Commission (2) and its follow-up in the "constitutional dispute" in Liechtenstein (3).

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[1] Member of the Venice Commission in respect of Liechtenstein

[2] See for example *Pallinger*, Liechtenstein, in: Riescher/Thumfart (eds.), Monarchien (2008), p. 149.

1. The history of the amendment of the Constitution of Liechtenstein LGBl. 2003/186

The Constitution of the Principality of Liechtenstein and its dualism

According to Article 2 of the Constitution of Liechtenstein (LV), the Principality of Liechtenstein is a constitutional hereditary monarchy on a democratic and parliamentary basis, meaning there is a balance of power between the people and the Prince. Parliament is the legal body representing the entire people and, as such, has the duty of safeguarding and vindicating the rights and interests of the people.

The people exercise their rights through elections and popular votings, and hold the right of initiative and referendum both on the legislative and constitutional level (see nearer Article 64 and 66 LV) in their power.[3] Even if the *Landtag* is legislator according to Article 65 of the Constitution, its decisions may be overruled by the voting of the people in a referendum on ground of the beforementioned constitutional provisions.

Due to Liechtenstein's dualist structure, the Prince must also sanction every law, and if he refuses to do so within 6 months, the law is considered refused (Articles 9 and 65 para. 1 LV). The far-reaching powers of the Prince have stirred up discussions about the qualification of Liechtenstein as a parliamentary monarchy.[4]

Discussion on a general revision of the Constitution

In November 1989, Prince *Hans Adam II.* took over the Throne from his father, Prince *Franz Josef II.*, who passed away in these days. Yet in 1984, *Hans Adam* was assigned with the exercise of the sovereign powers held as a representative according to Article 13bis LV by his father.

In 1992, discussions between the *Landtag* on the one side and the Prince on the other side about the appropriate procedures in the context of the envisaged accession of Liechtenstein to the Agreement on the European Economic Area (EEA-Treaty) culminated in a state crisis.[5] Against theh background of this situation, the Prince proposed various amendments to the Constitution of 1921 in his so-called "*Thronrede*" (throne speech), which

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[3] A version of the Constitution in English is available under https://www.llv.li/files/rdr/Verfassung-E-01-02-2014.pdf.

[4] *Bußjäger/Johler,* Monarchical Constitutions, in: Max Planck Encyclopedia of Comparative Constitutional Law (last update of Article December 2017), p. 24.

[5] See for example nearer *Merki* (ed.), Liechtensteins Verfassung 1992 – 2003. Ein Quellen und Lesebuch (2015), p. 56.

traditionally opens the session of the *Landtag* each year, on 12 May 1993, proclaiming additional powers to him.[6]

Proposals and the initiative of the Princely House

On 2 August 2002, Prince *Hans Adam II.* and the successor of the throne, *Alois*, proposed an initiative including some major changes to the Constitution of the Principality (see nearer under 3.), which can be considered rather problematic under various aspects: The envisaged modifications of the Constitution should strengthen the role of the Prince in the political system of Liechtenstein. It was clear, that this would not constitute a parliamentary monarchy along the model in Western Europe as in UK, Spain, Belgium, Netherlands, Luxemburg, Denmark, Norway and Sweden, but a monarchy constructed in the model of the "constitutional monarchies" of the 19th century.

Another critical aspect was that these two members of the Princely House used the instrument of the people´s initiative to realize their concept after it became more or less clear, that it would not be possible for any bill to reach the necessary majority of 75 percent in favour of changing the constitution in the *Landtag* (Article 113 LV).

Against the background of the constitution that declares in its Article 2 that the power of the State is embodied in the Reigning Prince and the People and shall be exercised by both of them under the conditions set forth in the provisions of this Constitution, it was stunning that the Prince considered himself as part of the People. Therefore, the dualism of People and Prince, which shapes the Constitution of the Principality according to Article 2 LV, seemed to be abolished.

Finally, it was problematic that the Princely initiative was rather different compared to the proposals of the constitutional commission of the *Landtag*. This circumstance provoked a conflict between Parliament and the Prince.

Involvement of the Venice Commission

In a submission from September 2002, a group of Liechtenstein citizens, who opposed the initiative of the Princely House, addressed the President of the Parliamentary Assembly of the Council of Europe and its Secretary General.

At its meeting on 6 November 2002, the Bureau of the Parliamentary Assembly agreed to ask the Venice Commission to provide an opinion on the

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[6] See *Merki,* Fn 5, p. 61.

conformity of the proposed revision of the Constitution of Liechtenstein with the fundamental principles of the Council of Europe. However, there were two proposals for a revision of the Constitution of Liechtenstein: one from the Princely House and the other made by a "Citizens' Initiative for Constitutional Peace".

2. Opinion No. 227 and the "Constitutional Dispute" in Liechtenstein

Opinion No. 227, elaborated by the rapporteurs of the Commission, Professor *Pieter van Dijk* (Netherlands), Professor *Henrik Zahle* (Denmark) and Professor *Jean-Claude Scholsem* (Belgium), was adopted by the Commission at its 53rd Plenary Session in Venice on 12 December 2002. Both the opinion and the individual comments focused on the initiative from the Princely House since the proposal made by the Citizens' initiative did not raise any problems as to its compatibility with Council of Europe standards.

The main criticisms of the Venice Commission were:

Dismissal of the Government and of Members of the Government (Article 80 LV)

According to Article 80 LV, the Government loses the power to exercise its functions if it loses the confidence of the Prince, even if it still enjoys the confidence of the *Landtag*. Until a new Government takes office, the Reigning Prince shall appoint a transitional Government. The transitional Government shall submit to a vote of confidence in Parliament within four months, unless the Reigning Prince appoints a new Government beforehand by mutual agreement with and on the recommendation of Parliament (Article 79 para. 2 LV). Article 80 para. 2 LV provides that if an individual Minister should lose the confidence of the Reigning Prince or of Parliament, the decision on the loss of the authority of the Minister to exercise his functions shall be taken by mutual agreement between the Reigning Prince and Parliament. The Minister's alternate performs the official duties of the Minister until a new one is appointed.

The Venice Commission saw this proposal *"in flat contradiction with the principle of representation and the requirement of countersignature. Under this requirement the Prince Regnant is not supposed to pursue his own personal policy but his acts have to be confirmed at any moment by a minister directly responsible before a parliamentary assembly."*

The Venice Commission considered this amendment as a step back towards a rather anachronistic constitutional situation as it existed before (!) the establishment of constitutional monarchies in Europe. The Venice Commission took the example of the Constitution of Belgium, which provides in Article 96 that the King appoints and dismisses the ministers. This rule however should be read together with the requirement of countersignature and all such acts have to be countersigned by the (outgoing) Prime Minister. While the King had some personal influence on the composition of the government in the 19th and early 20th century, this influence has waned. A ministerial candidate has to be immediately approved by a majority in parliament. The role of the King is limited to the role of a facilitator; he does not exercise any personal preference, but looks for the proposal, which will most likely receive the acceptance of Parliament.

Similar considerations would apply to the proposal concerning individual ministers in the second paragraph of Article 80. The proposal would violate the principle of governmental solidarity. The head of government should take responsibility for the dismissal of a minister before Parliament.

Opinion No. 227, however, did not take notice that on the basis of the legal situation then in force, the dismissal of the Government depended on consensual action of the Diet and the Prince.

Sanctioning of Laws

The new Article 65 para. 1 LV provided that a law shall be deemed to have been refused, if the Reigning Prince does not grant his sanction within six months.

The Venice Commission pointed out that the simple fact that the Prince Regnant has not given his assent to a law adopted by the Diet within six months, would be equivalent to a veto. Inaction alone, which by its nature is not subject to countersignature, would be sufficient for a legislative veto.

Opinion No. 227 stated that in other monarchies in Council of Europe member States, the monarch cannot refuse to sanction a law on a personal basis.

It also criticized that the proposal by the Princely House did not only concern ordinary laws, but Article 112 requires the assent of the Prince for constitutional amendments, with the exception of the procedure to abolish the monarchy: "This would mean that a single person could exercise a veto at the highest level of the hierarchy of norms without any direct or indirect responsibility vis-à-vis the representatives of the people. This is in flagrant contradiction with the sovereignty of the people and democracy."

It was remarkable that Opinion No. 227 did not mention that the necessity of the Princly sanction was already provided in the current Constitution (Article 9 LV). Therefore the amendment in Article 65 para. 1 LV transferred no additional power to the Prince.

The Immunity of the Prince Regnant

According to the proposal from the Princely House, the traditional wording of Article 7 LV, that the person of the Prince Regnant is sacred and inviolable, should be replaced by "The Prince Regnant is not subject to the jurisdiction of the courts and does not have legal responsibility". The Venice Commission stated: *"When this wording– and indeed by what is does not say rather than by what it says – is read in connection with other amendments giving the Prince Regnant substantive constitutional powers, it raises serious concerns as to its compatibility with the Rule of Law.*

In constitutional monarchies, the immunity of the Prince is linked to ministerial countersignature. The Belgian Constitution provides in Article 88 'The King's person is inviolable; his ministers are responsible'. The Constitution of the Netherlands contains a similar provision in the second paragraph of Article 42. This wording ensures that at any moment a public authority can be identified that is responsible for the acts of the King. No such formula is contained in the proposed amendments to the Constitution of Liechtenstein. Without such a formula, immunity cannot however be justified in democratic terms and under the Rule of Law. This is of particular concern in view of the administrative and political powers of the Prince and may lead to violations of the obligations of Liechtenstein under Article 13 of the European Convention for Human Rights."

Abolishment of the interpreting role of the State Court

The Venice Commission also criticized the abolishment of the present Article 112, enabling the State Court to interpret the Constitution in case of doubts which cannot be resolved by agreement between the Government and the Diet. *"In a system where public power is exercised by very different actors with different legitimacy, the interpretative role of the constitutional court to resolve disputes between these actors would seem particularly significant. To abolish this possibility would amount to a reduction of the guarantees of the Rule of Law in favour of political compromises and, ultimately, in favour of the powers of the Prince Regnant which are not democratically controlled."*

No Parliamentary Control of the Prince Regnant

According to the foreseen amendment of Article 63, the right of control of the Diet does not extend to the functions assigned to the Prince Regnant. In the view of the Venice Commission, this meant that important decisions taken in the exercise of public power would not be subject to any democratic control since the Constitution does not ensure ministerial responsibility for the acts of the Prince Regnant.

In this regard it could also be discussed, if the modification, which from the point of view of the Prince was considered as a "clarification" did actually change the legal situation.

Appointment of Judges

The Venice Commission criticized the involvement of the Prince in the nomination procedure of judges according to the new Article 96 of the Constitution.

Article 96 has the impact that no candidate can be recommended to the Diet for election without the consent of the Prince Regnant. *"His far reaching involvement in the election procedure could amount to undue influence and could give rise to doubt about the objective independence and impartiality of the elected judge. The fact that the Prince Regnant himself is not subject to the jurisdiction of the courts does not change this; his prestige, authority and factual influence may give reason to believe that a certain pressure may radiate from his involvement. Therefore, the proposed Article 96 would not sufficiently ensure respect for the guarantees laid down in Article 6 of the European Convention on Human Rights and could therefore create problems with respect to Liechtenstein's obligation under Article 1 of that Convention."*

The Commission also pointed out that the term of office of five years for members of the administrative court, as proposed in Article 102 para. 2, would be a rather short one. In order to guarantee independence in the best way possible, judges should be appointed for a lifetime. It is true that so far the Strasbourg Court has not found comparable provisions concerning terms of office to be in violation of Article 6. However, the more political influence there is on the re-election procedure, the more likely a short term of office may throw a shadow on the independent position of the judge concerned.

Emergency Decrees (Article 10)

The Venice Commission criticized that the proposed Article 10 LV did not clearly define the conditions for an emergency situation compared to the current legal situation.

The Law on the Princely House

According to the revised Article 3 LV, the Princely House itself may, without the involvement of the Diet, regulate certain issues such as the succession to the throne by law. Amendments to the Constitution could not amend this law. The Venice Commission qualified this proposed rule as "astonishing" and considered that the succession to the throne as an essential element in any constitutional monarchy would have to be regulated by the Constitution.

Popular Initiative for a motion of no confidence against the Prince Regnant (Article 13ter)

According to Article 13ter LV at least 1.500 citizens can launch a motion of no confidence against the Prince Regnant. In the view of the Venice Commission, *"this proposal contradicts the logic of a constitutional monarchy which is characterized by stability and the sacrosanct position of the monarch due to his inability to act alone. If such a motion can be envisaged in the proposal from the Princely House, this is precisely because the Prince Regnant exercises powers on a personal basis. The proposal is however insufficient to provide a democratic legitimacy for the Prince. The initiative cannot be taken anonymously and is therefore not equivalent to democratic free elections. Moreover, the referendum taking place following the initiative would not be binding but the final decision would be taken by the members of the Princely House in accordance with the Law on the Princely House."*

Initiative to abolish the Monarchy (Article 113)

Article 113 LV introduced an initiative to abolish the monarchy followed by a referendum. From the Venice Commission's point of view, *"the mere possibility of such a referendum would not change the fact that before the possible success of such a referendum the constitutional system would be a monarchy characterized by excessive personal powers of the Prince Regnant. It would only provide a final remedy for an extreme situation but not an effective counterweight to the lack of balance in the distribution of powers"*

Conclusions

The Venice Commission considered that the present Constitution of Liechtenstein dating from 1921 gave the monarch a strong position, especially in comparison to Constitutions of other European monarchies, which are members of the Council of Europe. However, the experience of these monarchies would show that this is not necessarily an obstacle to the development of a constitutional monarchy fully respecting democratic

principles and the Rule of Law. Therefore, the Constitution was not considered an obstacle when Liechtenstein joined the Council of Europe in 1978.

By contrast, the present proposal from the Princely House would add some massive changes to the present Constitution. It would not only prevent the further development of constitutional practice in Liechtenstein towards a fully-fledged constitutional monarchy as in other European countries, but even constitute a serious step backwards. "*Its basic logic is not based on a monarch representing the state or nation and thereby being removed from political affiliations or controversies but on a monarch exercising personal discretionary power. This applies in particular to the powers exercised by the Prince Regnant in the legislative and executive field without any democratic control or judicial review.*" The Venice Commission warned that such a step backwards could lead to the isolation of Liechtenstein within the European community of states. Furthermore, it could also cause problems for Liechtenstein's membership in the Council of Europe.

3. Follow-up

Opinion No. 227 immediately became subject of media coverage in Liechtenstein after its publication.[7] While members of groups that had criticized the initiative welcomed the statement, the Government and the Princely House were not pleased with it. In its statement from 18 December 2002, the Government of the Principality pointed out that Opinion No. 227 did not pay attention to the present constitution and lacked a comparison between the proposed modifications and the constitution in force. This criticism was actually justified to a certain extent. The Government also stated that Opinion No. 227 did not take the expert opinions of the Austrian professors for Public Law *Günther Winkler* and *Franz Matscher* (the latter himself was Austrian member of the Venice Commission and abstained from participation in the endorsement of Opinion No. 227) into consideration.[8] The Princely House considered the report of the Venice Commission as an unlegitimate intervention of the Council of Europe.[9]

In an interview on 18 December 2002, *Franz Matscher* strongly criticized the result, procedure and assessment of Opinion No. 227. He accused the Venice Commission of not referring to the current constitution and

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[7] See nearer *Marcinkowski/Marxer*, Öffentlichkeit, öffentliche Meinung und direkte Demokratie. Eine Fallstudie zur Verfassungsreform in Liechtenstein (2010), p. 152.
[8] See nearer *Merki,* Fn 5, p. 650 ff.
[9] *Marcinkowski/Marxer*, Fn 7, p. 153.

therefore supporting the opponents of the monarchy. On the other side, *Giorgio Malinverni*, representative of Switzerland in the Venice Commission, defended Opinion No. 227 and called the initiative of the Princely House "anachronistic".

On 18 and 19 December 2002, the initiative of the Princely House as well as the initiative of "Constitutional Peace" were debated in the *Landtag*. Both initiatives did not reach the necessary majority according to Article 112 LV (unanimous decision in one session or a majority of ¾ in two session following each other). The *Landtag* decided that a referendum according to Article 66 para. 6 LV should take place.

On 30 December 2002, the Government of the Principality of Liechtenstein fixed the date of the referendum, which should take place on 14 and 16 March 2003. The initiative of the Princely House remained unchanged.

In the referendum the people of the Principality of Liechtenstein passed the law with a majority of 64,3 percent. The initiative of "Constitutional Peace" reached 16,6 percent, whilst 19,1 percent voted against both initiatives. The voter's turnout was 87,7 percent.

The constitutional amendments were finally published in Law gazette No. 186 on 15 September 2003. This marked the end of a long and exhausting constitutional dispute.

Since then, critics neither of the constitutional reform nor of Opinion No. 227 remained silent. The Austrian scholar *Günther Winkler* published several articles and books critical towards the Council of Europe as well as the Venice Commission.[10]

After holding a dialogue with the *Landtag* of the Principality of Liechtenstein, an ad-hoc committee of the Council of Europe stated in May 2006:

- *"There was a change in the balance of power between the Prince and the People (seen collectively as encompassing the government, parliament, media, and citizens) with the former having increased his powers;*
- *The trend of constitutional monarchies in member States of the Council of Europe was to reduce the political powers of the constitutional monarch and to increase the powers of the representatives elected by the people; the evolution in Liechtenstein due to the constitutional changes in 2003 was contrary to this trend;*

[10] *Winkler,* Die Verfassungsreform in Liechtenstein (2003); *Winkler*, Der Europarat und die Verfassungsautonomie seiner Mitgliedstaaten (2005); *Winkler*, Verfassungsgesetzgebung und Verfassungsinterpretation in Liechtenstein. öglichkeiten und Grenzen von Verfassungsänderungen (2015).

- *As only two years had elapsed since the constitutional changes had been enacted in Liechtenstein, it was too early to make a definitive judgment whether the trend described above contravened the fundamental norms of the Council of Europe."*[11]

4. Current situation

After about 17 years, it seems no longer too early to take stock of the constitutional revision. From a legal point of view, it can still be said that a change in the balance of power between the Prince and the People (with the former having increased his powers) took place. This does not change the fact that Hereditary Prince *Alois*, who now holds the reins of government, intends on reconciliation and the constitutional dispute has not flared up again.[12]

Fears that Liechtenstein would increasingly be governed by the Prince have not been confirmed:

The Prince never made use of his most contested power in the controversial dispute on the constitutional revision in 2003, the dismissal of the Government or members of the Government (Article 80 LV). Furthermore, he never refused to sanction a bill passed by the *Landtag*.[13] On the other hand, the Prince and the Hereditary Prince *Alois* have announced several time that they would refuse to sanction certain bills of the *Landtag* or initiatives of the people if they would be successful (for example on facilitating abortion).[14] However, there was not a single case in which the *Landtag* or the people in a referendum passed a bill in which a refusal of the Princely sanction was under discussion.

Concerning the appointment of judges, the concept of the selection of judges by a committee, which proposes candidates to the *Landtag* for election (Article 96 LV), has proved well and without any public disputes. In two cases, the *Landtag* denied the election of judges proposed by the selection committee, which had the consequence that based on Article 96 para. 2 LV the *Landtag* and the Prince to agree on other candidates.

The Prince also never made use of his competence to pass emergency decrees (Article 10 LV), not even in the present Corona-crisis. Other

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[11] *Merki*, Fn 5, p. 662.
[12] *Pallinger*, Fn 2, p. 151.
[13] See the cases of a refused sanction enlistet by *Bussjäger*, Article 9, in: Liechtenstein-Institut (ed.), Kommentar zur liechtensteinischen Verfassung. Online-Kommentar, 2016, No. 25, now available at: www.verfassung.li..
[14] See nearer examples mentioned by *Bussjäger*, Article 9, No. 26 and Footnote 44.

contested provisions of the constitutional revision in 2003, the abolishment of the interpreting role of the State Court, proved to be unproblematic in practice. The State Court remained unaffected and continues to play an indispensable role within the judicial system.

The monarchy as an institution is undisputed,[15] which is underlined by the fact that there were neither initiatives to abolish the monarchy (Article 113 LV) nor motions of non-confidence towards the Prince (Article 13ter LV), both instruments introduced by the revision of the Constitution in 2003. In 2012, an initiative to abolish the power of the Prince to sanction laws failed in a referendum; With a voter turnout of nearly 83 percent, about 76 percent voted against the initiative.

Nonetheless, this does not mean that Opinion No. 227 of the Venice Commission did not have any impact on Liechtenstein. On the contrary, the statement has strengthened the awareness that especially members of the Council of Europe must treat the values of democracy and the Rule of Law with great respect.

[15] See also *Pallinger*, Fn 2, p. 151.

Josep M. Castellà-Andreu[1]

The Venice Commission and Referendums on Secession[2]

1. Referendums on secession and Constitutional law

There is no secession clause in most of the current constitutions, understood as the right to self-determination of the territories that make up a country or a procedure to obtain it. Some Supreme or Constitutional Courts and constitutional scholarship have addressed the issue of referendums on secession under Constitutional law.

The legal discussion about the desirability of including such a clause in the constitutional charter (or at a legal level, like in Canada with the 2000 Clarity Act) is not new either in comparative law or constitutional theory. In favour of it, the following arguments have been displayed: first, it would add clarity to the debate on secession and it would have a dissuasive effect (Dion[3]); second, it "domesticates" secession (Weinstock, Mastromarino, Norman[4]) and, therefore, it enables the State to control better an inevitable process, and in fact it can even discourage its exercise (at least for now, future cannot be predicted), since its sole inclusion satisfies the aspirations of some nationalists (Mancini, Weinstock[5]), from the point of view of the politics of recognition. Most of these authors underline the qualified conditions and requirements that should be added to the secession clause, like qualified majorities or lapses of times between the holding of one referendum on

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[1] Member of the Venice Commission in respect of Spain.

[2] This chapter is a result of the project EU H2020, *Democratic Efficacy and the Varieties of Populism in Europe (Demos)*, Grant No 822590, and of the activities of the Research Group on Democracy and Constitutionalism (GEDECO). Paragraphs I and II are an updated and developed version of the chapter "Constitution and Referendum on Secession in Catalonia", in A. López-Basaguren & L. Escajedo (ed), *Claims for Secession and Federalism*, Springer, 2019.

[3] Dion, Stéphane (2013), "Secession and Democracy: A Canadian perspective", working paper Real Instituto Elcano, Madrid.

[4] Weinstock, Daniel (2001), "Constitutionalising the right to secede", *Political Philosophy*, vol. 9, 2; Mastromarino, Anna (2014), "Addomesticare la secessione: independentismo e integrazione europea in dialogo", *Percorsi Costituzionali,* 3, 639 ss.; Norman, Wayne (2006), *Negotiating nationalism: Nation-building, Federalism and Secession in Multinational State,* Oxford University Press, Oxford.

[5] Weinstock, Daniel (2001), cit; Mancini, Susana (2014), "Secession and Self-determination", in M. Rosenfeld and A. Sajó (ed.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, 2014

secession and the next one,[6] with the aim of hindering an instrumental use of the referendum and democracy: to organize the referendum as many times as necessary until the desired result is obtained and once it is obtained, then the logics of irreversibility prevail.

But there are also arguments against a secession clause. First, theoretical arguments: its sole admission would create a new sovereign political subject, dividing the constituent political subject and the underlying ties (Haljan[7]). This differs from the EU context (Article 50 TEU) or a confederation (for instance, the Union of Serbia-Montenegro in 2003). Second, constitutional-type arguments: Constitutions should not include secession clauses as a form of auto-protection (Madisonian argument). Likewise divorce terms are not discussed during the wedding. Third, practical reasons: its inclusion would encourage its exercise and even political blackmail (Sunstein[8]).

Although the referendum could be seen at first glance as an adequate means to decide key issues in a political community (specifically those of binary type), like secession, one cannot ignore some counter-indications. First of all, this is the case of a favourable tactical vote, especially if the referendum is non-binding or advisory, with the aim of achieving a stronger bargaining position of the regional authorities during the negotiations with the central government in order to obtain a greater autonomy or an improved funding system. In this sense, a binding and decisive referendum could be useful to convince the electoral body of the gravity of the issue, while a non-binding one might provoke, beyond the abovementioned tactical use, a lesser interest in voting. Secondly, as shown in most of the last referendums (Greek bailout, Brexit, Constitutional reform in Italy, Association agreement EU/Ukraine in the Netherlands, Hungary and the relocation plan of refugees decided by the EU Council, etc.), the populistic use of the instruments of direct democracy provokes a simplification of highly complex issues and conflicts with Parliament or representative democracy.[9]

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[6] Aláez Corral, Benito (2015), "Constitucionalizar la secesión para armonizar la legalidad constitucional y el principio democrático en Estados territorialmente descentralizados como España", *Revista d'Estudis Autonòmics i Federals,* 22, 163 ss.

[7] Haljan, David (2014), *Constitutionalizing Secession*, Hart, Oxford.

[8] Sunstein, Carl R. (1991), "Constitutionalism and Secession", *The University of Chicago Law Review*, vol. 58, 2.

[9] Hug, Simon (2009), "Some thoughts about referendums, representative democracy, and separation of powers", *Constitutional Political Economy*, 20(3-4), 251; Walker, Mark C. (2013), *The strategic use of referendums: Power, legitimacy, and democracy,* Springer, 200. See recently Castellà, Josep M. and Simonelli, Marco Antonio (2020), *On the institutional context of populism,* Working Paper, DEMOS, 15.

In the last decades, Canada, Spain and Italy have faced a secessionist challenge. All these are relevant experiences with the intervention of the High Courts in the context of legal constitutionalism. United Kingdom faces the Scottish demands of independence with a political agreement. There are different approaches by different High Courts, taking into account the constitutional differences among the different legal orders. At the same time, there are relevant common characteristics to be underlined.

In these countries, the respect for institutions and authorities of the Rule of Law and the Constitution are considered key principles of the Constitution and the referendum is decided (and conducted) on the basis of the legal order. Furthermore, in all these legal orders, the final decision on secession implies necessarily a constitutional reform. Thus, unilateral secession is excluded, for the sovereign power is the people (or the Parliament in the United Kingdom) as a whole and not the territorial entities that conform such countries. The German Constitutional Court has underlined this idea, when deciding upon a petition to organize a referendum on secession in Bayern (decision of 16 December 2016).[10]

The 1998 Opinion of the Supreme Court of Canada regarding the secession of Quebec is a milestone.[11] The Canadian doctrine argues that unilateral secession is not acceptable, but accepts the unilateral referendum, since the competence to organize such consultation belongs exclusively to provincial authorities.[12] This is one of the main difference with the Spanish case. The Spanish Constitutional Tribunal has not accepted any type of consultation on self-determination or the right to decide since the Basque Country first attempted to call for a consultation on the right to decide of the Basque people (Ruling 103/2008).[13] In that decision, the Constitutional

[10] For a more reviewed analysis of secession and comparative constitutional law, see González Campañá, Núria (2019), "Secesión y constitucionalismo comparado", *Revista de Derecho Político,* 106, 105 ss.

[11] Martinico summarized the achievements of the Reference: even in absence of explicit clause it is possible to proceduralise the secession avoiding delegating the issue to violence or politics only and direct democracy must be balanced with other values to protect the core of a legal system. In Martinico, Giuseppe (2019), "'A Message of hope': a legal perspective of the Reference", in Delledonne, Giaccomo and Martinico, Giuseppe (eds.), *The Canadian constribution to a Comparative Law of Secession,* Palgrave Macmillan, 252 ss.

[12] *Reference re Secession of Quebec,* [1998] 2 S.C.R. 217.

[13] The "right to decide" is a legal-political term different from the right to self-determination, created, precisely, given the difficulties to include the Basque or the Catalan cases within the accepted political entities that enjoy a right to self-determination under public international law. Vid. Pons Rafols, Xavier (2015), *Cataluña: Derecho a decidir y derecho internacional,* Reus ed, Madrid. It has its origins in the Basque Country in 2003. The legitimacy of a popular consultation refers both to the democratic principle and the fundamental right to political participation, both established in the Spanish Constitution. About the creation and the

Tribunal laid the foundations of its position: all Spaniards should have the right to decide when it comes to constitutional order issues through the constitutional amendment procedure. Thus, the Spanish Constitutional Court declared unconstitutional the Basque law that provided for an *ad hoc* popular consultation on the political future of the Basque country. According to the Court, the fact that the Basque law attempted to make a distinction between a popular consultation (non-binding) from a referendum was not convincing at all. A popular consultation could not exclude itself from the application of the general legal regime applicable to referendums organized by Autonomous Communities: according to the Constitution, such referendums need the authorization of the central Government (Article 149.1.32 Spanish Constitution) and have to be expressly established in the Statutes of Autonomy. Therefore, an implicit competence of Autonomous Communities on referendums has to be excluded. This is a general consideration on referendums, not limited to referendums on secession. In the 42/2014 Ruling the Spanish Constitutional Tribunal refers explicitly to the 1998 Opinion of the Supreme Court of Canada. Both Courts use a self-restrain approach and also ask the involved authorities to start a political dialogue. Finally, the Courts referred to the main principles of the constitutional order. Such principles are similar in both countries: democracy, Rule of Law and constitutionalism, federalism and minority rights (Canada) and democratic legitimacy, pluralism and legality (Spain).[14]

There is also some parallelism between the reasoning of both the Italian and the Spanish Courts: in both countries, the referendum is only foreseen at the end of the reform procedure for its ratification. However, there are differences between Spain and Italy: first, as it has been several times admitted by the Spanish Constitutional Tribunal, the whole Spanish Constitution can be amended, including the unity and indivisibility clause. There are neither express neither implicit limits to the constitutional amendments or intangibility clauses.[15] Therefore, an hypothetical constitutional reform could

justification of the right to decide, vid. Barceló i Serramalera, Mercè *et al.* (2015), *El derecho a decidir. Teoría y práctica de un nuevo derecho,* Atelier, Barcelona. Against, vid Ferreres Comella, Víctor (2016), "Cataluña y el derecho a decidir", *Teoría y Realidad Constitucional*, 37, 461 ss.

[14] Castellà Andreu, Josep M. (2019), "The reception in Spain of the Reference of the Supreme Court of Canada on the Secession of Quebec", in Delledonne, Giaccomo and Martinico, Giuseppe (eds.), *The Canadian constribution to a Comparative Law of Secession,* cit., 83

[15] A critical approach on such thesis to be found at De Miguel Bárcena, Josu (2019), *Justicia constitucional y secesión. El caso del proceso soberanista catalán,* Reus edit, Madrid, 78 ss. In this book there is the most updated study on the jurisprudence of the Constitutional Tribunal regarding the Catalan secessionist process.

include a secession clause, unlike in Italy, where such a clause is considered against the unity and indivisibility of the Republic (Article 5 of the Italian Constitution), like the Italian Constitutional Court said in 1992, 2002 and lastly in the 218/2015 Ruling, regarding the attempts of the Veneto region to organize a referendum or consultation on secession. In any case, in Spain such constitutional reform has to be done following the amendment process established in the Constitution, i.e. the qualified process aimed at total reform or fundamental sections (Article 168 Spanish Constitution). As a consequence, the ordinary legislator, central or regional, cannot decide the independence of an Autonomous Community or the procedure to obtain it.

Second, in Spain, the 42/2014 Ruling introduces a relevant nuance to the above referred doctrine: the distinction between preparatory acts and the constitutional reform itself. And the Constitutional Tribunal does it after admitting that the right to decide is a "legitimate political aspiration" if defended through adequate constitutional means, not as a right as such. The Tribunal admits that before the start of the constitutional reform it would be acceptable the realization of certain "preparatory acts". But the Spanish Tribunal does not clarify what type of acts are acceptable in this preparatory stage, only that they have to abide by the constitutional principles and provisions. The 31/2015 Ruling seems to exclude a referendum from the type of preparatory acts that could be acceptable before the start of the constitutional reform.

Third, the 118/2015 Italian Constitutional Court Ruling has accepted the legitimacy of a referendum to promote the enlargement of the autonomy of the Veneto region, which in Spain would require, necessarily, the reform of the Statute of Autonomy, that in the case of Catalonia (like in the Basque Country, Galicia and Andalusia), has to be ratified through referendum by the population respectively affected.

II. Referendums on secession and the Venice Commission standards

As for European standards, one should review the requirements established by the Venice Commission of the Council of Europe, since pro-independence groupings have constantly referred to it with the aim of justifying that the Catalan referendum on secession would be in conformity with its requirements.[16] In

[16] E.g. the First Report of the Advisory Council for the National Transition published on 25 July 2013 and included in Consell Assessor per a la Transició Nacional (2014), *Libro Blanco sobre la Transición Nacional de Cataluña*, Generalitat. The Report cites several times as an authoritative source the general rules of the Code of Goof Practices on referendums of the Venice Commission but not the opinions for constitutional and secession referendums (see footnotes 24, 25 and 26). See p. 69, 76, 84, 95, 109, 163 and 166 of the Report. A critical

effect, the Venice Commission or *European Commission for Democracy through Law*, has been establishing certain criteria and good practices regarding referendum. Such criteria have been included in opinions on the basis of both individual cases brought before the Commission and general studies.[17]

Referendums on secession receive a special treatment, not only in relation to ordinary referendums but also regarding constitutional referendums.[18] The Venice Commission firstly reminds that most of the Constitutions of European States do not contemplate secession, but such absence does not contradict European or international standards. And it also adds that, probably in the key paragraph of its position, independence is "possibly the most important decision that a political community may take by democratic means", and therefore "the matter requires the broadest possible commitment of the citizens to the resolutions of the issue".[19] And in the 2014 Opinion on the referendum of Crimea it also adds the following: "The Venice Commission recommended serious negotiations among all stakeholders to ensure the legitimacy and credibility of the referendum". Besides legitimacy and political credibility, the Venice Commission emphasized the need to respect the Rule of Law, and in particular to comply with the legal system as a whole, especially with the procedural rules on constitutional revision. It also warned against the use of referendums to bypass important constitutional safeguards such as the requirement for a qualified majority in Parliament.[20]

assesment of the references to the Venice Commission in López Basagurn, Alberto (2016), "Demanda de secesión en Cataluña y sistema democrático. El *procés* a la luz de la experiencia comparada", *Teoría y Realidad Constitucional,* 37, 172-177.

[17] Venice Commission, CDL-AD(2005)041, Opinion on the Compatibility of the Existing Legislation in Montenegro concerning the Organization of Referendums with Applicable International Standards; and CDL-AD(2014)002, Opinion on "whether the decision taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to organise a referendum on becoming a constituent territory of the Russian Federation or restoring Crimea's 1992 Constitution is compatible with constitutional principles". Among the general studies, above all the Guidelines on the holding of referendums (CDL-AD(2006)027rev) and CDL-AD(2007)008rev, Code of Good Practice on Referendums, with a Explanatory Memorandum. A summary of the position to be found in Venice Commission, CDL(2017)002, Compilation of Venice Commission Opinions and Reports concerning Referendums.

[18] Venice Commission, CDL-AD(2010)001, Report on Constitutional Amendment.

[19] 2005 Opinion on Montenegro, that is reiterated in the 2014 Crimea Opinion, n. 25.

[20] Venice Commission and OSCE, CDL-AD(2015)014, Joint Opinion on the Draft Law on "Introduction of changes and amendments to the Constitution" of the Kyrgyz Republic, n. 25. This is a joint Opinion with OSCE, in relation with constitutional referendums, but we understand it can also be applied to referendums on secession.

Thus, we can summarize the Venice Commission criteria on referendums (general criteria that can also be applied to referendums on secession) as such: respect to the democratic principle and the Rule of Law: as it has stated in the Montenegro Opinion, "to pass this test of legitimacy the referendum must be conducted in accordance with minimum standards of legality and good electoral practice...".[21]

But previously, it is worthy to underline the twofold approach followed by the Venice Commission that might be useful to understand its position: first, the distinction between constitutional democracy and revolutionary or radical democracy. According to the former, referendums, in the event they are foreseen within a given legal order, since not all of them include such mechanism, are subject to the limits, conditions and requirements set forth by that particular constitutional order.[22] Second, the consideration that direct democracy is a complement of representative democracy, not an alternative to it and the conviction that direct democracy is not more democratic than representative democracy, but on the contrary: "Representative democracy is certainly as legitimate as direct democracy on issues such as these [constitutional amendment], and may often be the more suitable procedure for in-depth discussion and evaluation".[23] In fact, the Venice Commission underlines the importance of Parliament when it comes to constitutional order decisions.[24] This is so because "national parliament is the most appropriate arena for constitutional amendment, in line with the modern idea of democracy".[25]

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[21] Venice Commission, CDL-AD(2005)041, *op. cit.*, n. 11.

[22] "It is to be stressed that the use of referendums should comply with the national constitutional system as a whole. As a main rule, a referendum on constitutional amendment should not be held unless the constitution explicitly provides for this...", Venice Commission, CDL-AD(2010)001, Report on Constitutional Amendment, cit., n. 185. This is stressed in Venice Commission, CDL-AD(2015)014, *op. cit.,* n. 26.

[23] *Ibidem*, n. 185. As the Venice Commission has reminded, "There is no international (or European) standard on the extent which should be given (or not) to instruments of direct democracy at national, regional or under-regional level. Nor is there a standard imposing their mere existence. What can be said is that there is a trend to extend them, especially at the infra-national level, which has always been a laboratory for innovations in the field of democracy. (…) These instruments of direct and participatory democracy should be seen as complementing representative democracy. 'Parliamentary democracy supported by free and fair elections ensuring representativeness, (political) pluralism, and the equality of citizens', is the core, but not the only aspect, of the democratic process": Venice Commission, CDL-AD(2015)009, Opinion on the Citizens' bill on the regulation of public participation, citizens' bills, referendums and popular initiatives and amendments to the Provincial Electoral Las of the Autonomous Province of Trento (Italy) n. 81.

[24] In the referred joint Opinion with OSCE, the Venice Commission warns "against constitutional referenda without a prior qualified majority vote in Parliament". Venice Commission, CDL-AD(2015)014 *op. cit.*, n. 25.

[25] Venice Commission, CDL-AD(2010)001, *op. cit.,* n. 183.

Firstly, a referendum on secession must be in conformity with the democratic principle. Given that secession is such a relevant decision for a political community, "it is desirable that all significant issues surrounding the conduct of the referendum should command the highest possible level of agreement from the major political forces".[26] And this is so because "it is of fundamental importance that the referendum and its results be accepted as legitimate".[27] The Commission also mentions the aspects that have to be reviewed in referendums: to obtain the "highest levels of transparency and inclusiveness";[28] agreement between parties, which implies the participation of such parties in the organization of the referendum, including minority parties, and a consensus around it; a turnout quorum, which is an exception to the general rule of not requiring such a quorum in ordinary referendums;[29] and an approval quorum, that the Commission prefers rather than the turnout quorum, and that offers different possibilities. Thus, it looks desirable to require in referendums on secession a clear majority, like the Supreme Court of Canada asked for in 1998. In the 2005 Montenegro Opinion the Commission argues in favour of a rule requiring a qualified majority of those voting. The Venice Commission also reminds that "the Supreme Court held that democracy means more than majority rule"[30] to make sure that the result achieves the greatest possible political legitimacy.

Secondly, a referendum on secession must be in conformity with the Rule of Law. The Venice Commission doctrine refers to the legality of all type of referendums, but it can also be applied to referendums on secession.

This means that the referendum, and the popular sovereignty principle in general, has to be in conformity with its own constitutional system: "The principle of the sovereignty of the people allows the latter to take decisions only in accordance with the law. The use of referendums must be permitted

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[26] Venice Commission, CDL-AD(2005)041, *op. cit.*, p.16..

[27] Venice Commission, CDL-INF(2001)023, Interim Report of the Constitutional situation of the Federal Republic of Yugoslavia*,* n. 24. The 2005 Opinion on Montenegro is stressed out, n. 16: "To make possible the holding of a fair and democratic referendum, and to enable the outcome of a referendum to be accepted as legitimate both in Serbia and Montenegro and in the international community at large..."

[28] Venice Commission, CDL-AD(2015)014, *op. cit.,* n. 27. This is an observation valid to any constitutional referendum.

[29] Venice Commission, CDL-AD(2007)008rev, *op. cit.*, n. III.7. In relation with constitutional referendums, the Commission admits that many constitutions foresee certain quorums, Venice Commission, CDL-AD(2010)001, *op. cit.*, ns. 49-50.

[30] Venice Commission, CDL-AD(2005)041, *op. cit.*, ns. 29, 34, 37. As it is well known, in the referendum on secession a minimum turnout of 50% and 55% of affirmative votes were required.

only where it is provided for by the Constitution or a statute in conformity with the latter, and the procedural rules applicable to referendums must be followed".[31] In this sense, regarding the Crimea referendum, the Commission points out that "[I]t is true that the Constitution of Ukraine... recognises referendums as an expression of the will of the people. This does, however, not mean that any referendum is automatically constitutional. On the contrary, there are numerous provisions of the Ukrainian Constitution which shows very clearly that the secession of a part of a territory of the country cannot be the object of a local referendum".[32] Among the Rule of Law requirements and guarantees mentioned (although many of them are also guarantees of the democratic principle), it is worthy to stress out the following: a reasonable time between the call and the organization of the referendum (it is rejected that in Crimea such period was just 10 days);[33] that the "law could include the question to be asked to the electorate";[34] any question submitted to the electorate must be clear (not obscure or ambiguous); voters must answer the questions asked by yes, no or a blank vote; the clarity of the question (like in Canada or Scotland), although this might lead to reject multiple choice referendums,[35] which is also a source of concerns since the results might not express clearly well the will of the people; the authorities must provide objective information and must not influence the outcome of the vote by excessive one-sided campaigning; the use of public funds by the authorities for campaign purposes must be

[31] Venice Commission, CDL-AD(2007)008rev, *op. cit.,* n. 26. This idea is pointed out in several opinions, i.e. Venice Commission, CDL-INF(2001)023, *op. cit.,* n. 17, cit.: "Democracy cannot be reduced to a simple reflection of the popular will. In a State respecting the principles of the Council of Europe decisions have to be taken in accordance with the Law...", and Venice Commission, CDL-INF(2000)013, Opinion on the Constitutional amendments concerning legislative elections in the Republic of Slovenia*,* ns. 3-4 "This is all the more so as the referendum cannot be regarded as an exercise of sovereign power by the people, but rather it is the expression of the will of the people by a means regulated within the framework of the Constitution."

[32] Venice Commission, CDL-AD(2014)002, *op. cit.* n. 10.

[33] "The timeframe of one month between the publication of the draft Constitution and the date of the referendum was extremely short", Venice Commission, CDL-AD(2007)045, n. 57. Opinion on the constitutional situation in the Kyrgyz Republic.

[34] In the abovementioned Opinion on Montenegro. Venice Commission, CDL-AD(2005)041, *op. cit.*, n. 16.

[35] "The unity of content between the various proposals should be ensured, in order to avoid any falsification of the voters' intention". Venice Commission, CDL-AD(2015)009, *op. cit.* n. 62. Opinion on the Citizens' bill on the regulation of public participation, citizens' bills, referendums and popular initiatives and amendments to the Provincial Electoral Laws of the Autonomous Province of Trento (Italy). In this Opinion, it refers to advisory referendums, but it can be applied to any type of referendums.

restricted; the public media have to be neutral, in particular in news coverage, and have to guarantee a balanced access of supporters and opponents to public media broadcast; and the organisation of the referendum by impartial electoral commissions and effective system of appeal.[36]

On 22 January 2019, the Parliamentary Assembly of the Council of Europe approved the Resolution 2251 (2019) Updating guidelines to ensure fair referendums in Council of Europe member States. In such resolution, the PACE addressed the Venice Commission for a revision of the Code of Good practice on referendums. Currently the Venice Commission is working on the updating of the Guidelines.

The PACE justifies the resolution on the situation around Europe, where "recent referendums in some countries have raised concerns about the process and/or the fairness of the outcome" (n. 2). The General principles that the Venice Commission is invited to take into account for the updating of the Code underline the complementary character of the referendum with the representative democracy and not as instrument of the government against the Parliament; the clarity of the proposal; and the balance between the sides (n. 3).

Among the specific aspects to be reviewed, the following are important for our purpose: 1) the creation of an impartial body which should "check any proposed referendum question to ensure it is clear, accessible and unbiased". Such body should be independent of government and should have powers to enforce the rules, including the power to impose sanctions in case of breach (n. 4.7 and 7). And 2) "the prohibition for the authorities to use public funds for campaigning purposes" throughout the campaign period. "In the case of public funding, the principle of equality between the sides should take precedence over that of proportional distribution of resources" (n. 4.10, 4.11 and 6.3).

Finally, is important to remark that the Assembly calls on member States to ensure that "all fundamental aspects of referendums, as defined in the current Code (…) are fixed in legislation for referendums in general (rather than on an *ad hoc* basis); such legislation should not be changed less than a year before a referendum is held" (n. 6.1).

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[36] Venice Commission, CDL-AD(2005)041, *op. cit.*, ns. 12, 14, 15 and 17. Many of these provisions are to be found for any type of referendum in Venice Commission, CDL-AD(2005)028, Opinion on Parliamentary Assembly Recommendation 1704 (2005) on Referendums: towards good practices in Europe. And later they are incorporated in the Good Practices Code on referendums, Venice Commission, CDL-AD(2007)008rev, *op. cit.*, n. 1.3.1.

3. The Venice Commission and the Catalan secessionist process

The Venice Commission did not discuss any opinion regarding the Catalan pro-independence process. However, there are two relevant interventions related directly or indirectly with the Catalan case: first, the letter of the president of the Venice Commission answering a request of the then president of the Catalan government, Carles Puigdemont, informing the Venice Commission of the Resolutions adopted by the Catalan Parliament regarding the independence of Catalonia and asking the co-operation of the Venice Commission for the referendum of 1st October 2017.[37] And second, also in 2017, the Venice Commission was requested by the Parliamentary Assembly of the Council of Europe to review the reform of the Organic Law of the Constitutional Tribunal, on the execution of the Rulings of the Constitutional Tribunal by public authorities.

As it is well-known, 1st October 2017 in Catalonia, the local authorities organized an illegal referendum on independence.[38] The Law of Referendum on self-determination (Law 19/2017, of 6 September) was passed by the Catalan Parliament only three weeks before the date of the Referendum. It was planned as a binding referendum, requiring the simple majority of the voters (Catalans with the right to vote in the elections of Catalan Parliament over 18 years old). After an affirmative majority, the Catalan Parliament would declare the unilateral independence (Articles 4 and 6). This ordinary law established "an exceptional legal regime" affirming its superiority in respect of all the other norms conflicting with it (including the Spanish Constitution and the Catalan Statute of Autonomy) (Article 3.2), placing itself outside constitutional legality. The law established a specific electoral commission (*Sindicatura electoral*) with five members elected by absolute majority of the Catalan Parliament (Article 19), without the participation of representatives

[37] The Plenary of the Parliament approved Resolution 306/XI, 6 October 2016, which established a date for the holding of the referendum: before October 2017. Such a referendum had to address specifically the independence of Catalonia, either through an agreement with the Spanish central government, consensual referendum, or without, unilateral referendum. The Resolution also proclaimed the right to self-determination (instead of the right to decide used before), it urged the Catalan government to hold a binding referendum (instead of popular consultation as in 2014) on independence with a clear question and a binary answer: yes or no (instead of a multiple-choice question like the one in the consultation of 2014).

[38] According to the organizers, 42% of the population went to the polls and almost unanimously voted for independence. The Unilateral Declaration of Independence was proclaimed by the Catalan Parliament on 27th October. Immediately the Spanish Senate passed extraordinary measures against Catalan Autonomy (the first and sole application of Article 155 SC), with the agreement of a large majority (PP, PSOE and Ciudadanos).

of the opposition parties.[39] Such parties also rejected to campaign and participate in the referendum. The Spanish Constitutional Court declared unconstitutional such referendum by procedural and substantial grounds. Such law violated the right of participation of the minority in Parliament and introduced a new legal order contrary to the foundations of the Spanish Constitution without following the procedures for constitutional amendment (Ruling 114/2017). The Court suspended the celebration of the referendum applying its own previous case-law (Ruling 259/2015). The Court also applied a new instrument established by the 2015 amendment of the Organic Law of the Constitutional Court (Organic Law 15/2015): the attribution to the Constitutional Court of the task to execute its own judgements. In other to do that, coercive penalty payments can be applied to authorities and it is possible to suspend officials from office. High penalty payments were decided against some officials for their participation on the referendum.

First, Mr Buquicchio in his letter of 2 June 2017 to Mr Puigdemont, after taking note of "the intention to co-operate with the Venice Commission on the modalities of an agreed referendum", first of all, welcomes the "interest shown by the Catalan Parliament in the Code of Good Practice on Referendums". Secondly, he recalls that "not only the referendum as such", but the co-operation with the Commission has to be carried out "in agreement with the Spanish authorities". Finally, and most importantly, the President underlines that the Venice Commission "the official name of which is European Commission for Democracy through Law, has consistently emphasised the need for any referendum to be carried out in full compliance with the Constitution and the applicable legislation". The letter had a notorious reception in the Catalan and Spanish newspapers. As it has been shown in the last paragraph, with the referendum of 1st October, the Catalan authorities ignored the suggestions of the President of the Venice Commission and also most of the requirements of the Code of Good Practice on Referendum and other documents related with referendums.

Second, the Venice Commission approved an Opinion on the Organic Law of 16 October 2015 amending the Organic Law No. 2/1979 on the Constitutional Court, on the execution of the Rulings of the Constitutional Court by public authorities.[40] The Venice Commission underlines the

[39] The 19/2017 Law was passed reducing the period for discussion and amendment to less than a day in only one Plenary session (without discussion in Commission). This was unanimously rejected by the very same Catalan Legal Advisory Council (Consell de Garanties Estatutàries).
[40] Venice Commission, CDL-AD(2017)003, Opinion on the Law of 16 October 2015 amending the Organic Law No. 2/1979 on the Constitutional Court of Spain.

submission of the public authorities to the Constitutional Court rulings as a consequence of the Rule of Law, and makes some objections and recommendations, mainly on the coercive penalty payments applied on individuals and the suspension of officials, particularly the elected ones, who refuse to execute the Court's decisions. But, the main concern of the Venice Commission is related to the consequences of the attribution of the power of execution of its decisions to the Constitutional Court taking into account the institutional position as judge of the laws and neutral arbiter. The Opinion recognized that in absence of European common standards in this field, there is no contradiction with such standards. However, it also recognized that in European countries there is generally a distinction among adjudication by the Court and the execution by other State powers. The Opinion has not yet led to a legal amendment,[41] although it may have had some influence in the reaction of the Constitutional Court in the crisis with Catalonia.

Both interventions of the Venice Commission were acknowledged by both High Spanish Courts, the Constitutional and the Supreme Courts, and by the European Court of Human Rights. They are good examples of the reception of the advisory doctrine of the Venice Commission by Courts, not only in the framework of the system of the Council of Europe. The *auctoritas* of the Venice Commission is consolidating throughout the dialogue between legal institutions regarding human rights protection and respect for the Rule of Law and constitutional democracy as European common heritage.[42]

Indeed, the letter of the President of the Venice Commission was mentioned by the Supreme Court in its judgement condemning for sedition some Catalan authorities by their participation in the organization of the referendum (Judgement 459/2019, p. 28).

Furthermore, the 2017 Opinion of the Venice Commission has been mentioned by the Spanish Constitutional Court (Autos 126 and 127/2017, by both the majority and the opinion concurring), in relation to the imposition of coercive penalties to the members of the Electoral Commission and to some high officials of the Catalan government due to their participation in actions related with the organization of the referendum. The concurring

[41] The Constitutional Court had declared the constitutionality of such reform in Rulings 185/2016 and 215/2017.

[42] Biglino Campos, Paloma (2018), "La Comisión de Venecia y el patrimonio constitucional común", *Revista General de Derecho Constitucional,* 28.

opinions agree with the position of the Venice Commission: the institutional status and the arbiter position of the Constitutional Tribunal should be preserved in its resolutions.

Finally, the ECtHR in both decisions related to the Catalan process, includes a literal transcription of the first paragraph of the Conclusions of the Opinion of the Venice Commission:[43] "judgements of Constitutional Courts have a final and binding character. As a corollary of the supremacy of the Constitution, judgements of Constitutional Courts have to be respected by all public bodies and individuals. Disregarding a judgement of a Constitutional Court is equivalent to disregarding the Constitution and the Constituent Power, which attributed the competence to ensure this supremacy to the Constitutional Court. When a public official refuses to execute a judgement of the Constitutional Court, he or she violates the principles the Rule of Law, the separation of powers and loyal cooperation of state organs. Measures to enforce these judgements are therefore legitimate. In the light of the absence of common European standards, this opinion examines to which extent the Amendment introduced to Organic Law no. 2/1979 on the Constitutional Court of Spain is an appropriate means to achieve this legitimate objective."[44] In both decisions, the Strasbourg Court unanimously declared the applications inadmissible. The first one was on the application of the coercive penalty to a member of an Electoral Commission in charge of supervising the referendum of 1st October 2017. In such case, the Court, agreeing with the Venice Commission, concludes the criminal character of the coercive payment imposed to the applicant (n. 48 and 55), a claim rejected by the Constitutional Court, but at the same time considered that this limitation of the right doesn't mean a violation of the rights of the Convention. The other application was introduced by the then President of the Catalan Parliament and the MPs of the majority (secessionist parties) for the suspension of the plenary sitting of the Parliament of Catalonia decided by the Constitutional Court on the 9th October 2017 to avoid a unilateral declaration of independence. According to the Court, invoking the Opinion of the Venice Commission, the Constitutional Court has the competence to suspend the sitting to preserve its decisions and the constitutional order and the Parliament should obey such decision of the Constitutional Court (n. 36).

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[43] Opinion on the Law of 16 October 2015 amending the Organic Law No. 2/1979 on the Constitutional Court of Spain, n. 69.

[44] Third Section, *Montserrat Aumatell i Arnau v. Spain*, n.º 70219/17, 04.10.2018; Third Section, *Carmen Forcadell i Lluis and others v. Spain*, n.º. 75147/17, 28.05.2019.

4. Conclusions

The Venice Commission has had a relevant role establishing the European standards on referendums, and particularly the secession ones, as we have shown in this paper. Such standards argue against referendums without the due democratic and constitutional guarantees and are aimed at placing the referendum in the context of a constitutional and a representative democracy. Such guarantees are particularly relevant for referendums on secession, given the fact that they are probably one of the most relevant decisions in the whole life of a State, as the Venice Commission argues. Thus, a unilateral referendum on secession and an illegal one are against European standards.

However, in a well-established constitutional democracy the admissibility of a secession clause, and the referendum in such context, is a decision of each national legal order, particularly of its Constitution and the High Courts interpreting the supreme norm. Thus, it is part of its national margin of appreciation. The conduct of a referendum of secession is only possible if it is in conformity with the constitution of each State. One of the main common conclusions of the High Courts that have discussed laws of referendum on secession is that the decision on secession is a competence of the national Parliament, as the institution representing the sovereign people, that can be delegated according to the legal provisions of a particular legal system (as it occurred in the United Kingdom). However, each legal order has different approaches on the issue, beginning with the admissibility of the secession clause, a referendum of secession or the moment of the referendum (to initiate the process or to ratify the decision previously adopted by representatives in a scenario of political negotiation). Also, in relation with the possibility to reform the constitution to include a secession clause.

According to the Venice Commission, legislation on referendums of secession should comply with the following requirements: the main ones are the clarity of the question, the requirement of a clear majority for the approval, the neutrality of the Administration during the campaign and the impartiality of the Body in charge of checking the whole process and the question. The first two of such aspects are already present in the Reference of the Supreme Court of Canada of 1998 and become the more relevant elements for the legal regime of the secession in a constitutional democracy today.

Chemavon Chahbazian[1]
Gaël Martin-Micallef[2]

30 ans de coopération entre l'Assemblée parlementaire et la Commission de Venise dans le domaine des élections

30 ans de coopération entre l'Assemblée parlementaire du Conseil de l'Europe et la Commission de Venise, c'est presque autant d'années de coopération dans le domaine de **l'observation des élections** et via **les textes, rapports, études et avis**. C'est aussi une coopération plus récente mais tout aussi fructueuse via **les conférences parlementaires régionales**.

La coopération via l'observation des élections

La coopération entre l'Assemblée parlementaire et la Commission de Venise dans le domaine des élections démarre pour ainsi dire dès la création de la Commission de Venise. En effet, l'Assemblée a commencé l'observation des élections d'une manière régulière à partir de 1989, lors de l'entrée des pays de l'Europe Centrale et de l'Est au Conseil de l'Europe et a d'ores-et-déjà entamé sa coopération avec la Commission de Venise dans le domaine électoral. La Commission de Venise a eu dès lors un rôle crucial dans l'assistance à ces Etats pour élaborer des législations électorales permettant la tenue d'élections pluralistes. La première trace de coopération en matière électorale entre la Commission de Venise et un Etat remonte à 1992 et concernait le projet de loi électorale de la Lettonie, qui n'était alors pas encore un Etat membre du Conseil de l'Europe[3]. On peut cependant affirmer que l'expertise en matière électorale a démarré dès la création de la Commission, dans le cadre de l'assistance apportée aux pays d'Europe Centrale et de l'Est dans l'élaboration de leurs Constitutions.

Cette coopération entre l'Assemblée parlementaire et la Commission s'intensifie progressivement dans les années 1990 et au début des années 2000 via l'observation des élections et s'institutionnalise en 2004 à la

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[1] Secrétariat de l'Assemblée parlementaire du Conseil de l'Europe. Les opinions exprimées dans cet article n'engagent que leur auteur.
[2] Secrétariat de la Commission de Venise. Les opinions exprimées dans cet article n'engagent que leur auteur.
[3] Voir à cet égard le rapport annuel d'activités pour 1992 de la Commission de Venise, partie II. 3. a, sous « Lettonie ».

faveur d'un accord entre les deux institutions. Dans le cadre de l'Accord de coopération signé le 4 octobre 2004 entre la Commission de Venise et l'Assemblée parlementaire, des représentants de la Commission de Venise peuvent être invités à participer aux missions d'observation des élections de l'Assemblée en qualité de conseillers juridiques[4]. De plus, lorsque le Bureau de l'Assemblée décide d'observer un scrutin *« dans un pays où la législation électorale a été précédemment examinée par la Commission de Venise, l'un des rapporteurs de la Commission de Venise sur cette question pourra être invité en qualité de conseiller juridique à participer à la mission d'observation de l'Assemblée »*[5]. C'est ainsi que la Commission de Venise est devenue le partenaire privilégié de l'Assemblée à l'occasion de presque toutes ses missions d'observation, venant renforcer la synergie entre les deux institutions dans la thématique électorale.

L'Assemblée parlementaire est à l'origine de l'observation internationale d'élections en Europe sous une forme institutionnalisée ; elle a ainsi observé les premières élections grecques après la chute des colonels en novembre 1974. Depuis 1989, elle a observé plus de 250 élections législatives et présidentielles dans 38 pays européens et environ 3000 de ses membres ont été déployés à cette fin.

L'observation électorale fait partie intégrante de la procédure de suivi de l'Assemblée. Celle-ci a régulièrement surveillé le respect des principes relatifs à des élections libres et équitables non seulement dans les pays candidats à l'adhésion mais aussi dans les Etats membres faisant l'objet d'une procédure de suivi ou d'un dialogue postsuivi. La même condition s'applique au statut de Partenaire pour la démocratie récemment créé pour les parlements des pays situés dans le voisinage du Conseil de l'Europe.

Dans le cadre de cet accord de 2004, la coopération entre les deux institutions s'est progressivement renforcée au fil des années. Ainsi, le secrétariat de la Commission de Venise prépare en vue de chacune de ces missions d'observation auxquelles elle participe un mémorandum juridique, qui vise à informer les parlementaires et les membres du secrétariat de l'Assemblée des éléments juridiques utiles à porter à leur connaissance en vue du scrutin à observer. Après avoir rappelé le contexte dans lequel s'inscrivent les élections à venir, la Commission développe dans ce mémorandum les éléments pertinents concernant le cadre juridique qui s'applique aux élections

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[4] Commission de Venise CDL(2004)102, Accord de coopération entre l'Assemblée parlementaire du Conseil de l'Europe et la Commission Européenne pour la Démocratie par le Droit, 4 octobre 2004, Article 14.

[5] *Ibidem*, Article 15.

à observer, le système électoral applicable, l'administration électorale en charge d'organiser les élections, les questions de l'enregistrement des candidats et de l'inscription des électeurs sur les listes. Le mémorandum présente aussi les éléments touchant à la campagne électorale et au financement des partis et des campagnes ainsi que ceux concernant les médias. Le mémorandum fournit également des éléments quant au jour du scrutin, dépouillement inclus. Les droits et devoirs des observateurs et la question de l'égalité femmes-hommes sont aussi au cœur des mémorandums juridiques que le secrétariat de la Commission fournit à l'Assemblée en vue des missions d'observation. Dernière section arrivée plus récemment dans les mémorandums, et non des moindres, le secrétariat propose une sélection de la jurisprudence pertinente de la Cour européenne des droits de l'homme concernant l'Etat où le scrutin va être observé. Il s'agit de la jurisprudence concernant une violation supposée ou avérée de l'article 3 du premier Protocole additionnel de la Convention européenne des droits de l'homme, portant sur le droit à des élections libres. Mais cette jurisprudence touche aussi d'autres principes fondamentaux pour une démocratie effective, en particulier pour le domaine des élections la liberté d'expression, la liberté de réunion et d'association, ainsi que l'interdiction de la discrimination (articles 10, 11 et 14 de la Convention).

Lors des missions d'observation, la Commission de Venise est le plus souvent représentée par un membre de la Commission ou un expert consultant, accompagné d'un membre du secrétariat. Ce binôme est crucial pour l'efficacité de ces missions. En effet, à deux voix sur le terrain, les principes du patrimoine électoral européen trouvent force et vigueur et viennent appuyer le travail de l'Assemblée, à la fois dans ses évaluations et rapports d'observation mais également lors des négociations sur place avec les autres délégations, membres de la mission internationale des élections.

En effet, les délégations de l'Assemblée parlementaire observent habituellement les élections dans le cadre de la mission internationale d'observation des élections qui comprend, outre l'Assemblée parlementaire elle-même, le Bureau des institutions démocratiques et des droits de l'homme de l'OSCE (l'OSCE-BIDDH), l'Assemblée parlementaire de l'OSCE et parfois le Parlement européen et l'Assemblée parlementaire de l'OTAN (pour cette dernière, lorsque le pays où le scrutin est observé est soit membre de l'OTAN soit candidat à l'OTAN). Ces missions internationales d'observation des élections ont un objectif essentiel : assurer une évaluation internationale conjointe et sans discordance du scrutin observé, tout en apportant les spécificités de chaque organisation au sein des discussions et

in fine dans les conclusions communes sur le processus observé, rendues publiques le lendemain du scrutin. A l'issue des missions d'observation des élections, le Bureau de l'Assemblée parlementaire adopte les rapports d'observation d'élections propres à l'Assemblée.

La coopération via les textes, rapports, études et avis

Dans le domaine des élections, la coopération entre la Commission et l'Assemblée se reflète aussi par les documents de l'Assemblée parlementaire dans le domaine des élections d'une part et par les avis, études et rapports comparatifs de la Commission de Venise d'autre part.

Outre les missions d'observation qui ont conduit à l'adoption de rapports d'observation d'élections par son Bureau, cette coopération a également permis à l'Assemblée parlementaire d'adopter différents textes dans le domaine normatif ; l'Assemblée adopte ainsi des recommandations et des résolutions non spécifiques dans le domaine des élections. Sa Commission de suivi adopte également des rapports comprenant des recommandations pour améliorer le cadre juridique des élections dans les pays faisant l'objet d'une procédure de suivi ou d'un dialogue postsuivi sur la base des rapports d'observation des élections. Ces différents textes de l'Assemblée s'appuient sur les avis, études et documents de référence en matière électorale de la Commission de Venise.

La coopération entre les deux institutions se concrétise aussi par l'usage que fait la Commission de Venise des documents de l'Assemblée dans le domaine électoral et par les nombreuses demandes de l'Assemblée d'avis et d'études à la Commission. Pour mémoire, le texte phare du Conseil de l'Europe en matière électorale et développé par la Commission de Venise, le Code de bonne conduite en matière électorale, était une demande de novembre 2001 de la Commission permanente de l'Assemblée parlementaire, agissant au nom de l'Assemblée, par laquelle elle a invité la Commission de Venise à élaborer un tel code. Le Code de bonne conduite en matière électorale a été adopté par la Commission de Venise en 2002, approuvé par l'Assemblée parlementaire lors de sa session de 2003 et par le Congrès des pouvoirs locaux et régionaux lors de sa session de printemps 2003. Il a été également entériné par le Comité des Ministres, qui « a invité les gouvernements, les parlements et les autres autorités compétentes des Etats membres à tenir compte du Code de bonne conduite en matière électorale, à s'en inspirer, dans le respect de leurs traditions nationales démocratiques, lors de l'élaboration et l'application de la législation électorale et à déployer

des efforts soutenus pour lui assurer une diffusion plus large au sein des milieux concernés »[6].

Le code de bonne conduite en matière électorale développe les principes du patrimoine électoral européen et les conditions de mise en œuvre de ces principes : un suffrage universel, égal, libre, secret et direct ainsi que la périodicité des élections. Le code développe également en soutien à ces principes les conditions de leur mise en œuvre, par le respect des droits fondamentaux, en assurant une stabilité du droit électoral, et par un ensemble de garanties procédurales : l'organisation du scrutin par un organe impartial, l'observation des élections, l'existence d'un système de recours efficace l'organisation et l'activité des bureaux de vote, le financement et des partis politiques et des campagnes, et enfin la sécurité des processus électoraux.

Ce document de référence, également amplement repris par la Cour européenne des droits de l'homme dans sa jurisprudence relative à l'article 3 du premier Protocole additionnel, est un exemple hautement symbolique de cette coopération entre l'Assemblée parlementaire et la Commission de Venise qui a permis le développement de normes et standards là où il n'en existait pas. Ce travail de développement des normes et standards (*standards setting* en anglais) est un aspect essentiel des travaux du Conseil de l'Europe et de ses diverses institutions dans la diffusion de tels principes, plus encore dans le domaine électoral où les instruments internationaux contraignants ne sont pas légion.

La coopération via les conférences parlementaires régionales

La coopération entre l'Assemblée et la Commission via la coopération interparlementaire est tout autant que les missions d'observation des élections ou la coopération via les textes produits un maillon essentiel dans l'assistance électorale qu'apporte le Conseil de l'Europe à ses Etats membres, ou à ceux pour lesquels s'applique le statut de Partenaire pour la démocratie. Les deux institutions ont ainsi coorganisé un cycle de conférences interparlementaires sur le droit à des élections libres et sur la question sensible de l'utilisation abusive des ressources administratives pendant les processus électoraux :

- conférence parlementaire sur « la mise en œuvre du droit à des élections libres : le défi de l'application des législations électorales et le respect des standards du Conseil de l'Europe », Paris, 4-5 juin 2015 ;

[6] Commission de Venise, CDL-AD(2002)023rev2-cor., Code de bonne conduite en matière électorale - Extrait de l'introduction.

- conférence régionale sur « l'abus des ressources administratives pendant les processus électoraux : un défi majeur pour des élections démocratiques », Londres, 9-10 novembre 2017 ;
- séminaire parlementaire conjoint sur « l'abus des ressources administratives pendant les processus électoraux : un défi majeur pour des élections démocratiques », Tirana, 10-11 avril 2018 ;
- conférence parlementaire régionale sur « la prévention et les réponses à l'utilisation abusive des ressources administratives pendant les processus électoraux : le rôle des parlements nationaux », Tbilissi, 2-3 décembre 2019.

Ces conférences ont permis de porter les voix concordantes des deux institutions auprès à la fois des parlementaires des pays bénéficiaires de ces événements de même qu'auprès des commissions électorales centrales des pays en question. Le but est simple : promouvoir auprès des partenaires nationaux impliqués dans les processus électoraux les principes du patrimoine électoral européen et les conditions et garanties procédurales qui permettent leur mise en œuvre[7]. C'est donc promouvoir dans la loi et dans la pratique les principes en question et les conditions et garanties procédurales qui les accompagnent. La thématique de l'utilisation des ressources administratives a par exemple permis de promouvoir, auprès des parlements nationaux et des commissions électorales centrales des pays bénéficiaires de ces événements, les Lignes directrices conjointes de la Commission de Venise et de l'OSCE/BIDDH visant à prévenir et à répondre à l'utilisation abusive de ressources administratives pendant les processus électoraux[8]. Ces Lignes directrices ont-elles-mêmes été développées sur la base d'un rapport sur le sujet publié par la Commission en 2013[9]. Or, ce rapport s'appuie notamment sur les rapports d'observation de l'Assemblée parlementaire[10].

La Commission de Venise organise tous les ans la Conférence européenne des administrations électorales[11] ainsi que des séminaires de droit comparé. Elle organise, pour les commissions électorales centrales et les juges, des ateliers de formation sur les contentieux électoraux et

[7] Eléments développés précédemment dans la section sur la coopération via les textes, rapports, études et avis.
[8] Commission de Venise, CDL-AD(2016)004, Lignes directrices conjointes visant à prévenir et a répondre à l'utilisation abusive de ressources administratives pendant les processus électoraux.
[9] Commission de Venise, CDL-AD(2013)033, Rapport sur l'abus de ressources administratives pendant les processus électoraux.
[10] Voir notamment le paragraphe 3 du rapport de 2013.
[11] www.coe.int/EMB.

d'autres questions juridiques et offre aussi une assistance à long terme à ces commissions. Ces différentes activités de terrain de la Commission prennent notamment appui sur les rapports d'observation des élections de l'Assemblée parlementaire pour axer les discussions sur les faiblesses non seulement contenues dans les législations électorales nationales mais dans la pratique également, telles que relevées par l'Assemblée dans ses rapports. Concernant la série de conférences européennes des administrations électorales tenues annuellement, la Commission de Venise convie systématiquement l'Assemblée à y prendre une part active. En effet, le public principalement concerné par ces conférences sont les membres et membres des secrétariats des administrations électorales, à savoir les institutions en charge d'organiser les scrutins et qui doivent à la fois prendre en considérations la législation du pays et les recommandations internationales visant à améliorer l'organisation de processus électoraux et le déroulement des opérations de vote.

En conclusion, il peut être affirmé que la coopération entre l'Assemblée parlementaire et la Commission de Venise est une synergie permanente et positive. La Commission de Venise puise dans les rapports d'observation et autres textes de l'Assemblée les problèmes soulevés et recommandations faites afin d'étayer ses avis et études en matière électorale. L'Assemblée pour sa part s'appuie sur les avis, rapports et documents de référence de la Commission pour étayer, notamment, ses rapports d'observation mais également les différents textes qu'elle adopte dans le domaine électoral. Si l'on ajoute à cette synergie le rôle essentiel de la Cour européenne des droits de l'homme dans le développement de la jurisprudence relative au droit à des élections libres, et qui s'appuie à la fois sur les avis et études de la Commission et sur les rapports d'observation de l'Assemblée, ces coopérations croisées permettent de renforcer la promotion des instruments, principes et bonnes pratiques en matière électorale dans les Etats membres et parfois au-delà.

Richard Clayton QC[1]

The impact of the Venice Commission on the UK and International Courts

As the Venice Commission reaches its 30th anniversary, it is timely to assess the impact of its work. The Commission's opinions, guidelines and reports have provided significant guidance to the UK domestic courts, the European Court of Human Rights (the ECtHR) and the Court of Justice of the European Union (the CJEU). I shall argue that they have influenced the various courts on numerous occasions, but this may not be a very reliable indicator of the extent to which the Commission's publications have influenced outcomes.

The enactment of the Human Rights Act

The UK was of course very slow to give effect to the European Convention on Human Rights, compared to other members of the Council of Europe. Until the Human Rights Act 1998 (hereinafter, the "HRA") enacted the Convention into domestic law, the Convention operated in UK law as an unincorporated treaty. The common law dualist view is that a ratified treaty has direct consequences in international law. But a treaty is not a direct source of rights or duties in domestic law because making a treaty is an executive act: performing treaty obligations, if they entail alteration of the existing domestic law, requires legislative action.[2] That is still the orthodox position in the UK. Recently, in *R(DA) v. Secretary of State for Work and Pensions* Lord Wilson JSC suggested that a "move is afoot, exemplified by Lord Kerr JSC's judgment in *R (SG) v. Secretary of State for Work and Pensions* for UK courts to treat the United National Convention on the Rights of the Child (UNCRC), which the UK has ratified, as being, exceptionally, part of our domestic law.[3] At present, however, it forms no part of it".[4]

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1 Former Member of Venice Commission in respect of the United Kingdom (2011-2019).
2 Per Lord Atkin, *A-G (for Canada) v. A-G (for Ontario)* [1937] AC 326, 347–348; see also *The Parlement Belge* (1879) 4 PD 129, 154.
3 [2015] 1 WLR 1449, paras. 247–257.
4 [2019] 1 WLR 3289 [67].

The HRA made Convention rights[5] directly enforceable under UK law against "public authorities" which fall into three different types. Core public authorities are, effectively, governmental bodies,[6] and public authorities are defined to include courts and tribunals,[7] and hybrid public bodies.[8] The HRA requires public authorities to act compatibly with Convention rights via two different routes. First, a public body must act[9] compatibly with Convention rights under Section 6(1) unless the principle of parliamentary sovereignty dictates otherwise.[10] Secondly, Section 3(1) imposes a strong obligation on the Courts to "so far as it is possible to do so", read and give effect to legislation in a way which is compatible with Convention rights.[11] The strong interpretative obligation under Section 3 has obvious analogies with the EU *Marleasing* obligation to interpret national legislation (whether adopted before or after a Directive's implementation), as far as possible, in the light of the wording and purpose of that Directive.[12]

If, however, the court cannot interpret legislation compatibly with Convention rights, it may make a declaration of incompatibility under Section 4, which entitles the Government to take remedial action to amend legislation so as to remove the incompatibility by enacting secondary

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[5] The HRA did not apply to all Convention rights. Section 1(1) (as amended) defines "Convention rights" as "In this Act "the Convention rights" means the rights and fundamental freedoms set out in- (a)Articles 2 to 12 and 14 of the Convention, (b) Articles 1 to 3 of the First Protocol, and (c) Article 1 of the Thirteenth Protocol, as read with Articles 16 to 18 of the Convention. These articles are set out in Section 1 of the HRA.

[6] See *Aston Cantlow v. Wallbank* [2004] 1 AC 546.

[7] Section 6(3) which requires the court to act compatibly with Convention rights. Section 6(3) means that Convention rights have horizonal application to private bodies. Although this broad issue has never been definitively resolved in definitive terms (see *Y v. X* [2004] ICR 1634 at para. 45 per Mummery LJ), it has resulted in the courts developing the common law compatibly with Convention rights and, in particular, has modified the common law of confidentiality to develop into the "misuse of private information" balancing Article 8 against Article 10: see e.g. *Campbell v. Mirror Group* [2004] AC 457.

[8] Section 6(3) states that a hybrid public authority is a person "whose functions are the functions of a public nature" and does not cover activities "where the nature of the act is private" under Section 6(5). Although there is no analogous Strasbourg principles, the UK courts must have regard to Strasbourg decisions, since they are now answerable to the ECtHR. There is no single test of universal application to determine whether a public body is a functional public authority: see, generally, the controversial decision in *YL v. Birmingham City Council* [2008] 1 AC 95 which Parliament reversed by the decision on its facts by introducing legislation which made care homes subject to the HRA: see Section 145 of the Health and Social Care Act 2008.

[9] Under Section 6(6) act includes "a failure to act".

[10] See the two exceptions defined in Section 6(2)(a) and 6(2)(b).

[11] See *Ghaidan v. Godin-Mendoza* [2004] 2 AC 557.

[12] See *Marleasing SA v. La Comercial Internacional de Alimentación SA* [1992] 1 CMLR 305.

legislation.[13] However, the application of the Section 3 interpretation and the declaration of incompatibility procedure is not an entirely straightforward exercise for a court to undertake.[14]

Ever since the HRA was enacted, the Commission's opinions have been widely valued by the UK courts. The Commission's views have been considered in 14 English cases and two Scottish ones.

The Human Rights Act cases

The controversial Grand Chamber judgment in the prisoner vote case, *Hirst v. United Kingdom*[15] gave great weight to the Commission's *Code of Good Practice in Electoral Matters*[16] and was only finally remedied by the UK government in November 2017- by making the modest proposal of allowing prisoners on Temporary Licence to vote.[17] It is, therefore, unsurprising that the English courts have often studied the Commission's work in election law: in cases concerning the ban on prisoners voting in the Scottish independence elections (*Moohan v. Lord Advocate*),[18] the disenfranchisement of most EU citizens from parliamentary elections (*R(Tomescu) v. Lord President of the Council*),[19] the Sark electoral system (*R(Barclay) v. Lord Chancellor and Secretary of State for Justice*),[20] and several cases considering the inability of EU citizens to vote as a result of not registering to vote in UK parliamentary elections for more than 15 years.[21]

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[13] The Joint Parliamentary Committee on Human Rights has regularly reviewed the Government's approach in exercising its discretion to introduce delegated legislation which to date it has done, albeit often after great delays: see the most recent report of the Joint Committee Responding to human rights judgments *Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2018–2019* CP 182.

[14] See the assisted suicide case, *Nicklinson v. Ministry of Justice* [2015] AC 657 where the Supreme Court split 5-4 (Lord Neuberger PSC Lady Hale, DPSC, Lord Mance, Lord Kerr and Lord Wilson JSC for the majority and Lord Clarke, Lord Sumption, Lord Reed and Lord Hughes JSC dissenting) and decided that, in enacting Section 4, Parliament had delegated the power to declare legislation incompatible with the Convention to the courts, even where the decision fell within the state's margin of appreciation, and the courts should not shirk from exercising it. When exercising that power, the courts did not force Parliament to act; and, consequently, it would not have been outside the court's institutional powers for it to declare Section 2 of the 1961 Act incompatible with the Convention.

[15] (2006) 42 EHRR 41.

[16] Venice Commission, CDL-AD(2002)023rev2-cor, Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report.

[17] "Prisoners' voting rights: developments since May 2015" House of Commons Library Briefing Paper no. 07461, 2 April 2020.

[18] [2015] AC 9; see also the discussion of *Hirst* by Laws LJ in *R(Chester) v. Secretary of State for Justice* [2011] 1 WLR 1436 [15].

[19] [2016] 1 CMLR 39.

[20] [2010] 1 AC 464 [68] per Lord Collins.

[21] In the recent decision in *Shindler v. Chancellor of the Duchy of La*ncaster [2016] 3 CMLR 22

More recently, the Divisional Court in *R(National Council for Civil Liberties) v. Secretary of State for the Home Department* examined whether bulk interception warrants authorising the interception of overseas-related communications breached Articles 8 and 10 and adopted the Commission's view in its *Report on the Democratic Oversight of Signals Intelligence Agencies* [22] that judicial authorisation was an "important safeguard against arbitrariness" when dealing with interferences with Article 8, but to date this obligation had not been recognised as a "necessary requirement" for proportionality purposes.[23]

In *Banks v. Commissioners for Her Majesty's Revenue & Customs* the Upper Tribunal Tax and Chancery Chamber dismissed an appeal rejecting a claim that donations to UK Independence Party were gifts to a political party, and referred to the Joint Venice Commission/ODHIR's *Guidelines on Political Party Regulations*[24] but did not consider them of great assistance.[25]

A few recent cases have looked at the Commission's views on the complex Rule of Law issues that have arisen in Poland. In *Wozniak v. District Court in Gniezno, Poland* the High Court considered the impact of the joint urgent opinion of the Commission and the Director General of Human Rights and the Rule of Law on the amendments to the laws on the judiciary,[26] passed by the Polish Sejm on 20 December 2019 on whether it is arguable that these developments compromise fundamental guarantees of independence and impartiality when pursuing a European Arrest Warrant.[27] Venice Commission opinions on Poland have also been considered in a few Scottish extradition cases. These issues have also arisen in Scotland before the Sheriff's Court in *Regional Court in Bielsko-Biala, Poland v. Charyszyn*[28] and in *Circuit Court of Warszawa-Praga v. Maciejec*.[29]

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which concerned the inability to vote of EU citizens who had not been registered to vote in UK parliamentary elections for more than 15 years, the Divisional Court considered material produced by the Commission concerning flexibility in relation to the right to vote, because the ECtHR had done so in *Shindler v. United Kingdom* (19840/09) (2014) 58 EHRR 5 where the same complaint was made in relation to a parliamentary election. See also *R(Preston) v. Wandsworth London Borough Council* [2013] QB 687.

[22] Venice Commission, CDL-AD(2015)011, Report on the Democratic Oversite of Signals Intelligence Agencies.

[23] [2020] 1 W66LR 243 see para. 212.

[24] Venice Commission and OSCE/ODIHR, CDL-AD(2010)024, Guidelines on Political Party Regulation.

[25] [2020] UKUT 0101 (TCC).

[26] Venice Commission, CDL-AD(2020)017, Joint Urgent Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on amendments to the Law on the Common courts, the Law on the Supreme court and some other Laws of Poland.

[27] [2020] EWHC 1459 (Admin).

[28] [2019] 5 WLUK 195.

[29] 2019 S.L.T. (Sh Ct) 123.

The Commission's Rule of Law Report was discussed by Lord Reed in *AXA General Insurance Ltd v. HM Advocate*,[30] and other reports were analysed in *R (Smith) v. Oxfordshire Assistant Deputy Coroner* by the House of Lords,[31] and by the Court of Appeal in *R(Al-Skeini) v. Secretary of State for Defence*.[32]

Perhaps the most striking use of a Venice Commission opinion concerned the contentious question as to whether freedom of expression under Article 10 confers a right of access to information, which the newer ECtHR case law confirm, as highlighted in a Commission's opinion concerned with obtaining information about the activities of the courts in Azerbaijan.[33] Nevertheless, the Supreme Court rejected this broad view in *Sugar v. BBC*[34] and, again, before a 7 judge court in *Kennedy v. Charity Commission*.[35] However, Lord Wilson dissented, stating:[36]

> I cannot subscribe to the view that the development of article 10 which was in effect initiated in the *Társaság* case has somehow been irregular.[37] The wider approach is not in conflict with the "basic" *Leander* approach:[38] it is a dynamic extension of it. The judgment in the Társaság case is not some arguably rogue decision which, unless and until squarely validated by the Grand Chamber, should be put to one side. Its importance was quickly and generally recognised. Within a year of its delivery the European Commission For Democracy through Law ("the Venice Commission") had hailed it as a "landmark decision on the relation between freedom to information and the … Convention"; and, in giving the judgment of the Court of Appeal in *Independent News and Media Ltd v. A*,[39] Lord Judge CJ had, at para. 42, specifically endorsed that specifically endorsed that description of it.

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[30] [2012] 1 AC 868 [118].
[31] [2011] 1 A.C. 1 [165] per Lord Mance where the Commission discussed ECtHR, *Bankovic v. United Kingdom* (2001) 11 BHRC 435 and the Commission's report on *Report on the Preferential Treatment of National Minorities by their Kin-States*.
[32] [2007] QB 140 [119] per Rix LJ for the Court on the *Report on the Preferential Treatment of National Minorities by their Kin-States*.
[33] Venice Commission, CDL(2009)184, Opinion No 458/2009 on the Draft Law about Obtaining Information of the Courts of Azerbaijan, 14 December 2009.
[34] [2012] 1 WLR 439 [95].
[35] [2015] AC 45.
[36] *Ibidem*, [188].
[37] ECtHR, *Tarsasag v. Hungary,* no. 37374/05, 14.04.2009, 53 EHRR 3.
[38] ECtHR, *Leander v. Sweden,* no.9248/81, 26.03.1987, 9 EHRR 433.
[39] [2010] 1 WLR 2262.

This debate about whether Article 10 included a right of access to information was eventually resolved in favour of the Commission's opinion, when the Grand Chamber effectively overruled *Kennedy* in *Magyar Helsinki Bizottság v. Hungary*.[40] However, the Grand Chambers' judgment has yet to be considered by the UK courts.

The European Court of Human Rights

The ECtHR has considered the Commission's work in 131 chamber[41] and 31 Grand Chamber judgments.[42] Since 2012 the Commission's views have been discussed in 21 Grand Chamber decisions ranging over many areas.

The ECtHR have discussed the Commission's *Code of Good Practice in Electoral Matters*[43] in four cases, *Magyar Kétfarkú Kutya Párt v. Hungary*,[44] *Muršić v. Croatia*,[45] *Scoppola v. Italy (No 3)*[46] and *Sitaropoulos v. Greece*.[47] Video surveillance was examined in *López Ribalda v. Spain*[48] which considered the *Opinion on "video surveillance by private operators in the public and private spheres and by public authorities in the private sphere and human rights protection*.[49] There have been four judgments concerning judicial and prosecutorial independence: *Ilgar Mammadov v. Azerbaijan*[50] which took account of *Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine* and[51] the *Opinion on proposals amending the Draft Law on the amendments to the Constitution to strengthen the independence of Judges of Ukraine*;[52] *Denisov v. Ukraine*-[53] which also looked at *Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine*; *de Carvalho e Sá v. Portugal*[54] which considered the *Report on the*

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[40] ECtHR, *Magyar Helsinki Bizottság v. Hungary*, no. 18030/11, 08.11.2016.
[41] Based on a HUDOC search on 7 July 2020.
[42] Based on a HUDOC search made on 7 July 2020.
[43] Venice Commission, CDL-AD(2002)023, Code of Good Practice on Electoral Matters, Guidelines and Explanatory Report.
[44] ECtHR, *Magyar Kétfarkú Kutya Párt v. Hungary,* no. 201/17, 20.01.2020.
[45] ECtHR, *Muršić v. Croatia,* no.7334/13, 20.10.2016
[46] ECtHR, *Scoppola v. Italy* (No 3), 126/05, 22.05.2012.
[47] ECtHR, *Sitaropoulos v. Greece*, no. 42202/07, 15.03.2012.
[48] ECtHR, *López Ribalda v. Spain*, nos. 1874/13 and 8567/13, 17.10.2019.
[49] Venice Commission, CDL-AD (2007)027, Opinion on Video Surveillance by Private Operators in the Public and Private Spheres and by Public Authorities in the Private Sphere and Human Rights Protection.
[50] ECtHR, *Mammadov v. Azerbaijan*, no. 15172/13, 29.05.2019.
[51] Judgment 18 July 2013.
[52] Venice Commission, CDL-AD(2013)034, Opinion on Proposals amending the Draft Law on the Amendments to the Constitution to Strengthen the Independence of Judges of Ukraine.
[53] ECtHR, *Denisov v. Ukraine*, no. 67739/11, 25.09.2018.
[54] ECtHR, *de Carvalho e Sá v. Portugal*, nos. 55391/14, 57728/13 and 74041/13, 06.11.2018.

Independence of the Judicial System Part I: The Independence of Judges[55] and the *Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "The Former Yugoslav Republic of Macedonia"*, and *Maktouf and Damjanović v. Bosnia and Herzegovina*[56] which examined *Opinion on Legal Certainty and the Independence of Judiciary in Bosnia and Herzegovina*).[57] The implementation of ECtHR judgments was addressed in *GIEM v. Italy*[58] which took account of the *Opinion on the implementation of the judgments of the European Court of Human Rights*.[59] The relationship between political and criminal ministerial responsibility was analysed in *Merabishvili v. Georgia*[60] which considered the *Report on the relationship between political and criminal ministerial responsibility*.[61] Recent national political developments have been examined: two in Hungary (*Baka v. Hungary*[62] which considered the *Position of the Government of Hungary on the Opinion on the Fundamental Law of Hungary*[63] and *Karácsony v. Hungary*[64] which examined the R*eport on the Role of the Opposition in a Democratic Parliament*[65] and the *Report on the Scope and Lifting of Parliamentary Immunities*),[66] and in Monaco (*Couderc and Hachette Filipacchi Associés v. France*[67] which referred to *Opinion on the balance of powers in the Constitution and the legislation of the Principality of Monanco*).[68] Freedom of religion was addressed in *İzzettin Doğan v. Turkey*[69] which took account of the *Opinion on the legal status of religious communities in Turkey and the right of the Orthodox Patriarchate of Istanbul*[70] and the Joint Venice Commission/ODIHR *Guidelines for*

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[55] Venice Commission, CDL-AD(2010)004, Report on the Independence of the Judicial system - Part 1: the Independence of Judges.
[56] ECtHR, *Maktouf and Damjanović v. Bosnia and Herzegovina*, no. 2312/08 and 34179/08, 18.07.2013.
[57] Venice Commission, CDL-AD(2012)014, Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina.
[58] ECtHR, *GIEM v. Italy*, nos. 1828/06, 34163/07 and19029/11, 28.06.2018.
[59] Venice Commission, CDL-AD(2002)034, Opinion on the Implementation of the Judgments of the European Court of Human Rights.
[60] ECtHR, *Merabishvili v. Georgia*, no. 72508/13, 28.11.2017.
[61] Venice Commission, CDL-AD(2013)001, Report on the Relationship between Political and Criminal Ministerial Responsibility.
[62] ECtHR, *Baka v. Hungary*, no. 20261/12, 23.06.2016.
[63] Venice Commission, CDL(2011)058, Position of the Government of Hungary on the Opinion on the new Constitution of Hungary.
[64] ECtHR, *Karácsony v. Hungary*, nos. 42461/13 and 44357/13, 17.05.2016.
[65] Study No. 497/2008.
[66] Study No. 714/2013.
[67] ECtHR, *Couderc and Hachette Filipacchi Associés v. France*, no. 40454/07, 10.11.2015.
[68] Venice Commission, CDL-AD(2013)018, Public Opinion on the balance of powers in the Constitution and the Legislation of the Principality of Monaco.
[69] ECtHR, *İzzettin Doğan v. Turkey*, no. 62649/10, 26.04.2016.
[70] Venice Commission, CDL-AD(2010)005, Opinion on the Legal Status of Religious

Legislative Reviews of Laws affecting Religion or Belief;[71] and *Martínez v. Spain*[72] which also considered these *Guidelines*. Freedom of assembly issues 3 times arose in *Navalnyy v. Russia*,[73] *Pentikäinen v. Finland*[74] and *Kudrevičius v. Lithuania* [75] all took account of the Joint Venice Commission/ODIHR *Guidelines on freedom of peaceful assembly*. Secret detention was scrutinised in *El-Masri v. the former Yugoslav Republic of Macedonia* [76] which had regard to the *Opinion on the international legal obligations of Council of Europe member States in respect of secret detention facilities and inter-State transport of* prisoners).[77] Freedom of expression was the subject of *Centro Europa 7 S.r.l. and Di Stefano v. Italy*[78] which considered the *Opinion on the compatibility of the "Gasparri" and "Frattini" laws of Italy with the Council of Europe standards in the field of freedom of expression and pluralism of the media*.[79]

The Court of Justice of the European Union cases

The Commission's work has also been examined in several decisions before the CJEU.[80] The most significant of these are the recent Grand Chamber judgments arising from the Rule of Law crisis in Poland.

In its important judgment in *Joined Cases C-585/18, C-624/18 and C-625/18*, the Grand Chamber decided that Article 47 of the Charter and Article 9(1) of Directive 2000/78 must be interpreted as precluding cases concerning the application of EU law from falling within the exclusive jurisdiction of a court which is not an independent and impartial tribunal,[81] and considered the Commission's *Opinion on the Draft Acts amending the Act on the National Council of the Judiciary, amending the Act on the Supreme Court and*

Communities in Turkey and the Right of the Orthodox Patriarchate of Istanbul to use the adjective "Ecumenical".

[71] Venice Commission, CDL-AD(2004)028, Guidelines for Legislative Reviews of Laws affecting Religion or Belief.

[72] ECtHR, *Martínez v. Spain*, no. 56030/07, 12.06.2014.

[73] ECtHR, *Navalnyy v. Russia*, nos. 29580/12 36847/12 11252/13 12317/13 43746/14, 15.11.2018.

[74] ECtHR, *Pentikäinen v. Finland*, no. 11882/10, 20.10.2015.

[75] ECtHR, *Kudrevičius v. Lithuania*, no. 37553/05, 15.10.2015.

[76] ECtHR, *El-Masri v. the former Yugoslav Republic of Macedonia*, no. 39630/09 13.12.2012.

[77] Venice Commission, CDL-AD(2006)009, Public Opinion on the International legal obligations of Council of Europe member States in respect of Secret Detention Facilities and Inter-state Transport of Prisoners.

[78] ECtHR, *Centro Europa 7 S.r.l. and Di Stefano v. Italy*, no. 38433/09, 07.06.2012.

[79] Venice Commission, CDL-AD(2020)017, *op. cit.*.

[80] Based on a survey of Case-law EUR-Lex, 8 July 2020.

[81] ECJ, Case C-619/18.

on the Act on the Organisation of Ordinary Courts.[82] The Grand Chamber in *European Commission v. Republic of Poland* upheld infringement proceedings against Poland under Article 258 TFEU for failing to fulfil its obligations under Article 19(1)(2) TEU and Article 47 of the Charter of Fundamental Rights of the European Union. The reference concerned a decision to lower the retirement age of the Supreme Court judges appointed before 3 April 2018. The Grand Chamber decided that the Government had failed to ensure respect for the Rule of Law in the Union legal order. First, the Government infringed the principle of irremovability of judges. Secondly, granting the President a discretion to extend the active mandate of Supreme Court judges when reaching the lowered retirement age infringe the principle of judicial independence.[83] The Grand Chamber, once again examined the Commission's *Opinion on the Draft Acts amending the Act on the National Council of the Judiciary, amending the Act on the Supreme Court and on the Act on the Organisation of Ordinary Courts*.[84]

In *Dunai*[85] the CJEU examined the EU's power to ensure a high level of consumer protection and the fundamental principles of equality before the law, non-discrimination, the right to an effective judicial remedy and the right to fair legal process and referenced the Commission's *Opinion on the Legal Status and Remuneration of Judges and on the Organisation and Administration of Courts of Hungary*.[86]

There have also been several CEJU cases where the opinions of the Advocate General took count of the Commission's views. In *Data Protection Commissioner v. Facebook Ireland*[87] AG Saugmandsgaard had to assess whether the European Commission standard contractual clauses for transferring personal data the EU breached 7,[88] 8[89] and 47[90] of the Charter of Fundamental Rights; in the course of his opinion, he took account of the

[82] Venice Commission, CDL-AD(2017)031, Opinion on the Draft Act amending the Act on the National Council of the Judiciary; on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts.
[83] ECJ, Case C-619/18.
[84] Venice Commission, CDL-AD(2017)031, *op. cit.*
[85] ECJ, Case C-118/17.
[86] Venice Commission, CDL-AD(2012)010, Opinion on the Revision of the Constitution of Belgium.
[87] ECJ, Case C-311/18.
[88] The right for respect for private and family rights.
[89] Protection of personal data.
[90] The right to an effective remedy and a fair trial.

Commission's *Opinion on the Democratic Oversight of Signals Intelligence Agencies*.[91] In *Minister for Justice and Equality v. LM*[92] AG Tanchev examined a challenge to a European arrest warrant on the basis that the individual in question runs a real risk of not receiving a fair trial in Poland; he referred to *Opinion on the Draft Acts amending the Act on the National Council of the Judiciary, amending the Act on the Supreme Court and on the Act on the Organisation of Ordinary Courts*[93] and its *Opinion on the Act on the Public Prosecutor's office*, as amended.[94]

In *European Commission v. Hungary (Transparency of associations)* AG Sanchez-Bordona scrutinised on donations received from abroad for the benefit of civil society organisations in breach of Article 63 TFEU and Articles 7,[95] 8[96] and 12[97] of the Charter and discussed the Commission's *Opinion on the draft law on the transparency of organisations receiving support from abroad*.[98] AG Saugmandsgaard in *Associação Sindical v. Tribunal de Conta*[99] rejected a reference from Portugal which asked whether the reduction of judicial salaries, which resulted from a law that temporarily reduced public sector remuneration to combat an economic was crisis compatible with the principle of judicial independence when he had regard to the Commission's *Report on the independence of the judicial system- Part I: The independence of judges*.[100] In *Strack v. European Commission*[101] which concerned a complaint that Commission failed to comply with time limits in respect of the general right of access to information AG Kokott also footnoted the *Report on the independence of the judicial system- Part I: The independence of judges*. [102]

In *Solvay SA v. European Commission*[103] AG Kokott considered the principle that proceedings must take place within a reasonable time and had regard to the Commission's *Report on the effectiveness of national remedies in respect of*

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[91] Venice Commission, CDL-AD(2015)011, *op. cit.*
[92] CJ, Case C-216/18 PPU.
[93] Venice Commission, CDL-AD(2017)031, *op. cit.*
[94] Venice Commission, CDL-AD(2017)028, Poland - Opinion on the Act on the Public Prosecutor's Office, as amended.
[95] The right to respect for private and family life.
[96] Protection of personal data.
[97] Freedom of association.
[98] Venice Commission, CDL-AD(2017)015, Hungary - Opinion on the Draft Law on the Transparency of Organisations receiving support from abroad.
[99] ECJ, Case C-64/16.
[100] Venice Commission, CDL-AD(2010)004,. *op. cit.*
[101] ECJ, Case C-127/13 P.
[102] Venice Commission, CDL-AD(2010)004, *op. cit.*
[103] ECJ, Case C-110/10 P.

excessive length of proceedings,[104] which he also mentioned in *Solvay SA v. European Commission*.[105] The only CJEU case which considered the Commission's *Code of Good Practice in Electoral Matters* was AG Tizzano in the complaint concerning EU elections in Gibraltar, *Kingdom of Spain v. United Kingdom*.[106]

It should also be noted that the General Court in *Klyuyev v. Council*[107] considered the Commission's *Rule of Law Checklist*.[108]

The impact of the Commission

However, identifying cases where references are made to the Commission's publications may seriously overstate the significance of the Commission's views. For instance, in March 2013 the Commission published an opinion on freedom of assembly in Russia.[109] The Commission expressed concerns about a legislative scheme which required an organiser to notify a demonstration in advance, entitling the authorities to respond with 'a well-motivated proposal to alter the place … and/or time of holding the public event', compelled the organiser to indicate whether it accepted the modification and gave it the option of either giving up the event or holding it in a different place from the original intention. The Commission advised that the organiser's autonomy in deciding the place of the event should be norm and any interferences with that principle must be justified as proportionate.

The Commission's analysis of the freedom of assembly issues strongly contrasts with the ECtHR's approach when it considered Article 11 in July 2012 in *Berladir v. Russia*.[110] The ECtHR stressed that it was not tasked to review the relevant legislation in the abstract, but must confine itself, as far as possible, without losing sight of the general context, to examining the issues raised by the case before it, and it went on to dismiss the application on its facts.

The ECtHR's judgment in *Berladir* confirms that the careful legal analysis that the Commission undertakes is fundamentally different in nature

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[104] Venice Commission, CDL-AD(2006)036rev, Report on the Effectiveness of National Remedies in respect of Excessive Length of Proceedings.
[105] ECJ, Case C-109/10 P.
[106] ECJ, Case C-145/04.
[107] ECJ, Case T-731/15.
[108] Venice Commission, Rule of Law Checklist Publication, www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf.
[109] Venice Commission, CDL-AD(2013)003, Opinion on Federal Law no. 65-FZ amending Federal Law No. 54-FZ on Assemblies, Meetings, Demonstrations, Marches and Picketing and the Code of Administrative Offences.
[110] ECtHR, *Berladir v. Russia*, no. 34202/06, 10.07.2012.

from the fact-finding functions which courts frequently carry out. However, the later Russian chamber judgments[111] and the Grand Chamber in *Navalnyy v. Russia* represent significant departures- in particular, the Grand Chamber considered the *Joint Guidelines* and undertook a very rigorous and detailed analysis, both of legal principles and of the facts of the case.[112]

Consequently, it is clear that, when courts are required to examine the legal principles where the Commission has spoken, its views are accorded great respect.

The position is, therefore, not very different from the exercise of evaluating whether Commission's opinions ultimately affect the countries which it studies. The Commission has no systematic means to assess whether the opinions it publishes are implemented in the countries it advises. However, the Secretariat makes considerable efforts to track whether its opinions are implemented- through formal channels with national governments and informal processes through communicating with Council of Europe field offices, Commission members and other contacts, which reported to the Commission and this has become formalised into the Commission's procedures. It seems that, where the state, itself, requests an opinion, it is normally implemented.[113]

It is, therefore, very difficult to assess the Commission's effectiveness in shaping constitutional or human rights standards,[114] and

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[111] ECtHR: *Kasparov v. Russia*, no. 21613/07, 03.10.2013; *Nosov v. Russia*, nos. 9117/04 and 10441/04, 20.02.2014; *Primov v. Russia*, no. 17391/06, 12.06.2014; *Mikhaylova v. Russia,* no. 46998/08, 19.11.2015; *Lashmankin v. Russia,* nos. 57818/09 *et al.*. 07.02.2017; *Annenkov v. Russia,* no. 31475/10, 25.07.2017*; Zimin v. Russia*, nos. 63686/13 and 60894/14, 30.01.2018; *Ognevenko v. Russia,* no. 44873/09, 20.11.2018; *Alekseyev v. Russia,* nos. 14988/09 *et al.*. 27.11.2018; *Dmitriyeva v. Russia,* nos. 60921/17 and 7202/18, 30.04.2019; *Zhdanov v. Russia,* nos. 12200/08, 35949/11 and 58282/12, 16.07.2019; *Razvozzhayev v. Russia*, nos. 75734/12, 2695/15 and 55325/15, 19.11.2019; *Obote v. Russia*, no. 58954/09, 19.11.2019.

[112] ECtHR, *Navalnyy v. Russia*, no. 29580 *et al.*, 15.11.2018.

[113] P van Dijk 'The Venice Commission in Certain Aspects of the European Convention of Human Rights, Ratione Personae' in S Breitenmoser, B Ehrenzeller, M Sassoli (ed) "Human Rights Democracy and the Rule of Law: *Libor Amicorum f*or Lucius Wildhaber" (2007). But W Hoffmann-Riem, Wolfgang takes a different view in The Venice Commission of the Council of Europe – Standards and Impact' [2014] 25 EJIL 57.

[114] See e.g. S Bartole 'Comparative Constitutional Law- an Indispensable Tool for the Creation of Transnational Law', European Constitutional Law Review, 13, 2017 601;. G Buquicchio, G / S Dürr 'Constitutional Courts - the living heart of the separation of powers, The role of the Venice Commission in promoting Constitutional Justice', in Raimondi, Guido / Motoc, Iulia / Pastor Vilanova, Pere / Morte Gomez, Carmen, eds., Human Rights in a Global World, Essays in honour of Judge Luis Lopez Guerra, Oisterwijk (2018), pp. 515-544.; P Craig "Transactional Constitution making: the Contribution of the Venice Commission on Law and Democracy' (2017) UC Irvine Journal of International, Transnational, and Comparative Law 2 Vol 57; M de Vissser 'A Critical Assessment of

some argue that such a role is objectionable in principle as being counter majoritarian.[115]

These debates underlie an argument of principle, which is fundamental to all of the Commission's work. The question of how much the Commission influences court decisions and how much its views affect national constitutional standards both serve to demonstrate the Commission's central role: the power of the Commission is the power to persuade.

the Role of the Venice Commission in the Process of Domestic Constitutional Reform' (2015) 63 AM J COMPl 963; W Hoffmann-Riem, The Venice Commission of the Council of Europe – Standards and Impact, above.

[115] V. Volpe 'Drafting Counter-Majoritarian Democracy: the Venice Commission's Constitutional Assistance', Heidelberg Journal for International Law, ZaöRV76(2016), 811.

Carlos Closa[1]

A Personal Recollection

I became a member of the Venice Commission at its Spring 2005 session, following my appointment as Deputy Director of the Centre for Political and Constitutional Studies (CEPC) in September 2004. The Spanish Foreign Affairs traditionally delegates the nomination of the Spanish member to the CEPC and it became customary that the Director or Deputy Director exercised this role. After an initial period of intense involvement of the first member, Prof. Francisco Laporta, Spanish participation had somehow receded a bit until the arrival of my predecessor, Prof. Ángel Sánchez Navarro, who became my substitute after my appointment. I intended to intensify presence in both the elaboration of Venice Commission documents and participation in sessions and, in fact, I did miss very few during my tenure (2005-2009). At that time, I belonged to the youngest cohort of members (being 41 at the time of appointment).

The environment was quite impressive: Scuola San Giovanni Evangelista conveyed a sense of pomp and circumstance and a seriousness in the purpose of the Venice Commission almost unrivalled. As was customary, I was invited to the main table in the official Plenary Session dinner, a privilege reserved for newly appointed members next to prominent political figures attending that session, the President and some other relevant personalities. Anecdotally, I did miss the original invitation because of my late arrival at the departure point but I could join at the next session.

My membership coincided with a transition period in the Commission[2] from the intense and highly praised involvement with constitutional engineering during the Central and Eastern European transitions to democracy to more unchartered waters in which the focus became mainly Balkan and former Soviet states non-EU members. Being a political scientist in an almost absolute environment of lawyers, I quickly became associated with electoral matters, political parties and referendums. In fact, the country opinions in which I took part (Armenia, Montenegro, Turkey, Ukraine and UK) deal with these issues (being the Opinion on civil control over

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[1] Former member of the Venice Commission in respect of Spain (2005-2009).

[2] Buquicchio, Gianni and Granata-Menghini, Simona (2013) - "The Venice Commission Twenty Years on. Challenge met but Challenges ahead" , in van Roosmalen, Marjolein / Vermeulen, Ben / van Hoof, Fried / Oostling, Merten, eds., Fundamental Rights and Principles – *Liber amicorum* Pieter van Dijk, Cambridge, Antwerp, Portland (Intersentia 2013), p. 252.

armed forces an exception). The same applies to the studies: Code of Good Practices for Political Parties and the Imperative Mandate.

1. Involvement with organizational issues

My organizational involvement, in formal terms, remained limited for most of my period. I was member of the Sub-Committee on Democratic institutions that did not have a very intense activity. Given my profile and expertise, I attended more often the Council for Democratic Elections (CDE) where Opinions were often approved before passing on to the Venice Commission Plenary. I had the opportunity to meet its seasoned president, Mr. Luc Van den Brande, form Belgium. My most relevant contribution to organizational issues refers to the election of the President after the late Antonio La Pregola.

Election of the new President (2007) The contact group

In 2007, the Commission faced a significant organizational challenge: the replacement of its President, Antonio La Pergola. The election of the new President was a highly sensitive issue since she/he needs to combine several dimensions to her profile and, at the same time, attract support and respect from those constituencies that are the focus of Venice Commission work: academics, practitioners, diplomats and, last but not least, politicians given the high political sensitivity of some of Venice Commission dossiers. Given the lack of specific statutory regulation of the election procedure, the Enlarged Bureau designed an *ad hoc* procedure, whose main objective was obtaining the most consensual possible agreement on a suitable profile. For this, it invited a group of junior or less experienced members to scout the perceptions of members. The consultations identified a number of preferences for certain institutional characteristics (the need to a large consensus and the necessity to keep the traditions and culture of the Venice Commission) next to some personal requirements: the need for independence and neutrality; the need for diplomatic skills, the sensibility towards specific geographic areas and, decisively, the capacity to engage with the secretariat. The Vice-Presidents emerged as obvious candidates but several of them self-discarded (i.e. Bonnici, Tuori and Van Dijk). The contact group finally identified a large support for the Norwegian representative, Jan Erik Helgesen, a legal adviser and law professor with large experience in UN Human Rights related bodies who had been a Venice Commission member since 1990. The scouting procedure resulted highly functional and it hence found its way into the Rules of Procedure, in Article 6 as amended at the 101st Session in 2014.

2. Drafting Opinions

Even though I am a political scientist interested in institutional design, I was assigned systematically to what Venice Commission considered more political issues closer to my profile: referendums, elections and political parties. Those Opinions in which I took part dealt with these topics.

Montenegro

Already in my first Plenary Session, Pierre Garrone (Venice Commission Secretariat) approached me and inquired whether I could collaborate in an Opinion on the secession referendum of Montenegro from Serbia.[3] No doubt, the topic was highly sensitive and not only because of its significance in the process of dissolution of Yugoslavia but also because its repercussions and possible contagion effects in other cases in Western Europe. The Catalan and Basque independentist movements have systematically referred to the Baltic and Balkan cases to justify their own claims. Writing for the Spanish paper *El País* on the lessons learned from the Opinion, I argued that the Montenegro precedent was improper for cases in Spain.[4] I worked together with two outstanding colleagues: Anthony Bradley (substitute member, UK) and Kaarlo Tuori (member, Finland) and we divided the work along the three questions that PACE had indicated: the required level of participation, the majority requirements and the criteria for eligibility to vote. I concentrated on the second issue on which we came to the conclusion that even though no set international standards existed, it would be advisable that a larger than usual majority would back such as transcendent decision as becoming an independent state. This recommendation did not go very easily with proponents of independence that strategically preferred a very short majority coinciding with their perceived voting strength.

Armenia

Armenia has been a recurrent "customer" of the Venice Commission and, in several of these occasions, on electoral matters. I drafted and opinion on its electoral code (together with two electoral experts; Mr Michael Krennerich

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[3] Venice Commission, CDL-AD(2005)094, Opinion on the Compatibility of the Existing Legislation in Montenegro concerning the Organisation of Referendums with Applicable International Standards.

[4] Montenegro, el precedente improcedente, El País, 27.06.2006 https://elpais.com/diario/2006/06/27/opinion/1151359205_850215.html.

and Mr Jessie Pilgrim)[5] and an *amicus curiae* for its constitutional court.[6] For the Opinion, I travelled to Yerevan and this visit resulted very instrumental to understanding the functioning of specific institutions in certain environments. Thus, opposition parties insisted on prohibiting party election observers to change party the same day of the election. Even this practice seemed odd, intuitively it did fit standard practice of political rights (people can change ideology even on the day of the election). However, once on the ground, I understood that bribes acted as the incentive to switching parties and, hence, this could also ease corrupting the election process by factually removing controls on the ground. In general, the lesson from this and other missions is that formal constitutional design must take into account current practice in specific environments (something that I also learned when acting as consultant for the Iraqi constitutional committee, see below).

UK

The significance of this opinion (jointly drafted with Malta's member Ugo Mifsud Bonnici) derives from the fact that the UK is a consolidated democracy that did not appear among the usual demanders of Venice Commission opinions and, moreover, national authorities were not the ones requesting the opinion: it came from the PACE Committee for Honouring the obligations and commitments of member States. In other words, it had a scrutiny dimension on a Western consolidated democracy (and EU member) not normally seen at that moment. The Opinion[7] addresses both the Great Britain and Northern Ireland electoral legislations and their differences. It concluded that the electoral legislation of the latter territory (Northern Ireland) was more aligned with European standards than the former one (i.e. Great Britain). The reason for that were the more stringent use of personal identifiers in Northern Ireland together with the existence of a permanent voter register that made the system less amenable to fraud. In fact, the Opinion argued that the existence of permanent identifiers in the whole of the UK would greatly enhance the reliability of the registration system.

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[5] Venice Commission, CDL-EL(2006)026rev, Joint opinion on draft amendments to the Electoral Code of the Republic of Armenia.

[6] Venice Commission, CDL (2006)079, Comments on the conformity of the Law on Political Parties of the Republic of Armenia with international standards (*amicus curiae* Opinion at the request of the Constitutional Court of Armenia).

[7] Venice Commission, CDL-AD(2007)046, Opinion on the Electoral Law of the United Kingdom.

Turkey

This Opinion (the last one in which I took part as full member of the Venice Commission) involved a relatively large group of rapporteurs as warranted by the importance of the case: Turkish courts had reiteratively banned political parties, and this had attracted criticism from the ECHR. Only two other European states (i.e. Germany and Spain) had similar legislation on political parties. In fact, the Spanish 2002 Law on political parties, designed to fight ETA related organizations, had resulted highly contentious and its application in 2003 to illegalize *Batasuna* reached the ECHR (the Court declared the law within the remit of the European Convention). The main difference with the Turkish legislation was that, under Spanish legislation, the effects of the prohibition of a political party by the Supreme Court extended to any succeeding party, whilst in the Turkish case any new party had to be dealt with as a totally new case. This explains the large number of prohibited parties that, in reality, replicate a previously forbidden one. The Opinion[8] reflected this difference.

Ukraine

This joint opinion together with OSCE/ODHIR had the invaluable collaboration of Jessie Pilgrim and it was adopted after I had already left the Venice Commission. The Opinion[9] pointed out that the law included some issues previously identified even though some few others remained unattended.

Bulgaria

My contribution to this Opinion[10] was not as intense as I would have liked and here I followed very much the leadership of Hans-Heinrich Vogel (member, Sweden).

3. Studies

I drafted two studies for the Venice Commission, both of them related to my broad field of expertise (elections, referendums, political parties). The first one on political parties aimed at producing a Code of Good Practices

[8] Venice Commission, CDL-AD (2009)006, Opinion on the Constitutional and Legal Provisions relevant to the Prohibition of Political Parties in Turkey.
[9] Venice Commission, CDL-AD(2009)028, Joint Opinion on the Draft Law No. 3366 about Elections to the Parliament of Ukraine.
[10] Venice Commission, CDL-AD(2008)034, Opinion on the draft amendments to the Law on Political Parties of Bulgaria.

with a general reach. The second one, on the imperative mandate, had a more limited reach given that the issue is only relevant in few jurisdictions. I additionally contributed to the Report on the democratic control of the armed forces[11] even though more marginally.

Political parties

The scope of the study was huge. The number of possible items to be included ranged from principles to very specific ones and intersected with other Venice Commission studies, on electoral matters or referendums. Also, the request from PACE[12] included a very long list of issues. Retrospectively, I believe that the rapporteurs (myself and Mr. Jean-Claude Colliard) gave in to the temptation of overregulation and this perhaps makes the Code[13] a less attractive instrument that it could have been.

Imperative mandate

I truly enjoyed drafting this study that, despite its general reach, was inspired by the Ukrainian practice (and subsequently prohibition of) "floor crossing" (i.e. changing party in the middle of the legislature). My conclusion[14] reflected the paradox that this institution (i.e. a modality of "imperative mandate closer to "mandate subject to party allegiance") served to fight corruption, but in the Ukraine case, it however contradicted European standards. As it was the case with other opinions and studies, the study reflected this paradox: practice of institutions might contradict the very principles that inspired them.

4. Other activities

Membership of the Venice Commission opened up to a range of activities beyond writing opinions and studies. These activities often combined an academic profile with a more diplomatic or advisory dimension. Among the purely academic ones, I remember with special pleasure my participation in the UNIDEM campus celebrated in Trieste and organized by Sergio Bartole and my participation in a conference

[11] Venice Commission, CDL-AD(2008)004, Report on the Democratic Control of the Armed Forces, Study no. 389/2006.
[12] Parliamentary Assembly of the Council of Europe, The Code of Good Practice for Political Parties, Doc. 11210, 29.03.2007.
[13] Venice Commission, CDL-EL(2008)020rev, Code of Good Practices in the Field of Political Parties.
[14] Venice Commission, CDL-AD(2009)027, Report on the Imperative Mandate and Similar Practices, Study No. 488/2008.

on second chambers that the French Senate organized in Paris.[15] I also collaborated in training missions in which other organizations requested Venice Commission expertise. This happened in relation to parliaments in the cases of Serbia and Montenegro that I visited on several occasions and on political parties and elections in the case of Ukraine that I visited in company of Serguei Kouznetsov (Venice Commission Secretariat). In other missions, the diplomatic dimension was much more prominent, as the one organized, following the involvement of the EU Commission, to Bolivia. In this occasion, I had the impression that our expertise was not really taken into account and local authorities had basically bowed to EU pressure to have their norms scrutinized by independent experts. This mission was preceded by few days in Peru to meet the Constitutional Court and, during these days, I had a memorable taxi drive through Lima in company of Serguei and Gianni. Last but not least, the participation of the Tribunal Federal Electoral (TRIFE) of Mexico and my specialization in electoral matters propitiated a couple of visits to the country, to the capital, Chihuahua and Morelia. Deriving from my Venice Commission membership, I became involved as occasional adviser to the Iraqi Constitutional Committee, in a number of meetings in Amman, Venice and Madrid. They were particularly interested in the federal models in Europe and, specifically, on the Spanish asymmetric model of autonomous communities.

5. A note on the Venice Commission Secretariat

The Secretariat and Venice Commission President make a wonderful team. As for the President, I knew of course Antonio La Pergola even though I had not met him. His reputation as a comparative constitutional lawyer was widespread in Spain and Latin America and, in fact, my own institution had published in 1994 his *New paths of federalism*. I enjoyed his company during three years before he sadly passed away and we used to sit together in the *vaporetto* trip when heading for official dinners, sharing conversations on Latin America and current political issues. Through the years, I developed a nice friendship with Gianni Buquicchio, President since 2009 and he is a person with a high degree of elegance and diplomatic ability that was

[15] Closa, C. (2008) Introductory report. Forms of representation in Second Chambers: election procedures, Proceedings Conference held by the French Senate on Bicameral systems and representation of regions and local authorities: the Role of Second Chambers in Europe, Senat, Palais du Luxembourg 21 February 2008, Paris. pp. 181-195.

absolutely essential for some Venice Commission missions. Within the Secretariat, I developed also a deep friendship with Simona and Serguei, excellent professionals and totally devoted to the work of the Commission and I also had a lot of appreciation for Thomas. They, together with Pierre, Gäel, Schnutz, Tatjana, Helen and the rest of the group compose a wonderful team that made my period as Venice Commission member a truly enjoyable experience.

João Correia[1]

La profession d'avocat vis-à-vis la Commission de Venise

I. Les préoccupations normatives de la commission de venise et, même, du conseil de l'Europe, face à l'univers judiciaire, sont du ressort, presque exclusivement, du pouvoir judiciaire et du ministère public.

Les prérogatives de ces statuts ont monopolisé l'attention du Conseil de l'Europe, ce qui peut être justifié par la tendance de certains États à minimiser l'autonomie technique du Ministère public et à limiter l'indépendance des juges.

Cependant, les garanties normatives visant à assurer un exercice Libre de la profession d'Avocat ne font pas l'objet d'une attention appropriée de la part du Conseil de l'Europe et, par conséquent, de la Commission de Venise.

Face à cette réalité, et étant conscient de la nécessité de combler cette lacune, j'ai présenté, en tant que Membre effectif de la Commission de Venise, le texte suivant :

II. Proposition de l'intervention de la commission de venise sur les barreaux

I. Introduction

Le Conseil de l'Europe et la Commission de Venise dirigent, en règle générale, leur attention aux relations entre les Etats et la Magistrature Judiciaire et même entre les Etats et le Ministère Publique.

Les préoccupations du Conseil de l'Europe et de la Commission de Venise sont objectivées par les nombreux Avis et par la multiplicité des recommandations, presque innombrables, au sujet des controverses et des demandes relatives aux garanties d'indépendance des juges et des procureurs face aux États et surtout contre le pouvoir politique.

Même la Convention Européenne des Droits de l'Homme (CEDH) et le Statut du Conseil de l'Europe consacrent expressément les privilèges et immunités des juges (article 51 de la CEDH et le Protocole n.º 6 à l´Accord général sur les privilèges et immunités du Conseil de l'Europe (2SET49).

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[1] Ancien membre de la Commission de Venise au titre du Portugal (2015-2019).

Récemment, des Avis ont été émis aux Systèmes Judiciaires et à l'Indépendance des juges concernant la Serbie, la Roumanie, la Yougoslavie, la Macédoine, par exemple.

Le catalogue de critères à noter sur l'état de Droit, organisé par la Commission de Venise, a formalisé avec abondance adéquate, les principes et les règles pour assurer l'indépendance et l'impartialité du pouvoir judiciaire (E. 1, Pp. 37 52).

Ces règles visent à l'indépendance du pouvoir judiciaire, mais aussi aux garanties et immunités des juges et des procureurs.

Il est, en bref, une omission évidente des règles édictées par la Commission de Venise et le Conseil de l'Europe concernant les Barreaux qui, en fait ne se justifie même pans, dans la mesure où l'on maintient encore la Recommandation n ^{0} R (2000) 21 du Conseil des Ministres (adopté le 25/10/2000).

Les normes contenues dans cette Recommandation sont présentées très courant, même si elles nécessitent plus de détails et une coercivité, au moins en ce qui concerne les États membres.

Il faut le dire, à l'appui du fait que l'Union Européenne a consacré une certaine attention aux Barreaux, que ce soit sur le plan législatif, ou bien au niveau de l'organisation.

II. le cadre juridique actuel (le plus pertinente)

En ce qui concerne le plaidoyer, les principales préoccupations normatives sont les suivantes :

1. Principes de base relatifs au rôle du barreau, adoptée par le VIII Congrès des Nations Unies, tenue à La Havane en Août, 1990 ;
2. Recommandation (2000) 21 du Conseil des Ministres des Etats Membres du Conseil de l'Europe ;
3. Code de Déontologie des Avocats Européens adopté par le Conseil des Barreaux Européens (CCBE), modifié en dernier lieu en date du 19 mai 2006 ;
4. Directives du Conseil des Communautés Européennes :
   a. du 22 mars 1977 (77249 / CEE);
   b. à partir du 21 décembre 1988 (89/48 / CEE) ;
   c. le 7 Septembre 2005 (texte pertinent aux fins de la CEE), adoptée également par le Parlement Européen ;
   d. Résolution du Parlement Européen sur les Professions et le fonctionnement des Systèmes Juridiques ;
   e. Du 12 décembre 2006 (2006/123 / CE) ;

f. Du 22 Octobre 2013 (2013/48 / UE) également approuvé par le Parlement Européen.

5. Liste de Critères sur l'Etat de Droit, organisée par la Commission de Venise (p. 46), consacrée aux règles et principes relatifs à l'indépendance et l'impartialité des Associations d'Avocats (Barreau) et sur l'éthique professionnelle et l'indépendance dans l'exercice du mandat.

III. Méthodologie proposée

A. Dans ce cadre Juridique, il est souhaitable d'examiner s'il est suffisant et approprié pour garantir l'Indépendance et les Immunités naturelles des avocats et des associations d'avocats qui les représentent. Toutes les normes indiquées ci-dessus formalisent les grandes orientations normatives pour l'exercice de plaidoyer. Cependant, ils souffrent de prolixité, de dispersion et d'un certaine déconnexion. Les prévisions de chaque organisme de réglementation ne coïncident pas avec celles d'autres instruments internationaux, on peut même dire que seule une interprétation commune peut parvenir à un cadre juridique cohérent et même suffisant.

B. Cependant, ce corpus législatif ne permet pas de faire preuve de coercition.

C. Cependant, la question la plus importante est l´ignorance absolue de savoir si chaque Etat, membre du Conseil de l'Europe et/ou l´intégration de la Commission de Venise accueille, respecte et met en œuvre les principes généraux et les règles contenues dans ces instruments internationaux.

D. La première question est donc d'établir que le droit interne de chaque Etat est respecté par rapport aux directives internationales. Cet objectif ne peut être atteint que si la Commission de Venise décide de réaliser une enquête, au moyen de laquelle chaque État membre identifie les règles régissant la profession juridique et leurs associations professionnelles. De cette façon, ce sera la Commission de Venise habilitée à édicter des règles de conduite à adopter par les États afin d'obtenir des résultats dans un plaidoyer libre, les garanties indépendantes, fournie d'immunités qualifiés et proportionnées pour l'exercice effectif de cette activité, avec coercivité adéquate pour parvenir à l'indépendance indispensable et à l'immunité inhérente à la pratique du plaidoyer.

IV. Questions à soutenir, en général, aux états membres

1. Formation professionnelle initiale et permanente pour la pratique des barreaux ;
2. Statut des Ordres Professionnels :
   a. l'autonomie gouvernementale ;
   b. code d'éthique ;
   c. discipline.
3. La tutelle légale du secret professionnel (immunités, garanties d'indépendance, etc.) ;
4. Devoirs envers les clients ;
5. L'accès des citoyens à l'information juridique et à la représentation juridique par des avocats ;
6. Droits et devoirs devant les tribunaux ;
7. Participation à l'élaboration des lois ;
8. Prévision constitutionnel ou simplement légal de l'Ordre des Avocats ;
9. Droits des avocats en justice pénale ;
10. Liberté d'expression et d'association ;
11. Forum spécial.

V. Conclusions

A. L'ensemble des principes et des règles internationales déjà inscrits dans l'ensemble conviennent à la mise en place d´un plaidoyer libre ;
B. La dispersion normative et l'absence d'unité et de cohérence entre les différentes sources conseillent l'élaboration d'un code des droits et devoirs des États, des avocats et de leurs associations, formalisant les principes et (éventuellement constitutionnels) les règles de conduite ;
C. Pour atteindre objectif, il est nécessaire de promouvoir une enquête dans tous les états membres, qui permette une vision globale et, parallèlement, de l'harmonisation ou du retrait des principes internationaux déjà consacres ;
D. Dans le même temps, il sera nécessaire de déterminer le taux de contrainte nécessaire pour garantir l'indépendance et les immunités appropriées et proportionnes des avocats ;
E. Ce n'est qu'à ce moment-là que la Commission de Venise pourra délibérer sur la nécessité d´élaborer et d´approuver un code de conduite et, si nécessaire, formaliser les principes et règles inhérents et nécessaires à la garantie d'un cabinet libre et indépendant.

III. Cette proposition, bien qu'elle ait été approuvée, n'a pas eu de suivi puisque son auteur a cessé le mandat

Toutefois, de l'ensemble des organes normatifs en présence, je soulignerais les suivants, compte tenu de la pertinence de son contenu et de l'autorité scientifique, sociale et politique de son origine.

Il s'agit des suivants :

A. Principes de Base des Nations Unies relatifs au rôle du barreau (adoptés par le huitième Congrès des Nations Unies pour la prévention du crime et le traitement des délinquants qui s'est tenu à La Havane, Cuba, du 27 août au 7 septembre 1990) ;
B. Recommandation nº R (2000)21 du Comité des Ministres aux États-membres sur la liberté d'exercice de la profession d'avocat (adoptée pour le Comité de Ministres du 25 Octobre 2000) ;
C. Liste Des Critères De L´État de Droit (approuvée par la Commission de Venise (2017)) ;
D. Code de Déontologie des Avocats Européens (approuvé le 17 de Mai 2019 par le Conseil des Barreaux Européens).

IV. De l'ensemble des textes, il est possible d'extraire plusieurs conclusions

Tout d'abord, on constate que certains textes préconisent des commandements normatifs pour les États concernés par les normes en question.

Ensuite, on constate une formalisation scientifique très correcte et assez complète de l'ensemble des Droits et devoirs des Avocats, vis-à-vis de leurs clients, devant les Magistrats et, même, dans le cadre des relations avec ses pairs.

Finalement, il est possible de vérifier que les textes d'origine européenne énumèrent ces droits et devoirs des Avocats, mais sans aucune coercition, c'est à dire, chaque État a assumé, en ce qui concerne la profession d'Avocat, le statut légal qu'il entend ou qui lui convient.

Pourtant, même les Principes de Base consacrés par les Nations Unies en 1990, malgré le fait qu'ils exigent que les États fournissent des garanties pour l'exercice de la profession d'Avocat, ces normes, bien qu'imprégnées d'une certaine coercition, n'ont atteint aucun résultat pratique, et ne pourraient raisonnablement en atteindre, face à l'inexistence de tout organe ou mécanisme de droit international permettant à chaque État de déterminer la consécration interne, pour chaque État, d'autant plus que les Nations unies consacrent le caractère essentiel de la profession d'Avocat dans l'Administration de la justice (point 12), préconisant la réception des Principes de consécration par les Gouvernements.

V. Examinons les lignes directrices et la formalisation de chacun des textes en présence :

A. Principes de Base des Nations Unies relatifs au rôle du barreau

L'autorité naturelle des Nations Unies devrait suffire pour que chaque État puisse absorber dans son droit interne les principes et les commandements normatifs qu'elle a consacré en 1990.

Mais, dans ce huitième Congrès, la Charte des Nations Unies, ainsi que la D. U. D. H., le Pacte international relatif aux droits civils et politiques, le Pacte international relatif aux droits économiques sociaux et culturels, et les autres principes relatifs au traitement des détenus, sans oublier, bien sûr, les Principes fondamentaux de justice relatifs aux victimes de la criminalité et aux victimes d'Abus de pouvoir ont été invoqués comme documents de référence.

On peut conclure facilement que la faisabilité de ces Principes présuppose et exige une profession d'Avocat libre, soit du pouvoir politique, soit du pouvoir économique.

Voici la raison pour laquelle ce huitième Congrès comprend, parmi de nombreuses normes pertinentes, les suivantes :

> *« Les avocats, en tant qu'agents essentiels de l'administration de la justice, doivent préserver à tous moments l'honneur et la dignité de leur profession »* (point 12).

Mais, au même temps, les Gouvernements sont tenus de ... « *prévoir des procédures efficaces et des mécanismes adéquats permettant à toute personne vivant sur leur territoire et soumise à leur juridiction, sans distinction d'aucune sorte, ni discrimination fondée sur la race, la couleur, l'origine ethnique, le sexe, la langue, la religion, les opinions politiques ou autres, l'origine nationale ou sociale, la fortune, la naissance ou la situation économique ou autre, d'avoir effectivement accès, et ce dans des conditions d'égalité, aux services d'un avocat* » (point 16 des Principes de base des Nations Unies).

Comme on le constate, le caractère essentiel de la profession d'Avocat implique les obligations des Gouvernements d'assurer, c'est à dire, tel qu'il est ajouté dans le même Document des Nations Unies, la garantie *«... de la protection adéquate des libertés fondamentales et des droits de l'homme, qu'ils soient économiques, sociaux et culturels ou civils et politiques, dont toute personne doit pouvoir jouir, exige que chacun ait effectivement accès à des services juridiques fournis par des avocats indépendants* ».

Dans ce Congrès des Nations Unies, l'origine des obligations des Gouvernements vis-à-vis de la profession d'Avocat a donc été consacrée comme condition sine qua non pour être indépendante et libre de tous les pouvoirs.

Mais celui-ci est le seul Document à consacrer expressément des obligations et devoirs pour le pouvoir publique.

Dans les autres corps normatifs, les principes fondamentaux pour la réalisation d'une profession d'Avocat Libre sont soigneusement énumérés; cependant, des obligations ou des devoirs spéciaux afin de garantir ce Statut ne sont pas énumérés, et, encore moins, les solutions juridiques adéquates pour empêcher sa violation ou contraction.

B. Recommandation N.º R (2000)21 du Comité des Ministres aux États membres (25 octobre 2000)

La recommandation du Conseil est d'une importance particulière dans le contexte de l'Union Européenne mais, naturellement, dans le cadre du Conseil de l'Europe (C.E.).

En effet, dans ce Document, il est fait appel à la C. E. D. H., et les Principes des Nations Unies sont invoqués.

La liste des prérogatives des Avocats est formalisée au niveau des Principes, d'ailleurs, correctement consacrés.

Les plus pertinentes sont les suivants :

1. Toutes les mesures nécessaires devraient être prises pour respecter, protéger et promouvoir la liberté de la profession d'avocat sans discrimination ni intervention injustifiée des autorités ou du public, notamment à la lumière des dispositions pertinentes de la Convention Européenne des Droits de l'Homme.
2. Les avocats devraient jouir de la liberté d'opinion, d´expression, de déplacement, d'association et de réunion, et, notamment, avoir le droit de participer aux débats publics sur des questions relatives à la loi et l'administration de la justice et de suggérer des réformes législatives.
3. Les avocats ne devraient pas subir ou être menacés de subir des sanctions ou faire l'objet de pression d'aucune sorte lorsqu'ils agissent en conformité avec la déontologie de leur profession.
4. Les avocats ne devraient pas se voir refuser l'accès à un tribunal devant lequel ils sont habilités à comparaître et devraient avoir accès á tous les dossiers pertinentes lorsqu´ils défendent les droits et les intérêts de leurs clientes, conformément à la déontologie de leur profession.

Dans cet ensemble de normes, également, malgré la rigueur de son énonciation, rien n'indique une quelconque coercition ou, encore moins, une recommandation concrète d'insérer, que soit au niveau constitutionnel ou en droit commun, un corps normatif capable d'en obtenir l'efficacité nécessaire.

Nous convenons tous qu'il faut adopter des « *mesures nécessaires... pour respecter, protéger et promouvoir la liberté d'exercice de la profession d'avocat, ainsi comme il est impératif d'inscrire dans le droit national l'interdiction de punir ou de menacer un avocat, ou, même, de le pousser, quand il agit à quelque niveau que ce soit, s'il agit dans le respect de la déontologie de la profession* ».

De l'ensemble des prérogatives des Avocats consacrées dans la Recommandation N° R (2000)21 du Comité des Ministres, toutes les préoccupations sont équitables et légitimes, mais, une fois de plus, aucun mécanisme d'efficacité entraînant sa Consécration dans le droit interne de chaque État n'est prévu.

C. Code de Déontologie des Avocats Européens

Cet ensemble de normes du C.C.B.E. (Conseil des Barreaux Européens) est le meilleur et le plus complet corps normatif formalisant les droits, devoirs, prérogatives et garanties des Avocats au niveau de l'Union européenne, facilement reconnaissable comme un document - guide à être adopté par les instances internationales comme des règles et principes minimaux dans le droit interne de chaque État.

Il n'est pas approprié à ce stade, ou dans le présent document, de disséquer en détail ce que le Code d'éthique du C.C.B.E. consacre.

En effet, ce qui y ressort sur l'indépendance et la liberté de l'Avocat, le respect du secret professionnel et de la confidentialité des sujets qui lui sont confiés, sur l'autorégulation de la profession, uniquement pour mettre en évidence les aspects les plus sensibles de la relation entre le pouvoir politique et le pouvoir judiciaire vis-à-vis de la profession d'Avocat, est de la plus haute importance pour que le Conseil de l'Europe transforme cet ensemble de normes, dans la mesure du possible, en un document d'orientation permettant de déterminer ce qui, dans chaque État, est consacré, positivement ou négativement, face à l'indépendance de la profession d'Avocat.

D. Liste des critères de l´État de droit (Commission de Venise)

La Commission de Venise a élaboré en temps utile un Catalogue de Droits Fondamentaux caractéristiques d'un État de droit.

Il s'agit d'un Document Historique qui sert de paradigme pour tout État, sur tout Continent.

Toutefois, dans ce qui importe à présent, les questions du point 97 constituent l'essentiel des questions à poser à chaque État afin d'évaluer le degré, l'intensité et la véhémence de l'intervention à adopter pour réaliser également, par le biais de la profession d'Avocat, un État de droit.

En raison de leur importance, la transcription des questions soulevées par la Commission de Venise s'impose, ainsi que celle des principes structurants consacrés par la Liste des critères pour l'État de droit :

"L´indépendance et l´impartialité du barreau sont-elles garanties ?

i. Existe-t-il un corps d´avocats reconnu, organisé et indépendant (barreau) ?
ii. Le fonctionnement du barreau a-t-il une base juridique, consacrant les principes d´indépendance de l´avocat, de confidentialité et de déontologie, ainsi que de prévention des conflits d´intérêts ?
iii. L´accès à un avocat est-il soumis à des règles objectives et suffisamment ouvertes, y compris en matière de rémunération et d´aide juridictionnelle ?
iv. Existe-t-il ao sein du barreau des procédures disciplinaires justes et efficaces ?
v. Comment le public perçoit-il l´indépendance du barreau ?"

Compte tenu de ces questions, la Commission de Venise a décidé d'officialiser les principes suivants, qui sont consacrés comme étant essentiels *:*

> *"97. Les avocats sont d´indispensables auxiliaires de justice. Il est donc essentiel que leur organisation garantisse l´indépendance et le bon fonctionnement du barreau. La législation doit prévoir les grandes composantes de cette indépendance, et faire en sorte que l´accès à un avocat soit suffisamment ouvert pour garantir l´exercice du droit à un conseil. Les procédures pénales et disciplinaires doivent être efficaces et équitables, de manière à ce que les avocats soient indépendants et impartiaux.*
>
> *98. La déontologie prévoit notamment les principes suivants : "L´avocat doit préserver son indépendance et pouvoir bénéficier de la protection qu´offre cette indépendance lorsqu´il représente ses clients et qu´il leur fournit des conseils impartiaux"; il ou elle "doit faire preuve, à tout moment, de la plus haute probité, intégrité et équité à l´égard de ses clients, des tribunaux, de ses confrères et de tous ceux avec lesquels il est amené à établir un contact professionnel"; il "s´abstiendra d´accepter un mandate lorsque les intérêts du client s´opposent aux siens"; et il "accordera aux intérêts du client la plus haute importance".*

E. De toutes ces normes, on extrait l'établissement et la formalisation très rigoureuse et complète de l'ensemble des droits, devoirs et prérogatives de la profession d'Avocat, que ce soit dans le Plan européen ou au niveau mondial, en vue des Délibérations des Nations Unies

On peut même affirmer que nous sommes dûment équipés d'un catalogue normatif complet qui, étant observé et respecté, conférerait à la profession d'Avocat la fonction qu'elle doit exécuter et exercer pour, en ce qui la concerne, contribuer pour la construction d'un État démocratique et pour la Démocratie judiciaire.

Toutefois, pour que la Commission de Venise puisse jouer son rôle de manière sûre et efficace, elle devra, tout d'abord, connaître le droit national de chaque État et le degré de respect pour les principes à observer, selon les critères propres d'un État de droit.

Pour atteindre cet objectif, il est impératif de demander à chaque État membre la réponse à toutes les questions pertinentes en vue d'atteindre cet objectif.

Les questions suivantes ont été proposées (déjà présentées dans le cadre des travaux de la Commission de Venise, qui sont maintenant réitérées :

"Les avocats peuvent être salariés de non-avocats ? Si oui, quel est le régime juridique et statutaire applicable ?

Régime relatif aux incompatibilités et aux empêchements

- Quels sont les incompatibilités et les empêchements qui sont fixés dans les statuts de la profession d'avocat ? Les avocats peuvent exercer s'ils sont membres du gouvernement ? Ou des forces armées ? Ou du Parlement ? Être fonctionnaires publics ? Ou avoir un autre lien quelconque ?
- Obligations envers la communauté

Les avocats ont-ils des obligations envers la communauté ? Comme par exemple :

- Défendre les droits, libertés et garanties ?
- Ne pas employer de moyens contraire à la loi ?
- Ne pas se servir du mandat pour atteindre des objectifs autres que professionnels ?
- Ne pas démarcher les clients ?
- Ne pas faire de publicité ou, s'ils peuvent en faire, au titre de quel régime légal ?

Obligations envers l'association d'avocats respective

L'avocat a des obligations tout comme il a des droits par rapport à son association d'avocats? Par exemple :

- Ne pas nuire aux fins ni au prestige de l'association ?
- Collaborer à l'accomplissement de ses attributions ?

Intervention publique

- L'avocat peut discuter publiquement des questions qui lui ont été confiées ?

- Les avocats peuvent parler librement et publiquement de litiges qui ont été remis à d'autres avocats ? Si oui, quels sont les délimitations déontologiques ?

Obligations envers les clients
Quels sont les obligations de l'avocat face au client ?
- Le pacte de quota litis est-il admissible ?
- Des conflits d'intérêts, quels qu'ils soient, sont-ils prévus ?
- Existe-t-il un barème d'honoraires ? Si oui, à qui revient-il de l'établir et de l'approuver ?

Fixation des honoraires
Existe-t-il un critère juridique ou statutaire pour fixer les honoraires ?

Relations entre avocats
Dans les relations entre avocats eux-mêmes quels sont les obligations réciproques ?

Sociétés d'avocats
- Les avocats peuvent constituer des sociétés professionnelles ?
- Quelles sont les exigences juridiques concernant les sociétés d'avocats ?
- Les sociétés d'avocats, lorsqu'elles existent, peuvent être pluridisciplinaires et intégrer, par exemple, des comptables ?

Voici les questions Jugées essentielles :

Approche normative
Quel est le siège de la disposition législative portant sur l'exercice de la profession d'avocat ?
- Loi fondamentale ?
- Loi-cadre ?
- Législation ordinaire I loi commune ?
- Mesures juridiques non contraignantes *(soft law)* ?

Accès à la profession
Comment se déroule l'accès à la profession ?
- Moyennant une formation académique (maîtrise universitaire en Droit), exclusivement ?

- Un stage professionnel est-il prévu, obligatoire ou facultatif ? Si oui, le stage se fait sous l'égide d'un avocat au barreau ? Dans le cadre d'une association professionnelle ? Est assuré par les universités ? Ou existe-t-il d'autres alternatives, auquel cas quel est le régime permettant d'accéder à la profession d'avocat ?

Organisation, règlementation et gouvernance

- La profession d'avocat s'inscrit dans une association d'avocats agréée ? Ou bien il n'existe aucune association professionnelle ? Si ce dernier cas prévaut alors quel organisme régule la profession d'avocat ?
- S'il existe une association d'avocats, quelle en est la nature juridique ? Association publique ? Association de droit privé ? Relevant de quelle disposition législative ?
- L'association d'avocats, en partant du principe qu'elle existe, dispose d'un pouvoir disciplinaire à l'égard des avocats ? Ou ce sont les tribunaux qui exercènt un contrôle déontologique direct par rapport au respect de la déontologie professionnelle ?
- L'association d'avocats jouit d'une gouvernance autonome ? Qui vérifie la légalité de son activité ? L'administration publique ? Le gouvememement ? Les juridictions (tribunaux ou cours) ?

Code déontologique

La profession d'avocat est-elle soumise à un code déontologique ? Quel en est la source normative ? La loi ? Les statuts de l'association d'avocats ? Quel organe surveille l'acquittement du code déontologique ?

Secret professionnel

Qui veille à protection du secret professionnel ? Il est prévu par la loi ? Uniquement dans les statuts de l'association d'avocats ? Quelles sont les garanties et les Iimites légales du secret professionnel ?

Immunités

- Les avocats bénéficient d'immunités vis-à-vis de l'État? Vis-à-vis des Juridictions? Quels sont le type et la nature des prérogatives dont Jouissent les avocats, le cas échéant ?
- Les cabinets d'avocats ont-ils des immunités spécifiques ? Si oui, lesquelles ?

Relations avec l'administration publique et le pouvoir judiciaire (magistrature debout)

- Quels droits et obligations ont-ils face aux juges et face à l'administration publique ?
- Quelles prérogatives ont les juges à l'égard des avocats ?
- Quelles sont les limites dans leur liberté de plaider ?

Prérogatives dans le cadre des procédures pénales

- Les avocats sont-ils à même de tenir des réunions et d'échanger librement avec leurs clients qui sont détenus, et encore de préparer leur défense sans contraintes ni surveillance policière ?
- Quelles sont les prérogatives des avocats dans le cadre des procédures pénales ? Face au Ministère public/Parquet ? Ont-ils accès au dossier y compris lorsque qu'il tombe sous le secret de justice ?

Portée territoriale de l'action

Les avocats peuvent exercer leur profession sur l'ensemble du territoire national ?

Forme du mandat juridique

Le mandat juridique doit-il être formalisé ?

Relations de travail

- Est-il possible d'exercer la profession d'avocat en régime subordination par un contrat de travail ?
- Les sociétés d'avocats peuvent compter des avocats salariés ?

F. Conclusions

Comme on peut facilement le conclure, l'un des fondements de l'État de droit est la Démocratie judiciaire.

Face à cette conclusion inexorable, il n'est plus possible de limiter les préoccupations politiques aux garanties de l'indépendance des juges et à l'autonomie technique du Ministère public.

Aujourd'hui, plus que jamais, la Démocratie judiciaire repose sur un trépied qui vise, avec la même véhémence, importance juridique et politique, la liberté de l'Avocat face à tous les pouvoirs.

Sans cette indépendance des juges, sans l'Autonomie technique du Ministère public et sans la profession d'Avocat libre il n'y aura pas d'État de droit démocratique.

Commission de Venise
Le dénominateur commun

Il est manifestement difficile de s'exprimer sur la Commission de Venise.

La perspective de chaque Pays et de chacun de ses représentants est nécessairement divergente, sinon contradictoire.

Par conséquent, l'effort d'analyse doit assumer deux dimensions.

D'une part, quelle est l'approche de chaque pays quant à l'attitude de la Commission de Venise vis-à-vis de sa culture Constitutionnelle, c'est à dire, dans quelle mesure la praxis, les priorités et la hiérarchie des valeurs de la Commission de Venise sont-elles en ligne avec les mêmes préoccupations du pays que chacun représente ?

Et cet examen, cette superposition de cultures, exige, d'autre part, un effort sérieux d'adaptation et de mutation, une métamorphose, de la culture juridique, sociale et politique, en bref, de la vocation constitutionnelle de chaque protagoniste.

Et, en ce qui concerne le représentant du Portugal, cet effort et cette adaptation ont été réalisés.

Cependant, cette première perspective subjective et, même, comportementale, d'analyse est fermement liée à une deuxième perspective.

En effet, au long de quatre années, il est possible d'extraire quelques enseignements et quelques conclusions de ce qui est franchement positif dans l'activité de la Commission de Venise et d'écarter, d'abandonner, certains aspects moins agréables de son quotidien.

Pour arriver à ce deuxième niveau, nous ne pouvons pas oublier la dignité, la sécurité, la culture et la personnalité unique de son Président, Gianni Buquicchio.

En effet, nous sommes en présence d'une direction magistrale, guidée par la sobriété, l'intelligence et la discipline sereine que Gianni Buquicchio imprime dans la conduite des Travaux de la Commission.

Cependant, bien que ce Président renforce l'importance de la Commission de Venise, cela ne suffit pas à mettre en évidence le rôle historique de ses travaux, de ses Avis, de ses délibérations.

Sur le plan des droits de l'homme de la première génération, curieusement mis en crise par certains pays, la Commission de Venise et ses Rapporteurs ont su établir et consacrer la liaison entre les droits fondamentaux et la culture de chaque Peuple, de chaque Pays et de leur Histoire.

Ce lien a permis et a justifié l'actualité des commandements de la Cour européenne des Droits de l'Homme, et il nous conduit à l'approfondissement et à la densification de l'univers des droits fondamentaux.

Historiquement, il s'avère que nous sommes arrivés à la nécessité d'atteindre un autre niveau.

Le temps qui passe, la crise mondiale, supposent une autre approche de la dimension et de la qualité de la liste et du Catalogue des droits fondamentaux.

Les flux migratoires (Sud / Nord et Est / Ouest), la secousse causée par le Covid 19, et la recomposition des centres de pouvoir au niveau mondial, tout bien considéré, nous obligent à élargir la vision du monde Juridique en ce qui concerne les droits de l'homme.

Il semble donc que les droits fondamentaux de la première et de la deuxième génération ont fusionné, et il n'est plus indispensable de limiter les préoccupations des instances européennes, avec la Commission de Venise, aux droits civils et politiques de la première génération.

En effet, les droits du travail et la liberté de travailler, le droit à un logement digne, le droit à des soins de santé (à tous les âges), le droit à l'éducation et à l'instruction scolaire, la formation professionnelle, la progression dans l'emploi concrétisé dans la pertinence juridique des connaissances et du curriculum, sont des droits qui ne peuvent pas être laissés en dehors du concert des nations.

Seulement ainsi, seulement de cette manière, les mouvements migratoires se justifieront pleinement et seront absorbés pacifiquement, et seulement par cette voie le miscégénation pourra pacifiquement et habilement garantir le progrès des Peuples.

Cela est le devoir de la Commission de Venise, et cela sera, inexorablement, sa justification historique

Schnutz Rudolf Dürr[1]

Constitutional Justice – A key mission of the Venice Commission

1. Introduction

Since its establishment 30 years ago, the Venice Commission has considered the promotion of constitutional justice (or constitutional review) as one of its key missions, as an essential part of its wider goal to promote constitutionalism in its member States and beyond.

The Venice Commission[2] of the Council of Europe is a group of distinguished constitutional lawyers who provide advice to the Commission's member States in constitutional matters in the wide sense, covering para-constitutional law, such as electoral legislation, laws on various state institutions, such as the judiciary or the ombudsman, or laws on specific rights such as the right to assembly or the right to religion, etc.

While advice on the drafting of opinions on constitutional and legal texts is the main work of the members of the Venice Commission, it was clear from the outset that these texts must be properly implemented in order to be of use. Under its first President Antonio La Pergola who had been a professor of constitutional law and constitutional judge himself, the Commission turned to the bodies which are charged with overseeing

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[1] Secretariat of the Venice Commission, Head of Constitutional Justice Division, Secretary General of the World Conference on Constitutional Justice. This paper was written in a strictly personal capacity and does not necessarily reflect the official position of the Venice Commission or the Council of Europe.
A shorter version of this article is being published as the *Liber amicorum* for the President of the Constitutional Court of Belgium, Prof. André Alen. This text is based on earlier presentations by the author: Dürr, Schnutz Rudolf, Constitutional Courts: an endangered species?, in Rousseau, Dominique, ed., Les Cours constitutionnelles, garantie de la qualité démocratique des sociétés ?, LGDJ, Lextenso, Issy-les-Moulineaux (2019), pp. 111-136; Buquicchio, Gianni / Dürr, Schnutz Rudolf, Constitutional Courts - the living heart of the separation of powers, The role of the Venice Commission in promoting Constitutional Justice, in Raimondi, Guido *et. al.* eds. Essays in honour of Judge Luis Lopez Guerra, Oisterwijk (2018), pp. 515-544; Dürr, Schnutz Rudolf, Improving Human Rights Protection on the National and the European Levels – Individual Access to Constitutional Courts and the Accession of the European Union to the European Convention on Human Rights, Homenaje a Jean-Claude Colliard, Tomo II, Mexico, 2016, pp. 267-298; Buquicchio, Gianni / Dürr, Schnutz, Judicial Cross-Fertilisation - Co-operation between Constitutional Courts as a means to promote Democracy, the Protection of Human Rights and the Rule of Law, in Martens, Paul *et. al.*, *Liber Amicorum* Michel Melchior, Bruxelles (2010), pp. 311-323.

[2] The statutory name of the Commission, which is rarely used, is the European Commission for Democracy through Law.

the implementation of the constitution and the principles embodied therein. These are foremost the judiciary in general and constitutional courts in particular.

The Venice Commission facilitates and promotes an exchange of information and discussion between constitutional courts and equivalent bodies (constitutional councils, supreme courts with constitutional jurisdiction, constitutional chambers within supreme courts – hereinafter, "constitutional courts" in the wider sense).

The practical tools for this exchange of information are the electronic *Bulletin on Constitutional Case-Law* and the database CODICES, which contains more than 10.000 judgments. The confidential on-line Venice Forum allows all the courts co-operating with the Commission to seek information from other courts on specific topics or to inform them on on-going or recently decided cases.

The Commission organises seminars with the courts (called CoCoSems) and, when necessary, assists them when they come under undue pressure from other state powers.

It was probably this panoply of unique services that triggered the interest in the work of the Venice Commission by apex courts not only in Europe, but also abroad. Soon after its creation as a partial agreement[3] of the Council of Europe by 18 out of its then 23 member States, a number of non-European countries became interested in the Venice Commission and sought observer status with the Commission. The strong interest, witnessed by the accession of all 47 member States of the Council of Europe and a number of non-European countries,[4] is probably due to the fact that no comparable body exists on the international level. While a number of governmental and non-governmental organisations also provide constitutional advice, they lack the specific mix, notably a collegiate group of independent experts who nonetheless operate within the framework of an intergovernmental organisation, which gives them important institutional access to state bodies in the countries they work with.

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[3] A partial agreement allows some member States of the Council of Europe to participate in an activity in spite of the abstention of other member States.

[4] In addition to the 47 member States of the Council of Europe, the following countries are member States: Algerim, Brazil, Canada, Chile, Costa Rica, Israel, Kazakhstan, Republic of Korea, Kosovo, Kyrgyzstan, Mexico, Morocco, Peru, Tunisia and the United States of America. The remaining observers are Argentina, the Holy See, Japan and Uruguay (since 2002, only full accession is available to for non-Council of Europe member States; many previous observers became full members). South Africa and Palestine have a special co-operation status, which is equivalent to that of an observer.

The Venice Commission provides tailor-made advice to each country, taking into account the historic and political background of the country concerned. There is no perfect constitution, which would fit all countries. On the basis of common minimum standards, the Commission accepts the choices made by the constitutional or legislative drafters, but it aims for a coherent system, for instance accepting a country's choice for a strong executive, but at the same time insisting on appropriate checks on government by parliament and, even more importantly, by the judiciary.

This open attitude has allowed the countries that the Commission is working with, to accept advice, as the constitution and legislation drafters see that their basic choices are being respected. The drafters, in turn, recognise that the Venice Commission's recommendations help in making their texts coherent.

II. Documentation exchange – cross-fertilisation

A. The origins – Antonio La Pergola

The backbone of judicial dialogue is mutual knowledge of each other's judgments. From his experience as constitutional judge, the Venice Commission's founding President Antonio La Pergola knew about the difficulties for exchange between constitutional lawyers in Europe, marked by a rich diversity not only of legal systems, but also of the use of languages. Thanks to available legal literature, constitutional lawyers might be able to follow the case-law of courts in large countries like Germany or France, but even the rich constitutional jurisprudence of La Pergola's own country, Italy, was accessible to a few only.

Already since 1972, the prestigious Conference of European Constitutional Courts[5] tried to remedy to this problem, but the Courts could meet only every three years, being able to discuss to great avail only one specific topic in depth. After such a meeting, called congress, the Courts would split and the Conference could not ensure the follow-up of the topics discussed.

In 1991 Antonio La Pergola invited the Presidents of the Constitutional Courts to a conference on constitutional justice in Piazzola sul Brenta,[6]

[5] www.confeuconstco.org/en/common/home.html and https://www.cecc2017-2020.org/ (accessed 06/2020).

[6] Venice Commission, CDL-STD(1990)001. Proceedings of the conference, (Meeting with the Presidents of Constitutional Courts and other equivalent bodies. Documents starting with "CDL" as a reference are available at the web-site of the Venice Commission at www.Venice.CoE.int.

Italy, where he proposed the establishment of a constitutional justice documentation centre. This idea was welcomed by the Court Presidents, who appointed liaison officers with the Venice Commission. In 1992, the Venice Commission established this centre[7] and the first issue of the Bulletin on Constitutional Case-Law produced by this centre was published in 1993.

B. The Bulletin on Constitutional Case-Law and the CODICES database

The Constitutional Court of Belgium (formerly the Court of Arbitration) was at the very origin of the Commission's co-operation with the constitutional courts through the pioneering work by its liaison officers Rik Ryckeboer and Pierre Vandernoot, which shapes this co-operation to our days. They not only provided the first proposals for a Systematic Thesaurus for the classification of constitutional case-law, they also prepared a report on the needs and possibilities of consolidating and computerising the documentation centre.[8] Their report[9] set out the basic framework of the co-operation between the Constitutional Courts and equivalent bodies[10] and the Venice Commission. They proposed the presentation of a regular *Bulletin*, defined the need for a database to search the case-law and most importantly provided the concept and first draft for a Systematic Thesaurus allowing annotating the case-law according to coherent search criteria.

On this basis, the Commission has published since 1993 three times per year the *Bulletin on Constitutional Case-Law*. Some 80 regular and 21 special issues of the *Bulletin* have been published so far.[11] The topics of the special issues are often the themes of the congresses of the Conference of European Constitutional Courts; the draft version of these special issues serve the Conference as a working document. The contents of all *Bulletins* have been included in the CODICES database. Since 2018, the *Bulletin* is published in electronic form.[12] The contributions for the Bulletin and CODICES are kindly provided by

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[7] Venice Commission, CDL-JU(1992)005, Documentation Centre for Constitutional Case-Law.

[8] The documentation centre also includes a physical library at the seat of the Venice Commission Secretariat in Strasbourg to which notably the constitutional courts donate books generously: www.venice.coe.int/WebForms/cocentre/new.aspx?lang=en.

[9] Venice Commission, CDL-JU(1994)002, Study on the possibilities for improving and developing the *Bulletin on Constitutional Case-Law* and on establishing a computerised data bank on this Case-Law.

[10] Such as the Constitutional Council of France or a Supreme Court with constitutional jurisdiction (e.g. Supreme Courts of Norway, Monaco or Ireland).

[11] See www.venice.coe.int/WebForms/pages/?p=02_02_Bulletins (accessed 06/2020).

[12] Subscription page: www.venice.coe.int/files/bulletin/eBulletin-subscription.html; see for instance issue 2018/3: www.venice.coe.int/Files/Bulletin/Bulletin2018-3-E.HTM (accessed 06/2020).

the Court's liaison officers who send summaries (précis) of relevant cases be published in English or French, the official languages of the Council of Europe. With the help of external proof-readers, the Secretariat of the Commission in Strasbourg proof-reads the contributions, ensures that the headnotes are draft in abstract terms, checks the indexing according to the Systematic Thesaurus and translates the contributions to the other language (English/French).

Since 1996, the Venice Commission has operated the database CODICES,[13] which present important constitutional decisions (judgments), including human rights case-law. The database CODICES (www.CODICES.CoE.int[14]) contains more than 10,000 judgments (précis and full texts), court descriptions (allowing to understand the functioning of the courts), 97 constitutions and the laws on the courts searchable in full text and via the Systematic Thesaurus of the Commission.

The *Bulletin* and the database CODICES[15] are appreciated by the participating Courts[16] and the public at large as a unique source of information on comparative constitutional case-law. In addition to some 140 national apex courts world-wide, the European Court of Human Rights and the Court of Justice of the European Union, as well as the Inter-American Court of Human Rights, contribute to CODICES.

Another service provided by the Venice Commission is the (classic) Venice Forum, which enables liaison officers to ask questions relating to pending case-law to other liaison officers.[17] The Constitutional Justice Media Observatory[18] reflects the outside view on the participating courts as it contains links to on-line articles referring to the work of the courts.

The cooperation between the constitutional courts and the Venice Commission is steered by the Joint Council on Constitutional Justice, which is composed of members of the Venice Commission and the liaison officers who are appointed by the constitutional courts in the Commission's member

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[13] The programming of the database (Folio View/NXT, VBA) was the first task of the author at the Venice Commission's secretariat since October 1994.

[14] User's guide available at www.venice.coe.int/webforms/documents/?pdf=CDL-JU(2019)005-e (accessed 06/2020).

[15] www.CODICES.coe.int.

[16] The *Bulletin on Constitutional Case-Law* is open to Courts in the member, associate member and observer countries of the Venice Commission. The CODICES database is open to all courts that co-operate with the Venice Commission in the framework of the World Conference on Constitutional Justice or a regional group (see further below).

[17] After a formal check of the request, the Secretariat sends it to the other liaison officers. Their replies go directly to the requesting court. The Secretariat keeps a copy of all replies in the archive at the Venice Forum site.

[18] Available on the restricted Venice Forum site.

and observer States. The Joint Council has a double presidency, which means that its meetings are co-chaired. One of the presidents is a member of the Venice Commission, elected by the Commission, while the other is a liaison officer, elected by the liaison officers. The Joint Council meets annually upon invitation of a participating court or in Venice.

III. Geographical scope

C. Regional co-operation (agreements)

While clearly a European body, the Venice Commission's Statute, first as a partial agreement and even more so since its conversion into an enlarged agreement in 2002, allowed the Commission to reply positively to the expression of interest in its work from abroad. While the Commission promotes the basic principles of the Council of Europe – democracy, the protection of human rights and the Rule of Law – it is aware that these are not only European, but truly universal values and much can be gained by exchanging not only within one continent, but also with other regions of the world.

Due to the strong interest from non-European constitutional courts in its activities, the Venice Commission established cooperation[19] with 10 regional or language based groups of courts, such as the Association of Francophone Constitutional Courts,[20] the Southern African Chief Justices Forum,[21] the Eurasian Association of Bodies of Constitutional Control,[22] the Association of Asian Constitutional Courts and Equivalent Bodies, the Union of Arab Constitutional Courts and Councils, the Ibero-American Conference of Constitutional Justice, the Conference of Tribunals of Countries of Portuguese Language and the Conference of Constitutional Jurisdictions of Africa and Commonwealth Courts. The courts members of all these groups are invited to contribute to the CODICES database.

D. World Conference on Constitutional Justice

By 2008, the Venice Commission had established fruitful co-operation with a number of regional groups. Possibly with the exception of the encounter between the Arab and Southern African groups in March 2006 during a plenary

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[19] www.venice.coe.int/WebForms/pages/?p=02_Regional&lang=EN (accessed 06/2020).
[20] Formerly the Association of Constitutional Courts using the French Language (ACCPUF), of which the Constitutional Court of Belgium is a founding member.
[21] Formerly the Southern African Judges Commission (SAJC).
[22] Formerly the Conference of Constitutional Control Organs of Countries of New Democracy.

session of the Venice Commission, these were however bilateral relationships between the Commission and the respective partners. In order to provide further occasion for exchange and judicial cross-fertilisation, the Constitutional Court of South Africa and the Venice Commission invited all the relevant groups[23] to come together in Cape Town on 22-24 January 2009 for a World Conference on Constitutional Justice on the topic "Influential Constitutional Justice - its influence on society and on developing a global jurisprudence on human rights".

This topic was chosen to show that such a gathering was not to be seen as a protocol exercise for the highest courts, but that the World Conference was to have a purpose, such as promoting democracy, human rights and the Rule of Law not only in countries with a long tradition in the pursuit of these values, but also in countries still struggling to live up to the principles enshrined in their constitutions. Even in counties where democracy is far from being achieved or where we had to witness setbacks, the support for constitutional judges is a goal worth pursuing. In some countries, the judges have little leeway, some risk losing their position or even their life if they dare to confront power outright. However, the judges are only too aware of the flaws in their countries and international and foreign support can help them to stand up to pressure and to decide on the sole basis of the Constitution, which often enounces all the principles required for a 'just' decision. Support from abroad will allow these judges to take at least some steps in ensuring these principles.

The reply to the call for participation from the courts was so overwhelming that a larger venue had to be found shortly before the beginning of the conference. 93 constitutional courts and equivalent bodies as well as 9 regional and linguistic groups participated in Cape Town. The Conference[24] adopted a Declaration,[25] which also highlights the value of judicial cross-fertilisation[26] between the courts, within the regions and world-wide.

The Cape Town Declaration also "entrusted a Bureau, composed of the Presidents of the regional groups and the three Courts which hosted the preparatory meetings, assisted by the Venice Commission, with the goal of organising a second World Conference on Constitutional Justice" and "with

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[23] And Commonwealth Courts, see above.

[24] While the Cape Town event was called "conference", the draft Statute provides that the organisation is to be called "Conference", whereas the gatherings of the members for an exchange on a subject (chosen by the Bureau) are called "congresses".

[25] www.venice.coe.int/WCCJ/WCCJ_CapeTown_E.asp.

[26] Buquicchio, Gianni / Dürr, Schnutz, Judicial Cross-Fertilisation - Co-operation between Constitutional Courts as a means to promote Democracy, the Protection of Human Rights and the Rule of Law, in Martens, Paul *et. al.*, *Liber Amicorum* Michel Melchior, Bruxelles (2010), pp. 311-323.

making proposals for the establishment of a world-wide association open to the Courts belonging to the regional or linguistic groups".

During consultations throughout the year 2009 at the occasion of gatherings of the regional and linguistic groups, most groups and courts welcomed the idea of establishing the World Conference as a permanent body, others, especially in the Conference of European Constitutional Courts were more hesitant and preferred to move towards this goal at a slower pace.

A few months later, at the VI[th] Ibero-American Conference on Constitutional Justice in Mérida, Mexico, the Bureau met for the first time[27] and prepared a first draft statute for the Conference. This first version of the Statue laid much emphasis on the role of the Bureau and the representatives of the regional and linguistic groups. However, it soon became clear that both individual Courts and the groups themselves preferred to attribute important deciding powers to the General Assembly, in which the member Courts are represented individually. Later versions of the draft Statute, which were discussed at further Bureau meetings in Venice in December 2009 and in June 2010, provided a clear shift of competences towards the General Assembly.

The 2[nd] Congress in Rio de Janeiro, Brazil, in January 2011 was an important step on this path, because it gave the potential member courts the opportunity to express their views also informally, at coffee breaks or meals.

The Statute[28] for the World Conference was prepared before and at the second Congress in January 2011 in Rio de Janeiro, Brazil. It was adopted in Bucharest in May 2011 and entered into force on 24 September 2011, once 30 courts had accepted it. The Statute establishes a General Assembly, chaired by the host court of the congress, a Bureau[29] and provides that the Venice Commission acts as the Secretariat for the World Conference. Membership is open to the members of ten regional and linguistic groups as well as to the courts participating in the Joint Council on Constitutional Justice (see above).[30]

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[27] During the preparation of the Cape Town Conference, the representatives of the groups had already met three times for preparatory meetings held in Vilnius, Seoul and Algiers, but they have met formally as the Bureau of the World Conference on Constitutional Justice only since the Cape Town Declaration.

[28] Venice Commission, CDL-WCCJ-GA(2017)010, Revised Statute of the World Conference on Constitutional Justice.

[29] The revised Statute 2017 provides that the Bureau is composed of four individual courts representing four continents, the host courts of the last and next host congresses and representatives of the 10 regional and linguistic groups – current composition - Venice Commission, CDL-WCCJ-GA(2019)002rev4 - www.venice.coe.int/webforms/documents/?pdf=CDL-WCCJ-GA(2019)002rev4-bil (accessed 06/2020).

[30] 2020 the WCCJ has 117 members: Albania, Constitutional Court, Algeria, Constitutional

The latter criterion allowed also some courts that were not member of a regional or linguistic group to join the World Conference.[31]

Council, Andorra, Constitutional Court, Angola, Constitutional Court, Armenia, Constitutional Court, Australia, High Court, Austria, Constitutional Court, Azerbaijan, Constitutional Court, Bahrain, Constitutional Court, Belarus, Constitutional Court, Belgium, Constitutional Court, Benin, Constitutional Court, Bosnia and Herzegovina, Constitutional Court, Brazil, Federal Supreme Court, Bulgaria, Constitutional Court, Burkina Faso, Constitutional Council, Burundi, Constitutional Court, Cambodia, Constitutional Council, Cameroon, Supreme Court, Canada, Supreme Court, Cape Verde, Constitutional Court, Central African Republic, Constitutional Court, Chad, Supreme Court, Chile, Constitutional Court, Colombia, Constitutional Court, Comoros, Supreme Court, Congo (Brazzaville), Constitutional Court, Congo, Democratic Republic, Constitutional Court, Costa Rica, Constitutional Chamber of the Supreme Court, Côte d'Ivoire, Constitutional Council, Croatia, Constitutional Court, Cyprus, Supreme Court, Czech Republic, Constitutional Court, Denmark, Supreme Court, Djibouti, Constitutional Council, Dominican Republic, Constitutional Court, Ecuador, Constitutional Court, Egypt, Supreme Constitutional Court, Estonia, Supreme Court, ESwatini, Supreme Court, Ethiopia, Council of Constitutional Inquiry, Finland, Supreme Administrative Court, Finland, Supreme Court, France, Constitutional Council, Gabon, Constitutional Court, Georgia, Constitutional Court, Germany, Federal Constitutional Court, Ghana, Supreme Court, Guinea, Constitutional Court, Guinea-Bissau, Supreme Court of Justice, Hungary, Constitutional Court, Indonesia, Constitutional Court, India, Supreme Court>54. Ireland, Supreme Court, Israel, Supreme Court, Italy, Constitutional Court, Jordan, Constitutional Court, Kazakhstan, Constitutional Council, Kenya, Supreme Court, Korea, Republic, Constitutional Court, Kosovo, Constitutional Court, Kuwait, Constitutional Court, Kyrgyzstan, Constitutional Chamber of the Supreme Court, Latvia, Constitutional Court, Lithuania, Constitutional Court, Lebanon, Constitutional Council, Luxembourg, Constitutional Court, Madagascar, High Constitutional Court, Malaysia, Federal Court, Mali, Constitutional Court, Mauritania, Constitutional Council, Mauritius, Supreme Court, Mexico, Supreme Court, Mexico, Electoral Court of the Federal Judiciary, Moldova, Constitutional Court, Monaco, Supreme Court, Mongolia, Constitutional Court, Montenegro, Constitutional Court, Morocco, Constitutional Court, Mozambique, Constitutional Council, Namibia, Supreme Court, Netherlands, Council of State, Netherlands, Supreme Court, Nicaragua, Constitutional Chamber of the Supreme Court, Niger, Constitutional Court, North Macedonia, Constitutional Court, Norway, Supreme Court, Pakistan, Supreme Court, Palestine*, Supreme Constitutional Court, Panama, Supreme Court, Peru, Constitutional Court, Poland, Constitutional Tribunal, Portugal, Constitutional Court, Romania, Constitutional Court, Russia, Constitutional Court, Samoa, Supreme Court, São Tomé and Príncipe, Supreme Court / Constitutional Court, Senegal, Constitutional Council, Serbia, Constitutional Court, Seychelles, Supreme Court, Slovakia, Constitutional Court, Slovenia, Constitutional Court, Somalia, Supreme Court, South Africa, Constitutional Court, Spain, Constitutional Court, Sweden, Supreme Administrative Court, Switzerland, Federal Court, Tajikistan, Constitutional Court, Tanzania, Court of Appeal, Thailand, Constitutional Court, Togo, Constitutional Court, Turkey, Constitutional Court, Uganda, Supreme Court, Ukraine, Constitutional Court, Uzbekistan, Constitutional Court, Zambia, Supreme Court, Zimbabwe, Constitutional Court.

[31] For instance, the Constitutional Court of Kosovo, the Supreme Court of Israel, the Council of State and the Supreme Court of the Netherlands (the latter joined the European Conference after becoming member of the World Conference).

Depending on the gross domestic product per person of their country, the member courts contribute a membership fee between 200 and 2000 Euros to the budget of the Conference.

The World Conference promotes constitutional justice as a key element for democracy, the protection of human rights and the Rule of Law. Member Courts which violate these principles in a flagrant way can be suspended.

The 2nd Congress of the World Conference in Rio de Janeiro in 2011, hosted by the Supreme Court of Brazil, was dedicated to the independence of the Constitutional Courts.[32]

The 3rd Congress of the World Conference on Constitutional Justice on the topic "Constitutional Justice and Social Integration"[33] was hosted by the Constitutional Court of the Republic of Korea on 28 September – 1 October 2014. The participants in the 3rd Congress of the World Conference on Constitutional Justice adopted the Seoul Communiqué.[34]

During the 3rd Congress the General Assembly of the World Conference took place for the first time (the two first congresses had taken place before the Statute entered into force in September 2011).

Upon invitation by the Constitutional Court of Lithuania, the 4th Congress of the World Conference on the "Rule of Law and Constitutional Justice in the Modern World" was held in Vilnius, Republic of Lithuania, on 11-14 September 2017.[35] In Vilnius, the General Assembly amended the Statute replacing these individual courts as members of the Bureau with four courts elected in respect of four continents.

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[32] www.venice.coe.int/WCCJ/Rio/Papers/WCCJ_papers_E.asp. See also key-note speech at: www.venice.coe.int/WCCJ/Rio/Papers/AUT_Grabenwarter_keynotespeech.pdf (accessed 06/2020).

[33] The 3rd congress examined how Constitutional Courts have dealt with social integration and – in its absence – with social conflict. The participating judges were able to draw inspiration from the experience of their peers, whether from positive examples or from cases where the courts were unable to solve these issues. Notwithstanding the diversity of jurisdictions of the World Conference Member Courts, there was consensus among the participants of the 3rd Congress that "their work, whether directly related to social rights, or to civil and political rights or to institutional issues, contributes to social integration. At some point, all Constitutional Courts have to deal with social issues, be it because they have to solve a legal conflict, which developed between actors in society, be it because they act preventively and have to examine the constitutionality of legislation before it enters into force." (Seoul Communiqué).

[34] Venice Commission, WCCJ Seoul Communique, www.venice.coe.int/wccj/seoul/WCCJ_Seoul_Communique-E.pdf (accessed 06/2020).

[35] Venice Commission, CDL-WCCJ-GA(2017)007, The Vilnius Communiqué. www.venice.coe.int/webforms/documents/?pdf=CDL-WCCJ-GA(2017)007-e (accessed 06/2020).

With the 5th Congress on the topic "Constitutional Justice and Peace" in Algiers in 2021, the World Conference will return to Africa.

The defence of the independence of its members is a main issue of the World Conference, after being the topic of the 2nd Congress in Rio de Janeiro. Following that Congress, the Bureau decided that all future congresses should include a special session on stock-taking on the members' independence. The 2014 and 2017 congresses included such stock-taking exercise and it will be part of the 5th Congress. This stock-taking showed that several courts had come under undue pressure from other state powers.[36]

A reaction to such situations is foreseen in the Statute. Upon request, the World Conference can offer its good services[37] and - if need be - the Bureau of the Conference can make public declarations in this framework. The Bureau has not yet made any such statement but in order to operationalize the support for its members, the Bureau authorised the President of the Venice Commission to make statements supporting WCCJ member courts under undue pressure in consultation with the regional or linguistic group(s) concerned, unless there is an explicit objection by a member of the Bureau or the court concerned.[38]

The President of the Venice Commission already had a practice of making statements[39] supporting courts or judges in the member States of the Venice Commission (see below) but the mandate by the Bureau of the World Conference extends the geographical scope of this possibility to the Member Courts of the World Conference in countries that are not Members of the Venice Commission.

IV. Constitutional and legal advice in the field of constitutional justice

The main task of the Venice Commission is to adopt opinions on specific countries and general reports for the benefit of its member States. This includes advice on constitutional and legal provisions concerning constitutional justice or constitutional review. During the 30 years of its

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[36] See also Dürr, Schnutz Rudolf, Constitutional Courts: an endangered species?, in Rousseau, Dominique, ed., Les Cours constitutionnelles, garantie de la qualité démocratique des sociétés?, LGDJ, Lextenso, Issy-les-Moulineaux (2019), pp. 111-136.

[37] Venice Commission, CDL-WCCJ(2011)001, Statute of the World Conference on Constitutional Justice. www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-WCCJ(2011)001 (Articles 1 and 4.b.7).

[38] Venice Commission www.venice.coe.int/webforms/events/?id=2589 (accessed 06/2020); CDL-WCCJ(2019)002, 14th Meeting of the Bureau of the World Conference on Constitutional Justice, Santo Domingo, Dominican Republic - available in the Venice Forum.

[39] www.venice.coe.int/WebForms/pages/?p=01_02_statements_GB&lang=en (accessed 06/2020).

existence, the Venice Commission has given numerous opinions relating to constitutional justice, as part of opinions on draft constitutions or constitutional amendments or in opinions on draft (constitutional) laws on the constitutional courts and their procedures.

While the Commission supported in many opinions the establishment of specialised constitutional courts, the Commission also made it clear that constitutional justice (review/control) by the ordinary (supreme) courts is a valid model.[40] However, the Commission also regretted that an existing specialised constitutional court had been dissolved following a revolution.[41]

In the field of constitutional justice, the Venice Commission adopted two major reports, on individual access and on the composition of constitutional courts, together with numerous opinions for individual countries relating also to other issues. An overview of these opinions is available in the Commissions' compilation on constitutional justice.[42] In addition, the Commission's Rule of Law Checklist sets out important benchmarks for constitutional justice as part of the Rule of Law.[43]

A. Individual access

The Venice Commission's Study on Individual Access to Constitutional Justice[44] examined various forms of indirect and direct access of the individual to the Constitutional Court, including via petitions to parliament or the ombudsman, where the link between the individual and the Court is very weak, however.

A widely used form of indirect access are preliminary requests from ordinary courts to the Constitutional Courts. In such a case, either upon request by a party or upon initiative by the ordinary court, the requesting court (judge *a quo*), suspends the case at hand and sends (either directly or via a supreme court) a request to control the constitutionality of a provision that has to be applied in the current case to the constitutional court (judge *ad quem)*. Once the Constitutional Court has decided, the judge *a quo* resumes

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[40] Venice Commission, CDL(1998)059, Opinion on the Reform of Constitutional Justice in Estonia.

[41] Venice Commission, CDL-AD(2010)015, Opinion on the draft Constitution of the Kyrgyz Republic.

[42] Venice Commission, CDL-PI(2017)008, Compilation of Venice Commission Opinions, Reports and Studies on Constitutional Justice (updated) - www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2017)008 (accessed 06/2020).

[43] Venice Commission, CDL-AD(2016)007, Rule of Law Checklist, section II.E.3.

[44] Venice Commission, CDL-AD(2010)039rev, Study on Individual Access to Constitutional Justice.

the case and decides it on the basis of the decision of the Constitutional Court, possibly without applying the challenged provision if it was found to be unconstitutional. The study welcomes this type of individual access, which often co-exists with direct access (e.g. Belgium, Germany) but which is the only way for individuals to have access to the Constitutional Court in other countries (e.g. Italy, Romania).

Individual complaints provide direct access to the Constitutional Court. They come in two major types: normative constitutional complaints and full constitutional complaints.

Normative constitutional complaints exist for instance in Poland or Russia. Here, the individual challenges before the Constitutional Court an allegedly unconstitutional legal provision that has already been applied in a final judgement of the ordinary courts. The Constitutional Court annuls the challenged legal provision if it is unconstitutional.

The Venice Commission's Study found that normative complaints can remedy only a smaller part of human rights violations because more often they result from the unconstitutional application of a constitutional law rather than an unconstitutional law itself. The introduction of a merely normative constitutional complaint thus can raise high expectations in the population, which sometimes cannot be fulfilled.

The Study found that the most efficient remedy is the full constitutional complaint, which allows challenging also unconstitutional individual acts. Here the individual challenges a last instance judgment of the ordinary courts as such. It does not matter whether the unconstitutionality stems from an unconstitutional legal provision or an unconstitutional application of the law. The constitutional court will annul the legal provision if it is unconstitutional. The Study found that countries which have such a full individual complaint have significantly lower levels of violations found by the European Court of Human Rights than those with normative complaints only.[45]

The introduction of a full constitutional complaint is therefore a very efficient means of human rights protection. It even reduces the workload of the European Court of Human Rights because fewer cases come to Strasbourg. Therefore, the Venice Commission usually recommends the introduction of full constitutional complaints in countries which already have a normative complaint, such as Ukraine,[46] in countries which have a

[45] *Ibidem*, para. 5.
[46] Venice Commission, CDL-AD(2016)034, Ukraine - Opinion on the draft law on the Constitutional Court, Section II.B.

preliminary request to the Constitutional court, as was the case in Turkey[47] and in countries which have no individual access at all, like Bulgaria.[48]

The Study on individual access thus showed that in countries with a specialised constitutional court,[49] individual access to that Court is a key to the settlement of human rights issues on the national level before these cases reach the European level. The full constitutional complaint is the most efficient means to protect human rights.[50]

B. Composition of Constitutional Courts

In its Report on the Composition of (specialised) Constitutional Courts[51] the Commission identified three main issues. These are balance, independence and effectiveness.

Depending on the country and its society, several types of balance may need to be achieved. This can concern *inter alia* political sensitivities, regional or ethnic representation and gender balance. A balance between state powers can also be an objective pursued.

The pursuit of these balances is limited by the need to maintain the independence and impartiality of constitutional judges.

As concerns the appointing authorities, roughly two main systems of their appointment exist; either all judges are elected by Parliament (German model) or the three state powers each appoint one third of the judges: the President (executive), Parliament (legislative) and the Supreme Court / congress of judges (judicial power) – Italian model. Both models are perfectly valid.

The Venice Commission insists that the parliamentary component be elected by a qualified majority.[52] Ideally, this brings forward non-political candidates who are acceptable to the majority and the opposition or – at the very least – there is a trade-off and both the majority and the opposition appoint "their" candidates who balance each other.

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[47] Venice Commission, CDL-AD(2004)024, Opinion on the Draft Constitutional Amendments with regard to the Constitutional Court of Turkey.

[48] Venice Commission, CDL-AD(2008)009,Opinion on the Constitution of Bulgaria, para. 88.

[49] The issue is not relevant to countries where constitutional justice is exercised by the regular courts. In these countries, access of individuals is governed by the general rules on access to court.

[50] The Study also deals with the question on how an overburdening of the constitutional court can be avoided.

[51] Venice Commission, CDL-STD(1997)020, The Composition of Constitutional Courts - Science and Technique of Democracy, no. 20 (1997).

[52] The introduction of anti-deadlock mechanisms may be necessary.

Any rules for dismissal of judges and the president of the court should be very restrictive.

Obviously, constitutional judges should live up to the highest standards of professional qualification and strict rules of incompatibility must ensure that they do not have any interests compromising their neutrality.

Contrary to ordinary judges who are typically appointed until retirement, constitutional judges usually have a fixed term mandate. The Commission insists that this be a long mandate, much longer than the term of parliament. A re-election of constitutional judges should not be possible,[53] at least not immediately after the end of the first mandate. In order to avoid that all judges retire at the same time, the first appointments should be staggered. Judges should retire only when their successor takes office.[54]

The Study finds a central key role of collegiality, i.e. the fact that the members adjudicate as a group, whether or not they deliver separate opinions, constitutes an important safeguard. This can help them to overcome any expectations on how they would adjudicate. Once in office, the judges have to live up to the "duty of ingratitude" towards those who have nominated and elected them.

C. Other topics dealt with in Venice Commission opinions

In its opinions, the Venice Commission insisted that the basic tenets of the composition and jurisdiction of constitutional courts be regulated at the constitutional level.[55] This is because an organ that is empowered to annul laws adopted by Parliament representing the sovereign people, needs a high level of constitutional legitimacy for this task.

The discipline of a judge at the Constitutional Court should be in the hands of the other judges,[56] no other state body, including the judicial council, often in charge of discipline of ordinary courts, should be competent for that.

The position of the President should be that of a *primus inter pares*. She or he should not be in a position to push other judges towards the adoption

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[53] Venice Commission, CDL-STD(1997)020, *op. cit.*, Section I.4.2.

[54] See also Venice Commission, CDL-AD(2006)016, Opinion Constitutional and Legislative Improvements to ensure the uninterrupted functioning of the Constitutional Court of Ukraine.

[55] Venice Commission, CDL-AD(2004)023, Opinion on the Rules of Procedure of the Constitutional Court of Azerbaijan, paras. 5-6.

[56] Venice Commission, CDL-STD(1997)020, *op. cit.*, p. 21.

of specific judgments.[57] Specifically, the President should not be alone in full control of case-allocation among the judges.[58]

In many opinions and notably the report in individual access (see above), the Commission insisted on wide access to the constitutional court by parliamentary minorities, the ombudsman and by ordinary courts (preliminary requests).

As to the scope of jurisdiction, while no statutory act should be removed from the control by the Constitutional Court, the Venice Commission warned against burdening the Court with the control of sub-statutory acts, lest the Court turns from a constitutional court to a 'court of hierarchy'.[59] The Commission strongly insisted that while *a priori* constitutional control of international treaties is useful, it is important that legislation be controlled *a posteriori*, after its entry into force because only practice can reveal unconstitutionalities that remain undetected by a mere abstract control of a bill before promulgation.[60] In addition to international treaties, other exceptions can be *a priori* constitutionality control of questions to be put to referenda and *a priori* control of constitutional amendments that can be controlled against basic principles of the Constitution or its unamendable provisions.

Specific powers of providing a "binding interpretation of the Constitution" should not be part of the jurisdiction of the Court[61] because in practice such a competence only hides conflicts of competence between state organs, which should be adjudicated with the conflicting powers as parties.

As concerns procedure, the Commission favoured written but adversarial procedures,[62] notably when a Constitutional Court is faced with a high case-load due to wide individual access. The introduction of dissenting opinions was always welcomed by the Commission.[63]

A clear regulation of the effects of constitutional court judgments is essential for the efficiency of the Court's work. Mere declarations of

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[57] Venice Commission, CDL-AD(2017)011, Opinion on the Draft Constitutional Law on the Constitutional Court of Armenia, para. 52.
[58] *Ibidem*, para. 66.
[59] Venice Commission, CDL-INF(1996)010, Opinion on the Draft Law on the Constitutional Court of the Republic of Azerbaijan, p. 3.
[60] Venice Commission, CDL-AD(2011)001, Opinion on Three legal questions arising in the process of drafting the New Constitution of Hungary, paras. 49-50.
[61] Venice Commission, CDL-AD(2008)029, Opinion on the Draft Laws amending and supplementing (1) the Law on Constitutional Proceedings and (2) the Law on the Constitutional Court of Kyrgyzstan, paras. 17-18.
[62] *Ibidem*, para. 19.
[63] Venice Commission, CDL-AD(2018)030, Report on Separate Opinions of Constitutional Courts.

unconstitutionality, accompanied with recommendations to Parliament to change the legislation are clearly insufficient.[64] The Court must have the power to annul the unconstitutional provisions but it should be possible to postpone this effect to give Parliament enough time to adopt new legislation in order to avoid a legal gap.[65] Depending on the context, ordinary courts should be obliged to reopen a case, notably when individuals are detained on the basis of penal provisions found unconstitutional.

V. Support for Constitutional Courts under undue pressure

Constitutional Courts are an excellent means to limit excesses of state power. Therefore, those who want to exercise unchecked power often resent and fight them. The Venice Commission tries to support the Courts when there is a danger to the independence of the court and thus the constitutional values, which are also the values of the Council of Europe.

As a non-political actor, the Venice Commission does not monitor the constitutional situation in its member States but sometimes its opinions have the effect of supporting Constitutional Courts in difficult situations.[66] When there is undue pressure on a Court, the Commission or its President can make declarations or statements supporting the Courts.[67]

It is political actors which take opinions or alerts from the Venice Commission as a basis for their support. Such actors are the Venice Commission's parent organisation, the Council of Europe (Secretary General, Parliamentary Assembly), but also by the EU, individual EU member States or the even the USA.[68]

VI. Conclusion

The supremacy of Constitutions and the values enshrined it them are at the centre of the work of the Venice Commission. The Commission is aware that in order to be of practical use the Constitutions need to be implemented.

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[64] Venice Commission, CDL-AD(2009)014, Opinion on the Law on the High Constitutional Court of the Palestinian National Authority, para. 27.
[65] Venice Commission, *op. cit.*, para. 197.
[66] Venice Commission, CDL-AD(2016)001, Opinion on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland; CDL-AD(2016)026, Poland - Opinion on the Act on the Constitutional Tribunal; CDL-AD(2012)009, Opinion on Act CLI of 2011 on the Constitutional Court of Hungary.
[67] ww.venice.coe.int/WebForms/pages/?p=01_02_statements_GB&lang=en (accessed 06/2020).
[68] www.venice.coe.int/WebForms/pages/?p=02_references&lang=EN (accessed 06/2020).

Therefore, since its establishment in 1990, it supports Constitutional Courts as the bodies entrusted with supervising this implementation.

In addition to assistance in the drafting of Constitutions and legislation providing for an effective constitutional justice, the two main vectors of this support are judicial dialogue and cross-fertilisation on the one hand and direct support for the Courts against undue pressure on the other hand.

The Venice Commission's tools for judicial dialogue are conferences, the electronic *Bulletin on Constitutional Case-Law*, the CODICES database and the Venice Forum, which are the backbone of the co-operation. The key asset of these tools are their regularity and coherence.[69] The co-operation in the field of judicial documentation is not a purpose on its own, but it is a tool for judicial cross-fertilisation, allowing legal arguments to travel from court to court, from country to country, from continent to continent.

The Commission provides direct support to the Constitutional Court in various forms, through its opinions on constitutions, on the courts' legislation, through *amicus curiae* briefs, through formal or informal contacts with the authorities or - when necessary - through public statements.

The Venice Commission's model for co-operation with Constitutional Courts and equivalent bodies proved to be a successful one in Europe, so much so that soon courts and groups of courts from other regions wanted to participate in this work.

Following the establishment of co-operation with these groups, the Venice Commission assisted in the establishment of the World Conference on Constitutional Justice, for which it successfully acts as the Secretariat.

Several factors have contributed to the Venice Commission's success: its independent membership, its open approach based on dialogue and the acceptance of constitutional diversity.

[69] Through the Systematic Thesaurus developed by the liaison officers.

Pierre Garrone[1]

Vingt ans de codification du patrimoine électoral européen : adolescence ou maturité ?

Le Code de bonne conduite en matière électorale et sa reconnaissance par la Cour européenne des Droits de l'Homme

I. Introduction

Le droit électoral est l'un des principaux domaines d'activité de la Commission de Venise (ci-après : la Commission), presque depuis sa création. En effet, les élections sont au centre du constitutionnalisme démocratique, car il n'est pas de démocratie sans élections – et, plus précisément, sans élections conformes aux principes internationalement reconnus en la matière.

Comment reconnait-on ces principes internationalement reconnus ? Qui les a établis ? Qu'est-ce qui assure leur reconnaissance ? La réponse est relativement facile quand on traite de « droit dur » (« *hard law* »), mais beaucoup moins concernant le « droit souple » (« *soft law* »). Or, c'est ce dernier qu'a développé la Commission de Venise (la Commission), et qui sera l'objet de nos propos.

Le « droit dur » en la matière était déjà établi en 1989, avant la révolution démocratique qui a bouleversé la partie orientale de l'Europe et, avec plus ou moins de succès, a affecté le reste du monde. Il s'agit, au niveau universel, de l'article 25.b du Pacte international sur les droits civils et politiques – relatif au droit de voter et d'être élu -, et, au niveau européen, de l'article 3 du premier Protocole additionnel à la Convention européenne des Droits de l'Homme (ci-après : Protocole 1), garantissant le droit à des élections libres[2]. Le commentaire général n° 25 du Comité des droits de l'homme (datant de 1996), d'une part, et la jurisprudence de la Cour européenne des Droits de l'Homme (ci-après : la Cour), ont développé et précisé la portée de ces règles.

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[1] Secrétariat de la Commission de Venise, Chef de la division des élections et des partis politiques. Les opinions exprimées dans cet article n'engagent que leur auteur.

[2] Nous ne traiterons pas ici des normes applicables au niveau régional sur d'autres continents, telles que l'article 23.1.b de la Convention américaine relative aux droits de l'homme et l'article 13 de la Charte africaine des droits de l'homme et des peuples.

Reste à passer des grands principes à la pratique quotidienne. La jurisprudence est forcément casuistique, comme le sont les avis des organisations internationales – y compris le Conseil de l'Europe et en particulier la Commission – ou encore les rapports d'observation. C'est ce qui a poussé, en 2001, l'Assemblée parlementaire du Conseil de l'Europe à inviter la Commission de Venise à élaborer un Code de bonne conduite en matière électorale, car « les critères et les règles rest(ai)ent fragmentaires »[3]. C'est ainsi que la Commission a élaboré le document portant le titre de « Code de bonne conduite en matière électorale » (ci-après : le Code)[4].

Ce document contient les normes fondamentales du patrimoine électoral européen. Ces normes sont d'abord les principes constitutionnels classiques du droit électoral : le suffrage universel, égal, libre, secret et direct, ainsi que la périodicité des élections. Le Code développe également les conditions-cadres nécessaires à la mise en œuvre de ces principes, comme le respect des droits fondamentaux, la stabilité du droit électoral et les garanties procédurales telles que l'organisation du scrutin par un organe impartial et l'existence d'un système de recours et d'observation efficace.

Le Code est un texte de base destiné à promouvoir l'harmonisation des normes relatives aux élections et à servir de référence pour l'évaluation des élections. Il a été adopté par le Conseil des élections démocratiques et la Commission de Venise, puis approuvé par l'Assemblée parlementaire et le Congrès des pouvoirs locaux et régionaux du Conseil de l'Europe. Dans une déclaration adoptée au niveau ministériel, le Comité des Ministres lui a apporté son soutien. Il s'agit donc du document de référence du Conseil de l'Europe dans le domaine des élections. Il est complété par un Code de bonne conduite en matière référendaire qui reprend les principes du Code de bonne conduite en matière électorale en les adaptant aux particularités du référendum, avant de mettre l'accent sur les règles spécifiques applicables au référendum.

Conformément à la résolution de l'Assemblée qui a fait suite au rapport précité de 2001, la Commission de Venise a créé en son sein un groupe de travail auquel participent des représentants de l'Assemblée parlementaire, du CPLRE[5] et d'autres organisations ayant une expérience en la matière (principalement l'OSCE/BIDDH), dans le but de réfléchir

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[3] Commission de Venise, Doc. 9267, Code de bonne conduite en matière électorale, 15 octobre 2001.

[4] Commission de Venise, CDL-AD(2002)023rev2-cor, Code de bonne conduite en matière électorale : Lignes directrices et rapport explicatif.

[5] Congrès des pouvoirs locaux et régionaux du Conseil de l'Europe.

de façon régulière aux questions électorales[6]. Il s'agit du Conseil des élections démocratiques, qui examine les projets d'avis et d'études de la Commission en matière électorale avant leur soumission à la session plénière. Il assure ainsi la coordination entre la Commission, organe juridique, et l'Assemblée parlementaire et le Congrès, organes d'observation des élections. Tous trois se basent dans leurs travaux sur le Code, dans les avis électoraux – presque toujours élaborés conjointement par la Commission et l'OSCE/BIDDH -, comme dans les rapports d'observation. Cela peut sembler naturel car il s'agit des organes qui ont participé à la rédaction du Code. Quant à eux, les Etats s'y réfèrent, du moins occasionnellement, lorsque la Commission examine leur législation électorale, voire lors de litiges devant la Cour[7]. Par contre, il était moins certain que la Cour considère celui-ci comme un des fondements du droit international en la matière, lorsqu'elle rend des arrêts relatifs, avant tout, à l'article 3 Protocole 1.

L'objet de la présente contribution sera donc de déterminer le rôle du Code dans la jurisprudence de la Cour, qui est un très bon indicateur du caractère de document de référence du Code. Auparavant, nous allons résumer le contenu du Code.

II. le Code de bonne conduite en matière électorale, expression du patrimoine électoral européen : éléments essentiels

Le Code de bonne conduite en matière électorale définit d'abord les principes constitutionnels classiques du droit électoral : le suffrage universel, égal, libre, secret et direct, ainsi que la périodicité des élections. Ainsi proclamés, ces principes ne suscitent guère de contestations ; il en va cependant autrement lorsqu'il s'agit d'en définir précisément le contenu. Ainsi, selon le Code :

- Le suffrage universel[8] admet la soumission du droit de vote à des conditions d'âge, de nationalité et de résidence, mais dans certaines limites ; par exemple, le Code n'autorise (pour les nationaux) une condition de durée de résidence que pour les élections locales et régionales, qui ne peut excéder six mois sauf pour assurer la protection des minorités nationales.

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[6] Assemblée parlementaire du Conseil de l'Europe, Résolution 1264(2001), Code de bonne conduite en matière électorale, 6.1.

[7] Voir, en dernier lieu, *Mugemangango*, par. 56. La liste des arrêts cités figure en annexe à cette contribution.

[8] I.1.

- Le suffrage égal[9] n'autorise les inégalités de représentation que de manière limitée : l'écart maximal admissible par rapport à la clé de répartition ne devrait pas dépasser 10 %, et en tout cas pas 15 %, sauf circonstance spéciale (protection d'une minorité concentrée, entité administrative à faible densité de population) ; l'égalité des chances s'étend à l'accès aux médias et au financement public des partis et des campagnes ; des règles spécifiques peuvent garantir aux minorités nationales des sièges réservés ou prévoir une exception aux règles normales d'attribution des sièges (par exemple suppression du quorum) pour les partis de minorités nationales.
- Le suffrage libre[10] comprend deux aspects : la libre formation et la libre expression de la volonté de l'électeur. Le premier aspect, la libre formation de la volonté de l'électeur, est souvent oublié, mais implique par exemple la neutralité des médias publics, qui est encore loin d'être réalisée de manière générale. Quant au deuxième aspect, la libre expression de la volonté de l'électeur, il impose un examen des procédures de vote, de décompte et de transmission des résultats qui ne peut rester superficiel. La libre expression de la volonté de l'électeur implique aussi un décompte régulier, transparent, avec présence des observateurs, des représentants des candidats et des médias, ainsi que la transparence de la transmission des résultats au niveau supérieur.

Le respect des principes cités (suffrage universel, égal, libre, secret et direct, périodicité des élections) est nécessaire à des élections régulières, mais non suffisant : certaines conditions-cadres doivent être remplies[11]. L'une d'entre elles est l'organisation du scrutin par un organe impartial – c'est-à-dire par des commissions électorales indépendantes et impartiales, sauf en cas de longue tradition d'indépendance de l'administration face au pouvoir politique[12]. Un système de recours efficace est également indispensable, tant il est vrai que toute règle ne pouvant être sanctionnée par une autorité n'est que lex imperfecta[13]. Une autre condition fondamentale est le respect des droits de l'homme, et notamment de la liberté d'expression et de la liberté de réunion et d'association à des fins politiques[14]. On pourrait encore citer l'ouverture la plus large possible du scrutin aux observateurs nationaux

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9 I.2.
10 I.3.
11 II.
12 II.3.1.
13 II.3.3.
14 I.1.

et internationaux[15] ou la stabilité du droit électoral, et notamment de ses éléments fondamentaux, tels que la composition des commissions électorales et le système électoral proprement dit[16].

La Commission a en outre élaboré des déclarations interprétatives précisant certains aspects spécifiques :

- La stabilité du droit électoral[17] ; celle-ci n'est pas une fin en soi, et ne peut dès lors être invoquée pour maintenir une situation contraire aux standards du patrimoine électoral européen ni faire obstacle à la mise en œuvre des recommandations des organisations internationales ;
- La participation des femmes aux élections[18] ; l'accent est mis en particulier sur la possibilité de mesures positives destinées à assurer la parité ;
- La participation des personnes handicapées aux élections[19] ; celles-ci ne doivent notamment pas faire l'objet de discrimination et leur accès au processus électoral doit être facilité ;
- La publication de la liste des électeurs ayant participé aux élections[20] (ou plutôt l'encadrement de l'accès aux données figurant dans cette liste, afin d'assurer le respect de la protection des données et de la liberté de vote, tout en assurant un équilibre avec l'objectif d'éviter la fraude électorale).

III. La jurisprudence de la Cour européenne des Droits de l'Homme : des références régulières au Code

Les références au Code de bonne conduite en matière électorale se sont peu à peu introduites, sinon imposées, dans la jurisprudence de la Cour. A ce jour, c'est dans une trentaine arrêts qu'il est ainsi fait référence au Code, dont six de Grande Chambre (sans compter une opinion dissidente),

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[15] II.3.2.
[16] II.2.b.
[17] Commission de Venise, CDL-AD(2005)043, Déclaration interprétative sur la stabilité du droit électoral.
[18] Commission de Venise, CDL-AD(2006)020, Déclaration relative à la participation des femmes aux élections.
[19] Commission de Venise, CDL-AD(2011)045, Déclaration interprétative révisée du code de bonne conduite en matière électorale relative à la participation des personnes handicapées aux élections.
[20] Commission de Venise, CDL-AD(2016)028, Déclaration interprétative du code de bonne conduite en matière électorale sur la publication de la liste des électeurs ayant participé aux élections.

et deux arrêts dans des « affaires phares »[21]. Il s'agit, comme on pouvait s'y attendre, essentiellement d'arrêts relatifs au droit à des élections libres (article 3 Protocole 1), parfois combinés avec l'article 13 (droit à un recours effectif) ou 14 CEDH (interdiction de discrimination), auxquels il faut ajouter quelques arrêts en matière de liberté d'expression (article 10 CEDH).

Quant à la fréquence des citations du Code, depuis la première en 2004 dans l'affaire *Hirst (n° 2)* devant une Chambre (en 2005 devant la Grande Chambre), elle est en moyenne de deux par an environ, avec une certaine concentration entre 2010 et 2016. La Cour cite le Code sous le titre « les textes internationaux pertinents », voire, plus récemment, « le cadre juridique international pertinent », reconnaissant de la sorte son caractère juridique ; elle ne le mentionne cependant pas systématiquement dans la partie « en droit », même si ses principes sont repris.

Avant d'entrer dans l'examen par thèmes des arrêts rendus par la Cour et qui font référence au Code, il convient d'examiner ce que la Cour a dit de la nature du Code. A vrai dire, la question a été traitée de manière indirecte. Dans l'affaire *Muršić*, le juge Pinto de Albuquerque a écrit : « L'interprétation évolutive de la Convention a également amené la Cour à étayer son raisonnement par des références à d'autres normes émanant des organes du Conseil de l'Europe, même si ces organes n'ont pas de fonction représentative des États parties à la Convention, qu'il s'agisse de mécanismes de contrôle ou de groupes d'experts. Pour déterminer la portée exacte des droits et libertés garantis par la Convention, la Cour s'est référée, par exemple, aux travaux de la Commission européenne contre le racisme et l'intolérance (ECRI) et de la Commission pour la démocratie par le droit (Commission de Venise) »[22] ; il est alors fait référence à l'affaire *Hirst (n° 2)* où, pour la première fois, la Cour mentionne le Code. Ce texte suit l'affirmation suivante : « en droit européen des droits de l'homme, la *hard law* et la *soft law* sont profondément entremêlées »[23]. Il s'agit certes de *soft law*, mais elle est une source d'inspiration de la jurisprudence de la Cour. C'est ce que la Grande Chambre avait déjà écrit indirectement dès 2007 dans l'affaire *Parti conservateur russe des entrepreneurs*, en affirmant :

> 70. En vertu des principes communs du patrimoine électoral européen, qui forment la base de toute société véritablement démocratique, le droit de vote comprend la possibilité de voter lors d'élections libres à scrutin égal, universel, secret et direct tenues à intervalles réguliers

[21] *Davydov* et *Abdalov*.
[22] Par. 19.
[23] Par. 18.

(voir la résolution de l'Assemblée parlementaire sur le Code de bonne conduite en matière électorale au paragraphe 37 ci-dessus, la déclaration du Comité des ministres sur le Code de bonne conduite en matière électorale au paragraphe 38 ci-dessus, et les lignes directrices sur les élections aux paragraphes 40 et 41 ci-dessus)…

Il avait ainsi déjà été fait référence au Code, qui avait développé la notion de « patrimoine électoral européen ».

Par thèmes, c'est la question du *suffrage universel* (droit de vote et d'être élu) qui revient le plus souvent. Il est vrai que c'est de loin la question la plus traitée par le Cour dans sa jurisprudence relative à l'article 3 Protocole 1. Toutefois, même si le suffrage universel est le sujet le plus fréquemment traité dans la jurisprudence de la Cour en général comme dans celle se référant au Code, il est intéressant de noter la fréquence (et donc l'importance) des références à la deuxième partie du Code, relative aux conditions-cadres des élections démocratiques, notamment en ce qui concerne le droit à un système de recours efficace et la stabilité du droit électoral, voire l'organisation des élections par un organe impartial. Rappelons en effet que l'article 3 Protocole 1 ne traite pas des recours et que l'article 6 CEDH ne s'applique pas en matière électorale[24] ; quant à la stabilité du droit, le moins que l'on puisse dire est qu'elle ne résulte pas expressément du droit international des droits de l'homme. Sur ces points, l'apport du Code nous apparait dès lors décisif.

Un bon nombre d'arrêts citant le Code concernent donc le *suffrage universel*, dans ses aspects actif comme passif. Ainsi, la première affaire où la Cour a fait référence au Code, *Hirst (n° 2)*, était relative à l'exclusion du droit de vote suite à une condamnation pénale : le Code prévoit que cette privation « doit être motivée par… des condamnations pénales pour des délits graves » et « prononcée par un tribunal dans une décision spécifique» [25]. La Cour a fait référence à cette exigence d'une décision spécifique et considéré que le caractère automatique de la sanction allait à l'encontre de l'article 3 Protocole 1[26]. Il faut cependant relever que, dans un arrêt ultérieur, elle a considéré acceptable une interdiction du droit de vote qui s'appliquait automatiquement, mais seulement aux personnes condamnées pour certaines infractions bien déterminées ou à une peine privative de liberté dont la durée était supérieure à un seuil fixé par la

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[24] Voir par exemple *Riza* par. 184, et les références ; voir déjà *Pierre-Bloch.*
[25] I.1.d.
[26] Voir en particulier les par. 71 et 82.

loi. Le législateur avait eu soin de moduler l'emploi de cette mesure en fonction des particularités de chaque affaire. Il avait également modulé la durée de la mesure d'interdiction en fonction de la peine infligée et donc, indirectement, de la gravité de l'infraction[27]. Par contre, la Cour a confirmé que l'application automatique d'une restriction au droit de vote à tous les détenus condamnés, quelles que soient la durée de leur peine, la nature ou la gravité de l'infraction qu'ils ont commise ou leurs circonstances personnelles, entraine violation de l'article 3 Protocole 1 même dans un cas où une décision individuelle de privation du droit de vote serait légitime[28]. De même, la Cour a fait référence au Code avant de considérer que le retrait du droit de vote, sans évaluation judiciaire individualisée de la situation de personnes placées sous tutelle, n'était pas proportionné au but visé[29].

Le Code a été cité à plusieurs reprises concernant le vote des citoyens à l'étranger. Pourtant, il est très prudent à cet égard, puisqu'il dit simplement que « le droit de vote et d'éligibilité peut être accordé aux citoyens résidant à l'étranger »[30]. Dans ses travaux ultérieurs, la Commission est restée prudente, en concluant comme suit : « Bien que l'introduction du droit de vote des citoyens résidant à l'étranger ne soit pas imposée par les principes du droit du patrimoine électoral européen, la Commission européenne pour la démocratie par le droit propose que les Etats, compte tenu de la mobilité européenne des citoyens, et en conformité avec la situation particulière de certains Etats, adoptent une approche positive relative au droit de vote des citoyens résidant à l'étranger, puisque ce droit contribue à l'expansion de la citoyenneté nationale et européenne »[31]. La Cour est elle aussi restée prudente. La Grande Chambre (contrairement à la première section) a ainsi considéré que, même en présence d'une disposition constitutionnelle prévoyant la possibilité d'introduire le vote à l'étranger, il était possible de l'exclure – le retour au pays pour voter étant possible[32] ; quant à la perte du droit de vote après quinze ans de séjour à l'étranger, la Cour l'a estimée proportionnée[33]. Elle s'est aussi référée à la marge de manœuvre laissée aux Etats par le Code pour estimer que l'impossibilité pour un candidat indépendant de se présenter aux électeurs à l'étranger n'entrainait pas violation des articles 3 Protocole 1 et 14 CEDH[34].

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[27] *Scoppola (n° 3).*
[28] *Anchugov et Gladkov.*
[29] *Alajos Kiss.*
[30] I.1.1.c.v.
[31] Par. 99.
[32] *Sitaropoulos et Giakoumopoulos.*
[33] *Shindler.*
[34] *Oran*, par. 60.

Plusieurs affaires où référence a été faite au Code concernaient l'*éligibilité*. Dans la première[35], la Cour considéra admissible d'imposer une caution pour écarter les candidatures fantaisistes. En l'espèce, la caution était peu importante et donc conforme au principe de la proportionnalité ; quant au fait que celle-ci ne pouvait être remboursée, la Cour ne considéra pas que cela posait problème au vu de son montant, notamment[36]. Le Code prévoit cependant que la caution doit être remboursée si le candidat ou le parti dépasse un certain nombre de suffrages[37,38].

D'autres affaires concernaient le refus de candidatures en l'absence de recours efficaces. Cette absence peut résulter du contenu de la loi : un organe de dernier recours composé en majorité de représentants de partis politiques n'apparait pas comme impartial[39]. Elle peut aussi résulter d'une pratique où l'arbitraire a une grande place[40] ; l'acceptation très tardive de candidatures due à la fois à des délais trop longs pour statuer et à des pratiques arbitraires récurrentes entraine également une violation du droit d'être élu, car elle ne permet pas aux candidats de faire campagne correctement[41].

Même s'il s'agit d'une question d'incompatibilité plutôt que d'inéligibilité, une loi empêchant les doubles nationaux d'exercer un mandat de député à moins de renoncer à leur autre nationalité porte aussi atteinte au droit d'être élu tel que garanti par l'article 3 Protocole 1 et précisé par le Code, du moins dans les Etats qui admettent la double nationalité[42].

La Cour s'est aussi référée à la *libre formation de la volonté de l'électeur* et à *l'égalité des chances*, questions souvent étroitement liées. Dans l'affaire *Parti communiste de Russie*, elle a considéré que l'accès aux médias publics n'avait pas été égal dans les faits, mais qu' « il ne (pouvait) être considéré comme établi que l'État ait en l'espèce manqué à ses obligations positives dans ce domaine au point de violer cette disposition »[43]. Dans l'affaire *Orlovskaya Iskra*, le fait de qualifier des articles de presse partisans d'éléments de « campagne électorale » (soumise à des règles spécifiques de financement) allait à l'encontre de l'article 10, qui devait être considéré à la lumière des

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35 *Soukhovetski*.
36 Par. 70ss.
37 I.1.3.vi.
38 L'arrêt *Parti conservateur russe des entrepreneurs* porte largement sur l'éligibilité, mais le Code n'est pas cité sur ce point.
39 *Ofensiva tinerilor*.
40 *Tahirov*.
41 *Abdalov*.
42 *Tănase*.
43 Par. 103.

droits garantis par l'article 3 du Protocole n° 1 ; la mesure litigieuse ne visait pas à garantir l'égalité des chances, au contraire.

C'est dans l'arrêt *Parti conservateur russe des entrepreneurs* que la Cour s'est pour la première fois référée au Code pour préciser que le suffrage libre implique aussi bien la libre formation que la libre expression de la volonté de l'électeur. « Pour ce qui est de la libre formation de la volonté de l'électeur, la Cour note que les institutions du Conseil de l'Europe l'ont essentiellement envisagée sous l'angle de l'obligation des autorités publiques de respecter leur devoir de neutralité, notamment en ce qui concerne l'usage des médias, l'affichage, le droit de manifester sur la voie publique ou le financement des partis et des candidats » « Quant à la libre expression de la volonté de l'électeur, on a estimé qu'elle implique en premier lieu que la procédure de vote soit strictement respectée. L'électeur doit pouvoir émettre son vote pour les listes ou les candidats enregistrés sans être soumis à des menaces ou des contraintes l'empêchant d'exercer son suffrage ou de l'exercer comme il l'entend, qu'elles émanent d'autorités ou de particuliers »[44].

Le Code a été cité à plusieurs reprises dans des affaires relatives à la libre expression de la volonté de l'électeur. Dans l'affaire « phare » Davydov, la Cour a observé que le Code « accorde une attention particulière au processus de décompte, de transfert et de tabulation des résultats, en insistant sur le fait que ce processus doit être transparent et ouvert, et que les observateurs et les représentants des candidats doivent être autorisés à être présents et obtenir des copies des dossiers… Ces recommandations détaillées reflètent l'importance des détails techniques, qui peuvent être cruciaux pour garantir une procédure ouverte et transparente de vérification de la volonté des électeurs par le dépouillement des bulletins de vote et l'enregistrement précis des résultats des élections … du bureau de vote local à la Commission électorale centrale. Elles confirment qu'aux yeux du Code de bonne conduite en matière électorale, les étapes post-électorales couvrant le dépouillement, l'enregistrement et le transfert des résultats des élections constituent un élément indispensable du processus électoral. En cette qualité, elles devraient être accompagnées de garanties procédurales claires, être ouvertes et transparentes et permettre l'observation par des membres de tout l'éventail politique, y compris l'opposition, afin d'assurer la réalisation du principe de la libre expression de la volonté de l'électeur et la nécessité de lutter contre la fraude électorale »[45]. La Cour a aussi fait

[44] Par. 71-73.
[45] Par. 283-284 (notre traduction).

référence au Code lorsqu'elle a souligné qu'il est préférable de procéder au décompte dans le bureau de vote pour éviter les risques de substitution, notamment lors du transport[46].

Dans l'affaire *Karimov*, des militaires avaient voté dans des bureaux de votes séparés en violation du droit interne, qui prévoyait le vote dans des bureaux ordinaires sauf exceptions clairement définies. La Cour a rappelé le risque que les supérieurs imposent ou ordonnent des choix politiques, en particulier dans un pays où des observateurs internationaux renommés ont constaté la violation de nombreuses normes internationales[47].

Comme déjà indiqué, la Cour a cité à plusieurs reprises la deuxième partie du Code relative aux « conditions de mise en œuvre des principes » du patrimoine électoral européen, conditions qui ne relèvent certes pas de la lettre de l'article 3 Protocole 1, mais sans lesquelles des élections démocratiques ne sont pas possibles. Ainsi en va-t-il du respect des droits fondamentaux, et notamment de la liberté de faire campagne[48].

La stabilité du droit électoral est un principe qui a été développé spécifiquement par la Commission et la jurisprudence de la Cour en la matière peut donc être considérée comme celle qui se fonde le plus directement sur les travaux de la Commission. Nous avions eu l'honneur d'en suggérer les premiers éléments il y a près de trois décennies, en ce qui concerne le système électoral, le but étant d'éviter les manipulations, voire les apparences de manipulations (en faveur des sortants)[49]. Ce sont surtout les éléments fondamentaux du droit électoral qui doivent être stables (c'est-à-dire qu'ils ne doivent en principe pas être modifiés dans l'année précédant l'élection)[50].

« Sont des règles fondamentales, notamment :

- le système électoral proprement dit, c'est-à-dire les règles relatives à la transformation des voix en sièges ;
- les règles relatives à la composition des commissions électorales ou d'un autre organe chargé de l'organisation du scrutin ;
- le découpage des circonscriptions et les règles relatives à la répartition des sièges entre les circonscriptions[51]. »

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[46] Code, I.3.2.xii et rapport explicatif, par. 45 ; par. 299 de l'arrêt.
[47] Rapport explicatif, par. 41, cité au par. 39 de l'arrêt. Voir Code, I.3.2.xi.
[48] *Uspaskich*, par. 74, 90 ss. Voir aussi l'affaire *Orlovskaya Iskra* précitée, où une violation de l'article 10 CEDH a été constatée dans le cadre d'une campagne électorale.
[49] Commission de Venise, CDL(1992)001, Le droit électoral : principes généraux et niveaux normatifs, B.1.
[50] Commission de Venise, CDL-AD(2002)023rev-cor, II.2 ; CDL-AD(2005)043, Déclaration interprétative sur la stabilité du droit électoral.
[51] Commission de Venise, CDL-AD(2005)043, *op. cit.,* II.4.

Dans la première affaire où la Cour a cité ce principe, il s'agissait uniquement d'une référence non décisive pour la solution du litige (relatif à la liberté d'association)[52] ; le principe de stabilité a par contre été décisif dans l'affaire *Ekoglanost* ; la Cour, se fondant sur le délai d'un an recommandé par la Commission, a jugé que l'introduction de nouvelles conditions de participation à un scrutin, peu avant la date des élections, peut amener à la disqualification de partis bénéficiant d'un important soutien populaire et profiter ainsi aux formations politiques au pouvoir ; en l'espèce, le parti requérant n'avait eu qu'un mois pour satisfaire aux conditions nouvelles imposées par la loi et l'article 3 Protocole 1 avait été violé. Dans l'affaire *Danis*, la Cour a estimé qu'en modifiant la législation électorale sept mois avant les élections parlementaires de 2008, les autorités n'ont pas donné aux requérants l'occasion d'organiser leur activité de telle sorte qu'ils puissent se voir reconnaître le statut d'utilité publique. Les requérants ont été placés dans une impossibilité objective d'obtenir ce statut et de remplir ainsi la condition d'éligibilité requise par la nouvelle loi électorale. Dans l'affaire *Cernea*, la loi avait introduit une règle excluant les partis non représentés au parlement (c'est-à-dire, en l'espèce, qui n'avaient pas obtenu le quorum légal) des élections complémentaires moins de trois mois avant les élections. La Cour, tout en mentionnant pour mémoire le principe de stabilité du droit électoral, a considéré implicitement qu'il n'avait pas été violé, car il n'était pas porté atteinte à un principe fondamental ; au contraire, le quorum n'était pas contraire aux normes internationales, et « la Cour [a pris] note de l'argument de la Cour constitutionnelle selon lequel le but des élections partielles n'est pas d'offrir à un parti une voie détournée pour obtenir un mandat de parlementaire qui n'a pas pu être remporté à l'issue des élections générales », donc la nouvelle règle n'était qu'une mise en œuvre du principe du quorum[53]. Enfin, dans l'arrêt *Cegolea*, la Cour a souligné que « l'introduction de nouvelles exigences peu de temps avant la date des élections peut amener, dans des cas extrêmes, à la disqualification d'office de partis et coalitions d'opposition bénéficiant d'un soutien populaire important, et ainsi favoriser les formations politiques au pouvoir. Il va de soi qu'une telle pratique est incompatible avec l'ordre démocratique et qu'elle sape la confiance des citoyens dans les pouvoirs publics de leur pays »[54].

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[52] *Parti républicain de Russie.*
[53] Par. 51.
[54] Par. 51.

Tout en refusant d'appliquer l'article 6 CEDH au contentieux électoral, la Cour a développé les *garanties procédurales* du droit à des élections libres. En cela, elle s'est fondée aussi bien sur l'article 3 Protocole 1 que sur l'article 13 CEDH, tout en se référant à plusieurs reprises au Code[55]. Ainsi, dans l'affaire *Namat Aliyev*, elle l'a cité pour mettre en garde contre le formalisme excessif, notamment en matière de recevabilité des recours[56]. Dans l'affaire *Petkov*, elle a considéré que le recours disponible dans le cadre des élections – contre la radiation de la liste des candidats - n'offrant qu'une réparation pécuniaire, il ne pouvait être considéré comme effectif au regard de l'article 13 de la Convention. Faisant expressément référence au Code, elle a jugé « qu'un système efficace de recours en matière électorale, tel que celui décrit dans le code de bonne conduite en matière électorale adopté sous les auspices de la Commission de Venise…, constitue une garantie importante contre l'arbitraire dans le processus électoral. Le fait de ne pas se conformer à des décisions définitives rendues en réponse à des recours sape à n'en pas douter l'effectivité de pareil système »[57]. Dans l'affaire *Gahramanli*, des violations répétées des règles procédurales – en substance, les instances compétentes n'ont pas sérieusement examiné les griefs des requérants – ont constitué une violation de l'article 3 Protocole 1. Dans l'affaire *Parti communiste de Russie*, la Cour a renoncé à déterminer si la question se posait sous l'angle de l'article 3 Protocole 1 ou de l'article 13 CEDH, tout en se référant au Code comme une source confirmant l'existence d'obligations positives en matière de recours découlant de l'article 3 Protocole 1[58].

Sans imposer un recours judiciaire tel que recommandé par le Code, du moins en dernière instance, la Cour a estimé, dans l'affaire *Grosaru*[59], que l'« absence de garanties suffisantes quant à l'impartialité de l'organe chargé d'examiner les contestations du requérant ont porté atteinte à la substance même des droits garantis par l'article 3 du Protocole nº 1 »[60]. L'organe en question était composé en majorité de représentants de partis politiques et non de juges. Le traitement du contentieux par un seul degré de juridiction (en l'espèce, la Cour constitutionnelle), s'il a un caractère judiciaire, est par contre admissible, conformément au Code, que la Cour de Strasbourg suit

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55 II.3.3, « l'existence d'un système de recours efficace ».
56 Par. 86.
57 Par. 63.
58 Par. 99.
59 Par. 56(-57).
60 Voir aussi *Ofensiva Tinerilor*, où la Cour a considéré que l'absence de garanties suffisantes quant à l'impartialité de l'organe chargé d'examiner la candidature de la requérante entraînait violation de son droit d'être élue. A noter que cette affaire, comme l'affaire *Grosaru*, concernait la représentation des minorités.

encore lorsqu'il demande que de nouvelles élections puissent être organisées en cas d'annulation du scrutin[61],[62].

La question de l'organe de recours s'est posée tout récemment devant la Cour dans l'affaire *Mugemangango*. Le parlement wallon était le seul juge de sa propre élection. La Cour a constaté une violation de l'article 3 Protocole 1 et de l'article 13 CEDH combiné avec l'article 3 Protocole 1 parce que l'organe de recours ne présentait pas de garanties suffisantes d'impartialité ; le pouvoir d'appréciation du parlement wallon n'était pas circonscrit par des dispositions du droit interne à un niveau suffisant de précision ; et les garanties dont le requérant a bénéficié au cours de la procédure n'étaient pas non plus suffisantes dans la mesure où elles ont été mises en place de manière discrétionnaire[63]. La Cour n'est cependant pas allée aussi loin que la Commission puisqu'elle n'a pas exclu qu'un recours devant un Parlement en instance unique puisse satisfaire aux exigences de la Convention, notamment de l'article 13[64]. Elle a cependant cité à plusieurs reprises le Code de bonne conduite en matière électorale, ainsi que le mémoire *amicus curiae* demandé à la Commission[65], pour constater l'absence de garanties suffisantes d'impartialité, notamment parce que le vote à la majorité simple au parlement permettait à la majorité politique d'imposer son point de vue et que les membres élus dans la circonscription du requérant, compétiteurs directs de celui-ci, n'ont pas été écartés du vote de l'assemblée plénière dudit parlement.

Sur la question précise du délai de recours, la Cour s'est référée à l'exigence du Code, selon lequel il doit être de trois à cinq jours en première instance[66]. Toutefois, elle n'a pas voulu imposer une règle générale compte tenu des divergences entre les législations nationales, voire entre les cas particuliers, mais a constaté que, en l'espèce, un délai de deux jours n'était pas contraire à l'article 13[67].

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[61] *Rizˇa*, par. 166, 177.
[62] Voir aussi *supra* concernant la violation du droit d'être élu en l'absence de recours efficaces.
[63] Par. 94ss.
[64] Par. 137ss.
[65] Mémoire *amicus curiae* pour la Cour européenne des Droits de l'Homme en l'affaire *Mugemangango c. Belgique* sur les garanties procédurales qu'un État doit fournir dans le cadre d'une procédure de contestation du résultat d'une élection ou de répartition des sièges, Commission de Venise, CDL-AD(2019)021, Mémoire *amicus curiae* pour la Cour européenne des Droits de l'Homme en l'affaire *Mugemangango c. Belgique* sur les garanties procédurales qu'un État doit fournir dans le cadre d'une procédure de contestation du résultat d'une élection ou de répartition des sièges.
[66] II.3.3.g.
[67] *Etxeberria*, par. 79.

L'organisation des élections par un organe impartial est un élément essentiel pour garantir des élections reflétant la volonté de l'électeur. Cela n'échappe pas aux parties prenantes au droit électoral, qui se focalisent très souvent là-dessus lors de débats sur le contenu des législations électorales, comme nous avons pu le constater depuis près de trois décennies. Le Code insiste sur la nécessité d'établir des commissions électorales indépendantes et impartiales à tous les niveaux, du moins en l'absence d'une longue tradition d'indépendance de l'administration face au pouvoir politique[68]. Dane l'affaire *Parti travailliste géorgien*[69], les commissions électorales comptaient à tous les niveaux sept membres sur quinze (y compris le président, qui a voix prépondérante) désignés par le président de la République et son parti, proportion particulièrement élevée comparée aux autres pays européens, ce qui traduisait des lacunes dans le système des freins et contrepoids aux pouvoirs présidentiels et démontrait qu'elles ne pouvaient guère faire preuve d'indépendance par rapport aux pressions politiques extérieures. Toutefois, faute pour l'intéressé d'avoir rapporté la preuve d'un cas concret d'abus de pouvoir ou de fraude électorale commis au sein d'une commission à son détriment, la Cour n'a pas considéré qu'il y avait violation de l'article 3 Protocole 1 de ce chef. En Azerbaïdjan, les commissions électorales manquaient d'impartialité. Elles étaient, à tous les niveaux, présidées par des personnes nommées par le parti au pouvoir, qui désignait *de iure* la majorité relative de leurs membres ; *de facto*, celui-ci jouissait du soutien de la majorité absolue des membres des commissions concernées[70]. Là encore, la Cour n'a pas considéré que la composition des commissions électorales constituait en soi une violation de l'article 3 Protocole 1, mais qu'il s'agissait d'un des facteurs systémiques de l'inefficacité de l'examen du recours des requérants en matière électorale par la Commission électorale centrale dans le cas particulier[71].

Le choix du *système électoral* est, avec la composition de l'administration électorale, le thème le plus débattu lors des réformes électorales. C'est ainsi que dans la célèbre affaire *Yumak et Sadak* relative au quorum de 10 % en Turquie, la Cour a cité plusieurs documents de la Commission[72] : le Code de bonne conduite en matière électorale, selon lequel le choix du système électoral est « libre, sous réserve du respect des principes mentionnés ci-dessus »[73] ; mais aussi son Rapport sur les règles électorales et les actions positives en faveur de la participation des

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[68] Code, II.3.1.b.
[69] Voir la référence au passage précité du Code au par. 59.
[70] *Garahmanli*, par. 78ss ; pour la citation du Code, voir par. 52.
[71] Par. 78.
[72] Par. 53-56.
[73] Code, II.4.

minorités nationales aux processus de décision dans les pays européens, qui prévoit que « les seuils électoraux (quorums) ne devraient pas affecter les chances des minorités nationales d'être représentées »[74]. La Cour avait reconnu que le quorum de 10 % était élevé, mais l'avait déclaré néanmoins acceptable parce que des correctifs permettaient d'assurer la représentation des petits partis au parlement.

IV. Conclusion et perspectives

Le Code de bonne conduite en matière électorale a atteint sa maturité. Il est régulièrement cité au sein du Conseil de l'Europe, tout particulièrement par la Cour, qui en a fait un élément enrichissant sa jurisprudence sur l'article 3 du Premier Protocole additionnel à la Convention européenne des droits de l'homme – même si elle n'en a pas retenu toutes les propositions. Il a donc largement dépassé le cadre des organes qui l'ont élaboré – Commission, Assemblée et Congrès -, d'autant plus que les avis sont rédigés conjointement avec l'OSCE/BIDDH et que les Etats s'y réfèrent lors de l'examen de leurs lois électorales.

Cependant, ce Code est-il gravé dans le marbre ? Non, il reste du « droit souple » même s'il est loin d'être bâti sur le sable - comme le montre la jurisprudence de la Cour. Son contenu est arrivé à maturité. Le fruit mûr doit-il alors tomber ? Non, là encore, mais un peu de souplesse n'est pas exclue. C'est ainsi que la Commission, en coopération avec l'Assemblée parlementaire, a entrepris de réviser son « petit frère », le Code de bonne conduite en matière référendaire[75], bien que plus récent que le Code en matière électorale, en tenant compte des développements intervenus depuis son adoption en 2007. Même si les référendums possèdent un bon nombre de particularités par rapport aux élections, certains développements sur des points communs aux élections et aux référendums pourraient être actualisés, notamment en ce qui concerne l'usage des nouvelles technologies - en matière de vote mais aussi et surtout de campagnes et d'expression politique en général. Le socle restera, mais il appartiendra à la Commission d'exprimer, le cas échéant, sa volonté d'adapter ce document aux changements intervenus, ou d'y ajouter de nouvelles déclarations portant sur des points non envisagés, ou plutôt non envisageables lors de sa rédaction.

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[74] Commission de Venise, CDL-AD(2005)009, Rapport sur les règles électorales et les actions positives en faveur de la participation des minorités nationales aux processus de décision dans les pays européens, par. 68, d.

[75] Commission de Venise, CDL-AD(2007)008rev-cor, Code de bonne conduite en matière référendaire.

Annexe : liste des arrêts de la Cour européenne des Droits de l'Homme cités

- *Pierre-Bloch c. France,* 24194/94, 21 octobre 1997
- *Hirst (n°2) c. Royaume-Uni* [GC], 74025/01, 6 octobre 2005
- *Soukhovetski c. Ukraine*, 13716/02, 28 mars 2006
- *Parti conservateur russe des entrepreneurs et autres c. Russie*, 55066/00 et 55638/00, 11 janvier 2007
- *Parti travailliste géorgien c. Géorgie*, 9103/04, 8 juillet 2008
- *Yumak et Sadak c. Turquie* [GC], 10226/03, 8 juillet 2008
- *Petkov et autres c. Bulgarie*, 77568/01, 11 juin 2009
- *Etxeberria Barrena Arza Nafarroako Autodeterminazio Bilgunea et Aiarako et autres c. Espagne*, 35579/03, 35613/03, 35626/03, 30 juin 2009
- *Grosaru c. Roumanie*, 78039/01, 2 mars 2010
- *Namat Aliyev c. Azerbaïdjan*, 18705/06, 8 avril 2010
- *Tanase c. Moldova* [GC], 7/08, 27 avril 2010
- *Alajos Kiss c. Hongrie*, 38832/06, 30 mai 2010
- *Parti républicain de Russie c. Russie*, 12976/07, 12 avril 2011
- *Sitaropoulos et Giakoumopoulos c. Grèce* [GC], 42202/07, 15 mars 2012
- *Scoppola (N° 3) c. Italie* [GC], 126/05, 22 mai 2012
- *Parti communiste de Russie et autres c. Russie*, 29400/05, 19 juin 2012
- *Ekoglasnost c. Bulgarie*, 30386/05, 6 novembre 2012
- *Shindler c. Royaume-Uni*, 19840/09, 7 mai 2013
- *Anchugov et Gladkov c. Russie*, 11157/04, 15162/05, 4 juillet 2013
- *Oran c. Turquie*, 28881/07 et 37920/07, 15 avril 2014
- *Karimov c. Azerbaïdjan*, 12535/06, 25 septembre 2014
- *Danis et l'association des personnes d'origine turque c. Roumanie*, 16632/09, 21 avril 2015
- *Tahirov c. Azerbaïdjan*, 31953/11, 11 juin 2015
- *Gahramanli et autres c. Azerbaïdjan*, 36503/11, 8 octobre 2015
- *Riza et autres c. Bulgarie*, 48555/10 et 48377/10, 13 octobre 2015
- *Ofensiva Tinerilor c. Roumanie*, 16732/05,15 décembre 2015
- *Muršić c. Croatie* [GC], 7334/13, 20 octobre 2016

- *Uspaskich c. Lituanie*, 14737/08, 20 décembre 2016
- *Orlovskaya Iskra c. Russie*, 42911/08, 21 février 2017
- *Davydov et autres c. Russie*, 75947/11, 30 mai 2017
- *Cernea c. Roumanie*, 43609/10, 27 février 2018
- *Abdalov et autres c. Azerbaïdjan*, 28508/11, 37602/11 et 43776/11, 11 juillet 2019
- *Cegolea c. Roumanie*, 25560/13, 24 mars 2020
- *Mugemangango c. Belgique*, 310/15, 10 juillet 2020.

Manuel Gonzalez Oropeza[1]

Venice Commission
Mexico´s participation 2010-2016

The Rule of Law brings the world together, from the Mediterranean Sea to the Gulf of Mexico and all around the Pacific Ocean.[2] This vision was foreseen by the distinguished jurist and scholar Antonio La Pergola (1931-2007) from Italy and a distinguished Judge of the European Court of Human Rights who, in May 1990, proposed the creation of a special Commission within the structure of the Council of Europe, that later on, was called Commission for Democracy under the Rule of Law or Venice Commission.

As a Judge of the Electoral Court of Mexico (2006-2016), I was attracted by the sole idea of debating constitutional designs and Democracy troubles in an International Law environment, without following strict paradigms or regional conceptions, but with the interest of finding the right solution for the betterment of the Rule of Law in a specific country at a specific time. And this was the great vision of Antonio La Pergola: finding common solutions on constitutional problems by the international community, not only from Europe, but from many other countries, including Latin America.[3]

On my admission, I was amazed by the prolific labor of the Commission compiled in more than 900 opinions and studies; nearly 700 seminars and conferences and more than 3,000 training sessions, as well as plenty of electoral observations in all around the world, with the help of the Office for Democratic Institutions and Human Rights, a special branch of the Organization for Security and Cooperation in Europe (OSCE/ODHIR).

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[1] Former Substitute Member of the Venice Commission in respect of Mexico (2010-2016).

[2] Thanks to the revision made to the Bylaws of the Venice Commission on February 21, 2002, approved by the Ministers Council of the Council of Europe, a new agreement to receive non-member countries of the Council of Europe made possible to have four countries from Latin America. *La Commission de Venise. Rapport annuel d'activités. 2010*. 2011. p. 20.

[3] He held honorary academic degrees from the Universidad Externado de Colombia and also He was an honorary professor at the Universidad Nacional Autónoma de México, among many other Universities and Institutions. He published specialized books on the federal system and democracy.

In order to achieve this goal, the politically oriented problems submitted to the Council of Europe, must be reduced to the best legal solutions provided by the principles of Law that are approved by the majority or the unanimous consensus of the 62 members of the Venice Commission, to which Mexico belongs since 2010.

Politicians, Diplomats, Judges and Academics, among many others, sit together in the Plenary sessions of the Venice Commission in the beautiful building of the San Giovani Evangelist Scuola, during four months a year and discusses various topics on Democratic Constitutions, fundamental rights, constitutional justice and elections.

I began attending the Plenary Sessions in 2010 to hear the most interesting opinions about the three pillars of the Commission regarding Constitutional assistance, Constitutional justice and Reports on Elections and referendum missions. In the first topic, I was introduced to the constitutional reform of Georgia; since the beginning I was greatly surprised that even though the Constitutional Heritage of Europe should be considered, members of the Commission were advised not to impose solutions or abstract models, something that Latin America were used to, by following paradigms that in many occasions, do not fit in our countries.

The authority of opinions in this respect, are self-convincing and they are not binding upon the countries, so they trust to the convictions of the respective governments that request from the Commission their opinion. Many current issues were debated globally by all the countries gathered in the sessions. In the case of Georgia, the authorities consulted the Commission concerning the amendments on the change of the presidential to the parliamentary system, reform that has been also considered in Mexico since 1917,[4] face to the crisis of presidential regimes.

Another interesting issue raised by the Republic of Moldova before the Venice Commission concerned the amendment of Articles 78 & 89 of its Constitution and the procedure to remove the President and call for new elections.[5] As a member of the Commission, I had the opportunity to contribute with able colleagues in the drafting and approval of the opinion following the

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[4] Manuel González Oropeza y Arturo Zaldívar Lelo de Larrea. "Proyectos de Parlamentarismo en México". *El Constitucionalismo en las postrimerías del siglo XX. La Constitución Mexicana. 70 años después.* Tomo VI. p. 407-415. UNAM. 1988.

[5] On September 22, 2000 had been enacted the Law 1234 to fix the procedure of Presidential appointment by 3/5 of the votes in Parliament, which proved to be a very difficult procedure to fulfill, producing four consecutive dissolutions of Parliament and their respective removals of the President.

discussion in the session of June 13, 2016 (Opinion 848/2016),[6] during which all electoral possibilities were analyzed according to the Code of Elections.

Along other sessions, the situation of the Bolivia Constitution was considered at different times.

In general, opinions are achieved through several examinations by the sub-commissions and discussions held in plenary sessions of the Venice Commission. This was the case of the final draft on Forfeiture in favor of the State of illegally acquired assets, which lead to the preparation of three draft opinions that were adopted on October 15-16, 2010. These guidelines correcting the Law in Bulgaria[7] were benefic for the precedents that later on took the Supreme Court of Mexico during the 2015-2016 resolutions.[8]

As a member, I tried always to inform about resolutions and activities performed during my tenure on the Electoral court in Mexico,[9] establishing links with the resolutions of the Venice Commission.

Likewise, the guidelines offered by the Venice Commission concerning the Rule of Law[10] are efficient sources for Mexico, because even though the Country has made efforts in political pluralism, serious defects stain the human rights record and the corruption problem has not been solved.[11]

Electoral justice has been considered in Mexico as part of the Constitutional Justice, not only because human rights are entrenched, but because electoral principles are established in the Mexican Constitutions since the

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[6] Venice Commission, CDL-AD(2016)021, Republic of Moldova - Joint Opinion on the draft law on changes to the electoral code.

[7] Venice Commission, CDL-AD(2010)030, PACE Recommendation 1898(2010) on the Thresholds and other features of electoral systems which have an impact on representativity of parliaments in Council of Europe member States, Venice Commission comments in view of the reply of the Committee of Ministers.

[8] The resolutions set precedents on the title of under the name of "extinción de dominio" (Jurisprudencias 1a./J 15 y 23/2015 (10a.) April 17, 2015.

[9] 1. *A brief commentary on the State of Mexican Electoral Justice after the 2007 Constitutional Reform* (Kiev, Ukraine. October 21-23, 2009). 2. *The citizen's proceedings. An instrument to protect political and electoral rights in Mexico (*Venice. June 4-5, 2010). 3. *A presentation of the Electoral Court of the Federal Judiciary from Mexico.* (2012). 4. *International Electoral Policy. a Strategy document for the Electoral Tribunal of the Federal Judiciary. (*Venice, Tribunal Electoral del Poder Judicial de la Federación. July 2014). 5. *The suspension of political rights for criminal issues in Mexico.* (December 2010). 6. *A preface to electoral justice in Mexico.* Submitted to the Election Administration in Lebanon (Beirut, December 4-5, 2008). 7. *Laws and Electoral Bodies. The role of the Judiciary in shaping democratic institutions: The Mexican experience.* (Lisbon. Forum 2014). 8. *Guarantees, te Constitutitonality of elections.* (Venice, June 2012).

[10] Venice Commission, CDL-AD (2011)003rev, Report on the Rule of Law.

[11] Manuel González Oropeza. *The Rule of Law. Guidelines for Mexico.* Paper submitted at the 86th. Plenary Session. March 24-26, 2011. 27 p.

beginning (1824). For that reason, Mexico enthusiastically endorsed the Venice Commission in updating the VOTA database, which contains the pertinent legislation from the members States of the Venice Commission, along with reviews and studies as well as international documents, making this database a fundamental tool for the Commission and for all the other members.[12]

Mexico gladly offered technical assistance to improve the recording format and the loading of the data for the VOTA system, getting an improvement in the searching process in the time and languages.

In the same token, once the Venice Commission issued the Code of good practices in Electoral matters in July 5-6, 2002, Mexico decided to translate this compilation of principles on good practices on elections into Spanish, so this could be divulgated among Latin America.

Despite the efficiency of the legal protection provided in many Countries for minority rights, freedom of speech and association, the independence of judges and courts is still a problem for the members of the Venice Commission. Threats against and interference in the judicial function result in the lack of execution of court decisions and claims concerning violation of the Constitution and laws. Removal and transfer of prosecutors and judges are at discretion of authorities and retaliation from political agents to judicial resolutions are observed in many Countries.

Starting from 2014, the Venice Commission learnt about these situations affecting judicial independence in Turkey; but beyond specific cases, the Commission rendered opinions about the independence of judges[13] and prosecutors.[14] I witnessed special attention on Hungary and the abuse of powers granted to the President of the National Judicial Council provided by law.

It is worthy to mention that Mexico participated in the *amicus curiae brief* on the case of Santiago Brysón de la Barra et al. on crimes against humanity, adopted on October 14-15, 2011, for the Constitutional Court of Peru.[15] In this opinion, the concepts of crimes against humanity and statutory limitations on

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[12] *Summary on the advancement of the VOTA database before the Venice Commission*. Venice. December 13- 14-15, 2012. www.te.gop.mx.

[13] Venice Commission, CDL-AD(2010)003, Comments on the interpretation of Articles 78.5 and 85.3 of the Constitution of Moldova, *Amicus curiae* brief for the Constitutional Court of Moldova.

[14] Venice Commission, CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service.

[15] Venice Commission, CDL(2011)071, Comments on the case Santiago Brysón de la Barra *et al* (on crimes against humanity) *Amicus curiae* brief for the Constitutional Court of Peru.

these crimes, were analyzed under a comparative view with the Inter-American Court of Human Rights with a perspective of international justice.

Electoral observation missions in which Mexico participated actively were organized extensively. Mexico's collaboration for the opinion provided by the Venice Commission on the electoral legislation of our country (CDL-AD(2013)21) was an interesting experience showing that participants in the Venice Commission also have the duty to perform activities to be observed by the same Commission.

In conjunction with the OSCE/ODHIR, the Venice Commission approved an opinion on the draft of the Electoral Code of Georgia on December 16-17, 2011 on the basis of the electoral observation mission reports by the author of this article, among other participants.

In the same way, gathering previous experiences, Mexico participated in the formation of Guidelines for preventing and responding to the misuse of administrative resources during electoral processes on March 11-12, 2016,[16] that entails very much fundamental concepts of Article 134 of the Constitution of Mexico.

One of the last missions I had in the official capacity of member of the Venice Commission was the one in Armenia where in 2017 I had the privilege to advise the authorities for nearly one month in how to conduct fair elections working closely with the Central Electoral Committee, following the comments made on the draft electoral code discussed at the meeting of the Council for Democratic Elections held in Venice on June 6, 2016.

Previously I had the opportunity to conduct an electoral observation in Azerbaijan in a mission approved since 2014 by the Parliamentary Assembly of the Council of Europe (PACE), participating in an *ad hoc* committee representing the Venice Commission as advisor in 2015. In that capacity I reported the situation of polling stations and focused on the legal remedies available for the electorate.

PACE had to express in its Resolution 2062 (2015) that the Venice Commission has not found complete implementation of the recommendations on electoral commissions, candidate registration as well as compliance with the European Human Rights Court resolutions.[17]

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[16] Venice Commission, CDL-AD(2016)004, Joint Guidelines for preventing and responding to the misuse of administrative resources during electoral processes Commission.

[17] *Observation of the Parliamentary Elections in Azerbaijan. November 1, 2015*. Election Observation Report. Document 13923. 20 November 2015.

Christoph Grabenwarter[1]

Standard-Setting in the Spirit of the European Constitutional Heritage

1. Introduction

For almost thirty years, a commission of experts on public law has existed within the framework of the Council of Europe. The Venice Commission, officially called the "European Commission for Democracy through Law", was established at the beginning of the 1990s out of the conviction that the sustainability of democracy requires a sound constitutional foundation based, in particular, on the Rule of Law.[2] Originally, not all member States of the Council of Europe were open to this idea, which aimed to support the countries of Central and Eastern Europe in their democracy-building efforts after the fall of the Iron Curtain.[3] Since then, however, the membership of the Venice Commission has expanded far beyond that of the Council of Europe, now including, for example, South Korea, Algeria, Israel, Brazil, Mexico and the USA.[4] Altogether, the Commission today has more than 60 members, in principle one per country, acting independently in their individual capacities and not as representatives of their respective governments.

As an institution, the Venice Commission is difficult to categorise. It is characterised by its functions, its membership and its working methods. When dealing with the issue of how the Venice Commission develops European constitutional standards each of these three characteristics need to be addressed.

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[1] Member of the Venice Commission in respect of Austria. Former Vice President of the Venice Commission (2015-2017).

[2] See, in particular, the speeches delivered by Antonio La Pergola at the first two conferences of the Venice Commission, reproduced in Liber Amicorum Antonio La Pergola (2008), p. 29 *seq*.

[3] On the early history of the Venice Commission e.g. *Buquicchio/Granata-Menghini*, The Venice Commission twenty years on, in: van Roosmalen et al. (ed.), Fundamental rights and principles – *Liber Amicorum* Pieter van Dijk, 2013, p. 241, 242 *seq*.; *Dürr*, The Venice Commission, in: Kleinsorge (ed.), Council of Europe (CE), 2010, S. 151 (152 *seq*.); *Grabenwarter*, Constitutional standard-setting and strengthening of new democracies, in: Schmahl/Breuer (ed.), The Council of Europe, 2017, p. 732 (733 seq.); *Matscher*, Die Europäische Kommission für Demokratie durch Recht (Venedig-Kommission), in: Hummer (ed.), Österreich im Europarat 1956-2006, sub-vol. 1, 2008, p. 191 (191 *seq.)*.

[4] On the development of membership, see e.g. *Dürr*, Venice Commission, p. 153 *seq*.

First of all, however, it is essential to emphasise that the Venice Commission is neither a judicial nor a quasi-judicial body. Such qualification is not implied in the legal framework, nor would the exercise of a judicial function be at all possible on account of the size of the body and its actual composition.

2. The legal bases

2.1. Establishment as an advisory body of experts

The Venice Commission was established in 1990 through a so-called "partial agreement"[5] by a resolution of the Committee of Ministers of the Council of Europe. This means that the Venice Commission is not fully integrated into the Council of Europe, but enjoys a certain degree of autonomy in budgetary and organisational terms. The employees of the Commission's Secretariat, which has a staff of about thirty people headed by a Secretary, nevertheless have the status of officials of the Council of Europe. Article 1 of the revised Statute of the Venice Commission of 2002[6] underlines the consultative and cooperative character of the activity of the Venice Commission, stating that the Commission "shall be an independent consultative body which cooperates with the member States of the Council of Europe, as well as with interested non-member States and interested international organisations and bodies".

The legal basis for membership in the Commission is outlined in Article 2 of the revised Statute, according to which the members have to be independent experts who have achieved international reputation through their experience in democratic institutions or "by their contribution to the enhancement of law". Although these terms are open to interpretation, officials subject to instructions are not to be members of the Commission. In practice, exceptions are allowed for senior officials. The term "democratic institution" is very vague; it does not refer to a specific state function but encompasses individuals with experience in governmental or parliamentary functions as well as acting (and occasionally former) judges of national supreme and constitutional courts or (usually former) judges of international and/or European courts. The fact that a growing number of judges at European courts, especially at the European Court of Human

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[5] Partial agreements are not independent international treaties but provide the framework for a form of cooperation within the international organisation of the Council of Europe..

[6] Resolution (2002) 3, adopted by the Committee of Ministers of the Council of Europe at the 784th meeting of the Ministers' Deputies on 21 February 2002.

Rights, are former (substitute) members of the Venice Commission certainly has an impact on the reception of the documents produced by the Venice Commission.[7]

The members hold office for a four-year term and may be reappointed. Numerous members have been reappointed several times by the governments of their respective countries. This accounts for the substantial number of judges and professors with many years of membership in the Venice Commission, who contribute the necessary experience.[8]

2.2. Priorities in the Venice Commission's work

In general terms, the priorities of the Commission's work are derived from Article 1 of the Statute of the Venice Commission. In paragraph 1 of Article 1, the field of action is described as "the guarantees offered by law in the service of democracy". The objectives within this field of action are explicitly specified: strengthening the understanding of the legal systems of the participating states (notably with a view to bringing them closer to one another), promoting the Rule of Law and democracy, examining the problems raised by the working of democratic institutions and, finally, the reinforcement and development of such democratic institutions. Specifying the Commission's priorities of work, Article 1 refers to constitutional, legislative and administrative principles which serve the efficiency of democratic institutions and the principle of the Rule of Law, fundamental rights and freedoms and, finally, the contribution of local and regional self-government to the enhancement of democracy.

Over the decades, numerous specific requests for opinions have shown that, in practice, the Commission's work is focused on certain priority topics. These priorities are reflected not only in the content of the requests received but also in the circle of institutions requesting opinions. In terms of substance, the requests cover a broad range of issues, from comprehensive reforms of a country's constitutional system to judicial reforms to fundamental rights issues. Other priority topics concern issues of constitutional justice and electoral law. As regards the circle of applicants, the distinction between requests coming from a government itself or from other eligible bodies has been and still is crucial.

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[7] Although there is no legal incompatibility, it is common practice at the ECtHR that newly elected judges resign from their membership to the Venice Commission.

[8] On the membership of the Venice Commission, see Venice Commission, CDL(2002)27, Statute of the Venice Commission, Article 2 paras. 1-3. For details see *Grabenwarter*, Constitutional standard-setting, p. 734 *seq*.; *Matscher*, Venedig-Kommission, p. 192.

A closer look at the activities of the Venice Commission in practice confirms that constitutional reforms, democratic institutions, the judiciary, fundamental law and constitutional justice, as well as issues relating to elections, are among the Commission's main fields of activity.[9]

3. Types of documents

The work of the Venice Commission is determined by the aforementioned types of documents, the most important ones being opinions, studies, reports and guidelines as well as *amicus curiae* briefs.

3.1. Opinions

The most frequent and most important type of documents are opinions on draft acts and draft constitutions as well as on (constitutional) acts which have already entered into force at the time of the request or the adoption of the opinion by the plenary session.[10] The objective of an opinion is to perform a complete, precise, detailed and objective analysis of the solutions aimed at by the government concerned not only for their compatibility with European and international standards, but also for their practicability and transferability to other situations. The Commission's mode of working is consensus-based and guided by the principle of dialogue; in many cases, the Commission's opinion not only addresses the question of compatibility with European standards but also contains specific recommendations for the government concerned.[11]

3.2. Studies, reports and guidelines

In certain cases, the Venice Commission's work does not concern a particular country but consists in the elaboration of studies, reports and guidelines.[12] In such cases, the Venice Commission does not examine a specific legislative proposal of a country but analyses general issues of regional or international interest. Guidelines usually emanate from specific studies or reports,[13] in one particular case the Venice Commission even drew up a checklist on the topic of the Rule of Law,[14] as well as a corresponding questionnaire.

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[9] *Grabenwarter*, Constitutional standard-setting, p. 737 *seq*.
[10] Under time pressure, which is usually due to political reasons in the country.
[11] On the importance of dialogue, sometimes across several opinions, *Hoffmann-Riem*, The Venice Commission of the Council of Europe – Standards and Impact, EJIL 25 (2014), p. 579, 589 *seq*.
[12] Venice Commission, CDL(2002)27, Statute of the Venice Commission, Article 3 para. 1. See *Dürr*, Venice Commission, p. 159 *seq*.
[13] For details see *Grabenwarter*, Constitutional standard-setting, p. 736.
[14] Venice Commission, CDL-AD(2016)007, Rule of Law checklist, Study No. 711/2013.

3.3. Amicus curiae briefs

Amicus curiae briefs are yet another type of document produced by the Venice Commission, in which it provides information to supreme and constitutional courts in the form of replies to questions put by the respective court which are of importance for a specific case.[15] This is related to another activity of the Venice Commission, which is to provide a forum for exchange among constitutional courts on specific questions of jurisprudence (the "Venice Forum"). This on-line forum[16] supplements the CODICES database, which is operated by the Venice Commission and where the case law of the member courts of the World Conference on Constitutional Justice can be documented and accessed.[17]

4. The procedure of preparing an opinion

The following section provides an inside view of the procedure followed by the Venice Commission in the elaboration of its documents, focusing on opinions as the most frequent and most important type of document. The procedure itself depends on which body has requested the Venice Commission to act. Article 3 of the Statute of the Venice Commission lists the bodies entitled to address themselves to the Commission, the most important case, i.e. requests for opinions, being specified in paragraph 2. The following description primarily refers to the procedure of drafting opinions, although to a large extent, it also applies to the production of other types of documents.

In the first place, opinions are issued upon requests submitted by various bodies of the Council of Europe, namely the Committee of Ministers, the Parliamentary Assembly, the Secretary General or the Congress of Local and Regional Authorities of Europe.[18] In practical terms, the second case mentioned in paragraph 2 of Article 3, i.e. opinions requested by member States

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[15] For the ECtHR see e.g. Article 36 para. 2 ECHR; see above all *Bode-Kirchhoff*, Why the road from Luxembourg to Strasbourg leads through Venice: the Venice Commission as a link between the EU and the ECHR, in: *Dzehtsiarou et al.* (ed.), Human Rights Law in Europe, 2014, p. 55.

[16] Within the framework of the Venice Forum, the Constitutional Justice Media Observatory provides interested members and correspondents with an overview of news from constitutional courts all over the world.

[17] At www.codices.coe.int.

[18] See with further references *Grabenwarter*, Constitutional standard-setting, p. 737 *seq.*; *Matscher*, Venedig-Kommission, p. 194 *seq*. For details on these bodies and their powers, see the contributions by *Palmer, Leach, Ruffert and Schaffarzik,* in Schmahl/Breuer (ed.), The Council of Europe, 2017, Sections 6, 7, 8 and 10.

that mainly concern the state's own legal system, is of particular importance. Finally, organisations or bodies "participating in the work of the Commission" also have the right to request opinions, although this is of lesser practical importance. Examples include requests submitted by the EU, the OSCE and the United Nations, but compared to the total number, such requests are relatively rare. Acting on its own initiative, the Commission may carry out research and produce documents other than opinions, i.e. studies or draft guidelines.

In the event of constitutional crises, requests are often submitted by bodies of the Council of Europe, in particular the Committee of Ministers and the Parliamentary Assembly. Recent examples include questions regarding additional powers for the Spanish constitutional court in connection with the Catalan crisis[19], or the opinions on media legislation and the constitutional reform in Turkey.[20] In such cases, the request itself reveals the existence of a conflict, which in turn influences the preparation of the opinion, from the selection of the rapporteurs to the rapporteurs' visit to the state concerned to the deliberations on the opinion in the plenary meeting of the Commission.[21]

If the request is submitted by the member State concerned, the situation is completely different, because the main point is, or appears to be, the wish to draw on external expertise. The requests submitted in the context of constitutional reforms in Luxembourg[22] or Finland[23] were clearly focused on this function. However, to this very day there are cases in which the government hopes to succeed more easily in enforcing its own political ideas by involving the Venice Commission, Armenia being a recent example of this approach.[24] The request by the President of Slovakia, after years of conflict with the Slovak Parliament over the appointment of three judges

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[19] Venice Commission, CDL-AD(2017)003, Opinion on the Law of 16 October 2015 amending the Organic Law No. 2/1979 on the Constitutional Court.

[20] Venice Commission, CDL-AD(2017)005, Turkey - Opinion on the amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a National Referendum on 16 April 2017; CDL-AD(2017)007, Turkey - Opinion on the Measures provided in the recent Emergency Decree Laws with respect to Freedom of the Media.

[21] For instance, Venice Commission, CDL-INF(2001)019, Report on the Preferential Treatment of National Minorities by their Kin-State, originated from such a conflict. For details see *Buquicchio/Granata-Menghini*, Venice Commission, p. 249 with fn. 19.

[22] Venice Commission, CDL-AD(2009)057, Public Interim Opinion on the Draft Constitutional Amendments of Luxembourg.

[23] Venice Commission, CDL-AD(2008)010, Opinion on the Constitution of Finland.

[24] Venice Commission, CDL-AD(2019)018, Armenia - Opinion on the constitutional implications of the ratification of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention).

of the constitutional court, may have been motivated by similar reasons,[25] considering that the President's advisor in matters of constitutional law was not only a former Advocate General at the CJEU, but also a former member of the Venice Commission. Another group of opinions constitutes those requested by member States in the course of their EU accession process, which aim to implement reforms as a prerequisite for accession and have been advised by the EU to obtain an opinion from the Venice Commission. Such advice may be motivated by doubts on the part of the European Commission regarding the compatibility of a certain piece of legislation with European standards, which can be either eliminated or confirmed by the Venice Commission's opinion. The latter case usually entails changes in legislation.

However, there are other examples of submissions from the state concerned, in which the motivation is less clear or entirely different. In the case of Hungary, an opinion was requested soon after the Secretary General had addressed a similar request to the Venice Commission. Presumably, Hungary expected to have its constitutional reform legitimised by an opinion of the Venice Commission.[26] This expectation was not met.[27] The situation was slightly different in the case of the first opinion on the Polish system of constitutional justice in 2016.[28] Here, too, the request was submitted on the initiative of the Minister of Foreign Affairs. The Polish government not only expected to receive a positive opinion but, in view of first critical comments from Brussels, also hoped to pre-empt a request "from external sources".

5. The impact of the documents on the evolution of European constitutional law

Looking at developments in the course of almost three decades from the viewpoint of the impact of these documents, it turns out that the objectives pursued, and the resultant impact varies over time and depending on the content of the opinions issued.

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[25] Venice Commission, CDL-AD(2017)001, Slovak Republic – Opinion on Questions relating to the Appointment of Judges of the Constitutional Court.
[26] For a similar case concerning Romania, see Venice Commission, CDL-AD(2012)026.
[27] Venice Commission, CDL-AD(2013)012, Opinion on the Fourth Amendment to the Fundamental Law of Hungary.
[28] Venice Commission, CDL-AD(2016)001, Opinion on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland.

In its early years, the Venice Commission had a significant influence on the design of constitutional systems, as it contributed towards eliminating non-democratic remnants of the era of dictatorships incompatible with the Rule of Law. In most cases, the Venice Commission used to refer to models from other democratic constitutions as a basis for concrete advice and assistance.[29]

In preparing for a possible accession to the European Union, governments have been and still are strongly motivated to obtain opinions from the Venice Commission and to adjust and strengthen the standards of the Rule of Law in order to bring the legal system of a formerly non-democratic state up to a level that meets the requirements of European Union law. The changes in legislation achieved through this process can still be perceived today.[30] More recently, opinions by the Venice Commission tend to be requested more frequently in cases of constitutional controversies triggered by internal political conflicts. Via the Venice Commission and the Parliamentary Assembly of the Council of Europe, the conflict is then played out at European level. Early examples of this approach include the constitutional conflict in the Principality of Liechtenstein[31] and, more recently, the conflicts in Ukraine,[32] Turkey[33] and Poland,[34] as well as isolated political controversies, e.g. in connection with the election of constitutional court judges in Slovakia.[35]

Constitutional crises arising in the wake of a change of government represent another specific field of activity of the Venice Commission. When new governments and parliamentary majorities implement constitutional reforms immediately after a regime change, advice from the Venice Commission is in high demand. Against the background of heated political debates at domestic level, the state itself or the Parliamentary Assembly of the Council of Europe, at the instigation of members of parliament of the state concerned, ask the Venice Commission to issue an opinion on the controversial questions. Very rarely do governments, heads of state or speakers of national parliaments, themselves, request an opinion from the Venice Commission. Occasionally, the

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[29] In particular with a view to Central and Eastern Europe, e.g. *Bartole*, Final remarks: The role of the Venice Commission, Review of Central and East European Law 26 (2000), p. 351.
[30] *Grabenwarter*, Constitutional standard-setting, p. 743; *Hoffmann-Riem*, Venice Commission, p. 595.
[31] Venice Commission, CDL-AD(2002)32, Opinion on the Amendments to the Constitution of Liechtenstein proposed by the Princely House of Liechtenstein.
[32] Venice Commission, CDL-AD(2016)034, Ukraine - Opinion on the draft Law on the Constitutional Court.
[33] Venice Commission, CDL-AD(2017)005, *op. cit.*
[34] Venice Commission, CDL-AD(2016)001, *op. cit.*
[35] Venice Commission, CDL-AD(2017)001, *op. cit.*

body that has requested the opinion is not satisfied with its content. However, this does not change the fact that opinions by the Venice Commission have to be taken into account and that its recommendations are largely observed in practice.

The objectives of answers to requests for *amicus curiae* briefs and guidelines are entirely different. By issuing an *amicus curiae* brief, the Venice Commission aims to strengthen the authority of the requesting constitutional court by means of an answer based on an analysis of European law, usually of a comparative nature, to increase acceptance of the court's decision and thus strengthen its independence in the long term.[36] Guidelines and rules of conduct are primarily intended to harmonise and, in many instances, enhance European standards.[37]

6. Preparing an opinion: the procedure in detail

6.1. General remarks

The role of the Venice Commission in the European area of democratic states governed by the Rule of Law is determined largely by the procedure followed in preparing opinions. In principle, state bodies that have the authority to represent a state under international law are eligible to request an opinion. As a rule, the initiative is taken by the government or the head of state.[38] The process of preparing an opinion comprises several steps. Each phase has an influence on the content and the style of the opinion ultimately issued.

As a first step, which is coordinated by the Commission President and supported by the Secretariat, the Venice Commission establishes a group of rapporteurs. The selection of three to six rapporteurs ensures that aspects

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[36] See *Grabenwarter*, Constitutional standard-setting, p. 743 with fn. 59; id., Menschenrechts-schutz und Menschenrechtspolitik durch den EGMR, in: Hillgruber (ed.), Gouvernement des juges – Fluch oder Segen, 2014, p. 45; *Hoffmann-Riem*, Venice Commission, p. 591 *seq*.

[37] On the influence of "soft law" and "soft instruments", see *Hoffmann-Riem*, Venice Commission, p. 595 *seq*.

[38] In exceptional cases, governments try to exert influence on the opinion through the wording of their questions, for instance by putting the questions in very general terms or by excluding delicate issues. The question of the election of constitutional court judges, which arose in the autumn of 2015, was to be explicitly excluded from the request for an opinion, but the Venice Commission regarded the issue as inseparably linked to the crisis of the constitutional court and therefore included it in its assessment. The subject matter of the opinion was presented in relatively extensive terms: Venice Commission, CDL-AD(2016)001, Opinion on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, point 6 *seq*.

of comparative law from different legal systems are taken into account. On the basis of drafts produced by the individual rapporteurs, a draft opinion is prepared with the assistance of the Secretariat, which is then transmitted to all members of the Commission, the government concerned and all permanent representatives of the member States in Strasbourg not later than 14 days before the plenary meeting of the Commission. As a rule, the process of preparing an opinion involves a visit to the state concerned, in the course of which government representatives as well as members of the opposition and civil society are heard. Naturally, the type of conversations conducted on site by the rapporteurs depends on the reason why the opinion was requested.

6.2. The selection of rapporteurs

When a request for an opinion is received or about to be received by the Secretariat, the search for rapporteurs begins. All members of the Commission are notified of requests for opinions and the composition of the group of rapporteurs at regular intervals. In principle and from a formal point of view, every member can express his/her interest in participating in the preparation of an opinion, provided the member is in a position to actively contribute to the process within the time frame foreseen.[39]

In practice, however, information on requests for opinions arrives too late; hence, the selection of rapporteurs, as a matter of considerable urgency, is made by the President with support from the Secretariat. The rapporteurs work as a collective known as the group of rapporteurs. In practice, given that the Secretariat of the Venice Commission consists of several departments[40], the staff members in charge of the topic on which the opinion is to be issued will address the respective enquiry to the Commission members eligible to serve as rapporteurs. This is done either informally during the quarterly meetings of the Commission or by telephone or email.

The criteria applied in the selection of rapporteurs primarily refer to their individual fields of specialisation and their expertise in the subject matter concerned. To a large extent, these are matters of general knowledge derived from the members' biographies and their activities in public offices and at universities. Moreover, all newly appointed members and substitute members are asked about their fields of specialisation and their interests.

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[39] Venice Commission, CDL-AD(2010)034, Guidelines relating to the Working Methods of the Venice Commission, p. 4.

[40] Division for Democratic Institutions and Human Rights, Division for Constitutional Justice, Division for Elections and Referendums, Neighbourhood Cooperation Division.

Other aspects taken into account in the selection are the national origins of the rapporteurs, gender equality, availability in terms of time (especially with a view to a possible visit to the country concerned) and experience with the subject matter of the opinion. As regards the members' origins, efforts are made to ensure not only a regional balance but also a proper balance between rapporteurs closely familiar with the subject matter and the constitutional system concerned and others with a more distanced relationship to the matter at hand. No member may serve as a rapporteur on a matter concerning his or her own country. For example, the rapporteurs dealing with the constitutional reforms in Hungary came from Poland, Austria and Germany. For opinions regarding the judiciary or constitutional justice, it is advisable to have judges of constitutional courts and/or ordinary courts in the group of rapporteurs. Preference is given to members who have already worked on the same subject matter in connection with the same or another country.[41]

The Venice Commission frequently includes external experts in order to enhance the quality of its opinions and to strengthen their legitimacy vis-à-vis the outside world. In this context, cooperation with the OSCE, in particular with the Office for Democratic Institutions and Human Rights (ODIHR) in Warsaw, is of special importance. ODIHR experts and representatives not only participate in the meetings of the Venice Commission but regularly serve as rapporteurs. Additional experts are recruited from other fields of activity of the Council of Europe.

A group of rapporteurs normally consists of three members, although there may be up to six members in particularly important and complex cases. The number of rapporteurs recruited is determined by the costs involved and, above all, by the importance and complexity of the matter. The decision to recruit groups of six and five rapporteurs for the two opinions on the reform of constitutional justice in Poland in 2016 was quite exceptional.

6.3. Initial information

Upon commencement of their work, the rapporteurs receive a set of documents compiled by the Secretariat. This so-called information sheet greatly facilitates their work. It includes the necessary supporting documents, i.e. the complete wording of the request for an opinion (in some cases with an interpretation of the request and statements on possible limitations of the scope) and the relevant national legal provisions and descriptions of the

[41] Venice Commission, CDL(2014)037, Revised guide to the Venice Commission's Activities and Working Methods.

facts of the case. In view of the time constraints, additional information contained in this set of documents is particularly important, as it serves as a starting point for the review on the basis of the standards applied.[42] This includes the relevant case law of the European Court of Human Rights and other important sources of law, such as other international treaties; documents of the Council of Europe (in particular resolutions of the Parliamentary Assembly and Recommendations issued by the Committee of Ministers), earlier relevant opinions or other documents produced by the Venice Commission as well as references to comparative law studies in individual cases. Moreover, the Secretariat includes references to issues of potential interest to be taken up in the opinion, ranging from topics subject to controversial debates in the state concerned to politically delicate issues. It is important to note that among the Secretariat's staff there are people who can draw on decades of experience with certain member States, who know these states well from previous visits and are therefore familiar with some of the individuals involved and with the constitutional and general culture of the country concerned. Based on this experience and with a view to the Commission's past practice in comparable cases, a first cautious assessment of the request for an opinion may be provided. Finally, the set of documents also contains information of a purely practical nature, such as the deadlines to be met and the requirement of a visit by the rapporteurs to the state concerned.

6.4. Comments and draft texts proposed by the rapporteurs

During the subsequent phase, the individual rapporteurs draft pieces of text which may serve as a basis for the draft opinion to be prepared later by the Secretariat. Time permitting, the rapporteurs meet for a first discussion, either on the margins of a Venice Commission meeting or, exceptionally, within the framework of a separate meeting.

At this stage, the rapporteurs usually communicate by email. They are given a deadline of several weeks to transmit their drafts to the staff member in charge at the Secretariat. The time frame is determined primarily by the fact that the opinion must be ready for adoption at the next plenary meeting. Given that the Commission holds its meetings every two to three months, except for the summer break, and that draft opinions, as decided some time ago, must be transmitted to all members not later than two weeks before the

[42] On this point and subsequent statements, see Venice Commission, CDL-AD(2010)034, Guidelines relating to the Working Methods of the Venice Commission, Annex.

meeting, the time available for preparing these drafts in the majority of cases where a visit to the member State is required, is three to four weeks at best, and often only two weeks. As a rule, the drafts are to be ready before the visit to the state concerned, so that the rapporteurs will still have a chance to modify their drafts after the visit before the member of the Secretariat starts working on them.

Up to 2015, the drafts produced by the individual rapporteurs were sent to all members of the Commission together with the Secretariat's draft opinion, and subsequently published. Many of these drafts can still be found on the Venice Commission's website. In 2015, publication of the drafts was discontinued in order to protect the rapporteurs from potential pressure exercised by individual governments. Hence, examples of the Commission's more recent practice are no longer available. However, there is no evidence that the Commission's practice has changed to such an extent that the following observations would no longer apply.

Looking at the rapporteurs' drafts in their entirety, a great variety in terms of style, degree of detail and analytical depth can be observed. Some rapporteurs deliver elaborate scientific analyses, especially of the case law of the ECtHR, with extensive footnotes and annotations,[43] while others produce comments of some pages[44] which may also include comments on the political aspects of the case.[45] In exceptional cases, rapporteurs even limit themselves to comments on the drafts produced by the other rapporteurs

[43] See e.g. the extensive analysis of an amendment to an Azerbaijani act on non-governmental organisations for compliance with the principle of freedom of assembly and association enshrined in Article 10 ECHR by *Veronika Bílková* in 2009 (Venice Commission, CDL(2011)089, Comments on the Compatibility with Human Rights Standards of the Legislation on Non-Governmental Organisations of the Republic of Azerbaijan). Alongside other relevant documents, the opinion analyses more than a dozen relevant ECtHR decisions.

[44] See e.g. the two-page opinion by *Giorgio Malinverni* on a draft law on religious freedom and the general regime of religions in Romania from 2005 (Venice Commission, CDL(2005)079, Comments on the Conformity of the Law on Political Parties of the Republic of Armenia with International Standards), which does without any references.

[45] See the following excerpt from an opinion by *Kaarlo Tuori* on general issues of constitutional law in respect of the prohibition of a political party in Turkey from 2008: "As regards the right to launch the process, we should stress the desirability of a solution which, already at this stage, combines legal considerations and the attention to the political repercussions of such a highly politically-laden issue as the prohibition of a political party. As I have stated before, I find a purely political solution problematic, too. Already launching a case concerning the prohibition of a party has political consequences, and those holding political power can always be accused of using their right of initiative for political purposes. This is highly detrimental to the legitimacy of the procedure. This consideration is of particular relevance in a country like Turkey with its long tradition of party prohibition", Venice Commission, CDL(2008)141, Comments on the Constitutional and Legal Provisions relevant for the Prohibition of Political Parties in Turkey.

or the Secretariat's draft opinion. This plurality reflects the diversity of the members' professional backgrounds and the legal traditions they tend to follow.

6.5. Visits to the member State

The visit to the member State concerned plays an important role in the drafting process. During this visit, the rapporteurs meet with representatives of the government and the parliament; depending on the issue under review, they may also meet with representatives of other state bodies concerned and representatives of non-governmental organisations. As a consequence of the Covid19-pandemic in 2020 these visits are now also held by means of videoconferences.

The primary purpose of these visits is to obtain additional information on the subject matter of the opinion and, in the case of controversial questions, to give all those involved in the conflict the opportunity to express their points of view. Moreover, the rapporteurs can use the occasion of the trip to discuss open issues and/or the influence of newly obtained information on the opinion with the accompanying staff members of the Secretariat.

Depending on the urgency of the issue and the intensity of the political controversy within the country, the atmosphere during the visit may be quite tense, with considerable interest being shown by the media. The Venice Commission's visit to Poland in February 2016 was an extraordinary example of enormous media interest. When the opinion on the constitutional reform in Armenia was produced in 2015, the Venice Commission had a public meeting with NGOs and media representatives; the discussions in a room packed with journalists and NOGs were recorded by a dozen cameras.

The atmosphere prevailing during a visit is determined largely by the attitude taken by the government. When the first opinion on constitutional justice in Poland was prepared in 2016, the government's intention initially was to influence the process through its cooperative attitude. The government also exerted an influence on the programme of the visit, especially by selecting the (NGOs and) other bodies that the Venice Commission's delegation was to speak with.

6.6. Preparation of a draft opinion

After the visit to the state concerned and after having received the comments by the individual rapporteurs, the staff member in charge at the Secretariat starts working on the draft opinion; the time available for this task usually varies between a few days and a maximum of one week. The type of work

required differs from case to case. If the rapporteurs have already submitted very detailed comments leading to more or less the same conclusions, the Secretariat's work is mainly of an editorial nature, consisting in the addition of annotations, the drafting of an introduction and a summary, and a linguistic revision by other Secretariat staff if the rapporteurs are not native speakers of the language in which the opinion is written (English as a rule, French in exceptional cases).

Once the rapporteurs have reached a consensus on the draft opinion, the draft is distributed internally to all members of the Commission, the government concerned, and all permanent representatives of the member States at the Council of Europe, i.e. to the governments of all member States, not later than fourteen days before the beginning of the plenary meeting.

At this point in time, the draft opinion is still confidential, although in controversial cases it happens time and again that the draft is leaked to the media in the member States. In this context, attention should be drawn to a problem regarding which the Venice Commission is often subject to reproach in politically controversial cases: given the significant recent increase in the media's interest in opinions issued by the Venice Commission, especially in conflictual cases, it has happened that draft opinions have been made public. It is important to bear in mind that the draft opinion is sent by email to a large circle of recipients; the number of people who have access to the opinion is likely to be several times higher. In view of today's possibilities of communication, confidentiality can no longer be maintained in such a situation. Faced with the conflicting targets of confidentiality, the size of the Commission and the principle of a dialogue-based procedure, the Commission currently tends to opt in favour of dialogue.

6.7. The government's comments

The government is then invited to submit written comments and most governments or parliaments take the opportunity to do so. Usually, they draw attention to technical details, which are subsequently amended, but rarely reject the draft opinion in its entirety or large parts thereof. In the case of complex opinions, such comments provide the basis for brief discussions between representatives of the government/parliament and the rapporteurs (supported by the Secretariat), which usually take place in Venice the day before or even on the day of the plenary meeting at the meeting venue.

6.8. Deliberations by sub-commissions and the Enlarged Bureau

Preliminary deliberations on a draft opinion can also be held by one of the sub-commissions on the day before the plenary meeting. In practice, the Secretariat transmits the drafts to the sub-commissions without formally consulting the rapporteurs. Recently, this has become quite common. As a rule, this is the last point in time for a truly extensive discussion.

6.9. Deliberations by the plenary

In the plenary, making fundamental amendments to the text of an opinion is very difficult, if not almost impossible. This is primarily due to the "setting" of plenary deliberations. With about 120 participants in the meeting, an interactive discussion is hardly possible. Moreover, meetings almost always take place in a hall of the Scuola Grande di San Giovanni Evangelista in Venice, which is only sparsely lit. Seated rather closely together in an elongated rectangle, the participants can only see each other thanks to the introduction of video transmission to a big screen in the room some years ago. Another reason is the strict limitation of speaking time. This is indispensable on account of the size of the body and it disciplines those who have a tendency to speak too long. Overall, however, the members' time-keeping discipline is excellent.

In accordance with the Rules of Procedure of the Venice Commission, the plenary deliberations are confidential, which is why no media representatives are permitted to attend. Minutes are taken, and a summary of the minutes is published a few weeks after the meeting. The President is free to invite guests to the meetings, who also have the right to speak. When an opinion on a certain country is adopted, the representative of that country has the right to participate in the meeting of the Venice Commission and to speak on the respective agenda item. However, he or she is expected to merely draw attention to objective errors in the draft opinion, for instance if a relevant legal provision was not discussed, but under no circumstances to speak in favour of or against the draft. Nor is the national member allowed to take part in the vote on the opinion.

Every opinion is put to the vote. The chairperson ascertains whether there is a consensus by asking only whether there are any votes against the opinion. According to Article 12 of the Rules of Procedure, the Commission adopts its decisions by a majority of votes. In practice, however, opinions are almost always adopted without any votes to the contrary, which is facilitated by the general awareness of the non-binding character of the opinions.[46]

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[46] *Hoffmann-Riem*, "Soft Law" und "Soft Instruments" in der Arbeit der Venedig-Kommission des Europarates, Festschrift Bryde (2013), p. 595 (605).

7. Observations on the conditions of setting constitutional standards

The preceding sections have given readers a first insight into the way the Venice Commission works. In the following, a few characteristics of the Commission's work will be highlighted to shed some light on the distinctive features of the Venice Commission and its work.

7.1. Name and venue of the Venice Commission

Any attempt to describe the character of the Venice Commission as a hybrid of an advisory body of experts and an institution setting standards in the fields of soft law must begin with some remarks on the name and the venue of the Commission. The venue and the name derived from it were chosen for historical reasons associated with individuals who played a role in Europe at the end of the Cold War, in particular with Gianni de Michelis, then Foreign Minister of Italy (who was born in Venice). Today, the Commission's way of working is marked by the arrival, at regular intervals, of a crowd of Commission members, representatives of European institutions, members of governments and their staff, and officials of the Secretariat. Four times a year, the Venice Commission occupies the Scuola Grande di San Giovanni Evangelista in the centre of Venice. On the first floor, in a long, high hall with a marble floor and typically Venetian ceiling frescoes, seating for 120 people is provided on old chairs and mobile interpretation booths are set up. On the ground floor, a provisional Secretariat with two computers brought from Strasbourg is installed. A small table is available for last-minute discussions among the rapporteurs. Even in the small café opposite the Scuola, compromises are often sought and found for delicate points in the opinion just before the plenary meeting starts.

This move away from the European capitals to the eastern Mediterranean, into a port city with a rich history that was always oriented rather towards the East, is not merely of symbolic importance. It reflects the commitment to a shared European constitutional heritage, which is evolving independently in all parts of Europe and is strongly marked by the institutions of the member States and their representatives.

7.2. Origin, age and professional background of the members: legitimacy derived from the members' expertise and reputation

Moving on to the members of the Venice Commission, it is interesting to note that membership is not subject to strict quality criteria; in fact, in contrast to the

courts, the legal basis does not even require an education in law. The Statute of the Venice Commission is relatively vague in this respect, with a mere reference in Article 2 to experience in democratic institutions and contributions to the enhancement of law and political science. Based on the provisions of the Statute, over the years criteria have gradually evolved which are observed by the member States in the selection of their members and substitute members.[47] In most of the member States, however, it has become common practice to appoint either renowned professors (mainly professors of constitutional and administrative law, but also professors of international and European law) or individuals holding top positions in the judiciary, be they judges at supreme courts or constitutional courts, or members of other independent bodies. About a dozen members are active or former ministers, deputy ministers, state secretaries or senior ministerial officials, mainly from ministries of justice, but also from ministries of foreign affairs; diplomats have also been appointed as members of the Commission. Given that the members act independently, there is a perceived conflict between the membership of civil servants subject to a hierarchy of instructions and the requirement of independence. The membership of the Commission includes a few (former) members of parliament and lawyers or legal experts working in the private sector, but the overwhelming majority determining the work of the Venice Commission are judges and professors of law.

The Statute emphasises the importance of members being independent. Pursuant to Article 2 paragraph 1, the Commission is composed of independent experts who serve in their individual capacity and do not receive or accept any instructions. Article 3a of the Rules of Procedure,[48] which was added in 2004, requires members to be independent and impartial. In particular, it provides for the publication of the members' biographies, the duty to give notification of any conflict of interest, and the obligation not to take part in a vote in the event of a potential conflict of interest. As a general rule, members do not take part in the vote on opinions specifically relating to the state which appointed them or of which they are citizens (Article13 paragraph 1 of the Rules of Procedure). Following the practice of the European Court of Human Rights, members of the Venice Commission elected to serve as judges at the ECtHR resign from the Venice Commission due to the ECtHR's presumption that otherwise an incompatibility would arise.

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[47] For each member, a substitute member is appointed. Some countries appoint two substitute members, especially if the member's availability is limited in time.

[48] Venice Commission, CDL-AD(2015)044, Revised Rules of Procedure.

An essential characteristic in which the Venice Commission differs from most of the national supreme and constitutional courts is the part-time nature of its members' activity. For the preparation of opinions, members receive a small compensation for expenses; the same applies to participation in the quarterly meetings, for which the members merely receive reimbursement of their costs of accommodation and travel from member States. On the one hand, the part-time nature of membership offers the advantage of members being able to contribute their professional expertise, but on the other hand it limits the time they can devote to the issues they are dealing with. However, there are members who have already retired from their positions at national level and are therefore able to devote more of their time to the Venice Commission. Members holding active professorships may also be able to combine their scientific work with the activity of drafting an opinion. Active judges find themselves in a different situation, as they have less time and more work to do at their own courts. On the whole, however, the current membership is characterised by a balanced mix of different professional and age groups, so that the workload can be divided up in accordance with the members' individual availability.

Another of the Commission's characteristics is its age structure. As there is no age limit by which members have to resign (although national criteria may apply), the age spectrum is broader than at national supreme courts. There are a number of members above the age of seventy, some significantly. The majority of members are between 55 and 65 years of age, except for a few members who are younger than 50. In terms of gender equality, there is still a clear predominance of male members.

Irrespective of the uniformity of the Commission's composition, the diversity of the members' profiles, their backgrounds in constitutional law and the aforementioned geographic diversity result in a variety of inputs to the process of drafting an opinion. This is attributable, in particular, to the members' diverse professional backgrounds, the various constitutional traditions they represent and, occasionally, their political orientation. The additional plurality arising from the involvement of external experts, especially from the OSCE and ODIHR, is yet another factor that enhances the substantive quality of the opinions produced.

7.3. The time factor

The timing of the individual steps described above clearly shows that opinions, as a rule, are produced within a period of less than two months. Speed is of the essence. National as well as international bodies expect swift replies to questions of constitutional law from an independent, international

advisory body, and their expectations are met in the majority of cases. The opinions received can thus have an immediate impact on the political process or, in individual cases, even on court proceedings. A quick reaction also satisfies the needs of modern media reporting.

However, speed also has its disadvantages. The rapporteurs have no possibility of working as thoroughly as a court, nor do they have the time to engage in an extensive judicial debate among colleagues for several days. The geographic scatter of the team of rapporteurs is another handicap. With a team consisting of one member from the USA, two from Scandinavia, two from Central Europe and one from Western Europe, as was the case with the more recent opinions on Poland, written exchanges by email are the only economically justifiable way of engaging in an extensive debate. A thorough discussion of the kind taking place among colleagues in a senate or chamber of a court is impossible between the Commission's sessions.

The time factor is even more important when an opinion needs to be produced as quickly as possible. In exceptional cases, if the internal situation of a state demands instant action, so-called "urgent opinions" are published without discussion and adoption by the plenary after approval by the Enlarged Bureau of the Commission.[49] The opinion is then submitted to the plenary for endorsement or adoption at the next meeting of the Venice Commission. Under such exceptional circumstances, the plenary has the authority to decide on substantive amendments to the opinion. As a rule, however, the plenary merely endorses the opinion.

8. Some reflections on text production

As illustrated in the preceding sections, the final text of an opinion is produced in a complex, multi-stage process, which is not subject to the "strict" procedural rules applicable to a court decision. A critical reflection on the factual reasons determining the process of preparing an opinion is therefore all the more important. The following observations can be made:

When drafting their texts, the individual rapporteurs do so with the other rapporteurs in mind. Each rapporteur tries to contribute

[49] According to the new Protocol on the preparation of urgent opinions, the latter are approved by the Bureau, the Chairs and the Vice-Chairs of the Sub-Commissions.

substantive elements which he/she assumes will not be mentioned by his/her colleagues. Moreover, the rapporteurs strive to follow the lines of argumentation contained in the initial information, putting them down in writing as a basis for the draft opinion to be produced by the Secretariat. In doing so, the rapporteurs highlight their own expertise, for instance in the field of human rights or the constitutional law underlying the constitutional systems they know best. The Secretariat, on its part, attempts to combine the draft texts into a substantively and formally coherent whole. Depending on how detailed and comprehensive the draft texts are, it may be sufficient for the Secretariat to combine them and add a few minor points, especially in the introduction and the summary of the opinion. On the contrary, if the rapporteurs' drafts represent mere propositions, the actual wording of the draft opinion will be, to a greater extent, incumbent on the staff members of the Secretariat.

In many cases, the visit to the state concerned plays an important role. In the course of the visit, the rapporteurs have a chance to compare their preliminary notions with the reality on site and, most importantly, not only to exchange ideas with national authorities and experts, but also to discuss their own drafts and those of the other rapporteurs face to face.

As mentioned above, the entire text is the outcome of a process of exchanging ideas and combining pieces of text. Apart from the exceptional meetings of rapporteurs during the drafting process, a face-to-face discussion on the substance and the wording of the draft opinion can only take place immediately before the plenary meeting. If the government concerned submits extensive comments on a draft opinion, such conversations are not unusual. The rapporteurs not only discuss the case amongst themselves but also engage in talks with government representatives, which may be quite controversial, especially if it was not the government itself that applied for an opinion.

Once the drafts supplied by the rapporteurs have been combined into a complete text, subsequent discussions are usually limited to editorial matters. However, if conflicting positions were taken by the rapporteurs and the Secretariat proposes a compromise, the rapporteurs may continue their discussions by email. At this point, it is worthwhile to mention a mechanism which is referred to in the guidelines on the working methods of the Venice Commission but rarely used in practice. The guidelines provide for a Scientific Council to be primarily responsible for the high quality of and the absence of contradictions in the studies and opinions produced by the Commission. This advisory body is intended to provide the rapporteurs with information

on the Commission's doctrine and other relevant scientific material for the preparation of opinions. The provisions contained in the guidelines reflect the Commission's awareness of the problem that the documents, irrespective of time pressure, need a proper scientific foundation, which may not always be guaranteed in every respect. Today, valuable support is being provided in the form of compilations on certain topics, which are to be further elaborated in the future.

The other members of the Commission, who have not been appointed as rapporteurs, normally do not have any substantial influence on an opinion. Nevertheless, the guidelines on the working methods of the Venice Commission state that a member having substantial objections to a draft opinion distributed for discussion in the plenary meeting is to inform the rapporteurs thereof before the beginning of the plenary deliberations. As far as possible, suggestions of alternative wordings are to be communicated to the rapporteurs in writing before the plenary starts its deliberations. If necessary, opinions are discussed in one of the sub-commissions on the day before the plenary meeting; during this phase, the members of the sub-commission can exert an influence on the content of the opinion.

The quality of the opinions as non-binding recommendations tends to facilitate the further evolution of existing standards. The point at issue is not to arrive at a mere definition of certain minimum standards but to identify "best practices". Once again, the diversity of the members, ranging from judges to members with a political background tending to take a political approach and aiming to further develop the law, is worth mentioning.[50]

Overall, the process of producing an opinion represents a joint effort undertaken by actors of diverse characteristics, most of them specialists in European constitutional law, guided more by tacit consensus and decades of practice than by formal procedural rules. Given the time pressure and the awareness of the non-binding nature of the documents, their wording is not always as precise and as thoroughly discussed as most of the decisions by constitutional and supreme courts. Their special value resides in the European perspective, the incorporation of various standards, and the fact that the opinion manifests a commonality of standards which other bodies, be they courts or political bodies, can build upon.

Finally, the principle of a dialogue-based procedure is to be highlighted once again as a general characteristic. This principle dominates the concluding phase of the procedure. Just before the final deliberations by the plenary,

[50] See e.g. *Hoffmann-Riem*, Festschrift Bryde, p. 604.

draft opinions are frequently discussed upon the governments' requests in bilateral conversations between rapporteurs and government representatives. Such discussions, for which the groundwork is sometimes laid in the form of written comments by governments, may still result in substantial amendments. Government representatives even have the right to speak during the plenary deliberations on the draft opinion, although they have scarcely any real chance of influencing the content of the opinion at this late stage.

9. Concluding remarks

The Agora Building of the Council of Europe, which accommodates the Secretariat of the Venice Commission, is located opposite the European Court of Human Rights, just across the Allée des Droits de l'Homme on one of the Strasbourg canals. This location is of more than merely symbolic importance. Like the judges of the ECtHR, the members of the Venice Commission are guided by the ideal of a common European constitutional heritage. This is what the governments of the member States had in mind (at least at the time of the foundation of the Council of Europe), if one takes the last recital of the preamble to the European Convention on Human Rights seriously, which speaks of governments of states "which are like-minded and have a common heritage of political traditions, ideals, freedom and the Rule of Law". Mutual references contained in opinions, studies and court decisions serve to enhance cohesion and strengthen the awareness of the need for mutual support in the preservation and further development of the standards of democracy, the Rule of Law and, last but not least, human rights.

Years, in some cases decades, of joint efforts in the elaborations of dozens of opinions and studies have generated an esprit de corps among the members of the Venice Commission and a loyalty to the objectives of the Council of Europe and, in particular, the Venice Commission, even in times when some governments no longer manifest an unconditional commitment to these objectives. National interests and perspectives are relegated to the background in favour of a common European perspective, of the search for consensus and, ultimately, of a shared responsibility for the Venice Commission and its mission of securing the existence of democratic states governed by the Rule of Law throughout Europe and all over the world.

Simona Granata-Menghini[1]

Martin Kuijer[2]

Advisory or *de facto* binding? Follow up to Venice Commission's opinions: between reality and perception

This book celebrates the 30th anniversary of the European Commission for Democracy through Law as the Council of Europe's advisory body on constitutional matters. In those 30 years the Commission developed in various ways. One could say it 'matured'. It became a well-known, widely respected and influential international body with growing membership and participation. It is not our intention to exhaustively describe that historic process in this contribution.[3] Instead, we would like to highlight some developments that in our view affected how the Commission's *advisory* role is perceived in some quarters. Following a brief paragraph on the advisory nature of the Commission's work, we will analyse the follow up to the Commission's opinions in greater depth. We will subsequently reflect on certain features of the Commission's work which affect how the Commission is perceived by states and then conclude by reflecting on how the described developments impact the future work of the Commission.

1. The Commission as an advisory body

Let us start by reiterating the obvious. Formally speaking the Commission is an advisory body and the recommendations expressed in its opinions are just that: recommendations which are not legally binding upon the authorities to which they are addressed. Article 1 of the Revised Statute of the Commission speaks of "an independent consultative body", which reflects the backdrop against which the Commission was established in May 1990. The initiative to set up a body on constitutional matters was viable in a political reality in which many states felt a real need to receive technical assistance and advice on constitutional matters. At the time, various states

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[2] Substitute Member of the Venice Commission in respect of The Netherlands.

[3] See, for example, Gianni Buquicchio and Simona Granata-Menghini, "The Venice Commission Twenty Years on, Challenges met, but Challenges Ahead", in: Marjolein van Roosmalen a.o. (eds.), *Fundamental Rights and Principles, Liber Amicorum Pieter van Dijk* (Cambridge: Intersentia, 2013), pp. 241-265.

that had belonged to the Soviet Union – or had been one of its allies – regained their independence and wished to join a Europe of freedom and democracy. Aspiring to become a member of the Council of Europe was part of that political process. Membership of the Council of Europe was seen as a quality mark for a state respecting the basic principles of democracy, Rule of Law and human rights. Accession to the Council of Europe and thereby committing to human rights standards was a goal in itself for the new political decisionmakers wanting to ensure basic freedoms for their peoples who had been deprived of those freedoms for decades, it enhanced confidence to attract the necessary investments, and for some states it was a necessary precondition to eventually become a member State of the European Union. In short, there was a very real desire to become a member State of the Council of Europe as quickly as possible. The resulting challenges for an international organisation seeing its membership increase from 20+ states to 40+ states in such a short period of time are well-documented. But what is sometimes overlooked is that this period in time also posed huge challenges for the states concerned. They were required – in order to be allowed in – to fundamentally reform their political and legal systems. Constitutions had to be rewritten. Organic laws had to be fundamentally revised. As expertise was not always available within the states concerned, outside assistance on constitutional matters was welcome. Against that backdrop, the initiative to set up a Venice Commission received political support (even though some of the 'old' member States of the Council of Europe had expressed hesitations as they feared external interference with a State's sovereign powers par excellence in the field of political infrastructure and constitutional arrangements). It will therefore come as no surprise that the Commission immediately had plenty of work, albeit almost exclusively in Central and Eastern Europe.

These historic origins explain to a certain extent why the advice that is offered by the Commission is not abstract and academic but aims to offer short-term practicable solutions to problems encountered by (constitutional) legislators. It may also explain why the recommendations of the Commission were largely followed in practice. Because the advice offered by the Commission met the most urgent needs of that part of Europe in the field of legislation and because observance of the recommendations would enhance the chances to swiftly achieve the greater political aim of sharing the freedom and prosperity of the other European states. In that sense it has to be acknowledged that the advice offered by the Commission has always been – at least to a certain degree – more than purely advisory

and that the level of observance of opinions by the Commission cannot be solely explained by the quality of the advice offered and its independence. The observance of the opinions of the Commission is also – at least in part – the result of the interplay between the work of the Commission and the political forces at play.

It is this latter feature that, in our view, has become more visible in recent years. The (effects of the) work of the Commission cannot be viewed in isolation but can only be understood properly when looked at in a more holistic manner. All European states, with the exception of Belarus, have become members of the Council of Europe; the initial motivation for adopting changes to the legal order is therefore not relevant anymore. Several of these countries, however, have aspired or still aspire to become members of the European Union. An opinion adopted by the Commission in respect of a state which is also a candidate member State of the European Union will – almost without exception – impact its accession negotiations and is therefore perceived by the state authorities concerned (and may result in being) *de facto* binding. As a matter of example, one can refer to the EU Council conclusions on enlargement and stabilisation and association process in respect of the Republic of North Macedonia and the Republic of Albania of 25 March 2020 in which the EU Council decided to open accession negotiations with the Republic of Albania and adopted a series of conditions Albania needs to fulfil prior to its first intergovernmental conference with the EU member States. The document reads *inter alia* that "Albania should (…) ensure the continued implementation of the judicial reform, including ensuring the functioning of the Constitutional Court and the High Court, taking into account relevant international expertise including applicable opinions of the Venice Commission".[4] Similar developments can be discerned vis-à-vis other candidate member States in the Western Balkans. In respect of Turkey, one could refer to a joint statement by Federica Mogherini and Commissioner Johannes Hahn of 13 March 2017: "We have taken good note of the Venice Commission's Opinion on the amendments to the Constitution of the Republic of Turkey adopted by the Turkish Grand National Assembly on 21 January 2017. (…) [T]he Venice Commission's comments on the proposed Constitutional amendments raise serious concerns at the excessive concentration of powers in one office, with serious effect on the necessary checks and balances and on the independence of the judiciary. It is also of concern that this process of constitutional change

[4] https://data.consilium.europa.eu/doc/document/ST-7002-2020-INIT/en/pdf.

is taking place under the state of emergency. The proposed amendments, if approved at the referendum of 16 April, and especially their practical implementation, will be assessed in light of Turkey's obligations as an EU candidate country and as a member of the Council of Europe".[5]

Likewise, a member State of the European Union will no longer perceive the work of the Venice Commission as being truly advisory if the opinions are subsequently used by EU institutions to voice rule of law concerns,[6] as a basis of infringements proceedings[7] or as a basis for so called Article 7 proceedings.[8]

In conclusion, the recommendations of the Venice Commission are at times perceived and indeed result in being no more merely advisory, but instead *de facto* binding. This in turn affects the manner in which the Commission is perceived. And it affects the manner in which the Commission perceives itself and its role. In the following paragraph we analyse the follow up to Opinions adopted by the Commission in greater depth.

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[5] https://ec.europa.eu/commission/presscorner/detail/en/statement_17_588.

[6] See for example the Rule of Law Recommendation on the situation in Poland the European Commission adopted in July 2016: https://ec.europa.eu/commission/presscorner/detail/en/MEMO_16_2644. The document refers to the opinions adopted by the Venice Commission.

[7] In some instances the Commission may be able to start infringement procedures against member States if rule of law deficiencies constitute a violation of EU law. Whether or not national authorities are willing to implement recommendations by the Venice Commission can be a relevant criterion in deciding whether infringement proceedings will be commenced and if so, the scope of those infringement proceedings. See in the case of Hungary more elaborately: Wolfgang Hoffmann-Riem, "The Venice Commission of the Council of Europe – Standards and Impact", in: *European Journal of International Law* Vol. 25 no. 2, p. 579-597 at 594.

[8] In case of the 'existence of a serious and persistent breach by a member State of the values referred to in Article 2' [i.e. respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities] the Council may decide to suspend certain of the rights deriving from the application of the Treaties to the member State in question, including the voting rights of the representative of the government of that member State in the Council. In December 2017, the European Commission triggered the Article 7 mechanism vis-à-vis Poland in order to protect judicial independence in Poland after the PiS party had enacted laws affecting the entire structure of the justice system in Poland, impacting the Constitutional Tribunal, Supreme Court, ordinary courts, National Council for the Judiciary, prosecution service and National School of Judiciary. And in September 2018, the European Parliament adopted a resolution calling on the Council to determine the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded following the so-called Sargentini report (www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2018-0340&language=EN&ring=A8-2018-0250) which referred extensively to opinions adopted by the Venice Commission.

2. Follow up to the Commission's opinions

The most frequently asked question at presentations of the Venice Commission's work has traditionally been: "How often are the Commission's recommendations followed by the relevant States?" The most frequently given reply has been: "Almost always". There is a lot of truth in this answer, and much qualification to be added.[9]

What is "follow-up"? To the extent that this term means that consideration is given by the national authorities to the opinion of the Commission – in terms of debating about it - the rate of follow-up is close to 100 percent. Commission opinions are invariably the object of media attention, and normally of great expectation on the part of the opposition, the civil society and the other stakeholders of the reform at issue. Even more so, if the reform is part of stabilisation, cooperation or accession processes or of monitoring procedures.

To the extent that "follow-up" refers to the actual impact of the Commission's recommendations on the finally adopted text (or amendments to a text in force), it should be noted at the outset that there are different kinds of recommendations. Commission opinions contain both key-recommendations and minor, technical, detailed ones: a percentile approach to follow-up assessment therefore clearly lends itself to manipulation and distorted conclusions. Further, recommendations may be straightforward ("this provision should be removed from the law") or more general ("these provisions should be reconsidered to make them compatible with European standards"). It is important to stress that there are usually various modalities to adequately address a particular recommendation, and if the Commission recommends one course of action, it does not necessarily exclude others.

[9] In order to meet this growing public interest, information on the follow-up given to the Commission's recommendations has been made increasingly available by the Secretariat to members and to the public (See: Follow up to Venice Commission Opinions - Note prepared by the Secretariat www.venice.coe.int/webforms/documents/?pdf=CDL-WM(2017)001). Since March 2009, a specific item of the agenda of each Commission's Plenary Sessions is devoted to information provided by the Secretariat on the follow-up given to previous opinions. Such information is subsequently put into the session reports (which become public one year after they are issued). As of 2014, opinions have included a list of key recommendations, those which are deemed indispensable and which can easily be measured against the adopted text. Finally, a specific page was created on the Commission's website in 2018, providing the list of recommendations made in the opinion, the adopted texts and a brief description of how this text meets the Commission's recommendations (www.venice.coe.int/WebForms/followup/default.aspx?lang=EN). The impact of the Commission's opinions on the national and international debates is also a specific indicator of the Council of Europe's "Results Based Budget" system.

The actual solution should be decided by the governments in consultation with the other domestic stakeholders, normally after the adoption of an opinion: so that the recommendations may come to be superseded by equally acceptable solutions.

The preceptive tone of the recommendations also varies greatly, depending on whether they are based on hard law (such as the binding case-law of the European Court of Human Rights[10]), on soft law (including the standards defined by the Commission itself) or just on comparative good practice which the Commission deems relevant and instructive. To the extent that its advice is non-binding, the Commission is free to venture into proposals based on its own experience and predictions, even unrelated to international standards (in the absence of hard law obligations).

The Commission thus recommends that something "should" be done, or "could" be done, or that a law should or could be "reconsidered" or "improved" or "harmonised". The respondent State's corresponding margin of manoeuvre varies considerably, and the appraisal of the final result may require another full exercise of assessment.[11] In a few cases, the authorities themselves asked the Commission to assess formally the compliance of the adopted text with the Commission's recommendations; these requests were motivated by the need to explain publicly, in discussions at the domestic or international level, how the Commission's advice had been taken into account.[12]

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[10] For states that are parties to the European Convention on Human Rights.

[11] In several cases, at the request of the State, the Commission has issued an "interim" opinion on a first version of a draft law, followed by a "final" opinion on a revised version of the draft law or on the law as adopted: see for example the Interim Opinion on the amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation (CDL-AD(2016)005), which was followed by the relevant final opinion CDL-AD(2016)016 ; or the Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania (CDL-AD(2015)045), followed by the Final opinion (CDL-AD(2016)009)).

[12] This happened with Ukraine (CDL-AD(2015)029rev, Secretariat Memorandum on the Compatibility of the Draft Law on amending the Constitution of Ukraine as to Decentralization of Power as submitted by the Verkhovna Rada to the Constitutional Court of Ukraine on 16 July 2015 (CDL-REF(2015)035rev), with the Opinion on the Amendments to the Constitution of Ukraine regarding the Territorial Structure and Local Administration as proposed by the Working Group of the Constitutional Commission in June 2015 (CDL-AD(2015)028); CDL-AD(2015)043, Secretariat Memorandum on the compatibility of the Draft Law of Ukraine on amending the Constitution of Ukraine as to Justice as submitted by the President to the Verkhovna Rada on 25 November 2015 (CDL-REF(2015)047), with the Venice Commission's Opinion on the proposed amendments to the Constitution of Ukraine regarding the Judiciary as approved by the Constitutional Commission on 4 September 2015 (CDL-AD(2015)027); with Montenegro (CDL-AD(2016)022, Secretariat Memorandum on the Compliance of the revised draft

But the respondent State's margin of manoeuvre greatly depends on a number of other factors, both internal and external. Any effective assessment of follow-up should proceed from the premise that Commission opinions are the final product of a complex process, passing through different phases and involving different actors.

The first element to take into account is whether the text which the Commission is asked to assess has already been adopted or is still a draft. In the latter case, it will obviously be much easier for the opinion to influence the text. Opinions on constitutions and laws which are already in force fulfil a different objective: that of launching a reflection and political discussion on whether and to what extent a reform is necessary. This discussion may take place not only in the country but also at the international level, especially if the opinion request has been made not by the authorities but by a political actor such as the Parliamentary Assembly or within EU accession procedures.

The second factor is the requesting party.[13] Endogenous requests, coming directly – and spontaneously - from the state, fall within the category of classic "co-operation". In these cases, in principle, States seek the Commission's assistance just because they need it. And they may need it for a variety of reasons. They might need technical assistance on complex or new questions where the Commission's technical advice and a comparative review of the experience of other states may be useful. States might need the

Law on Minority Rights and Freedoms of Montenegro, as submitted by the Ministry of Human and Minority Rights on 4 May 2016 (CDL-REF(2016)039), with the Opinion of the Venice Commission on the draft Law on Amendments to the Law on Minority Rights and Freedoms (CDL-AD(2015)033); and with Serbia (Secretariat memorandum on the compatibility of the draft amendments to the Constitutional Provisions on the Judiciary of Serbia with the Venice Commission's Opinion on the draft Amendments to the Constitutional Provisions on the Judiciary (CDL-AD(2018)011), CDL-AD(2018)023).

[13] Of the roughly 800 opinions and reports produced by the Venice Commission since the beginning of its activities in 1990, approximately 200 were requested by the Parliamentary Assembly of the Council of Europe; amongst these, 32 requests were made through a Resolution or Recommendation adopted by the Plenary, 75 by the Monitoring Committee and 41 by the Legal Affairs Committee. Two were requested by the European Commission, one by the EU Special Representative in Kosovo, one by the European Parliament, and two by the Organisation of American States. The proportion between opinions requested by the states and those requested by the Parliamentary Assembly has been approximately 2 to 1 rather constantly. As explained in footnote 12, the Parliamentary Assembly may only request opinions relating to Council of Europe member States; the Commission receives requests also from its non-Council of Europe members. In 2020, of the 21 requests (19 opinions and 2 reports) received by the Commission between January and August, 15 were received from national authorities, 5 from the Parliamentary Assembly (3 from the Monitoring Committee, one from the Legal Affairs Committee and one from the Committee on Equality and Non -discrimination) and 1 from the European Parliament.

Commission's intervention for political reasons: because there is no dialogue with the opposition, or because they need to take an unpopular but necessary course of action. They might need to prove their doing in international fora. For all these reasons, the requesting state will tend to comply with the Commission's opinions which it has itself requested; the state will at any rate be under pressure by other stakeholders which have been involved in the process of preparation of the opinions. These stakeholders and the press will usually follow the procedure with the greatest care and won't let the Commission's opinion fall on deaf ears.

When the State is seeking public recognition for respecting international standards, it will proceed with improvements of the text even before the opinion is finalised, during its preparation: the respondent authorities indeed often act upon the indications received by the rapporteurs, so that the draft which is finally assessed in the Commission's opinion is already an ameliorated version of the initial one. The State in this way avoids being exposed to public criticism. Follow up is thus partly achieved even before the opinion is issued. Concessions may also be made by the government in the final phase of the procedure, at the moment of the adoption of the opinion at the Plenary Session in Venice. The authorities' representatives may indeed commit to making additional changes to the draft text, which the Commission then acknowledges in the final version of the opinion. These last-minute negotiations may be effective, although they exclude the other national stakeholders who are subsequently presented with the *fait accompli*.

Achieving satisfactory follow-up is a more complex matter for exogenous requests. When the request is made by one of the Council of Europe (or European Union) bodies,[14] there will normally have been a phase during which this body has tried to persuade the State to seek the opinion itself (indeed, it often happens that states let themselves be persuaded). States sometimes request an opinion to pre-empt an imminent exogenous request. An exogenous request

[14] The Council of Europe bodies may only request opinions relating to Council of Europe member States or countries which have a special status, such as partner for democracy pursuant to PACE Resolution 1818 (2011) (this resolution requires on the part of the partner for democracy "a statement on the intention of the parliament to make use of the Assembly's experience, as well as the expertise of the European Commission for Democracy through Law (Venice Commission), in its institutional and legislative work"; there are currently four partners for democracy; Morocco (2011), Palestine (2011), Kyrgyzstan (2014) and Jordan (2016). The European Commission may ask opinions on countries it cooperates with. If the country in question is not a member of the Venice Commission, the preparation of the opinion needs to be authorised by the Committee of Ministers.

is therefore usually made in respect of a state which is recalcitrant to receive the Commission's advice. The Commission follows the exact same procedure and working methods for endogenous and exogenous requests: the opinion is prepared in dialogue with the authorities and all the other national stakeholders. And until recently, the authorities had always engaged in such dialogue with the Commission, at least in the course of the preparation of the opinions. Poland's refusal in 2017 and 2019 to acknowledge the opinion requests made by the Parliamentary Assembly, to co-operate with the Commission and to discuss the opinions represents a negative precedent, which may scorn the Commission but certainly does not help Poland to the extent that failure to cooperate does not make the opinion go away,[15] and instead results in a waiver of the possibility to have the authorities' views presented and debated in the opinion itself.

Exogenous requesters however do have an arsenal of tools for pressurising states to comply with the Commission's recommendations. The Parliamentary Assembly relies on the Commission's opinions to draw its conclusions as to whether the respondent State complies with Council of Europe's standards or specifically with post-accession commitments. The European Commission often conditions progress in accession processes to meeting the Venice Commission's recommendations (see above).[16] Recently, Venice Commission's recommendations have been set as conditionality parameters for disbursement of Macro Financing Assistance (MFA)[17]

[15] The Commission's opinion has been used by the European Commission for opening infringement proceedings against Poland: see above, footnote 6.

[16] S. Bartole, International Constitutionalism and Conditionality - the Experience of the Venice Commission, Rivista AIC - Associazione Italiana dei Costituzionalisti, 4/2014; G. Lazarova-Déchaux, Doctrine de droit européen - L'exigence de qualité de la justice dans la nouvelle stratégie d'élargissement de l'Union Européenne dans «Revue du droit public» - N° 3-2015 (CNRS UMR 7318) pp. 729-760.

[17] See for example as concerns Moldova: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1309. The latest constitutional amendments relating to the judiciary were prepared with the assistance of the Venice Commission and the Directorate General of Human Rights and the Rule of Law; the government resisted some recommendations but finally accepted them, also because they were supported by the European Commission and EEAS (Venice Commission, CDL-AD(2020)007, Joint Opinion on the revised draft provisions on amending and supplementing the Constitution with respect to the Superior Council of Magistracy, and CDL-AD(2020)015, Joint urgent opinion on the draft law amending Law 947/1996 on the Superior Council of Magistracy. In July 2020, the European Commission and EEAS authorised the disbursement of the second instalment of €30 million in macro-financial assistance (MFA) to the Republic of Moldova taking into account *inter alia* that "[t]he Moldovan authorities also committed to continuing with justice reform, in particular by tabling long-awaited constitutional amendments for judicial reform, in accordance with international standards" (https://ec.europa.eu/neighbourhood-enlargement/news_corner/news/eu-approves-%E2%82%AC30-million-disbursement-macro-financial-assistance-republic-moldova-0_en).

or funding by the International Monetary Fund.[18] Exogenous opinions therefore normally do have quite an impact.

For both endogenous and exogenous requests, follow-up should be a holistic exercise. The Commission's recommendations are issued on the basis of a global examination of the text submitted and of the arguments raised by the stakeholders; they are interlinked and most of the time they cannot be separated from each other. Cherry-picking some recommendations to be followed disregarding the others does not ensure that the end result is standard-compliant, particularly if the context of the reform under examination has evolved.[19]

3. Certain features of the Commission's work affecting how it is perceived by state authorities

In the previous paragraphs we have asserted that the perception of the Venice Commission's work has developed over time in the sense that some states have experienced a change in the original advisory nature of the Commission's work. In this paragraph we would like to stress two features of the Commission's work which in our view are equally relevant when reflecting upon the manner in which the Commission is perceived: the voluntary nature of the Commission's involvement and the sensitive nature of the policy issues to which the Commission's opinions relate.

The voluntary nature of the Commission's involvement

As described above,[20] the Venice Commission has been receiving requests for opinions or reports from both member States and Council of Europe statutory bodies or other international organisations in a proportion of approximately 2 to 1.

During Plenary Sessions of the Commission the President will frequently refer to the Parliamentary Assembly of the Council of Europe (PACE) as one of the Commission's biggest clients. Besides numerical considerations, many opinions relating to major and sensitive political issues are produced at PACE's request.[21] In this respect, it is worth recalling that opinions may only

[18] See footnote 29.

[19] See for example, Venice Commission, CDL-AD(2020)007, Joint Opinion on the revised draft provisions on amending and supplementing the Constitution of the Republic of Moldova with respect to the Superior Council of Magistracy, paras. 11-15.

[20] And in footnote 13.

[21] To give two recent examples: Venice Commission, CDL-AD(2017)031, Opinion on the Polish Reform of the Judiciary, was at the request of the President of the Parliamentary Assembly and CDL-AD(2018)021, Opinion on the Romanian Criminal Code and Criminal Procedure Code, at the request of the Monitoring Committee of the Parliamentary Assembly.

be requested by the official state institutions: neither the opposition nor the civil society may seek an assessment by the Commission. Instead, they may address their concerns to the Parliamentary Assembly and thus eventually provoke urgent debates, or recommendations and even the opening or reopening of monitoring procedures.[22] Undeniably, the possibility to engage the involvement of the Venice Commission by a 'third' party is extremely useful when significant – and on occasion worrisome – developments occur in member States who do not desire external scrutiny out of their own motion. Equally undeniable is the fact that this impacts how national authorities perceive the role of the Commission (and their willingness to organise a productive visit of the Commission's delegation to the state concerned).

In addition, as mentioned above, even if the national authorities have requested the opinion themselves, they are often persuaded or pressurised to do so by external actors. Sometimes the request by national authorities is preceded by a request from another entity. The 2018 Opinion on the constitutional arrangements of Malta[23] was at the request of the Maltese government *and* the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly (the latter request having been submitted three days earlier than that of the national authorities).[24] Sometimes the request by national authorities is due to a political impasse in the country concerned. The involvement of the Venice Commission is then considered necessary as a kind of exit strategy hoping that any party will be willing to accept the objective opinion of an outside expert body. The 2020 Opinion on the appointment of judges to the Albanian Constitutional Court[25] may serve as an example. Both the Speaker of the Albanian Parliament and the President of Albania requested the opinion after the dialogue between the various state institutions had collapsed and resulted in a constitutional crisis. Sometimes national authorities consider it

[22] In January 2020, the Parliamentary Assembly decided to open a monitoring procedure in respect of Poland, *inter alia* in light of the failure by Poland to implement or address "numerous recommendations of the European Commission for Democracy through Law (Venice Commission) and other bodies of the Council of Europe" relating to the reform of the judiciary: see PACE Resolution 2316 (2020), The functioning of democratic institutions in Poland.

[23] Venice Commission, CDL-AD(2018)028, Malta - Opinion on Constitutional Arrangements and Separation of Powers and the Independence of the Judiciary and Law Enforcement.

[24] The European Parliament relied on the Venice Commission's 2018 opinion, urging the Maltese authorities to comply with its recommendations: European Parliament Resolution of 18 December 2019 on the rule of law in Malta following the recent revelations surrounding the murder of Daphne Caruana Galizia (2019/2954(RSP)), www.europarl.europa.eu/doceo/document/TA-9-2019-0103_en.html.

[25] Venice Commission, CDL-AD(2020)010, Albania - Opinion on the Appointment of Judges to the Constitutional Court.

necessary to involve the Commission because they need the political support of the opposition to successfully carry out a constitutional reform requiring a qualified majority in Parliament which the ruling party does not have. The national authorities then hope to convince the opposition of the compatibility of the reforms with international standards by allowing the Commission to express its views on the reforms. This may be true to a certain extent for the 2020 Opinion on the constitutional reform in Malta.[26] Following the (critical) findings by the Commission in 2018, the Maltese authorities sought the advice of the Commission in 2020 in order to see whether their proposed reform would meet approval, undoubtedly also to use the Commission's findings to convince the opposition (and others, including the EU).

In conclusion, the involvement of the Commission will not always be, or be perceived, as truly voluntary by national authorities (even though they themselves requested an opinion from the Commission).

The sensitive nature of the underlying policy issues to which the Commission's recommendations pertain

The Commission's work is almost always perceived by national authorities as delicate. As a rule, the work of the Commission pertains to policy issues which are regarded as highly sensitive: "constitutional law was – and still is – regarded as a State's reserved domain *par excellence*, and giving an expert body the task, hence the power, to criticise and perhaps influence domestic constitutional choices must have seemed, from a national perspective, dangerous".[27] This was true 30 years ago, and it is still true today. Opinions frequently relate to the functioning of state institutions (such as an independent judiciary) and the interrelationship between various state bodies (such as the relationship between the executive and the legislative branches) which are sensitive topics for any sovereign state. Opinions frequently relate to human rights issues or minority issues which are considered highly sensitive within a given society. National authorities may consider the involvement of the Commission sensitive because of the political implications in the next domestic elections, because of the diplomatic relations with neighbouring countries or because of the potential economic effects of a delayed EU accession. This increases the risk that the Commission is viewed as a political actor, more than an expert body working in a (very) political environment.

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[26] Venice Commission, CDL-AD(2020)006, Malta - Opinion on proposed legislative changes.
[27] G. Buquicchio and S. Granata-Menghini, "The Venice Commission Twenty Years on, Challenges met, but Challenges Ahead", in: Marjolein van Roosmalen a.o. (eds.), *Fundamental Rights and Principles, Liber Amicorum Pieter van Dijk* (Cambridge: Intersentia, 2013), p. 241-265 (at p. 241).

In summary, the stakes are high for national authorities given the sensitivity of the policy issues concerned and the possible consequences following an Opinion knowing that the recommendations issued by the Commission may in some cases be *de facto* binding. All of this obviously affects how state authorities perceive the Commission. Perhaps these dilemmas have always been an intrinsic part of the Commission's work but with the growing maturity of the Commission they have become more visible.

4. The Commission's evolving role

It is certainly true that for a State, seeking the assistance of the Commission comes with strings attached. These strings have increasingly tied the authorities, prompting them either to follow the Commission's recommendations or to provide public justification for not doing so – and expose themselves to political and often financial consequences on the national and/or international level. This fact does not change the "legal" nature of the Commission's advice, though. It is not the nature of the Commission's work that has evolved in the last thirty years: it is rather the complex political - national and international - context in which Venice Commission member States nowadays function.

Domestically, the influence of the Commission's opinions on the parliamentary and civil society debates testifies of positive developments in terms of transparency of law-making processes and of media access to government work. The parliamentary and non-parliamentary opposition, civil society, other stakeholders and the media use the Commission's opinions as an additional tool in their argumentation. This should not irritate governments.

Internationally, the "strings" tie these States to political players such as the European Union or the International Monetary Fund[28] or the World Bank. Governments have to respond to the latter, not to the Commission.

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[28] In 2017, for example, the IMF linked substantive funding in favour of Ukraine to the setting up of an anti-corruption court following the recommendations of the Venice Commission: See statement of the OMF Managing Director, 7 December 2017, www.imf.org/en/News/Articles/2017/12/08/pr17474-statement-by-the-imf-managing-director-on-ukraine. On 15 January 2018, the World Bank's country director, Satu Kahkonen, wrote to the presidential administration to express the bank's concerns about parts of the bill: "We believe that the draft law requires the following revisions to bring it into alignment with the recommendations of the Venice Commission and satisfy the requirements of the World Bank's estimated $800 million Policy-Based Guarantee to support key reforms in Ukraine": https://fr.reuters.com/article/idUSKBN1F5236. In the June 2020 Memorandum of Economic and Financial Policies between Ukraine and IMF, commitment 26 regarding strengthening the rule of law, by ensuring the independence, integrity and accountability of the judiciary refers explicitly to the need for Ukraine to ensure "consistency with European judicial standards and Venice Commission opinions": www.imf.org › Files › 2020 › English › 1UKREA2020001.

It has been observed that:

> "*Specially when the compliance with the conditionality is connected with the adhesion to an international or supranational institution and with the observance of the obligations of their membership, the task of checking the acceptance of the required purposes in the shaping of the internal constitutional order of the States concerned or in the establishment of the main elements of an economic free market is entrusted to a political authority whose deliberations are frequently supported by the reports and opinions of advisory technical bodies. As a matter of fact, decisions which have apparently only a political relevance, produce important legal effects as far as they regard the compliance with the yardstick of the conditionality, and condition the shaping of the internal organization of a State, the solution of problems regarding the functioning of this organization or the interpretation of the relevant internal constitutional provisions. The results are no more the fruits of the mere internal decision-making processes of that State but are directly affected by the construction of the conditionality yardstick by international technical bodies which don't have a judicial qualification and whose members are experts (lawyers, economists, etc.) who are entrusted with the task of evaluating the solutions adopted or proposed by the States for the adoption of necessary and constitutional reforms in view of the State's access to the membership of the relevant institution or of its continuity.*"[29]

The Commission's involvement thus provides a genuine opportunity for technical/legal discussions which could not take place in merely political fora. This explains why the Parliamentary Assembly, the European Commission (and in the future possibly also the European Parliament) so often seek Commission opinions: because they bring the technical/legal arguments to the political discussion. This is to the benefit of the States. Understandably, States might be reluctant to seek the Commission's involvement because they perceive that they might have to accept solutions which at the outset they do not advocate. But such solutions (or similar solutions not necessarily easier to accept) would be pushed for by those political actors in any case, even without an opinion of the Venice Commission. It is in the states' interest to engage with the Venice Commission.

We would argue that the success of the Venice Commission comes with strings attached too. Being a – merely – advisory body implies having a lot of liberty in devising the advice; the Commission has indeed

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[29] S.Bartole, International Constitutionalism and Conditionality - the Experience of the Venice Commission, Rivista AIC - Associazione Italiana dei Costituzionalisti, 4/2014 www.venice.coe.int/files/articles/Bartole_Constitutionalism_and_Conditionality_E.pdf.

proposed novel, creative solutions based on comparative experience. But can the Commission operate in this manner if its recommendations are *de facto* binding? The Commission has become aware of this nuance and has increasingly refrained from formulating recommendations in too prescriptive a manner and from making sweeping proposals in politically tense contexts.

After all, the authority and the power of persuasion of an international body such as the Venice Commission can only be maintained if it resists the temptation to 'overplay its hand'.[30]

It can do so if:

- the Commission is too firm in stating that a 'standard' has been breached if it is not convincingly demonstrated that such a standard exists. One of the added values of adopting the Rule of Law Checklist[31] is precisely that it identifies core elements covered by the terms 'rule of law', 'i and 'État de droit'. Even so, it is useful to make a distinction between hard and soft standards, as is also explicitly done in the Rule of Law Checklist.
- the Commission does not act as a technical body of constitutional experts, but as a human rights activist or lobbyist.
- the Commission does not sufficiently attach importance to the fact that constitutional designs among the various member States differ. It is not the Commission's task to impose an harmonization of the various legal orders.

In our opinion, the Commission has been very mindful in its opinions of the above-mentioned risks, exercising extra care in keeping within the boundaries of the role of the Commission and choosing the appropriate tone of the opinion.

The authority of the work of the Venice Commission as an advisory body with no political or judicial power of its own depends in the end on the quality of its argumentation, on its consistency and on whether it adopts a constructive attitude offering where possible alternative solutions to the measures taken by national authorities and considered problematic by the Commission.[32]

In this respect, it would help if the Commission, after issuing an opinion, would engage in discussions with the opinion's recipients trying to complement the very technical reasoning and arguments of its opinions

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[30] See previously M. Kuijer, "The Rule of Law in Crisis? – Some Observations from the Perspective of the Venice Commission", in: *Osteuropa Recht* 2018-4, pp. 530-551.

[31] Venice Commission, CDL-AD(2016)007, Rule of Law Checklist.

[32] It also depends on the factual accuracy of its opinions of course. This is not always easy to guarantee as the Commission has no fact-finding powers and usually has to deliver an opinion within a fairly short period of time. This explains why opinions always warn that inaccuracies may occur in the opinion as a result of incorrect translations of (draft) legislative texts.

with other arguments such as the societal consequences which would result from non-compliance with the legal standards.

The Venice Commission is assisted by the Communication Department of the Council of Europe, which is in constant contact with international and local media outlets. Even more efforts should be devoted to informing the media in a detailed but user-friendly manner about the Venice Commission's viewpoints. Ideally, the same level of media attention and coverage which the Venice Commission delegations receive during their country visits should be achieved when the opinion is adopted, including in countries which are not directly affected by the opinion.

5. Concluding remarks

Should some of the developments mentioned in our contribution result in amendments in our working methods? This is a difficult question to answer and it undoubtedly deserves a more in-depth analysis which the Commission will certainly carry out in the coming months. The working methods of the Commission have always been characterised by flexibility. There are convincing arguments to maintain that flexibility, which has so far enabled the Commission to react timely and effectively to all the requests it has received. The Venice Commission has always tried to meet the specific needs of the entity requesting the opinion, and custom-made solutions require flexibility. In addition, it is often neglected that the work of the Venice Commission can best be described as four sprints per year. Opinions are adopted during one of the four plenary sessions and all the substantive work on opinions has to be done during those intervals. The availability of individual Commission members to work on the pending requests varies over time and depends *inter alia* on the exact dates of a planned delegation visit to the capital, the language skills needed, the specific expertise of the member concerned, whether that member has been previously involved in a similar request (in the same country), et cetera. It is not only incredibly difficult to formulate rigid criteria,[33] it would most likely undermine the efficiency and efficacy of the Commission. The recent Covid-19 pandemic also demonstrated the need for flexible working methods. The pandemic made it necessary for the Commission to function without the possibility of meeting in person at Plenary Sessions. For the March 2020 and the June 2020 sessions, a written procedure of discussion and adoption of opinions has been

[33] The Secretariat identified these general criteria in its Note on the criteria for the appointment of rapporteurs: www.venice.coe.int/webforms/documents/?pdf=CDL-WM(2018)001.

applied. All members as well as the representatives of the authorities have been given the possibility of explaining, challenging, commenting with a view to producing the text which was finally adopted. Thanks once again to the Commission's reactivity and flexibility, sixteen opinions and reports could be adopted despite the lockdown. This written procedure echoed the procedure for the preparation of urgent opinions,[34] which the Commission adopted in 2018 when faced with an increasing number of requests for opinions to be delivered outside plenary sessions.[35]

The stakes are high for the national authorities concerned calling for predictability. In our view, one could contemplate whether the interaction between the Commission and the State concerned could not be developed further (for example by expanding the possibility for state authorities to respond to a draft opinion). The question arises for example whether the written procedure used during Covid-19 could not be used in the future to replace the urgent procedure, with a view to guaranteeing fuller rights of representation to the requesting government.[36] There is a delicate balance to be found between the need for the Commission to react promptly and constructively to opinion requests and the need for the Commission to have a thorough and in-depth collective examination of the underlying issues prior to adopting its opinions.

The assessment of the "follow-up" given to an opinion should however remain outside the realm of the Commission. The political and financial consequences of non-compliance should be discussed in political fora, not in Venice. While the Commission may express its view on some technical aspects of the follow-up, the general assessment does not belong to it. The Commission's assessments are meant to contribute to the domestic discussions, not to replace them. Ownership of the constitutional and institutional design of a country is a fundamental feature of its accountability towards its citizens; states should not be given the pretext of blaming an external advisory body for possible mistakes or lack of success.

We congratulate the Venice Commission and the maturity it has achieved at the age of 30, but – thankfully – its core (or if you want its character) remains unaltered, even though its appearances have developed over time.

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[34] Venice Commission, CDL-AD(2018)019, Protocol for the preparation of urgent opinions.
[35] At the June 2020 Session, the Commission endorsed two urgent opinions (on Poland and the Republic of Moldova). In July and August 2020 alone, the Venice Commission received four requests for urgent opinions and accepted three (on Montenegro, Ukraine, the Republic of Moldova).
[36] When a government requests an urgent opinion, because of the limited time available it has to waive its right to present its observations on the opinion prior to its adoption. It is only invited to correct, within a very short deadline, possible inaccuracies and mistakes.

Khanlar Hajiyev[1]

Source of inspiration

In the early 90's, during the annual Conference of Judges organized by the Center for democracy (USA) with an active participation of judges of the European Court of Human Rights, all national and international judges were invited to the Supreme Court of the United States. Judge Sandra Day O'Connor gave us her brief opinion on three basic principles of democracy. From her perspective, they consist in the right to free elections, independent justice, and freedom of speech. Subsequently, these ideas had served as the basis for my article that was published in the scientific collection "Azerbaijan on the threshold of the XXI century". This story still remains in my memory, for it happened when Azerbaijan started cooperating with the Venice Commission and I was lucky enough to become the first representative of the country in the Commission. But I was even more delighted to see that the Commission gave a special place in its work to the right to free elections, which was also guaranteed by the right to freedom of expression and the independent judiciary. For a young democracy it is difficult to overestimate the importance of cooperation with the Venice Commission for which the ideals of democracy, human rights and rule of law play a crucial role in supporting their aspirations to build modern States that would be in a position to protect these values. In fact, the new democracies did not pass their way of formation alone but in friendly company, while all stages of significant reforms are associated with the name of the Venice Commission, which acted as a reliable consultant. It is no exaggeration that it was involved in the process of evolutionary development of legislation and constitutional justice in these countries, on the one hand, by performing qualified examinations and giving opinions on draft laws, on the other hand, through the participation of leading European lawyers in this work, as well as in conferences that were held in these countries. It seems that another important part of the Commission's work is to maintain a constant dialogue with representatives of various branches of government, which is necessary for moving towards a pan-European consensus and a common respect for the standards of democratic institutions. The advisory opinions given by the experts of the Venice Commission are characterized by their completeness, accuracy and clarity. They do not look excessively scientific and are designed

[1] Former Member of the Venice Commission in respect of Azerbaijan (1996-2003).

for a wide range of readers just like a court decision that should be intelligible for the public. In addition, the Commission's assistance consisted not just in a critical analysis of the projects under discussion, but in concrete proposals and changes aimed at improving the legislative regulation. The main method that we learned from the Commission is the integrative approach and the method of comparative legal analysis.

The States that had just been admitted to the Commission had a chance to feel the advantages of cooperation mentioned above. The Venice Commission delegation, which visited Baku for the first time in September 1996, after several meetings and discussions, recommended making important amendments to a new draft law on the Constitutional Court of the country. The draft law provided for a limited number of subjects who had the right to submit a request to the Constitutional Court for a constitutional review of legal norms and for an interpretation of existing laws. The corresponding article of the draft law was substantially the same as the text of the country's Constitution regulating the activities of the Constitutional Court. It could in reality create problems with the access to the Constitutional Court and given that it was also a constitutional norm the situation seemed to be deadlocked. The Commission's experts proposed to provide for a judicial procedure, i.e. the right of the courts to submit requests to the Supreme Court, which under the Constitution in force could apply to the Constitutional Court, if it is necessary to determine the constitutionality of a legal norm. Meanwhile, I would like to emphasize that although the implementation of this proposal had significantly facilitated access to the Constitutional Court, it became clear to me as the head of the first established constitutional justice body of the country that it was necessary to take more decisive steps allowing citizens to freely apply to the Constitutional Court. The opponents of expanding the powers of the Constitutional Court referred to the impossibility of amending the Constitution that required a referendum for this purpose. However, new times were coming that called for the adoption of modern approaches, and one of the commitments that Azerbaijan made by its admission to the Council of Europe was to establish an institution of constitutional complaint. Throughout the period preceding and after this historic event, the Venice Commission constantly supported the Constitutional Court of Azerbaijan and this is a great merit of the former Secretary of the Venice Commission Gianni Buquicchio. He kindly responded to all requests, owing to his assistance we were able to receive qualified advice, regularly conduct seminars in the country on a variety of modern legal topics, what had a positive impact on the level of justice. The

Constitutional Court was established within a short time in the summer of 1998, and in the autumn of that year we issued the first judgments, that were substantially aimed at constitutionalizing of national legislation. During the first years of visiting the country Gianni Buquicchio had always reiterated that in modern historical conditions the Constitutional Courts were a showcase of a State used to assess the real level of democracy in the country. The foregoing led to a fast recognition of the Constitutional Court's work and its admission to the Conference of European Constitutional Courts just a year and a half after its establishment.

The next important stage was the drafting of a new law on the Constitutional Court, which we worked on together with the Venice Commission. It provided for a completely new institution of individual complaint in cases of violation of fundamental human rights, thus opening new opportunities for the Constitutional Court and ideally allowing it to become an effective remedy on the way to the European Court of Human Rights. Subsequently, as an elected judge of the European Court of Human Rights I as well as other judges often had to study the position of the Venice Commission when considering the case. Some of us had knowledge of the Commission's activity due to their previous work and rated it as an outstanding school of democracy. The judges highly appreciated the Commission's conclusions distinguished by their depth and modernity.

In a brief essay, we have listed only some of the advantages of the Commission while taking into account a great amount of its merits consisting in the modern vision when considering specific issues, which is very important for the evolutionary approach to understanding of law. Dealing with the Venice Commission and its work, you always feel a kind of involvement in the creative approach to law, realizing in the end that the Commission's work — and this is its main merit — serves as inspiration, a factor that is so needed for a lively perception of reality, completeness and freshness of thought and creative energy.

James Hamilton[1]

Prosecution Services Thirty Years after the Fall of Communism

Introduction

In May 2019, The Venice Commission marked the thirtieth year since the fall of communism with a UniDem seminar at the University of Lund in Sweden in which it aimed to examine the state of democratic institutions in former communist states. This is a revised version of a paper I gave at the seminar. In it I discuss the role of the Venice Commission in evaluating prosecution systems and its role in setting standards for prosecutors in the context of international standard setting in the area. I refer to the variety of different organisational and legal systems which apply to criminal prosecution but argue that while it is important to understand and to respect these differences it is nevertheless possible to set meaningful and universal standards in the area of criminal prosecution. Finally I address a number of matters which I argue are problematic, some persisting since the communist era, as well as some which are more recently introduced, which are frequently encountered in the post-communist prosecution systems of eastern Europe as well as in other states which were formerly part of the Soviet Union.

The Venice Commission and the role of criminal prosecution

The role that properly functioning prosecution services can play in maintaining and protecting the proper operation of the rule of law has often been overlooked. Likewise, the damage to the rule of law that an improperly functioning prosecution service can do is not always appreciated.

The Venice Commission was established in 1990. Its principal role as described on its website is "to help states wishing to bring their legal and institutional structures into line with European standards". From a perusal of the very useful Compilation of Venice Commission opinions and reports concerning prosecutors compiled by the Commission's secretariat[2] it appears

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[1] Former Member (1998-2002) and Substitute Member (2002-2014) of the Venice Commission in respect of Ireland.

[2] Venice Commission, CDL-PI(2015)009, Compilation of Venice Commission Opinions and Reports concerning Prosecutors.

that the earliest references by the Venice Commission to prosecution services are contained in opinions on the Constitutions of Hungary and Ukraine in 1995 and 1996.[3] The first opinion concerning a law on prosecutors was not adopted by the Commission until 2004.[4] In part this slowness to examine what in all communist and many post-communist societies was a key legal and institutional structure may have reflected a slowness in the years after the fall of communism to carry out real reform in the large number of highly politicised prosecution offices which continued to operate much as before, but to some extent also it may also have reflected a Western European perception of criminal prosecution services as relatively low-key, generally uncontroversial and for the most part apolitical, and which for those reasons were not always seen as key democratic institutions.

On the international level attempts to set standards concerning prosecutors and to establish international bodies representing prosecutors were also slow to happen by comparison with the other major actors in the criminal justice system, the judges and the police. The United Nations adopted its Guidelines on the Role of Prosecutors in 1990 (the Havana Guidelines).[5] The International Association of Prosecutors, founded in 1995, adopted its Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors (the IAP Standards) in 1999.[6] On the regional level in 2000 the Council of Europe adopted Recommendation Rec(2000)19 on the role of public prosecution in the criminal justice system. In 2006 the Council of Europe established the Consultative Council of European Prosecutors (CCPE) which as of May 2020 has adopted 14 general opinions on issues of interest or concern to prosecutors. Last but not least the Venice Commission's Report on European Standards as regards the independence of the judicial system: Part II: The Prosecution Service is a key document setting standards for prosecutors and prosecution services and has proved influential.[7]

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[3] Venice Commission, CDL(1995)073rev, Opinion on the Regulatory concept of the Constitution of the Hungarian Republic and CDL-INF(1996)006, Opinion on the Draft Constitution of Ukraine.

[4] Venice Commission, CDL-AD(2004)038, Opinion on the Draft Law amending the Law of Ukraine on the Office of the Public Prosecutor.

[5] Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

[6] www.iap-association.org.

[7] Venice Commission, CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System (Referred to subsequently in this paper as the Venice Commission Report).

The relative slowness of prosecutors to establish international representative bodies and to set standards probably to some extent reflects the large variety of different models of prosecution service which exist in the world. Lawyers in common law jurisdictions such as my own often think of the legal world as being divided into two parts, the common law world and the civil law world. So far as criminal prosecution is concerned the main distinction between the two systems is that between the adversarial nature of the common law trial and the inquisitorial nature of the civil law procedure with consequential differences in the role of the judge and prosecutor. The former distinction between the common law system of private prosecution and the civil law system of the public prosecutor has been largely eroded as the common law world has accepted the concept of the public prosecutor and limited the scope for private prosecution.

In some respects, it is unhelpful to focus exclusively on the divide between the common law and the civil law. To do so risks ignoring the reality that there are wide differences between different civil law countries. So far as the common law is concerned there are also wide divergences, in particular between the United States system and the rest of the common law countries with many features of the American law which are quite different to the rest of the common law world. In particular, the American system of plea-bargaining is unique. The system of grand juries is alive and well although it disappeared in the rest of the common law world over one hundred years ago. The practice of jury challenges is very different from elsewhere. The institution of elected prosecutors is found elsewhere in the world only in civil law Switzerland. Rates of incarceration are matched only in some very autocratic regimes but not in most of the democratic world. Conversely, America, along with Ireland, Canada and South Africa has a system where constitutionalism has had a major impact on criminal procedure unlike in many other common law countries.

While certain major distinctions between prosecution systems tend to follow the common law/civil law divide not all of them do. The reality is much more complex. This complexity complicates the task of setting meaningful standards, though it does not make it impossible. Often standards have to make different provisions for different prosecutorial arrangements, as is particularly illustrated by the Council of Europe's Recommendation Rec(2000)19 where, for example, different provisions deal with jurisdictions where prosecution is subordinate to the government and those where it is independent.[8] I propose to illustrate this complex variety by setting out six

[8] Recommendation Rec(2000)19 of the Committee of Ministers to member States on the Role of Public Prosecution in the Criminal Justice System, paras.13-14.

major ways in which prosecution services can differ in addition to the well-known division between common and civil law.

Varieties of Prosecutorial Arrangements

Firstly, the scope of functions conferred on the prosecutor can vary considerably between one jurisdiction and another. As Recommendation Rec (2000)19 points out, "in all criminal justice systems, public prosecutors: – decide whether to initiate or continue prosecutions; – conduct prosecutions before the courts; – may appeal or conduct appeals concerning all or some court decisions."[9] This is, or should be, the heart of the prosecutor's function. However, in many systems prosecutors have functions other than that of criminal prosecution, and criminal prosecution may not even be the prosecutor's primary focus. This was particularly true of the *prokuratura* system, a system far older than communism and dating back to the reforms of Tsar Peter the Great.

In the Russian Empire the procurator was famously regarded as the eyes and ears of the Tsar and fuctions such as ensuring the general supervision of laws, including supervision over executive bodies, and the power to assert public rights, were developed within the Russian Empire[10] and were further strengthened during the Soviet period so that the prosecutor's powers were intertwined with those of the legislature, the executive and especially the judiciary, which was reduced to a much less powerful branch of the legal system than the procuracy. Although the more egregious examples of prosecutorial domination over the judiciary may in most former communist states have been largely dismantled or modified, substantial elements of the system of procuracy remain in many jurisdictions and the culture of judicial deference to the prosecutor has not disappeared everywhere. It can be easier to change legal provisions than to change an underlying culture and attitudes.[11]

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[9] *Ibidem*, para. 2.

[10] See A.V. Palamarchuk, R.R. Sechenova and V.P. Zimin *The Activities of the Russian Prosecution Service outside the Criminal Law Field (*Published by the Prosecutor General's Office of the Russian Federation*)* (Moscow, 2013), which points out (at pp.6 and 19) that the function of general supervision over legality was not part of the heritage of the socialist era but had been performed in Russia since the establishment of the prosecution service in Russia under the decree of Peter I in 1722 and argues that this indeed was the main function of the Russian prosecution service. The book contains a robust defence of the legitimacy of this function.

[11] The Venice Commission has consistently criticised the 'prokuratura' model. In its Opinion on the Draft Law of Ukraine on the Office of the Public Prosecutor (CDL-AD(2009)048, adopted by the Venice Commission at its 79th Plenary Session (Venice, 12-13 June 2009), the Venice Commission found that: "In the opinion of [the] Consultative Council of

Prosecutors who had functions outside those of criminal prosecution were not unique to Russia. For example, in England the Attorney-General was originally not merely a prosecutor, and not even a public prosecutor in the European continental sense at all, since he (and until very recently it always was a he) enjoyed no monopoly on prosecution in a system where private prosecution remained a real option.[12] The Attorney-General's primary function was to represent and act as legal adviser to the Crown and to the government in civil as well as in criminal matters. In more recent years common law countries have tended to limit if not to eliminate altogether the right of private prosecution and to establish Directors of Public Prosecution separate from the Attorney General's establishment to whom they have transferred the conduct of criminal prosecution.[13] In both the English[14] and the Irish system[15] the Attorney General had functions in relation to the enforcement of public rights and the protection of public interest as well as the protection of persons under a disability and these functions, although diminished in importance, have not altogether disappeared.

The second way in which prosecution services can differ is that they may be part of either the judicial or the executive branch of government, and in some states can be regarded as a "fourth power" separate from all of the three traditional branches of government, as was the case in countries within the Soviet system. Elements of the fourth power concept undoubtedly still persist in many former communist countries.

European Prosecutors the constitutional history and legal tradition of a given country may thus justify non penal functions of the prosecutor. This reasoning can, however, only be applied with respect to democratic legal traditions, which are in line with Council of Europe values. The only historical model existing in Ukraine is the Soviet (and czarist) model of 'prokuratura'. This model reflects a non-democratic past and is not compatible with European standards and Council of Europe values. This is the reason why Ukraine, when joining the Council of Europe, had to enter into the commitment to transform this institution into a body which is in accordance with Council of Europe standards. 17. […] The general protection of human rights is not an appropriate sphere of activity for the prosecutor's office. It should be better realised by an ombudsman than by the prosecutor's office." This opinion was repeated in para. 81 of the Venice Commission Report. See also para. 73 of the Venice Commission Report which is critical of general supervisory powers.

[12] As recently as 1964 the author of the leading textbook on the English law officers could write the following: "Little is heard nowadays of any organised movement to establish in England and Wales a national system of public prosecutors along the lines of the systems which have been operating for several hundreds of years in Scotland, France and the United States of America." Edwards *The Law Officers of the Crown* (London 1964) at p 9.

[13] Venice Commission, CDL-AD(2010)040, *op. cit.*, para. 27.

[14] Edwards op. cit. pp 286-308.

[15] For a description of the Attorney General's functions in Ireland see Casey *The Office of the Attorney General in Ireland* (Dublin 1980), and Casey *The Irish Law Officers (*Dublin 1996).

A third way in which prosecution services may differ is that they can be independent of the executive, or subject to varying degrees of executive direction or control. Arguably the distinction between services which are independent of government control and those which are not is a much more fundamental distinction than the divide between the common law and the civil law world. Where the prosecution is part of the judicial power it is generally speaking independent of government, but some residual powers may be reserved to the Ministry of Justice as in France. Where the prosecution is regarded as part of the executive power it may nevertheless be independent of the rest of the executive, as is the case in Ireland, Canada and Northern Ireland, in each of which the DPP is independent of Government control. In some countries, including Germany, Denmark, the Netherlands and Austria, the prosecution remains to some extent subject to the Minister of Justice.[16]

In practice many prosecution services are formally declared to be independent but in reality, are subservient to interests outside the prosecution service, whether political, commercial or economic, or criminal, or a combination of any or all of these. In such cases the principle of independence may serve to conceal the true position by presenting a legal obstacle to its examination. In testing whether a prosecution service is really independent, therefore, it is important to consider who appoints, dismisses, promotes and disciplines the prosecutors in order to ascertain the true position. In its opinions the Venice Commission has consistently applied this approach.[17]

Prosecutors who are not wholly independent of government may nevertheless combine a considerable functional independence with an element of general accountability to an Attorney General, as is the case in England and Wales, or an element of general accountability to parliament as is the case in many democratic states. In the United States the Attorney General possesses formidable powers as a cabinet officer, and as head of the justice department, which includes the federal prosecution and control over federal police and prisons. But the United States Attorney General is appointed by the President and holds office at his pleasure. The practice has grown up of using special prosecutors so as to preserve an element of prosecution independent of government

[16] Venice Commission, CDL-AD(2010)040, *op. cit.*, para. 26.
[17] Venice Commission, CDL-AD(2010)040, *op. cit.*, paras. 32, 34-37, 50 and 65.

control in cases where wrongdoing by members of the administration is alleged. In recent times, however, the use of special prosecutors has come under criticism and attack from the Trump administration and this has demonstrated the vulnerability of the practice of using special prosecutors.

There would appear to be an increasing recognition for the principle that even where prosecutors are subject to political direction this should be confined to directions of a general nature. Examples of such might include directions to give priority to particular types of case, to give more attention to the needs of victims, to protect vulnerable witnesses, or to avoid children being brought into the criminal justice system through the greater use of diversion programmes. It is clearly legitimate for either or both the executive or the legislature to play a role in determining matters of policy as distinct from making decisions in individual cases. Where the issue is whether a particular individual is to be charged with a particular offence that issue should be one for the prosecutor to determine autonomously and without being subject to political direction. This principle has been consistently advocated by the Venice Commission.[18] Examples of international standards which support this principle include the Havana Guidelines which prohibit "improper interference,"[19] the IAP Standards which require prosecutors to "strive to be, and to be seen to be, consistent, independent and impartial"[20] and which require prosecutorial discretion to be exercised independently and free from political interference, and where instructions are permitted require that they be transparent, lawful and subject to established guidelines[21]. Most states claim to support these principles although in many cases it is clear that the reality is different.

A fourth major distinction is between prosecution services organised along hierarchical lines or those where individual prosecutors are independent of one another. The latter is, of course, generally - at least in principle -

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[18] Venice Commission, CDL-AD(2010)040, *op. cit.*, para. 43 states as follows: "It is important to be clear about what aspects of the prosecutor's work do or do not require to be carried out independently. The crucial element seems to be that the decision whether to prosecute or not should be for the prosecution office alone and not for the executive or the legislature. However, the making of prosecution policy (for example giving priority to certain types of cases, time limits, closer cooperation with other agencies etc.) seems to be an issue where the Legislature and the Ministry of Justice or Government can properly have a decisive role."

[19] Havana Guideline on the Role of Prosecutors, Guideline 4.

[20] IAP Standards, para. 1.

[21] IAP Standards, para. 2.1 and 2.2.

the case in countries where prosecutors are considered to be part of the judiciary but where they are part of the executive either a hierarchical system or one characterised by a degree of individual independence may be found.

Fifthly, the way in which the rest of the criminal justice system functions can have a profound effect on how the prosecution service is organised. Whether the system is adversarial or inquisitorial is very important. So is the question whether the system applies the opportunity principle which allows prosecutors a discretion not to prosecute where the public interest does not require a prosecution or the legality principle where the prosecutor has no such discretion. While the opportunity principle is the norm in common law countries it also applies in a number of civil law countries including France and the Netherlands.

The greater the discretion which prosecutors have the greater is the need for guidelines concerning its exercise and the greater the scope for prosecutors to make corrupt decisions. The divide between opportunity and legality principle jurisdictions has become increasingly significant in countries where the legality principle formerly held sway, but which have now introduced elements of the discretionary principle into their system through the importation of American style plea-bargaining. There is a tendency in the standard-setting instruments to require a greater degree of independence for the prosecutor in respect of any discretionary element in the decision-making process.[22]

Another important aspect of the criminal justice system which has a major effect on the way prosecution services are organised is whether guilt or innocence is decided by judges sitting alone, by juries, or by judges with lay participation. While juries were a creation of the common law world their use in civil law systems has increased in recent years.[23] Where there is lay involvement there is a particular onus on prosecutors to act impartially. To ensure that all evidence, whether favourable to the accused or not, is made available takes on added importance, and the problem of how to avoid the verdict of lay people being contaminated by evidence which is of limited probative value is made more difficult. It is sometimes overlooked that the rationale for many of the more restrictive rules of evidence to be found in common law countries is to shield legally untrained jurors from prejudice which might result from admitting evidence which has a low probative

[22] Venice Commission, CDL-AD(2010)040, *op. cit.*, paras. 54-56: IAP Standards para. 2.1.
[23] Venice Commission, CDL-AD(2010)040, *op. cit.*, para. 9. Civil law systems where juries have been introduced in some cases include France, Italy and Georgia.

value but which in a non-jury system a judge who has to decide on guilt or innocence may be trusted to assess.

Sixthly, an important question which has an impact on the organisation of prosecution services is whether prosecutors control and direct the investigation or whether the investigators are independent of the prosecutors. A further option exists in some Nordic countries where there is a degree of integration between the prosecution service and the police.

Thirty years after the fall of communism

What has changed in the former communist world during the past thirty years? It is difficult to generalise. Sometimes new systems have been introduced but elements of the old culture may persist. Some countries have proved very resistant to attempts to alter old habits. In many countries it is hard for the outside observer to see much evidence of change. Systems developed to protect the dictatorship of the proletariat have been re-tooled to protect the rule of the oligarchs.

In many countries of the former communist region corruption within the judiciary and within the prosecutor's office remains a major and even an increasing problem. In two countries, Ukraine and Albania, the Venice Commission has taken the highly unusual step of adopting opinions approving, subject to various safeguards, a general vetting of the competence and probity of all judges (and also prosecutors in Albania), so high was the incidence of corruption believed to be.[24] In many countries of the post-communist world the Venice Commission has adopted opinions but its recommendations have not been followed. Some states in the region rarely seek the Commission's advice although requests for opinions may be submitted by the Parliamentary Assembly of the Counci of Europe as well as the state concerned.

Introducing alien elements into a legal system

Many countries have attempted radical changes, sometimes in the belief that the best answer to problems is to make fundamental changes to the system

[24] Venice Commission, CDL-AD(2015)007, Joint opinion by the Venice Commission and the Directorate of Human Rights of the Directorate General of Human Rights and the Rule of Law on the Law on the Judiciary and the Status of Judges and amendments to the Law on the High Council of Justice of Ukraine and CDL-AD(2016)009, Final Opinion on the revised draft constitutional amendments on the Judiciary (15 January 2016) of Albania.

itself, and sometimes, one might suspect, in a cynical attempt to disguise the fact that no real change is taking place at all. Faraway hills are green or, as an Irish proverb has it, the cows in foreign countries have long horns. However, it is very often the case that the root cause of a problem is not so much that a legal system itself is irredeemably flawed as that it is operated in a corrupt or in an incompetent manner. In such a case changing the system is unlikely to solve the problem and may make things worse.

Problems can often arise when features which evolved in one jurisdiction are imported into another without a proper appreciation of the inter-connectedness of the different aspects of every legal system and the knock-on effects a change made in isolation can have. An example is the widespread introduction of plea-bargaining in countries where the practice was formerly unknown. Often such changes are made without an appreciation of the safeguards which may be required in order to avoid possible abuse- for example, by creating pressure on an accused to plead guilty to an offence he did not commit in order to avoid a harsher sentence, or, on the other hand, to enable corrupt judges or prosecutors abuse the system to allow the guilty to go free in exchange for receiving a bribe. The possibility that importing this new procedure may alter the balance between the relative power and status of the judge and the prosecutor may not be properly taken into account. The necessary safeguards to protect against these risks might include internal controls within the prosecution system to minimise the risk of a corrupt decision and a greater willingness amongst the judiciary to ensure that both the rights of the victim of a crime and the accused's right to a proper defence are respected. In some cases where plea-bargaining has been introduced with a view to reducing delays the uptake in its use has been lower than expected, possibly because many practitioners are slow to adopt procedures which are alien to their original legal culture. This appears to have been particularly the experience in a number of former-Yugoslav jurisdictions.

Legal systems are in many ways comparable to an organic growth which matures and develops over time, changing gradually in response to changing circumstances. Sudden and drastic legal change can be like an organ transplant. The new organ will be rejected if it is not compatible with the existing organs within the system. When novelties are introduced it is necessary to examine carefully their impact on every other element of the system and make adjustments accordingly.

An example of this was a problem which I recently heard described at a seminar in Georgia. The criminal code provided for a pre-trial application to a judge to exclude inadmissible evidence. Following some amendments to the law relating to the introduction of jury trial it became possible that a trial

could be heard before a jury before a judge had given a ruling on such an issue, with the result that the jury would be allowed to hear evidence which might subsequently be deemed inadmissible. How can a lay jury be expected to dismiss from their minds inadmissible evidence that they have wrongfully been allowed to hear? They can be told to disregard it, of course, but how can anybody be sure that they will follow such an instruction? How can one be sure the wrongfully-admitted evidence has not affected their verdict? In a jury system admissibility issues may be determined before the trial or in the course of a *voir dire*[25] but in any event must be decided before the jury is due to hear the disputed evidence. This is a small but instructive example of the sort of problem that can occur where all the consequences of a reform are not carefully thought through.

A related problem can be caused by trying to change too many things at the same time leading to confusion and greater inefficiencies. Often changes are made with insufficient thought given to the need for training and information campaigns.

For all these reasons I believe strongly that reform should start from the system a country has and focus on the elements in that system which impede its proper functioning rather than attempting to introduce completely new systems and change everything all at once. Such wholesale changes rarely turn out to be the panacea they are meant to be and often end badly.

Some specific problems

I propose to address a small number of specific problems which I believe are still widespread in the prosecution systems of many former communist countries. These are: the question of the individual independence of prosecutors within a hierarchical model, the political control of prosecutors, the nature of prosecutorial accountability, the role of prosecutorial councils, and the problem of how to evaluate prosecutors for purposes of promotion and salary. My comments are based primarily on my own experience involving numerous missions in different jurisdictions including Serbia, Bosnia-Herzegovina, Kosovo, Albania, North Macedonia, Montenegro, Bulgaria, Romania, Moldova, Georgia and Ukraine, but are supported by various surveys which have been undertaken and by the experience of others.

[25] A common law procedure whereby, during the course of a trial, evidence is heard in the absence of a jury to enable the judge to decide on its admissibility. If deemed admissible it is then given again in the presence of the jury.

The individual independence of prosecutors within a hierarchical system.

The basic principle which should be respected is that prosecutorial independence, like judicial independence, is not intended as a benefit for the prosecutor or judge, but aims to enable the prosecutor or judge to make decisions impartially, fairly and with integrity no matter who the decision offends and no matter whose interests are damaged by it.

Judges necessarily have both external and internal independence. The judiciary is independent from other bodies and institutions and at the same time each individual judge is independent of all other persons or bodies, even fellow judges.[26] Prosecutorial independence, where it exists, may follow the model which applies to judges characterised both by external and internal independence in cases where the prosecutors are considered as part of the judicial branch. In such cases the prosecution office is independent of the executive and each individual prosecutor is independent of every other prosecutor.

A different model is that of a service which is in principle independent from executive control but where individual prosecutors are subject to internal hierarchical control. Such a model is legitimate provided there is a clear definition of the scope of that control and of what matters may properly be the subject of an instruction or an over-riding decision made by the hierarchical superior, and provided that there is appropriate transparency in decision-making.[27] Not to provide such clear definitions and the necessary transparency creates a means whereby the source of decision-making may be concealed and thereby presents a corruption risk.

The reality in many post-communist prosecution systems is that the prosecutor, while nominally independent, is in fact subject to political or oligarchic influence and control primarily through the abuse of the system of appointments, promotions, transfers and dismissals, and of systems of assessment and reward, combined in some cases with threats. Typically, in such systems the supposed independence serves the purpose of avoiding accountability and shielding both the prosecution and the real power which controls it from any enquiry concerning the prosecutor's actions. Similarly, independence without accountability may serve to protect corrupt decision-making.[28]

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[26] *The Bangalore Principles of Judicial Conduct* 2002, para. 1.4.

[27] Venice Commission, CDL-AD(2010)040, *op. cit.*, paras. 53-57.

[28] An example of such a system is discussed in Part 2 of the *Report of the Senior Experts' Group on systemic Rule of Law issues relating to the communications interception revealed in Spring 2015 in the former Yugoslav Republic of Macedonia* (generally referred to as the Priebe Report) of which the writer of this paper was one of the authors (available at https://ec.europa.eu/

A related consideration is that frequently express instructions may be quite unnecessary. The prosecutor who is appointed through a politically-influenced system will know quite well what is expected of him or her in order to retain the favour and support of the political class, and this knowledge and the resulting self-censorship is likely to percolate down through all levels of the organisation.

Where a prosecution service is subject to internal hierarchical control certain safeguards may be necessary in order to impose limits on its exercise. These include rules such as that instructions by a superior prosecutor must be in writing, must be placed on the file, that general instructions only are permitted, that a prosecutor given an instruction which he or she believes is illegal or contrary to his or her conscience may seek to be taken off the case, that negative instructions (i.e. instructions not to prosecute) are prohibited, and that regardless of any instructions the prosecutor must be free to present all relevant arguments to the court. Finally, there may be provision for an appeal against a superior's instruction to a more senior prosecutor or to a court of law. The Venice Commission has expressed the view that the existing safeguards in Recommendation Rec(2000)19 are inadequate in providing merely for the prosecutor's right to be taken off the case without requiring a decision whether an instruction is illegal to be determined by a court of law or an independent body such as a Prosecutorial Council.[29]

In this regard many of the findings of a recent report[30] concerning the Ukrainian prosecution service are both instructive and disturbing. The Report describes a situation where prosecutors exercising procedural control over investigation are subject to an undocumented hierarchical control in virtually every case. Many of those who support the legitimacy in principle of hierarchically-controlled prosecution services, including this writer, do so not least because such a system can ensure consistency of approach and the avoidance of injustice. But in order to achieve this result it should not be necessary that the vast majority of prosecutorial decisions should be overruled by senior prosecutors. Where the proposed decision of a junior prosecutor is overturned it should only be because the decision is wrong in law or unsustainable on the facts. The decision of the superior prosecutor should therefore always be justified and given in writing in order to ensure transparency

neighbourhood-enlargement/sites/near/files/news_corner/news/news-files/20150619_recommendations_of_the_senior_experts_group.pdf).

[29] Venice Commission, CDL-AD(2010)040, *op. cit.*, para. 59.

[30] *Study Report on The Role of the Public Prosecutor at the Pre-Trial Stage of Criminal Proceedings:* Renaissance International Foundation Kyiv 2017, ISBN 978-966-2717-28-3.

and accountability. In a system where every decision is in reality made by a junior prosecutor only following an undocumented instruction from his senior leads one is led to ask- what are junior prosecutors for? It is difficult to avoid the conclusion that where such practices exist their only possible purpose is to avoid disclosure of who is really taking the decisions as well as to create a system which is opaque, impenetrable and unaccountable. Such a system is also susceptible to large-scale corruption. It is also inefficient and wasteful and leads ultimately to a paralysis of decision-making at the subordinate level.

Based on many discussions I have had with prosecutors in post-communist countries over the years I do not believe the situation described in this report concerning Ukraine to be unique- indeed, I believe it may well represent the norm in many post-communist prosecution services rather than being exceptional. The time may have come to consider whether the existing international standards are not over-favourable towards hierarchical models and may need some re-balancing towards favouring the individual independence of prosecutors.

These conclusions are supported by the report of a recent research project carried out by Professor Nikolai Kovalev on behalf of OSCE/ODIHR[31] in six states, Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine concerning the functional independence of prosecutors. Based on surveys carried out among prosecutors he concluded that many of the guarantees for the independence of prosecutors are not implemented or are neglected in practice, that consultation on key procedural decisions with senior prosecutors is common and their informal "approval" seen as necessary, that the issuing of verbal instructions is common, that the heads of the prosecution service maintain a strong influence, and that junior prosecutors depend on the head of the service for their career development, salaries and rewards, performance evaluation and sanctioning, even when self-governing bodies are meant to control these functions. In practice this creates an hierarchical system which is vulnerable to external influence. The factors which Professor Kovalev found explained this influence of senior prosecutors included an hierarchical tradition of informal consultations and instructions, performance evaluations based on clearance and conviction rates without a meaningful qualitative component, lack of experience and training among junior prosecutors, salaries based on non-transparent decision-making by senior prosecutors, lack of independence

[31] *Needs Assessment Report Strengthening functional independence of prosecutors in Eastern European participating States*, published on the OSCE/ODIHR website.

of self-governing bodies, and a general lack of transparent and merit-based decisions concerning personnel matters. The study, however, found that not all these factors were equally present in all the states covered by the study.[32]

Political direction in individual cases

The principal international instruments envisage that prosecutorial systems may in certain circumstances be subject to political direction, even in individual cases, although they tend to favour the limitation of such control and the circumstances in which such directions may be permissible is not very clearly defined. The principal legal instruments are instructive. The Havana Guidelines prohibit "improper influence" which is not, however, defined.[33] The IAP Standards try to limit the giving of instructions and, on the whole, this is the instrument most favourable to prosecutorial independence. Where the prosecutor has a discretion whether to prosecute it should be "exercised independently and be free from political interference".[34] Where there is a right to give either general or specific instructions, or to direct the institution or stopping of proceedings these should be transparent, consistent with lawful authority and "subject to established guidelines to safeguard the actuality and the perception of prosecutorial independence".[35] It would be interesting to know how many states have established any such guidelines.

Perhaps surprisingly Recommendation Rec(2000)19 is on the face of it the instrument which seems most open to the possibility of political direction. Paradoxically this may be because European law-based states which limit prosecutorial independence do so relatively openly, whereas in many other states which proclaim that prosecutors are independent the reality is quite different.

The safeguards against the abuse of political direction contained in paragraph 13 of Rec(2000)19 require that when prosecution is part of or subordinate to the government this has to be established by law, that the exercise of the power to give instructions has to be transparent, that instructions have to be in writing, that the prosecutor has to be consulted in advance about specific instructions, that specific instructions rejecting his advice have to be explained and form part of the file, and that the prosecutor remains free to choose the legal arguments to put to the court. Finally,

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[32] *Ibidem*, paras. 19-27.
[33] Havana Guideline No. 4.
[34] IAP Standards, para. 2.1.
[35] *Ibidem*, para. 2.2.

instructions not to prosecute a specific case are in principle prohibited, although in the opinion of this writer the precise scope of this provision could be more clearly stated than it is. However, the net effect of these provisions do add up to a severe limitation of the right of a government to give specific instructions. Despite first appearances, therefore, by defining the qualifications subject to which an instruction may be given, if its provisions are respected this instrument goes a long way to make specific instructions difficult for any government to give.

Section 36 of Opinion No. 13(2018) of the CCPE on Independence, accountability and ethics of prosecutors has reiterated this position in the following terms- "Instructions by the executive concerning specific cases are generally undesirable. In this context, instructions not to prosecute must be prohibited and instructions to prosecute must be strictly regulated in accordance with Recommendation Rec(2000)19."

The Venice Commission has taken a clear line against the legitimacy of political direction in individual cases. The Venice Commission Report refers in paragraph 30 to the "impermissibility of the executive to give instructions in individual cases to the Prosecutor General (and of course directly to any other prosecutor)."

The nature of prosecutorial accountability

A major problem in many post-communist countries is the absence of any real accountability of the prosecution service other than, in some cases, to political or other forces to which the prosecutor is not supposed to be answerable at all.

It is appropriate, indeed necessary, that General Prosecutors should be required to account for the general activity of the prosecution service, especially where the service is subject to general instructions and guidelines concerning prosecution policy set by the legislature, the Ministry of Justice or the Government. However, as already discussed no form of interference by these powers should be allowed in individual cases except in the very limited circumstances and subject to the safeguards envisaged in the international instruments concerning prosecutors. Decisions regarding specific criminal prosecutions should be left to the Prosecution Service itself and subject to appropriate transparency. If instructions are allowed in individual cases the risks are very high that a politically influenced, a media-driven or a populist approach will determine the prosecutor's decision-making.

The prosecutor's principal accountability for the conduct of particular criminal cases should be to the court of law which has seisin of the case. It

is particularly important that there be accountability to the Courts in cases where there is a challenge to the legality of an instruction given by a senior prosecutor as otherwise the principle of the independence of the prosecutor could be abused to hide improper interference coming from within the prosecution service itself.[36] Unfortunately the weakness of the judiciary's position relative to that of the prosecutor in many post-communist countries means that frequently accountability to the courts is very weak if not totally absent.

Other important forms of accountability should include the requirement to provide appropriate and relevant information concerning decisions in individual cases to interested parties including suspects and accused persons, crime victims and investigators, as well as the provision of statistical and other information to the general public through the use of a website, through the publication of an annual report, and through the publication of documents such as reports and guidelines, general instructions, information about legal procedures, the outcomes of concluded cases and the use of social media. However, in many post-communist countries many of these forms of accountability to interested parties as well as to the public as a whole are simply not there. Typically, the prosecution service can be excessively secretive and it can often be difficult to obtain even the most basic statistical information about its activities.

The career evaluation of prosecutors

There is still a tendency in many eastern European countries for the career evaluation of prosecutors to focus on quantitative measurements- numbers of cases dealt with, number of actions taken, and so forth, rather than emphasising issues relating to the quality of work which is of course much more difficult to evaluate. As referred to above this was an aspect of the management of prosecution offices in former communist countries criticised in Professor Kovalev's OSCE/ODIHR Needs Assessment Report.[37]

In some cases, the measurements used for evaluation are simply inappropriate. For example, it is common, indeed virtually universal, to count the number of cases which result in a conviction despite the fact that it is the prosecutor's fundamental duty, not to secure a conviction, but to obtain a just result. As Guideline 14 of the Havana Guidelines states

[36] Venice Commission, CDL-AD(2010)040, *op. cit.*, para. 59.
[37] See footnotes 31 and 32 above.

"Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded." Guideline 16 states "When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice."

Unfortunately, evaluation based on conviction rates can involve giving the prosecutor a direct and personal incentive to behave unethically. A prosecutor is rewarded for obtaining a conviction, even one involving a miscarriage of justice. Conversely the prosecutor is penalised for dropping a case which is unsustainable. What is, however, reasonable to evaluate when a case is lost is whether a prosecution should have been brought in the first place, or whether the case was lost due to any negligence or failing on the prosecutor's part either in initiating the prosecution, in persisting with it, or in the manner in which the prosecution was handled. But such questions require qualitative evaluation which needs both time and expertise to do properly.

The primary focus of a good evaluation system should be on ensuring an effective system of day-to-day line management in which evaluation aimed at improving performance would play a central part. Self-evaluation should form part of this process as should regular internal peer review by more experienced colleagues. The principal object should be to provide needs assessment concerning training, continuing education and professional development.

Unfortunately, it is the case that systems of performance evaluation can be easily abused. According to the Renaissance Report[38] cancellation of prosecutors' bonuses, which make up a large part of their earnings, is widespread at all levels of public prosecutors' offices in Ukraine and is used as a system of "informal punishment" for prosecutors whose cases end in acquittal.[39] "The existing practice of negative consequences for public prosecutors for acquittals and other lawful actions alleviating the situation for the suspect (release without a notice of suspicion, initiating a less severe

[38] At p. 84. See footnote 30 above.
[39] *Ibidem*, p. 248.

restraint measure) is one of the reasons behind violations of the principle of objectivity and impartiality in criminal proceedings and *de facto* denials to collect exculpatory evidence."[40] The recently dismissed Prosecutor General of Ukraine had established a working group to develop a new evaluation system for public prosecutors based not only on quantitative but also qualitative data. It is not clear whether anything will now come of this initiative.

Prosecutorial Councils

The establishment of Prosecutorial Councils has become quite common in many former communist countries, particularly in the Balkans. Recently Ukraine established an elaborate system of prosecutorial self-government. As well as a Conference and a Council of Public Prosecutors the system involves significant input into the appointment and promotion of prosecutors and their disciplining through the Qualifications and Disciplinary Commission of Public Prosecutors. The new system encountered some delays in its establishment but was finally brought into operation in 2018. However, in September 2019 this new system was suspended and a general vetting of prosecutors overseen by a group of senior prosecutors appointed by the then General Prosecutor was commenced. In February 2020, however, the General Prosecutor was replaced by the President of Ukraine. The eventual outcome of Ukraine's attempts to reform its prosecution service therefore remains uncertain.

Prosecutorial councils have often been established as a mirror image of judicial councils. This, of course, is a workable solution where prosecutors are part of the judiciary each with his or her own individual independence. One of the values of a judicial council is to provide a forum for decisions where a judiciary may need to take a collective decision. Generally speaking a judiciary does not have a management structure other than of a very rudimentary nature to deal with issues such as case allocation and a judicial council can provide a forum to deal with such matters as the defence of the judiciary against outside attack or issues relating to discipline, judicial ethics, training, the working conditions of judges, or to provide a judicial input into decision-making over judicial appointments and promotions.

Prosecutorial systems, by contrast, generally start with a much more developed management system. Most prosecutorial systems are to a greater

[40] *Ibidem*, p. 85.

or lesser extent hierarchical in nature. Copying and pasting provisions which are appropriate for judicial councils when applied to the different needs of prosecutorial councils can therefore risk creating a duplication of function between the existing hierarchical management structure and the Council. A striking example of this is in Kosovo where a number of functions have been conferred on both the Prosecutor General and the Prosecutorial Council.[41] This creates a risk of a conflict between the two institutions or, on the other hand, a risk that each will expect the other to act and nothing will get done while a game of "pass the parcel" takes place.

Another problem with prosecutorial councils is the risk that inappropriate functions will be conferred on them. This can be a particular problem in small jurisdictions. Again, to take the example of Kosovo, in 2017 there were 178 prosecutors in that jurisdiction of whom 10 were members of the Council. The Council has been conferred with a great number of managerial functions. It has the responsibility to recruit, promote, transfer, reappoint and discipline prosecutors. What are the chances in such a small jurisdiction that each of the members of the Council knows almost all of the other prosecutors? How can the members of the Council act impartially and objectively? What conflict of interest rules should apply? Is there not a danger that such a system will tend to end in favouritism, nepotism and cronyism?[42] The conferring of powers which have huge consequences for the lives of individuals on an elected council has created opportunities for corruption in other Balkan states, and there have been examples of Judicial and Prosecutorial Councils which have become instruments for a small group to exercise control.[43] While a similar problem may not yet have arisen in Kosovo there is a need to guard against future risks of corruption by ensuring a degree of transparency in decision-making on the Council. This problem could be avoided to a considerable extent if as a general practice prosecutorial councils were to be confined to the high-level tasks of setting the rules and procedures for recruitment, evaluation, promotion, and discipline and acting as overall guarantor of the fairness of the procedures rather than attempting to carry out the actual selections and decisions themselves.

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[41] James Hamilton *Corruption Risk Assessment of the Prosecution System in Kosovo,* Strasbourg, May 2017, paras.167-173. See https://rm.coe.int/peckii-4561-tp13-cra-prosecution/16808ade77.
[42] *Ibidem*, para. 129-131.
[43] his was notoriously the case in North Macedonia (then the FYROM). See the Priebe Report, footnote 28 above.

Conclusion

What has changed in the past thirty years in the prosecution services in the post-communist world? Perhaps not as much as might have been expected in the heady days after the fall of the Berlin Wall. Some countries have proved very resistant to attempts to alter the old Soviet model and, in some countries, it is hard to see much evidence of reform. Corruption within the judiciary and the prosecutor's office remains a major problem. In two countries, Ukraine and Albania, the Venice Commission has taken the highly unusual step of adopting opinions approving a general vetting of the competence and probity of all prosecutors, so high was the incidence of corruption believed to be. The reforms in both countries have been and remain problematical.

Many counties have adopted radical changes in their system in the belief that the answer to all problems is to make fundamental changes to the system. But it is very often the case that what is wrong is not the system itself but that a corrupt elite operates it for their own benefit. In such a case changing the system may amount to little more than a cosmetic change and end by making things worse rather than better.

There are many specific problems which are still widespread in the former communist space and which need to be addressed. This paper has emphasised the particular problems of the individual independence of prosecutors within a hierarchical model, the problem of political control over the prosecution, the nature of prosecutorial accountability, the role of prosecutorial councils, and the problem of career evaluation of prosecutors, but many other problems remain and the pace of reform has at best been uneven.

Gagik Harutynyan[1]

The world architecture of guaranteeing the Rule of Law

The 1990s were tempestuous years for not only for the communist countries but for all of the humanity alike. History is evidencing that the collapse of empires and devastation of value systems causes the suffering of millions of people. How to overcome it? How to find the key of living in true values and have minimal losses while getting on the path to smooth development and prosperity?

While accomplishing this mission, an exceptional role was given to the European Commission for Democracy through Law (The Venice Commission) of the Council of Europe. Since the day of its formation, the Venice Commission served as a beacon for dozens of countries on their way for the establishment of Rule of Law, as well as democracy, spreading and developing legal and constitutional European culture.

The idea of creating such a commission was one of the best achievements of the modern world. The Commission is a unique concentration of legal thought, which allows us to compile global expertise, to nurture enduring pan-European values of perception of law and to set the God pleasing standard of civil coexistence for millions of people.

By representing a select of legal thought from all continents, being staffed with renowned independent experts, as well as by consistently harmonizing legal practice of various countries with international progressive standards, the Commission acts like the United Nations in the field of law.

The Venice Commission regularly performs legal and constitutional monitoring of legal and institutional-structural developments of different countries through continuous and consistent elaboration of opinions, which is an important guarantee of sustainable development through democracy.

The fact that during the three decades of its activity the Venice Commission has adopted more than 3850 reports speaks for itself. Among these reports 1695 (39,7%) refer to five countries: Ukraine (512 reports), Moldova (271 reports), Bosnia and Herzegovina (247 reports), Armenia (354 reports), and Georgia (311 reports). The reports on the former Soviet Union countries compose 50.8%

[1] Member of the Venice Commission in respect of Armenia.

of total reports adopted by the Commission, 35.5% are on Eastern European countries and 3,8% are on the Western European countries. Reports on other countries and international organizations compose 9,9% of total reports.

We would like to represent another quantitative indicator of the activity of the Venice Commission. During the past 30 years the Commission has organized more than 2,380 international conferences, seminars and thematic discussions. In addition, while there were only 54 such events during 1991-2000, in 2001-2010 there were 926 and in 2011-2019 the number of events grew up to 1,400. During the last decade nearly 155 thematic discussions on the most urgent legal issues have been organized by the Venice Commission, where the number of participants exceeded 19,000. The number of participants of the forums which have been held in the last three decades is nearly 600,000. During the past 5 years every month the Venice Commission holds on average 14 events, including conferences, seminars and workshops. Such consistent and intensive work is an exclusive occurrence in the international practice. This in its turn results in the continuous development of legal thought and strong institutions, guarantees for sustainable development of young democracies, as well as establishes preconditions for the efficient activities of international organizations. In this regard, a unique example is the partnership of the Parliamentary Assembly of the Council of Europe and the Venice Commission.

Having cooperated with the Commission since 1996, I have realized that the development of pan-European and international legal thinking and law enforcement practice would have not reached their current level without such a structure.

If we try to highlight some qualitative characteristics of the Commission, the primary ones are as follows:

- unprecedentedly high level of professionalism
- devoted and cooperative working culture
- exceptional professional consistency and adherence to principles
- systemic and innovative approach to solving problems
- openness to partnership
- independent and impartial workstyle
- optimal organizational and structural solutions for effective work

The Venice Commission has assumed a leadership role in various legal fields and fulfils its duties with honour. Establishment of democracy, constitutional developments, constitutional justice, election processes, human rights and Rule of Law, guaranteeing independent judicial power, strengthening of institutional bases of human rights protection - these are the fields where the Venice Commission is known for and praised as the world flag holder.

I have to specifically appraise the initiative role of the Venice Commission in the creation of a global structure for the constitutional courts and equivalent bodies - the World Conference on Constitutional Justice, with membership of 117 countries at present. With my participation in the activities of the Conference since 2009 and especially being the president of the bureau of this renowned international body between 2014 and 2015, I have gained professional and aesthetic pleasure, especially from communicating with the exceptional environment and the creative spirit of the Congresses of this unique body of the 21st century.

This institution is a worldwide family of professionals where peace, mutual understanding and devotion to the Rule of Law are dominating. The engine and spirit of this body is the Venice Commission due to everyday consistent work of its tireless president Gianni Buquicchio and of the Secretariat, which includes adept and highly professional people with exceptional human virtues.

The Venice Commission favorably stands apart with its harmonic change of generations, where the high professional level is maintained by synchronized work of skilled and junior members. I am convinced that the history of the Commission will cherish the names of its first president Antonio La Pergola, as well as members François Luchaire, Giorgio Malinverni, Hanna Suchocka, Kaarlo Tuori, Sergio Bartole, Peter Paczolay, Herdis Thorgeirsdóttir, Jan Helgesen, Angelika Nussberger, Christoph Grabenwarter, Serhiy Holovatiy, Aivars Endzins, Veronika Bilkova and other honourable members who have made a great contribution to developing and spreading European legal heritage.

I highly value the continuous support of the Venice Commission to the regional bodies of constitutional justice due to which they have become important structures of partnership and experience exchange.

In my concluding retrospective view towards the past way, I would like to emphasize the fact that the Venice Commission exceeded everyone's expectations while accomplishing the mission of establishing democracy through law. Not only in Europe but also in Asia, Americas and Africa, many countries, with the Commission's support, within a few years, made a decades' worth of progress in laying the foundations for being states with Rule of Law, establishing constitutionalism, guaranteeing the Rule of Law, development of democracy and strong institutions as well as overcoming legal crises.

I am sure that the Venice Commission will continue to honorably carry out its mission of being the worldwide torchbearer in the field of law, highly contributing to the sustainable and harmonized development of various countries and nations.

Johan Hirschfeldt[1]

Two constitutional principles, objectivity and impartiality, under the protection of the Ombudsman – a Swedish example

1. The Venice principles on the protection and promotion of the Ombudsman institution

One of the institutions of great importance for the positive development of democracy through law is the Ombudman institution. In several opinions, the Commission has dealt with draft laws on installing or improving the concept of the Ombudsman under different jurisdictions.[2] The Venice Commission has thereby and in its recently adopted *Principles on the protection and promotion of the Ombudsman institution* ("The Venice principles") emphasized that the Ombudsman is an important element in a state based om democracy, the Rule of Law, the respect for human rights and fundamental freedoms and good governance.[3]

In view of the necessity for the executive to follow principles of good administration, it may, according to one of the opinions of the Commission, be useful to empower the Ombudsman to intervene not only when there are irregularities, i.e. violations of legal norms, but also when principles of good administration have been disregarded (e.g. humiliating behavior in relation to individuals, ostentatiously slow processing of affairs) and thereby control the objectivity and impartiality of the work of administrative bodies. Only general, "political" decisions of the Government as a whole should be excluded from the scope of the competence of the ombudsperson; ministerial and governmental decisions directly affecting individuals should be open to control by the Ombudsman.[4]

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[1] Substitute Member of the Venice Commission in respect of Sweden.
[2] See Venice Commission, CDL(2011)079, Compilation of the Ombudsman Institution, for an overview.
[3] Venice Commission, CDL-AD(2019)005, Principles on the protection and promotion of the Ombudsman Institution (The Venice Principles).
[4] Venice Commission, CDL-AD(2004)041, Joint opinion on the Draft Law on the Ombudsman of Serbia.

This element is now emphasized in The Venice principles as an important part of the role of the Ombudsman as protector of the citizens against maladministration and to promote good governance within the society.

According to Article 2 of the Principles, the Ombudsman institution, including its mandate, shall be based on a firm legal foundation, preferably at constitutional level.

So in line with the Principles, the Ombudsman preferably should have competence, based in the Constitution, to act in cases of maladministration concerning local and central government even at the highest level of the civil service. Here the Ombudsman has the role not only to protect legality but also to promote such values and principles as objectivity, transparency, fairness and impartiality.

When the Ombudsman, in a decision, not only evaluates and assesses detailed facts but also argues with clear reference to such values and principles, these get substance. The notions thereby can became better understood by the general public. They will no longer simply be vague principles or abstract visions but something concrete in real life to protect and promote within society.

2. The Swedish Parliamentary Ombudsman

The Swedish Parliamentary Ombudsman (*Riksdagens ombudsman*, JO) was founded already in 1809 as an important element of a general constitutional reform. The institution, its mandate and competencies are now based in the current Swedish Constitution (Chap. 13. in the Instrument of Government, Regeringsformen). This chapter deals with different elements of constitutional control such as the examinations of the performance of the ministers by the Constitutional Committee of Parliament, the National Audit Office and the Ombudsman. Article 6 on the Ombudsman reads as follows:

The *Riksdag* (Parliament) elects one or more Parliamentary Ombudsmen who shall supervise the application of laws and other regulations in public activities, under terms of reference drawn up by the *Riksdag*. An Ombudsman may institute legal proceedings in the cases indicated in these terms of reference.

Courts of law, administrative authorities and State and local employees shall provide an Ombudsman with such information and opinions as he or she may request. Other persons coming under the supervision of the Ombudsman have a similar obligation. An Ombudsman has the right to

access the records and other documents of courts of law and administrative authorities. A public prosecutor shall assist an Ombudsman if so requested. More detailed provisions concerning the Ombudsmen are laid down in the Riksdag Act and elsewhere in law.

Furthermore specific provisions on the Parliamentary Ombudsman are to be found in an ordinary law, *(Lag med instruktion för riksdagens ombudsmän*, SFS 1986:765). Article 3 prescribe the supervisory tasks of the Ombudsman, *inter alia* that the Ombudsman in particular, shall ensure that the administrative authorities in their activities observe a certain provision on objectivity and impartiality in the Constitution.[5]

3. The constitutional provision on objectivity and impartiality (the principle of objectivity)

At a very high level of the Swedish Constitution of 1974, already in the first chapter with its heading "On basic principles of the form of government", one of the articles (Chapter 1, Article 9) reads:

Courts of law, administrative authorities and others performing public administration functions shall pay regard in their work to the equality of all before the law and shall observe objectivity and impartiality.

This provision was inserted in the Constitution following a direct proposal by the Parliamentary Ombudsman. The arguments for the proposal were the following:

You are faced with something that is of fundamental importance to inculcate with the authorities and their executives, namely the demand for objectivity, impartiality and equal treatment of citizens which is a characteristic feature of the public enterprise and which sets a mark on it in comparison with private activities. Performing our tasks, we have often experienced the need to be able to refer to a statute in the Constitution that gives a clear message about the objectivity requirement.

The notions objectivity (saklighet in Swedish; Sachlichkeit in German) and impartiality are in Swedish vocabulary often presented together as the principle of objectivity. I will shortly introduce some aspects of this concept.[6]

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[5] For a general presentation on the Parliamentary Ombudsman of Sweden, see www.jo.se/en/About-JO/.

[6] See Anders Eka, Johan Hirschfeldt, Henrik Jermsten, Kristina Svahn Starrsjö, *Regeringsformen – med kommentarer*, 2 ed. 2018, Thomas Bull och Fredrik Sterzel*, Regeringsformen – en kommentar,* 4 ed., 2019 and Lotta Lerwall, JO och 1 kap. 9 para. regeringsformen i *JO - Lagarnas väktare*, 2009.

In summary, the principle implies that decisions by authorities must be based solely on considerations that may be taken into account in accordance with current regulations. Decision-making bodies must therefore not be guided by interests other than those they are supposed to meet, and they must adhere to the matter or, in other words, not take into account undue circumstances. Pure arbitrariness is prohibited, and the results achieved must be supported by considerations based on objectivity and impartiality. It has further been said that the principle of objectivity adheres to the principle of legality in situations when there is a scope for alternative choices or discretion in the judicial or administrative proceedings and decision-making. The requirement of objectivity can be said to constitute a safety net that will protect against abuse of power that the principle of legality cannot capture.

While the requirement of objectivity can be said to apply to decision-making as such, the requirement of impartiality is mainly about the decision-making procedures and how it is perceived. The principle of objectivity has been considered to be applicable in the event of errors and deficiencies such as factual errors, considerations of political opinions, unfair use of force and other irrelevant considerations, deficiencies in case handling, deficiencies in conduct and statements. The provision does not only cover how a case has actually been dealt with and what real reasons are behind a decision or other acts of an authority. How the authority's actions are perceived by the person concerned and by the general public is also of importance.

Failure to lawfully comply with the requirements of the principle of objectivity in the exercise of public authority can in extreme cases result in liability for malpractice under the Criminal Code or liability for damages for the State or Local government under the Compensation Act.

Compliance with the principle of objectivity is a cornerstone of confidence in the democratic chain from citizens to Parliament, government in Cabinet and central and local government in office back to citizens. This becomes particularly important when the official role and ideals of the civil servant are put under pressure in favor of other ideals such as flexibility, efficiency and political control.

4. The Ombudsman (JO) and the principle of objectivity

I have no intention to here give a comprehensive presentation of the Swedish Parliamentary Ombudsman (in the following I use the common shortening JO). Instead I will just present a few cases illustrating how JO uses the actual constitutional principles when dealing with complaints against or

inspections of governmental authorities and their officials. In JO´s decisions, the arguments are of course usually and primarily based on how specific provisions in ordinary legislation are applied by the authorities in their handling of cases. But in some cases where there are no direct provisions in the relevant legislation or where there is room for a certain discretion and JO finds it important to stress the constitutional aspect of his or her criticism, a reference to the Constitution and its principle on objectivity are made. It should be mentioned that JO does not, as some other Ombudsmen, has the task to act directly for or otherwise support complainants in courts or other decision-making institutions. JO acts as a supervisor of public authorities and their representatives ultimately with the competence of a prosecutor. The prosecutorial competence is however seldom used. Disciplinary actions by JO are also uncommon. Instead, JO usually uses his or her supervisory competence by making statements with advisory or critical observations. Sometimes JO´s observations are formulated with sharp or severe criticism. All these decisions are made public. They are accessible for the general public and often presented in the media. This is due to the constitutional principle of open access to information provided by public authorities, among them JO.

With some cases as examples I will illustrate how JO refers to the constitutional principle of objectivity.

Nonacceptable priorities of on-line applications in cases management

Following several complaints, the Ombudsman initiated an audit of the Swedish Migration Board's processing times in respect of applications for residence permits due to family connection and work, and for residence permit cards, for a two years period. The audit also addressed the differences in processing times between on-line and paper applications, and between applications for work permits from certified employers and others. It emerged from the audit that the processing times were, in many cases, unreasonably long, and that they regularly exceeded the constitutionally regulated limits by some distance. The information provided by the Board suggested that it had prioritized simple cases at the expense of more extensive or complicated cases. JO criticized the Migration Board for its long processing times and for the fact that legally regulated time limits was regularly exceeded. The audit also showed that, for several different types of cases, there was a considerable difference in the processing time for on-line applications and paper applications. The Board had stated that, in order to encourage people to apply on-line, it had chosen, in cases where the applications were otherwise identical, to give priority to on-line applications ahead of paper

applications. JO deemed this procedure to be inconsistent with the equality and objectivity principles found within the Swedish Constitution. The Swedish Migration Board is criticized for this. (5497-2013)

Requirements for impartiality when an authority hires a consultant, which may be considered challengeable

The Swedish Environmental Protection Agency used a private consultant to make assessments in matters concerning the approval of weapons for hunting. At the same time, the consultant traded arms. JO criticized the Environmental Protection Agency partly because the consultant participated in the authority's decision-making without it being made clear what position and responsibility he had, and partly for having violated the constitutional objectivity principle by giving a person with commercial interests in trade with weapons decisive influence over decisions regarding the approval of weapons. (3045-2008)

Criticism against shortcomings in the handling of a custody inquiry. It also matters how the authority's actions are perceived.

JO found a number of shortcomings in the handling of a custody inquiry for which a family law secretary at a local social board was responsible. The deficiencies mainly consisted in the omission of information that spoke to the disadvantage of the mother, that the father's request for information was handled unprofessionally and that at the mother's request a letter was drawn up, which can be perceived as saying in favor of the mother. JO stated in the decision that the deficiencies in a general assessment showed that there were grounds for questioning the impartiality of the family law secretary, who received criticism by JO for not meeting the constitutional objectivity principle. JO observed that this principle does not only cover how a case has actually been dealt with and what real reasons are behind a decision or other actions by an authority. It also matters how the authority's actions are perceived. (48-2013)

Humiliating behavior

An official at the Social Insurance Board had inadvertently left a message containing swearing and derogatory statements on an insured's answering machine. JO stated, *inter alia*, that the conduct of the official indicated an inability to adhere to the factual issue and that it contravened the constitutional principle of objectivity. She was severely criticized. (1855-2018)

The use of social media

An official at the Financial Supervisory Authority published, by mistake, a post with negative opinions regarding certain political parties, on the authority's official Twitter account. The post was deleted in a few minutes. Thereafter the Financial Supervisory Authority made a public clarification that the authority did not support the opinions in the post.

According to JO, it is clear that the political opinions in the Twitter post did not live up to the constitutional obligations on objectivity and impartiality and that the post damaged the authority's credibility. As the official has received a written injunction on the lack of judgment that the official had exhibited, JO refrained from making any further comments regarding the official's actions.

JO´s decision also included some general opinions regarding authorities' activities in social media. JO has observed that authorities are more and more active in social media, and by social media, authorities have the opportunity to reach a wide range of citizens as well as spread information quickly. This possibility is combined with a responsibility to; for example, make sure that the information that is spread conforms to the constitutional obligations on objectivity and impartiality. The Ombudsman stated that an authority that use social media, or is considering starting a social media account, should carefully consider what risks it might bring, as well as what actions and routines the authority may need to minimize the risks. (5866-2018)

A public authority designed an ad campaign in violation of the constitutional principle of objectivity

The Swedish Work Environment Authority produced an advertising campaign where individual employers described how they worked to prevent mental ill-health in the workplace. The ads were available at the authority´s website and also published in various media, including in the form of full-page ads in a daily newspaper. JO initiated an investigation. In JO´s decision it was stated that government information to the general public is covered by the constitutional principle of objectivity that also covers impartiality. This means that an information campaign from an authority must not be angled to the advantage of the authority or anyone else. JO emphasized the importance of observing and taking the principle of objectivity seriously. This is necessary because the principle is of great importance from the point of view of Rule of Law and for the general public to have confidence in the authorities and their activities. JO pointed out that the advertising campaign, objectively speaking, could be perceived in any other way than that the

Swedish Work Environment Authority promotes the employers mentioned in the advertisements. This risks causing the general public to question the impartiality of the authority vis-à-vis the employers who participated in the advertising campaign, which in itself is liable to disrupt public confidence in the authority as a whole. (8418-2017)

5. Summing-up

Characteristic of the Ombudsmen of different countries is that their role has been adapted to their respective national legal traditions, that their role has been adapted to their respective national legal traditions and that they are also characterized by the historical situation in which the institutions were created.

This aspect is presented also in the Venice Principles "emphasizing that long standing constitutional traditions and a mature constitutional and democratic political culture constitute an essential enabling element to the democratic and legal functioning of the Ombudsman institution." So it should be possible to bring somewhat different models of the Ombudsman institution under the Venice Principles.

In the Swedish dualistic constitutional tradition (King and Parliament with independent courts balancing in between) it was natural that JO 1809 became a prosecutor who should oversee the governmental administration and also the courts. Due to the peculiarities of the Swedish model for governmental administration, the Cabinet ministers were held outside the competence of the Ombudsman. Instead the ministers were and still are supervised by the Constitutional Committee of Parliament. The later Danish model of the Ombudsman differs from the Swedish and has righly been regarded as the basic model.

In the development of the Swedish model for the Ombudsman, sharp penalties were generally replaced by authoritative statements in the single case about the legal requirements together with more or less explicit reprimands against the authority or its officials if they were deemed to have acted wrongly. So instead of a punishment, the Ombudsman´s criticism presented in public works as a socially acting blame, which in many contexts is effective. The Ombudsman reports to the Constitutional Committee of Parliament. The Committee supports this strategy: The Ombudsman has always worked and will continue to work primarily through the power of his or her statements. It is with the quality of the argument for the assessments that the Ombudsman will keep the important societal legitimacy of the institution.

In the Swedish model the Ombudsman Institution is based on the constitutional level. But the Ombudsman may in his assessments also refer to the Constitution and its principle of objectivity. This definitely strengthens the quality of the argument. [7]

[7] See footnote 5 and Hans-Gunnar Axberger, *JO – i riksdagens tjänst*, 2014.

Serhiy Holovaty[1]

Backbone of the Rule of Law: The decisive contribution of the Venice Commission in Ukraine

The European Commission for Democracy through Law – more commonly known as the Venice Commission - has been a vital part of Ukraine's transition from totalitarianism to democracy from the beginning of Ukraine's constitutional process. In the twenty years from the signing of its Terms of Accession to the Council of Europe in 1995 to the constitutional reforms of 2016 that followed the Revolution of Dignity, Ukraine experienced a constant tension between authoritarian and democratic initiatives and tendencies in the development of its state institutions. The conflict involved the establishment of key state institutions set out in Ukraine's Terms of Accession: the functioning of the state prosecutor's office, the establishment of an independent judiciary and the proper and effective role of the Constitutional Court.

This paper will highlight the leading role played by the Venice Commission during this period. The Commission effectively guided Ukraine to compliance with European standards of justice as a democracy governed by the Rule of Law by producing 28 opinions, firmly upholding the European standards to be implemented in Ukraine's fundamental law (as well as in ordinary legislation) and leading the transformation of Soviet-era legal thought in Ukraine.

I. Introduction

The Venice Commission's involvement in Ukraine's constitutional development predated Ukraine's accession to the Council of Europe. Ukraine became a member of the Council of Europe in November 1995 with a Constitution in force dating from Soviet times, the Soviet Basic Law of 20 April 1978, based on the Commission's Opinion that the country had strong prospects to meet the standards of the Council of Europe by "implementing democracy, fundamental rights and freedoms and the Rule

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of Law."[2] Pursuant to its Terms of Accession, Ukraine finally adopted a new Constitution on 28 June 1996, almost five years after proclaiming its independence. Progress was made and in 1997, the Venice Commission produced an Opinion assessing the new Constitution, particularly from the standpoint of the Rule of Law, finding that "the important elements of the Rule of Law have found proper expression" in Chapter I (General Principles), namely that:

- the Constitution has the highest legal force and its norms have direct effect; laws and other legal acts are adopted on its basis and have to conform to it (Article 8);
- the principle of separation of powers is recognized and the bodies of the legislative, executive and judicial power exercise their authority within the limits established by the Constitution and in accordance with the laws (Article 6);
- the principle of legality has found a further clear expression in Article 19;
- the constitutional provisions concerning human rights are directly applied by the courts (Article 8, para. 3).[3]

Overall, the Venice Commission concluded that "the principles of the Rule of law were well reflected in the text of the Constitution."[4] Indeed, a few years later, the Venice Commission would positively assess Ukraine's democratic transition, stating that "a number of amendments had been made to the Constitution, particularly with the view to ensuring Ukraine's transition from a communist regime to freedom, democracy and the Rule of Law."[5]

This assessment by the Venice Commission of Ukraine's achievements in implementing "important elements of the Rule of Law" or "the principles of the Rule of law" into its Fundamental Law was naturally met with great satisfaction by the Ukrainian political establishment, legal community and in academic circles. We were all proud that Ukraine was the first and only nation among all the former Soviet republics that enshrined the notion of "the Rule of Law" in its Constitution. However, my experience was that this was done more by intuition than through a conscious understanding

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[2] Venice Commission, CDL-INF(1995)002, Opinion on the present constitutional situation in Ukraine. Following the Adoption of Constitutional Agreement between the Supreme *Rada* of Ukraine and the President of Ukraine, p. 13 (G. Conclusion).

[3] Venice Commission CDL-INF(1997)002, Opinion on the Constitution of Ukraine, p. 2.

[4] *Ibidem*, p. 13.

[5] Venice Commission CDL-AD(2002)002, Opinion of the Resolution on the principles of the State policy of Ukraine in the sphere of human rights adopted by the *Verkhovna Rada* of Ukraine on 17 June 1999, para. 3.

of any exact meaning of this notion. I state this as the person who at the time of drafting the Constitution and at the moment of its adoption by the Parliament on 28 June 1996 was the only one to insist that the notion of the Rule of Law appear in the text of the Ukrainian Fundamental Law (at that time I held the position of Minister of Justice and at the same time was also a member of the *Verkhovna Rada*, Ukraine's parliament). Through some tough persuasion, my initiative was ultimately supported by a qualified majority of MPs, resulting in the following formulation in the Constitution: "In Ukraine, the principle of the Rule of Law is recognized and is effective" (Article 8, para. 1).

II. Historical background

There are objective historical, cultural and institutional factors behind these issues. For a period of more than three centuries Ukraine was smothered first by Russian absolutism and then by the Russian version of Marxism. Both factors had immeasurable influence over the development of the Ukrainian legal culture and tradition. For its part, the Russian legal culture and legal tradition were under the lasting influence of German positivism, embodied in the concept of *Rechtsstaat,* which became "*pravovoie gosudarstvo*" (or *legal state*), and was adjusted to Russian political developments during various historical periods. In Soviet times, this spawned the notion of *the principle of socialist (soviet) legality,* which became the backbone of the Soviet political and legal system and which dominated Soviet legal thought for many decades. It mutated into derivatives as *the principle of supremacy of a law* (in Ukrainian: *verkhovenstvo zakonu*; in Russian: *verkhovenstvo zakona*) where "a law" (*zakon*) meant simply an ordinary statute.

It is well known that the concept of *verkhovenstvo zakona,* alongside the concept of *socialist (soviet) legality,* were developed by Stalin's Prosecutor General, *Andrei Vyshynsky,* in the 1930s as an outcome of his own "theory of state and law", according to which "law draws its force, and obtains its content, from the state."[6] Vyshynsky's concept of *socialist (soviet) legality* was officially approved by Stalin as the equivalent to *Leninist legality*.[7] The legal term "*verkhovenstvo zakona*", as it was always used in the Russian, Ukrainian or Belorussian languages would mean in English "the supremacy of an ordinary

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[6] Vyshynsky Andrei. *The Law of the Soviet State*. Translated from Russian by Hugh W. Babb; Introduction by John N. Hazard. – New York: Macmillan, 1954. – P. 5.

[7] See Strogovich M.S. *Socialist legality, legal order and application of the Soviet law (For the universities of Marxism-Leninism)*. – Moscow: Mysl, 1966. – S. 17-22. (*Sotsialisticheskaya zakonnost, pravoporiadok i primenieniye sovetskogo prava: dlia universitetov marksizma-leninizma*) [in Russian].

statute". Even at the end of the Soviet Union, the Communist party under the leadership of *Mikhail Gorbachev* continued to accommodate (in 1988) the concept of *sotsialisticheskoie pravovoie gosudarstvo (Socialist Rechtsstaat)* as an official doctrine to be used as a new basis for the "radical strengthening of *socialist legality*" within the framework of the *perestroika* process.[8] By any interpretation, this type of language constitutes a solid obstacle to making the *Rule of Law* effective or operative in any relevant country.

At the time of the adoption of the Ukrainian Constitution in 1996, we did not understand the origins of the notion of "the Rule of Law," or its genuine meaning. Most jurists at that time did not possess a clear understanding of the substantive meaning of "the Rule of Law", or what was meant by the "the principles of the Rule of Law" that were so "well reflected in the text of the Constitution". The term, the "highest legal force" of the Constitution, was, in fact, generally understood by Ukrainian jurists as representing the top of a hierarchical order within the national system of legal norms, rather than exceptional principles that govern such norms. Indeed, the political and legal elites had great difficulty in understanding how the principle of separation of powers relates to the notion of "the Rule of Law" and why the "direct application of human rights" should be treated as an element of "the principle" of the Rule of Law.

We certainly did not appreciate the broad definition of the Rule of Law worked out in 1959 by the International Commission of Jurists, expressing the Rule of Law as a *value* that belongs to a *common heritage* or constitutes a *common principle* for European nations:

> *"[t]he principles, institutions and procedures, not always identical, but broadly similar, which the experience and traditions of lawyers in different countries of the world, often having themselves varying political structures and economic backgrounds, have shown to be important to protect the individual from arbitrary government and to enable him to enjoy the dignity of men."*[9]

The Parliamentary Assembly of the Council of Europe was sufficiently concerned by this disconnection in understanding that it passed a resolution (initiated by this author) proclaiming that "certain traditions of the totalitarian

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[8] See Резолюция XIX Всесоюзной конференции КПСС: О демократизации советского общества и реформе политической системы. *Коммунист*. – 1988. – № 10. – С. 68 [Resolutions of XIX All-Union CPSU Conference: On democratization of Soviet society and the reform of the political system. *Communist*, `1988, No. 10. – P.68 (in Russian)].

[9] The Rule of Law in a Free Society: a report on the International Congress of Jurists. New Delhi, India. January 5-10, 1959 / prepared by Norman S. Marsh; with a foreword by Jean-Flavien Lalive. – Geneva: International Commission of Jurists, 1959, p. 197.

states [were] still present in theory and practice" in most of the post-Soviet states. In particular, "the Rule of Law" was still perceived as the "supremacy of the rules", or "written rules" set up in statutes (*verkhovenstvo zakona*).[10] The Assembly's report on this matter confirmed that in the states impacted by the Soviet Union "much of the legal-positivist tradition of the Soviet era is still prevailing."[11] Consequently, in its resolution, the Assembly drew attention to the fact that understanding the "Rule of Law" as the "supremacy of statute laws" (in Russian – "*verkhovenstvo zakona*") is a formalistic interpretation of this notion and "runs contrary to the essence" of the Rule of Law.[12]

The resolution demonstrated that the debate on this issue was not merely of a theoretical or academic nature. It had profound political and constitutional significance, since an interpretation of *the Rule of Law* that fosters the notion of *the* rule *by* law based on positivist legal thinking can easily be abused to create very favourable conditions for *autocratic rule*. Indeed, Soviet-era legal thinking and methodology constituted a serious obstacle to the development of Ukraine's legal system on the basis of the Rule of Law.

III. Institutional transformations required by the Rule of Law

After the adoption of Ukraine's new democratic Constitution in 1996, the Venice Commission became actively involved in shaping the process of Ukraine's constitutional reform. Ukraine's continuous cooperation with the Venice Commission in the field of constitutional development is explained by the fact that the 1996 Constitution contained a number of serious inadequacies, born out of political compromise. At the time of its adoption, an alliance of communists, post-communist socialists and former Soviet *nomenklatura* constituted a supermajority in the *Verkhovna Rada*. Accordingly, although the principles of the Rule of Law were reflected in the text of the Constitution, several provisions of Ukraine's fundamental law emanating from Ukraine's Terms of Accession that unfortunately remained "unsatisfactory from a legal point of view"[13] and not yet achieving European standards of the Rule of Law, the most important of which involved 1) the Public Prosecutor's Office (PPO); 2) the Judiciary, and 3) the Constitutional Court.

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[10] See The principle of the Rule of Law. *Motion for a resolution* presented by Mr Holovaty and others. *Doc 10180. 6 May 2004*.
[11] See The principle of the Rule of Law. Report. Committee on Legal Affairs and Human Rights. Rapporteur: Mr Erik Jurgens, Netherlands, Socialist Group. *Doc 1343, 6 July 2007*.
[12] See: The principle of the Rule of Law. Resolution 1594(2007). Text adopted by the Standing Committee, acting on behalf of the Assembly, on 23 November 2007 (para.4).
[13] Venice Commission, CDL-INF(1997)002, Opinion on the Constitution of Ukraine, p. 13.

1. Public Prosecutor's Office (PPO)

Of all the institutions of state in Ukraine, none has proven harder to reform than the so-called Public Prosecutor's Office, or *Prokuratura* (I will use the term "*prokuratura*" or "procuracy" throughout, as the term "prosecutor" does not begin to convey to the western-trained mind the vast powers of supervision, control, and outright repression vested in this Soviet-era institution).

The "*prokuratura*" system in the Soviet period has been described by the Venice Commission as follows:

> *The prosecution on criminal cases in court represented only one aspect of the procuracy's work, matched in significance throughout much Soviet history by a set of supervisory functions. In its nutshell, the procuracy bore responsibility for supervising the legality of public administration. Through the power of what was known as "general supervision", it became the duty of the procuracy to monitor the production of laws and instructions by lower levels of government; to investigate illegal actions by any governmental body or official (and issue protests); and to receive and process complaints from citizens about such actions. In addition, the procuracy supervised the work of the police and prisons and pre-trial phase of criminal cases, and, in particular, making decisions on such crucial matters as pre-trial detention, search and seizure, and eavesdropping. Finally, the procuracy was expected to exercise scrutiny over the legality of court proceedings. Supervision of trials gave the procurators at various levels of the hierarchy the right to review the legality of any verdict, sentence, or decision that already gone into effect (after cassation review) and, through a protest, to initiate yet another review by a court. Even more troubling, the duty to supervise the legality of trials meant that an assistant procurator, who was conducting a prosecution in criminal case, had an added responsibility of monitoring the conduct of the judge and making protests. This power placed the procurator in the courtroom above both the defence counsel and the judge, in theory if not also in practice.*[14]

Thus, the wide scope of the *prokuratura*'s authority as an effectively separate, and unaccountable branch of power, *outside* of the criminal justice system, was an obvious affront to notions of democratic accountability, justice and governance. As this was incompatible with European standards and Council of Europe values, as part of its Terms of Accession to the Council of Europe, Ukraine committed to transforming this institution into a body compliant with

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[14] Solomon and Foglesong, *The Procuracy and the Courts in Russia: A New Relationship?* In East European Constitutional Review, Vol 9 No 4 Fall 2000; quoted in Venice Commission, CDL-AD (2005)014, (Prosecutor's Office) of the Russian Federation, point. 5.

Council of Europe standards.[15] Having regard to the strong tradition of the *prokuratura* system in Ukraine, the Venice Commission deemed it "indispensable to explicitly provide for limitations in the text of the Constitution itself."[16]

But old habits die hard and the Commission was less than impressed to find that the 1996 Constitution retained the supervision powers of the procuracy in point 9 of the document's Transitional Provisions:[17]

> *Article 9. The procuracy continues to exercise, in accordance with the laws in force, the function of supervision over the observance and application of laws and the function of preliminary investigation, until the laws relating the activity of state bodies in regard to the control over the observance of laws are put into force, and until the system of pre-trial investigation is formed and the laws regulating its operation are put into effect.*

Stating that this provision propagated "a Soviet-style '*prokuratura*'",[18] the Commission provoked the authorities to try to limit the scope of the procuracy's powers through a subsequent amendment to the 1996 Constitution bestowing upon it the powers of '*supervision of the observance of human and citizens' rights and freedoms and the fulfilment of laws by bodies of executive power and by bodies of local self-government'*. The Venice Commission expressed its concern with this interpretation of European values, stating that "the extension of the power of the Prosecutor can be considered a step backward not in line with the historical traditions of the procuracy in a state subject to the Rule of Law. In a state like Ukraine <…> it is of paramount importance that the institution that supervises compliance with the Rule of Law is non-political."[19]

This tension between the authorities and the Commission came to a head regarding a whole slew of constitutional issues, including the prokuratura, during the political crisis of the so-called *Orange Revolution* that arose after the presidential elections in 2004. It reflected to a great degree the difficult democratic transformation underway in Ukrainian politics and society as a whole, as Ukrainians sought to shed their Soviet heritage. By 2004, while the democratic forces were in the ascendancy, the post-Soviet

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[15] Venice Commission, CDL-AD(2013)025, Opinion on the Draft law on the Public Prosecutor's Office of Ukraine, para. 27.
[16] Venice Commission, CDL-AD(2006)029, Opinion on the Draft law of Ukraine amending the Constitutional provisions on the Procuracy, para. 26.
[17] Venice Commission, CDL-INF(1997)002, Opinion on the Constitution of Ukraine, p. 8.
[18] Venice Commission, CDL-AD(2004)038, Opinion on the Draft Law amending the Law of Ukraine on the Office of the Public Prosecutor, para. 8; CDL-AD(2006)029, Opinion on the Draft Law of Ukraine amending the Constitutional provisions on the Procuracy, para. 4.
[19] Venice Commission, CDL-AD(2003)019, Opinion on the three Draft Laws proposing amendments to the Constitution of Ukraine, paras. 44, 73.

nomenklatura elites responded by trying to tighten their grip on power. In addition to attempting to steal the presidential election, in a last-ditch effort to shore up their position, on 8 December 2004 the nomenklatura forces pushed through an amendment to the Constitution (Article 121) in order to restore the function of a Soviet-type of *Prokuratura*. The amendment essentially conferring a fifth function on the procuracy:

> '*to supervise the observance of human and citizens' rights and freedoms, and the observance [of] of laws on these matters by bodies of state power, local self-governments, their officials and functionaries'*.

The Venice Commission rejected this innovation as well,[20] but to no avail: the amendment was adopted despite "the strongly-expressed opinion of the Commission"[21] against it. Regardless, the Venice Commission remained adamant in recommending to the Ukrainian authorities to bring "the role and functions of the public prosecutor's office into line with the European democratic standards"[22] and to make clear that "the prosecutor's office is not a separate (fourth) pillar of state power, as was the case previously in the Soviet system", thereby diminishing "the risk of returning to the system of *Prokuratura*."[23] Given the specific circumstances of Ukraine, the Venice Commission welcomed "the option in favour of an independent prosecution service in the framework of judicial power."[24] In order "to break with the Soviet model of *Prokuratura*",[25] the Commission advised the administration "to limit the role of procuracy to criminal prosecution."[26] The Commission has maintained this consistent position to this day.

Following the Orange Revolution, the democratic forces lead by President Victor Yushchenko tried to remove the entire separate Chapter on the procuracy from the Constitution. These draft changes were supported by the Venice Commission, which found them to be "in accordance with the European guidelines on the role of prosecutor's office and in line with Ukraine's commitments to the Council of Europe."[27]

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[20] Venice Commission, CDL-AD(2006)029, Opinion on the Draft Law of Ukraine amending the Constitutional provisions on the Procuracy, para. 8.
[21] *Ibidem*, para. 9.
[22] Venice Commission, CDL-AD(2005)015, Opinion on the amendments to the Constitution of Ukraine, paras 35-42.
[23] Venice Commission, CDL-AD(2006)029, Opinion on the Draft Law of Ukraine amending the Constitutional provisions on the Procuracy, para. 9.
[24] *Ibidem*, para. 12.
[25] *Ibidem*, para. 19.
[26] *Ibidem*, para. 24.
[27] Venice Commission, CDL-AD(2008)015, Opinion on the Draft Constitution of Ukraine, para. 76.

But the unreconstructed nomenklatura-dominated parliament foiled these attempts and the pendulum swung back to the revanchists during the presidency of Victor Yanukovych. The Venice Commission's stated fears about the scope and possible abuse of constitutional provisions regarding the procuracy in Article 121 proved to be well-founded. Determined to impose a Russia-style authoritarian regime on Ukraine's people, President Yanukovych used this provision to prepare a Draft Law on the Public Prosecutor's Office that would actually expand the *prokuratura*'s powers as a repressive tool of the state.

The Venice Commission did not mince words in its evaluation of the draft legislation. Concluding that the draft law essentially cemented the model of the Soviet *Prokuratura*, the Commission complained that "none of the major criticism made by the Venice Commission in its earlier opinions of 2001, 2004 or 2006 have been taken on board in this new draft."[28] The Venice Commission felt the draft law essentially created "a type of fourth power,"[29] and was "an attempt to preserve the status quo and put an end to reform efforts undertaken on the basis of the 1996 Constitution of Ukraine."[30]

The Commission then revisited the core of the issue - the procuracy's constitutionally-mandated "supervision function" – that effectively anchored the procuracy to the old system, "where the prosecutor's wide role is derived from the weakness of other institutions in the protection of human rights."[31] Summarizing its decade-long struggle to apply European standards to the institution of the procuracy, the Commission decried the widening scope for abuse and the threat of the erosion of democratic values, along with its possible use as a repressive instrument of power:

> *the retention of the general supervision power has – despite its supposedly transitional nature – been a repeated source of concern not only because it is buttressed by wide powers for public prosecutors to summon persons to appear before them, to enter any premises in the public and private sectors and to order action to be taken to comply with the law <…>. The general supervision function and its accompanying powers thus give the Public Prosecutor's Office*

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[28] Venice Commission, CDL-AD(2009)048, Opinion on the Draft Law of Ukraine on the Office of the Public Prosecutor, para. 7.
[29] *Ibidem* para. 19.
[30] *Ibidem* para. 28.
[31] Venice Commission, CDL-AD(2012)019, Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, para. 11; CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, para. 22.

> *an extensive ability both to intrude into the functioning of the executive and to interfere with the interests and activities of private individuals and organisations. This capacity is compounded by the entitlement of the Prosecutor General and other public prosecutors to participate in the proceedings of the Verkhovna Rada, boards of ministries, central executive agencies, local councils and other administrative bodies <…>. These powers and rights individually and cumulatively run counter to the appropriate separation of powers in a democracy, as well as posing threat to rights and freedoms that are supposedly safeguarded by the Constitution.*[32]

Harking back to Ukraine's Terms of Accession, the Venice Commission called for "a comprehensive reform in line with the country's commitment to the Council of Europe," essentially demanding that the procuracy be completely reconfigured.[33]

While the Commission's persistent complaints regarding the need to limit the power of the prosecutor's office fell on deaf ears in the executive branch, the efforts of the Venice Commission had begun to influence the judiciary. The Venice Commission's position on this issue, among others, was implemented through the Constitutional Court of Ukraine's decision of 30 September 2010.[34] While less than satisfactory as a final resolution to the issue of the broad supervisory powers of the *Prokuratura*, it was an important interim step; it set the foundation for the constitutional reforms regarding the judiciary and law enforcement bodies that followed the Revolution of Dignity in 2016. Work remains to be done – the Venice Commission's concerns regarding parliament's ability to remove a Procurator General through a vote of non- confidence and the right of the procuracy to represent "the people's interests" in any court proceedings have not yet been implemented. However, while amendments that the Venice Commission positively accessed to establish a new system of prosecution as part of the judiciary[35] have not yet been adopted, the trend of reforms in this area give cause for optimism.

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[32] Venice Commission, CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, para. 25.
[33] Venice Commission, CDL-AD(2009)048, Opinion on the Draft Law of Ukraine on the Office of the Public Prosecutor, para. 30.
[34] CCU Judgment No. 2-pn/2010. 30 September 2010 (Case No. 1-45/2010).
[35] Venice Commission, CDL-AD(2015)026, Opinion on the amendments to the Constitution of Ukraine regarding the Judiciary as proposed by the Working Group of the Constitutional Commission in July 2015, para. 39.

2. The Judiciary

Perhaps the most difficult institutional transformation to implement in any transitional democracy is judicial reform. That is because the stakes are so high – once the judiciary has been suborned by the executive, the latter acquires a virtual unaccountable monopoly on state power. The impulse of the executive branch of government to control the independence of the judiciary is not just the legacy of a totalitarian dictatorship – these tensions unfortunately often manifest themselves in some developed democracies as well. The situation is that much more complicated when trying to shed the legacy of a traditionally subordinated judiciary to one that functions as an independent branch of state power.

The Venice Commission was highly engaged in the crucial efforts to create a truly independent judicial branch of power. In numerous opinions the Commission consistently highlighted that the judiciary "is of the highest importance for the establishment and consolidation of the Rule of Law in Ukraine"[36] and that "the guiding principles of the Rule of Law require the guarantee of an independent judicial system."[37] Until (and even after) the constitutional reforms of 2016, the Commission found itself in perpetual tension, even conflict, with successive Ukrainian administrations over respect for the independence of Ukraine's courts, whether it involved the:

a. interference of political institutions in establishing the court structure, appointment and dismissal of judges;
b. initial appointment of a judge and probationary period;
c. dismissal of a judge for a "breach of oath";
d. role of the High Council of Justice;
e. lifting of a judge's immunity by parliament and the scope of immunity;
f. organization of courts;
g. judicial budget; and
h. corruption in the judiciary.

Of these, we will focus our attention on political interference, the role of the High Council of Justice, the organization of the courts, and corruption in the judiciary.

The genesis of many of these disputes was not merely ideological or transactional; they emanated from the idiosyncratic compromises and (mis)

[36] Venice Commission, CDL-INF(2000)005, Opinion on the Draft Law of Ukraine on the Judicial system, p. 2.
[37] Venice Commission, CDL-AD(2010)003, Joint Opinion on the Draft Law on the judicial system and the status of judges of Ukraine, para. 7.

understandings of the role of judges in a society governed by the Rule of Law that found their way into the text of the 1996 Constitution itself.[38] As the Venice Commission noted, "the most serious problems concerning the independence of the judiciary in Ukraine lie in the constitutional provisions <…>. To achieve an effective justice reform that satisfies European standards in Ukraine, constitutional amendments are necessary <…>."[39] The constitutional reforms enacted in 2016 following the Revolution of Dignity resolved many of these issues, due in large part to the Venice Commission acting throughout as the protective guardian of the country's judicial reform process, guiding it to a stable maturity.

At the heart of the tensions was the issue of **the involvement of political institutions in establishing the court structure, and appointment and dismissal of judges**. The 1996 Constitution provided that the courts should be established by the President according to the law (Article 106.23), leading the Venice Commission to criticize the constitutional framework granting the President discretionary powers regarding the selection and appointment of judges, as well as the power to remove and dismiss a judge.[40] The Commission pointed out that as long as these powers remained in the Constitution, the potential for politicization would always be present.[41] It took the position that the power of the President to establish and liquidate courts should be removed from the Constitution and that "this should be considered as a legislative matter."[42] The Commission pointed out that courts must be established "by law", which meant that the decisions should be made by the *Verkhovna Rada*, not by the Executive.[43]

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[38] Venice Commission, CDL-AD(2011)033, Joint opinion on the Draft Law amending the Law on the Judiciary and the status of judges and other legislative acts of Ukraine, para. 79; see also CDL-AD(2015)026, Opinion on the amendments to the Constitution of Ukraine regarding the Judiciary as proposed by the Working Group of the Constitutional Commission in July 2015, para. 6.

[39] Venice Commission, CDL-AD (2015)007, Human Rights and Rule of Law (DGI) of the Council of Europe on the Law on judicial system and the status of judges and amendments to the Law on the High Council of Justice of Ukraine, para. 58.

[40] Venice Commission, CDL-AD(2010)003, Joint Opinion on the Draft Law on the Judicial System and the Status of Judges of Ukraine, para. 63.

[41] Venice Commission, CDL-AD(2011)033, Joint opinion on the Draft Law amending the law on the judiciary and the status of judges and other legislative acts of Ukraine, para. 61.

[42] Venice Commission, CDL-AD(2015)007, Human Rights and Rule of Law (DGI) of the Council of Europe on the Law on judicial system and the status of judges and amendments to the Law on the High Council of Justice of Ukraine, paras. 58, 92.
Ibidem, para. 92.

[43] Venice Commission, CDL-AD(2015)026, Opinion on the amendments to the Constitution of Ukraine regarding the Judiciary as proposed by the Working Group of the Constitutional Commission in July 2015, para. 18; CDL-AD(2013)014, Opinion on the

However, the Venice Commission had no objection to the *pro forma* appointment of judges by the president as Head of State, "when the latter is bound by a proposal of the judicial council and acts in a 'ceremonial' way, only formalizing the decision taken by the judicial council in substance."[44] The idea was that the President only ratifies a decision of the judicial council and his decision therefore has the effect of a "notary".[45]

The Venice Commission similarly weighed in on constitutional powers to appoint judges. Articles 85(27) and 128 of the 1996 Constitution provided that the *Verkhovna Rada* (Parliament) had the power to make lifetime appointments of judges. The Venice Commission criticized these provisions many times,[46] considering them to unduly politicize appointments.[47] Instead, the Commission recommended that "the preparation of candidacies, should be entirely in the hands of an independent body" and that these "competences should be attributed to a High Council of Justice composed of a majority of judges."[48]

Similar concerns were expressed regarding the *Verkhovna Rada's* **power to lift a judge's immunity** pursuant to Article 126 of the 1996 Constitution: "it is not appropriate that the parliament should have any role of lifting a judge's immunity" since "this involves a political body in a decision concerning the status of judges and their immunities."[49] Consequently, "the competence to

Draft Law on the amendments to the Constitution, Strengthening the Independence of Judges and on the Changes to the Constitution proposed by the Constitutional Assembly of Ukraine, para. 14; CDL-AD(2010)026, Joint opinion on the Law on the Judicial system and the status of judges of Ukraine, para. 16.

[44] Venice Commission, CDL-AD(2013)034, Opinion on proposals amending the Draft Law on the amendments to the Constitution to strengthen the independence of judges of Ukraine, para. 16.

[45] Venice Commission, CDL-AD(2010)003, Joint Opinion on the Draft Law on the judicial system and the status of judges of Ukraine, para. 38.

[46] Venice Commission, CDL-AD(2010)003, Joint Opinion on the Draft Law on the judicial system and the status of judges of Ukraine, para. 64; see also CDL-AD(2015)007, Human Rights and Rule of Law (DGI) of the Council of Europe on the Law on judicial system and the status of judges and amendments to the Law on the High Council of Justice of Ukraine, para. 47.

[47] Venice Commission, CDL-AD(2007)003, Opinion on the Draft Law on the Judiciary and on the Draft Law on the status of judges of Ukraine, para. 23; CDL-AD(2010)003, Joint Opinion on the Draft Law on the judicial system and the Status of Judges of Ukraine, para. 45; CDL-AD(2010)026, Draft Joint opinion on the law on the judicial system and the status of judges of Ukraine, para. 64.

[48] Venice Commission, CDL-AD(2007)003, Opinion on the Draft Law on the Judiciary and on the Draft Law on the status of judges of Ukraine, paras. 23, 29; see also: CDL-AD(2009)024, Opinion on the Draft Law of Ukraine Amending the Constitution, para. 87.

[49] Venice Commission, CDL-AD(2009)024, Opinion on the Draft Law of Ukraine amending

lift judges' immunity should not belong to a political body like the *Verkhovna Rada*",[50] and that immunity should not be lifted by Parliament, but only by the High Council of Justice as part of its constitutional mandate.[51]

The Venice Commission was as strongly critical with regard to a provision of Article 126(5) of the Constitution, which allowed the dismissal of a judge for a **"breach of oath."**[52] As the Commission also pointed out, the language of the judicial oath provides for "indiscriminate sanctions of judges or removal from office by those who oppose the decisions of judges."[53]

The constitutional reforms of 2016 were ushered in based on a 2015 presidential draft law to amend the Constitution, which provided that judges will no longer be elected by the *Verkhovna Rada*, but will be appointed by the President upon the submission of the High Council of Justice, on the basis of an open and competitive process.

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the Constitution presented by the President of Ukraine, para. 84; CDL-AD(2007)003, Opinion on the Draft Law on the Judiciary and on the Draft Law on the status of judges of Ukraine, para. 12; CDL-AD(2013)034, Opinion on the Draft Law on the Judiciary and on the Draft Law on the status of judges of Ukraine, para. 25; CDL-AD(2015)007, Human Rights and Rule of Law (DGI) of the Council of Europe on the Law on judicial system and the Status of Judges and amendments to the Law on the High Council of Justice of Ukraine, para. 58.

[50] Venice Commission, CDL-AD(2015)007, Joint opinion by the Venice Commission and the Directorate of Human Rights of the Directorate General of Human Rights and the Rule of Law on the Law on the Judiciary and the Status of Judges and amendments to the Law on the High Council of Justice of Ukraine, para. 58.

[51] Venice Commission, CDL-AD(2010)003, Joint Opinion on the Draft Law on the Judicial System and the Status of Judges of Ukraine, para. 27; CDL-AD(2010)026, Draft Joint opinion on the law on the judicial system and the status of judges of Ukraine, para. 130(5); CDL-AD(2013)034, Opinion on proposals amending the Draft Law on the amendments to the Constitution to strengthen the independence of Judges of Ukraine, paras. 25, 57.

[52] Venice Commission, CDL-AD(2009)024, para. 90; Joint opinion on the Law amending certain legislative acts of Ukraine in relation to the prevention of abuse of the right to appeal. CDL-AD(2010)029, Joint opinion on the law amending certain legislative acts of Ukraine in relation to the prevention of abuse of the right to appeal by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe, para. 43; CDL-AD(2011)033, para. 63; Opinion on the Draft Law on the amendments to the Constitution, strengthening the independence of judges. CDL-AD(2013)014, Opinion on the Draft Law on the amendments to the Constitution, Strengthening the Independence of Judges and on the changes to the Constitution proposed by the Constitutional Assembly of Ukraine, para. 24; CDL-AD(2013)034, para. 54; CDL-AD(2015)007, Joint opinion by the Venice Commission and the Directorate of Human Rights of the Directorate General of Human Rights and the Rule of Law on the Law on the Judiciary and the Status of Judges and amendments to the Law on the High Council of Justice of Ukraine, paras. 51, 52.

[53] Venice Commission, CDL-AD(2011)033, Joint opinion on the Draft Law amending the law on the judiciary and the status of judges and other legislative acts of Ukraine, para. 41.

These changes received the full support of the Venice Commission as "it marked the end of the power of the *Verkhovna Rada* to influence the judiciary, which represented a threat to the independence of the judges and of the judiciary as such" and where the President was given "a ceremonial role" in appointing candidates submitted by the High Council of Justice, whose proposals assumed to be binding on the President.[54] The Venice Commission also welcomed other amendments that followed its recommendations, including removing the power of the President to dismiss judges and the authority of the parliament to lift judicial immunity, which were conferred on the High Council of Justice,[55] and removing the 'breach of oath' offence[56] from the Constitution.[57]

In this context, perhaps the most institutionally significant contribution the Venice Commission made to the development of the Rule of Law in Ukraine's judicial system involved the constitutional empowerment of the **High Council of Justice**. From the outset, controversy around the independence of this institution had been the subject of the Venice Commission's particular opprobrium. The Commission found it very unsatisfactory that Article 131 of the 1996 Constitution provided for a High Council of Justice that played no role in the procedure of establishing courts and that was composed of politically appointed representation in which judges constituted a minority.[58] The Commission recommended a constitutional amendment to ensure that the Council had the powers to act as the "guarantor of the independence of courts and judges," given that "the main task of the Council is to safeguard the independence of the third power and individual judges."[59] Changing the composition of the High Council of Justice to provide for a membership made up of a majority of judges elected

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[54] Venice Commission, CDL-AD(2015)027, Opinion on the proposed amendments to the constitution of Ukraine regarding the Judiciary, paras. 14, 26.
[55] *Ibidem*, para. 15.
[56] Venice Commission, CDL-AD(2015)026, Opinion on the amendments to the Constitution of Ukraine regarding the Judiciary as proposed by the Working Group of the Constitutional Commission in July 2015, para. 24.
[57] Venice Commission, CDL-AD(2015)007, Joint opinion by the Venice Commission and the Directorate of Human Rights of the Directorate General of Human Rights and the Rule of Law on the Law on the Judiciary and the Status of Judges and amendments to the Law on the High Council of Justice of Ukraine, para. 52.
[58] Venice Commission, CDL AD(2010)003, Joint Opinion on the Draft Law on the Judicial System and the Status of Judges of Ukrainepara. 69; CDL-AD(2007)003, Opinion on the Draft Law on the Judiciary and on the Draft Law on the status of judges of Ukraine, para. 43.
[59] Venice Commission, CDL-AD(2008)015, Opinion on the Draft Constitution of Ukraine (prepared by a Working Group headed by Mr V.M. Shapoval, para. 73.

by their peers[60] and exercising control over judicial training[61] would ensure that the administration of the judiciary would "be carried out by the judiciary itself or by an independent authority with substantial representation of the judiciary, at least where there is no other established tradition of handling that administration effectively and without influencing the judicial function."[62]

The Venice Commission was very pleased to see that virtually all of its recommendations regarding the High Judicial Council made their way into the 2016 constitutional reforms, including the composition of the HCJ where more than half of its members were proposed to be judges; all decisions regarding a judge's career (promotions, transfers, dismissals) were allocated to the High Council of Justice and not to political institutions; [63] judges would no longer be elected by the *Verkhovna Rada*, but appointed by the President upon the submission of the High Council of Justice;[64] and that the HCJ would have authority over both judges and prosecutors (assuming that the prosecution would be subsumed into the judiciary).[65]

Although the Venice Commission's advice that "the members of the HCJ chosen by the parliament should be elected by a qualified majority, which would favour candidates with cross-party support (or by other mechanisms enabling the opposition to participate in the choice)"[66] and extension of the HCJ's authority over the procuracy were not incorporated into the final

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[60] Venice Commission, CDL-AD(2010)026, Draft Joint opinion on the law on the judicial system and the status of judges of Ukraine, para. 130(3); CDL-AD(2015)007, Human Rights and Rule of Law (DGI) of the Council of Europe on the Law on judicial system and the Status of Judges and amendments to the Law on the High Council of Justice of Ukraine, paras. 83, 92.

[61] Venice Commission, CDL-AD(2007)003, Opinion on the Draft Law on the Judiciary and on the Draft Law on the status of judges of Ukraine, para. 66; CDL-AD (2010)003, Joint Opinion on the Draft Law on the Judicial System and the Status of Judges of Ukraine by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe, para. 103.

[62] Venice Commission, CDL-AD (2010)003, Joint Opinion on the Draft Law on the Judicial System and the Status of Judges of Ukraine by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe, para. 78.

[63] Venice Commission, CDL-AD(2015)027, Opinion on the proposed amendments to the constitution of Ukraine regarding the Judiciary, para. 16; CDL-AD(2015)026, Opinion on the amendments to the Constitution of Ukraine regarding the Judiciary as proposed by the Working Group of the Constitutional Commission in July 2015, para. 28.

[64] Venice Commission, CDL-AD(2015)026, Opinion on the amendments to the Constitution of Ukraine regarding the Judiciary as proposed by the Working Group of the Constitutional Commission in July 2015, para. 26.

[65] *Ibidem*, para. 33.

[66] *Ibidem*, para. 37.

amendments, what was accomplished marked a major leap forward for judicial independence in Ukraine according to European standards.

Reorganization of courts was fundamentally an issue of access to and efficiency of justice, but also impacted on corruption in the court system – it is easier to manipulate and extract rents from an opaque, procedurally complex and inefficient court system than from a transparent, efficient and accessible one. The 1996 version of the Constitution facilitated the creation of a four-instance system of local courts, courts of appeal, high specialized courts and the Supreme Court of Ukraine - the establishment and abolition of all of which was left to the discretion of the highest executive body, the President of the State.

The Venice Commission was highly critical of these arrangements, questioning the need for a four-instance court system[67] and proposed to merge the levels of the high specialized courts and the Supreme Court into one.[68] Under this fragmented structure, the Supreme Court was unable to influence the practice of the high specialized courts, a situation that the Venice Commission found profoundly unsatisfactory.[69] It insisted on the extension of the Supreme Court's jurisdiction so that it could exercise "its constitutional status as the highest judicial body in the system of courts of general jurisdiction."[70] The Commission maintained that the competence of the high specialized courts should be read in relation to the role of the Supreme Court, which should be "the ultimate guarantor of the uniformity of the jurisprudence of all courts."[71] The Commission held the view that "as long as the Supreme Court does not regain its general competence as a cassation court, it still has not fully

[67] Venice Commission, CDL-AD(2010)003, Draft Joint opinion on the law on the judicial system and the status of judges of Ukraine, para. 20; CDL-AD(2010)026, Draft Joint opinion on the law on the judicial system and the status of judges of Ukraine, para. 15; CDL-AD(2011)033, para. 8; CDL-AD(2013)014, Opinion on the Draft Law on the amendments to the Constitution, Strengthening the Independence of Judges and on the Changes to the Constitution proposed by the Constitutional Assembly of Ukraine, para. 45.

[68] Venice Commission, CDL-AD(2010)003, Draft Joint opinion on the law on the judicial system and the status of judges of Ukraine, para. 21.

[69] Venice Commission, CDL-AD(2013)034, Opinion on proposals amending the Draft Law on the amendments to the Constitution to strengthen the independence of judges of Ukraine, para. 21.

[70] Venice Commission, CDL-AD(2010)026, Draft Joint opinion on the law on the judicial system and the status of judges of Ukraine, para. 125.

[71] Venice Commission, CDL-AD(2011)033, Joint opinion on the Draft Law amending the law on the judiciary and the status of judges and other legislative acts of Ukraine,para. 29.

recovered its role."[72] The Commission pointed out the need to unify the system of ordinary courts and strongly recommended abolishing the high specialized courts and incorporating them into divisions within the Supreme Court (with the possible exception of the high administrative court).[73]

The reforms to the structure and organization of the Ukrainian court system were also designed to facilitate the elimination of **corruption in the judiciary** by encouraging efficiency of access to justice and applying procedural justice. With fewer instances to traverse and more transparent procedural rules, the notion was that claimants would find improvements to the access and efficiency of justice. However, without accountability on the part of the judges themselves, these hopes were likely to remain unrealized. Accordingly, the Venice Commission also recommended to introduce "the duty of judges to disclose their financial situation" that would "prevent financial conflicts of interest and protects judges against the reproach that they might have financial interests in a case," requiring judges to disclose their possessions, financial circumstances, stockholdings, presents, fees and other income, as well as loans.[74]

To change the court system and to bring the role of the political institutions (the President and the *Verkhovna Rada*) in establishing and abolishing the courts in compliance with European standards, the Venice Commission recommended to amend the Constitution, in particular, Article 125.[75] This, too, formed part of the 2016 constitutional transformations, leading to the abolishing of the high specialized courts and their transformation into divisions within the Supreme Court; confirming the Supreme Court as the highest judicial body in the system of courts of general jurisdiction, with the role of ultimate guarantor of

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[72] *Ibidem*, para. 33.

[73] Venice Commission, CDL-AD(2015)026, Opinion on the amendments to the Constitution of Ukraine regarding the Judiciary as proposed by the Working Group of the Constitutional Commission in July 2015, para. 19.

[74] Venice Commission, CDL-AD(2007)003, Opinion on the Draft Law on the Judiciary and on the Draft Law on the status of judges of Ukraine, para. 75.

[75] Venice Commission, CDL-AD(2007)003, Opinion on the Draft Law on the Judiciary and on the Draft Law on the status of judges of Ukraine, para. 18; CDL-AD(2010)003, Joint Opinion on the Draft Law on the judicial system and the status of judges of Ukraine, paras. 19, 23; CDL-AD(2010)026, paras. 16, 130(1); CDL-AD(2011)033, para. 8; CDL-AD(2011)033, Joint opinion on the Draft Law amending the law on the judiciary and the status of judges and other legislative acts of Ukraine, para. 20; CDL-AD(2013)014, Opinion on the Draft Law on the amendments to the Constitution, Strengthening the Independence of Judges and on the changes to the Constitution proposed by the Constitutional Assembly of Ukraine, para. 45.

the uniformity of the jurisprudence and practice of all courts; and the implementation of a system of electronic financial declarations mandatory for all judges, which are vetted and made accessible to the public at large on a central registry.

3. The Constitutional Court

Because of its paramount role in the judicial hierarchy and the finality of its decisions regarding constitutional interpretation, the Constitutional Court of Ukraine (CCU) deserves separate consideration from the rest of the judiciary. Given its importance as the guardian of constitutional justice, the role and function of the CCU became a key battleground between the Venice Commission and the presidency regarding the institutionalization of the Rule of Law in Ukrainian society.

Upon the creation in the 1996 Constitution of the Constitutional Court as an entirely new institution, the Venice Commission found the new Law on the Constitutional Court of Ukraine (1996) to be "an important <…> step on Ukraine's way to becoming a full-fledged constitutional democracy". At the same time, it expressed concern about the **lack of clarity regarding who had standing before the Court** - that the rights of parties "involved in a dispute before the Constitutional Court are in no way defined by the Law and will therefore have to be clarified by the rules of the procedure of the Court and its practice."[76]

In addressing the issue of standing, the Venice Commission stressed that "the principle of the Rule of Law requires that the status of the parties in the proceedings before the courts, their rights and the time limits to be complied with during the trial shall be established by Law" and that "leaving these items to the internal rules of procedure of the Court does not comply with the mentioned principle."[77] Later the Commission pointed out that the Constitution itself "should expressly provide for the adoption of a normative act on the internal organization and functioning of the Court, while establishing a distinction between issues to be regulated by law and issues reserved to the regulations of the Court".[78]

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[76] Venice Commission, CDL(1997)018 rev, Opinion on the Law on the Constitutional Court of Ukraine, para. 21.
[77] *Ibidem*, para. 22.
[78] Venice Commission, CDL-AD(2005)015, Opinion on the amendments to the Constitution of Ukraine, para. 47.

A special problem emerged in the fall of 2005 when the Constitutional Court became inoperative. On 18 October 2005, the term of office of ten justices came to an end, adding to three other vacant positions. Therefore, only five judges (out of a full bench of 18 judges - six judges appointed by each of the President, the *Verkhovna Rada* and the Congress of Judges) remained in office, whereas a quorum of twelve judges was required. On 3 November 2005, the Congress of Judges of Ukraine appointed six judges and on 14 November 2005 the President of Ukraine appointed three judges to the Court respectively. However, the *Verkhovna Rada* was reluctant to appoint the four judges under its quota and, moreover, to allow for the procedure of swearing in to take place.

The Venice Commission used this impasse as an opportunity to push for true independence in the administration and conduct of the all affairs of the CCU. With respect to the paralysis of the Court's operations, the Commission recommended default mechanisms through constitutional and legislative amendments, including a proposal to introduce a procedure enabling the newly appointed judges to be sworn in by the Constitutional Court itself.[79]

The Venice Commission pushed further - with respect to the appointment and dismissal of the constitutional judges, it recommended that the Constitution should provide for "a qualified special majority" of votes when judges are appointed by the Parliament,[80] as well as for "a special, qualified majority of members" voting when judges are appointed by the Congress of Judges of Ukraine.[81]

Regarding the dismissal of Constitutional Court judges, it strongly recommended the introduction of a special requirement in Article 149 that a preliminary decision on this matter be entrusted to the Constitutional Court itself.[82]

With respect to the organization and functioning of the Court and for the purpose of safeguarding the functioning and stability of constitutional justice, the Venice Commission recommended that a judge should remain in

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[79] Venice Commission, CDL-AD(2006)016, Opinion on possible constitutional and legislative improvements to ensure the uninterrupted functioning of the Constitutional Court of Ukraine, paras 19, 21

[80] Venice Commission, CDL-AD(2005)015, Opinion on the amendments to the Constitution of Ukraine, para. 43.

[81] *Ibidem*, para. 44.

[82] *Ibidem*, para. 46.

office after their term has expired until the judge's successor takes office[83] and that the dismissal of judges should be regulated in the Constitution only.[84]

Leaving the decision to detain or arrest judges of the Constitutional Court to the Parliament was considered not desirable by the Commission on the ground that "it would represent a continued politicization of judicial immunity and endanger judicial independence; " the Commission recommended that decisions to lift the immunity of constitutional judges should be left to the Court itself according to a vote "by the plenary of the Court, with the exception of the judge concerned."[85]

The vast majority of these positions of the Venice Commission were incorporated into the constitutional reforms of 2016, which marked a major victory for the institutionalization of the independence of the Constitutional Court. The Commission supported and warmly welcomed the new provisions, which provided that judges are to be appointed/elected after a selection on the basis of a competition among candidates whose high qualifications are listed in the Constitution;[86] a two-thirds vote of the Court members themselves was required regarding the termination and dismissal of judges,[87] the "breach of oath" offence be removed and that the oath of office be taken before the plenary of the Court; judges enjoy inviolability and functional immunity";[88] the budget of the Constitutional Court is not part of the general budget of the judiciary and is allocated taking into account of the proposals of the Chairman of the Court.[89]

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[83] Venice Commission, CDL-AD(2006)016, Opinion on possible constitutional and legislative improvements to ensure the uninterrupted functioning of the Constitutional Court of Ukraine, para 13; CDL-AD(2013)014, Opinion on the Draft Law on the amendments to the Constitution, Strengthening the Independence of Judges and on the Changes to the Constitution proposed by the Constitutional Assembly of Ukraine, para. 25.

[84] Venice Commission, CDL-AD(2013)014, Opinion on the Draft Law on the amendments to the Constitution, Strengthening the Independence of Judges and on the Changes to the Constitution proposed by the Constitutional Assembly of Ukraine, para. 21.

[85] *Ibidem*, para. 49.

[86] Venice Commission, CDL-AD(2015)027, Opinion on the proposed amendments to the constitution of Ukraine regarding the Judiciary, para. 24.

[87] Venice Commission, CDL-AD(2015)027, Opinion on the proposed amendments to the constitution of Ukraine regarding the Judiciary, para. 29; CDL-AD(2015)026, Opinion on the amendments to the Constitution of Ukraine regarding the Judiciary as proposed by the Working Group of the Constitutional Commission in July 2015, para. 46.

[88] Venice Commission, CDL-AD(2015)026, Opinion on the amendments to the Constitution of Ukraine regarding the Judiciary as proposed by the Working Group of the Constitutional Commission in July 2015, para. 44.

[89] *Ibidem*, para. 45.

The introduction of the mechanism of the constitutional complaint to afford an individual standing before the Constitutional Court for the first time was particularly welcomed, even if it did not go "as far as establishing a full constitutional complaint against individual acts", as the Venice Commission had recommended.[90] The reforms also granted the Court the right to postpone the invalidity of a law found to be unconstitutional.[91]

While certain of the Venice Commission's recommendations remained unfulfilled, they still remain relevant regarding future amendments to the Constitution. Of particular relevance is the introduction of a requirement of a qualified majority in parliamentary voting for the election of the *Verkhovna Rada*'s quota of judges to the Constitutional Court[92] and of the implementation of a more robust right of constitutional complaint.[93]

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Thus, the period of over twenty-five years of co-operation between the Venice Commission and the Ukrainian authorities reached its summit with the passage of comprehensive systemic judicial reform in 2016. These joint efforts resulted in the institutionalization in the Constitution of the fundamental principles and values of the Rule of Law consistently expounded by the Commission. To summarize, the main achievements were:

- Removing the power of the *Verkhovna Rada* and the President to appoint and dismiss judges;
- Limiting the role of the President in the establishment and dissolution of courts;
- Strengthening the guarantees of judicial independence by eliminating the initial 5-year appointment of judges in favour of lifetime appointment for all judges and giving the judiciary a greater role in the budgetary process;

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[90] Venice Commission, CDL-AD(2013)034, Opinion on proposals amending the Draft Law on the amendments to the Constitution o strengthen the independence of Judges of Ukraine, para. 11.
[91] Venice Commission, CDL-AD(2016)034, Opinion on the Draft Law on the Constitutional Court, para. 68.
[92] *Ibidem*, para. 25.
[93] *Ibidem*, para. 39.

- Abolishing the "breach of oath" as a ground for dismissal of judges;
- Bringing the composition of the High Council of Justice in line with the European standards, with more than a half of its member judges elected by their peers;
- Empowering the High Council of Justice to take all decisions regarding a judge's career (promotions, transfers, dismissals);
- Making the High Council of Justice responsible for the training of judges and prosecutors;
- Limiting judicial immunity to conduct on the bench, thereby promoting greater judicial accountability;
- Abolishing the high specialized courts and transforming them into divisions within the Supreme Court;
- Installing the Supreme Court as the highest judicial body in the system of courts of general jurisdiction with the role of the ultimate guarantor of the uniformity of the jurisprudence and practice of all courts;
- Balancing the composition of the Constitutional Court, with its members being appointed by the President, the *Verkhovna Rada* and the Congress of Judges, after selection on the basis of a competition among candidates whose high qualifications are listed in the Constitution;
- Introducing a constitutional complaint process for individuals to challenge the constitutionality of laws after exhaustion of the domestic remedies;
- Terminating or dismissing of the Constitutional Court judges by two-thirds vote of the Court itself.

Remaining outstanding as a work-in-progress are the Venice Commission's recommendations with respect to:

- Removing the power of the *Verkhovna Rada* regarding a vote of non-confidence in the Prosecutor General;
- Implementation of a special, qualified majority regarding the appointment of the Prosecutor General and the election of two members of the High Council of Justice and one-third of the members of the Constitutional Court by the Parliament;
- Requiring the vote of a qualified majority of members of the Congress of Judges regarding the appointment of one-third of Constitutional Court judges.

Nevertheless, the post-Revolution of Dignity reforms mark a colossal breakthrough in the institutionalization of the Rule of Law and European values in Ukraine. The opinions and recommendations of the Venice Commission facilitated Ukraine's integration not just into the constitutional structures of the European Union, but also promoted the integration of the concept of the Rule of Law into the Ukrainian legal thought, doctrine and, ultimately practice. Indeed, it is difficult to imagine Ukraine as the dynamic democracy that it is today without the Commission's steely assessments of its progress, keeping the country on a "straight and narrow" democratic path. There is no doubt in my mind that it was the guidance of the Venice Commission that helped shape Ukraine's modern constitutional development.

Since the notion of the "Rule of Law" was incorporated into the statutory documents of the European institutions, Ukrainian jurists and authorities have become more familiar with the substance of the *Rule of Law,* either as a set of *values* on which the "[European] Union is founded,"[94] as one of the *principles* "which form the basis of all genuine democracy,"[95] or as a *fundamental principle* of the European Convention "permeating it all and bonding it together."[96] In particular, in recent years much was done to reach a common understanding or to find a consensual definition of the "Rule of Law" notion both within the European Union[97] and within the Council of Europe institutions, in particular, the Parliamentary Assembly,[98] the Committee of Ministers,[99] and the Venice Commission.[100]

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[94] Consolidated version of the Treaty on European Union (Article 2). *Official Journal of the European Union (C 115/13, 9 May.2008).*

[95] Statute of the Council of Europe (Preamble and Article 3) *(ETS – Nos 1/6/7/8/11).*

[96] *he Hon. Chief Justice Emeritus Prof. John. J. Cremona.* The Rule of Law as a Fundamental Principle of the European Convention of Human Rights // In: A Council for all Seasons: 50th anniversary of the Council of Europe. – [Valetta]: Ministry of Foreign Affairs (Malta), 1999. – P. 124.

[97] See Conclusions [of the] Conference "The Rule of Law in a Democratic Society" (Noordwijk, The Netherlands, 23 and 24 June 1997). *Doc. PC-PR (97) misc 1.*; Council conclusions on the follow-up to the Noorwijk conference: the Rule of Law // Europe. EU Official Documents. Bulletin EU 5-1998.

[98] See The principle of the Rule of Law: Report of the Committee on Legal Affairs and Human Rights. Rapporteur: Mr Erik Jurgens, Netherlands, Socialist Group. Doc. 11343, 6 July 2007; Resolution 1594 (2007). The principle of the Rule of Law. Text adopted by the Standing Committee, acting on behalf of the Assembly, on 23 November 2007 (see Doc. 11343).

[99] See The Council of Europe and the Rule of Law – An Overview, CM(2008)170, 21 November 2008.

[100] Venice Commission, CDL-AD(2011)003rev., Report on the Rule of Law; CDL-AD(2016)007, Rule of Law Checklist.

Even though a consensual understanding has been reached that "the Rule of Law does constitute a fundamental and common European standard to guide and constraint the exercise of democratic power"[101] we have to admit that, for objective reasons, implementing these standards as part of Ukraine's democratic transformation proved to be more difficult than was initially expected at the time of its accession to the Council of Europe – confronting and overcoming the legacy of more than three centuries of influence of Russian absolutism and Marxism was never going to be easy. Even today, the Ukrainian legal thought is still to a large extent influenced by Russian legal thinking, which itself is deficient in the understanding the essence of the *Rule of Law* within its traditional interpretation and application by European institutions.

However, the influence of the Venice Commission in guiding, educating and cajoling Ukraine into the institutionalization of the Rule of Law has had a profound impact on Ukraine's unalterable orientation to the European family of democratic nations and traditions. In effect, the Commission became the backbone of the Ukrainian legal system.

Fruitful co-operation between the Venice Commission and the Ukrainian authorities has successfully continued following the 2016 constitutional reform and will continue further. Indeed, a recent decision of the Constitutional Court rejecting as unconstitutional the administration's unwarranted and arbitrary reduction in the number of judges of the Supreme Court from 200 to 100 was heavily influenced by two *Amicus Curiae* briefs (one on human rights,[102] the other on democracy[103]) and an Opinion of the Venice Commission; these argued that such action would be tantamount to "a second vetting"[104] of judges and would constitute "an obvious threat to their independence and to the role of judiciary in the light of Article 6 ECHR."[105] The Constitutional Court subsequently struck down the law as unconstitutional, grounding much of its judgement on the arguments advanced by the Venice Commission.

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[101] Venice Commission, CDL-AD(2011)003rev., Report on the Rule of Law, para.70.
[102] Venice Commission, CDL-AD(2019)001, *Amicus Curiae* brief on separate appeals against rulings on preventive measures (deprivation of liberty) of first instance courts, Strasbourg, 18 March 2019.
[103] Venice Commission, CDL-AD(2019)029, *Amicus Curiae* brief for the Constitutional Court of Ukraine on Draft Law 1027 on the early termination of a deputy's mandate, Strasbourg, 9 December 2019.
[104] Venice Commission, CDL-AD(2019)027, Opinion on amendments to the legal framework governing the Supreme Court and judicial governance bodies, para. 85.
[105] *Ibidem*, para. 83.

The co-operation between the Venice Commission and Ukraine contained in the Commission's almost 100 opinions and two *Amicus Curiae* briefs reflect a copious amount of intellectual nourishment, substantive legal doctrine and impressive practical guidance. All of which comprise the triad of European common values: Democracy, Human Rights and the Rule of Law - and, because of the crucial role played by the Venice Commission, all of which now form the corpus of Ukraine's legal and body politic.

Ilwon Kang[1]

Constitutional globalization in Korea and the Venice Commission

1. Introduction

China, Japan and Korea are major political and economic players in East Asia. China was one of the cradles of world civilization and principally the leading civilization in East Asia for thousands of years. However, Japan was the first Asian country which enacted a modern constitution. The Meiji Constitution, which was enacted in 1889, provided Japan a form of constitutional monarchy. The Meiji government transformed Japan from a feudal society into a modern industrial state. The modernized Japan collided with the Qing dynasty of China over influence in Korea. The First Sino-Japanese War broke out in 1894 and ended with the sweeping victory of Japan in 1895. For the first time, regional dominance in East Asia shifted from China to Japan.

Until the late 19th century Korea insisted the policy of seclusion under the influence of China. The defeat of China in the Sino-Japanese War forced Korea to open its border under the control of Japan. The Korean Empire became a protectorate of Japan in 1905 and was formally annexed to Japan in 1910. Japanese rule over Korea ended in 1945 upon the surrender of Japan in World War II. In 1948 the Republic of Korea was established in South Korea.

Korea had no sooner accepted the constitutional adjudication system than independence was achieved. The Founding Constitution of Korea created the Constitutional Committee which had a power of judicial review over Acts passed by the National Assembly. Since Koreans had no experience in the constitutional adjudication, the Constitutional Committee and the Korean judiciary heavily relied on the foreign and international jurisprudence. Judicial citation of foreign and international law became a tradition in Korean constitutional justice.

Koreans suffered the Korean War from 1950 to 1953. After the War, Korea was one of the poorest countries in the world. Since then Koreans

[1] Former Member of the Venice Commission in respect of Korea (2016-2019).

have experienced a rapid social change and economic growth. The economy of Korea is now the 4th largest in Asia and the 12th largest in the world. The development of constitutionalism in Korea has contributed to the rapid economic growth. The support of the Venice Commission has been a critical factor in Korea's constitutional development and globalization.

2. Constitutional Justice in Korea

The Japanese government implemented the European civil law system in Korea during the period of colonial rule. After World War II Koreans experienced the American common law system under the control of the US military government from 1945 to 1948. This historical background made the Korean legal system a mixture of the Continental and the American legal system.

When the Founding Constitutional Bill of Korea was drafted, there was a dispute over the constitutional adjudication system. The nominee for the first Chief Justice of the Supreme Court argued the power of judicial review should belong to the ordinary courts. He worked as the head of Judicial Department of the US Military Government. However, scholars who were in charge of drafting the Bill insisted it would be improper to adopt the American style judicial review system. They thought Korean judges' credibility suffered in their collaborating with the Japanese government during the colonial period. Also, at that time, many influential scholars studied law in Japan or Germany. So, the final version adopted the European style of constitutional adjudication.

Since Korean lawyers were not familiar with judicial review, only six cases were referred to the Constitutional Committee from 1948 to 1961. The Committee rendered a decision of unconstitutionality in two cases in 1952. One of them was related to the right to trial. When the Korean War broke out, the President issued the Special Decree which provided that adjudication of crimes which were committed during the state of emergency was limited to the district court and no appeal allowed. The Constitutional Committee found that this Presidential Decree was unconstitutional. Korean people realized that the Constitution was above the President who was an authoritarian ruler.

The Student Revolution of 19 April 1960 overthrew the first President Rhee's regime. The new Constitution adopted a parliamentary system and introduced the Constitutional Court. This new Court was designed following the German model. However, before the Constitutional Court

was organized, the military coup broke out and the Constitutional Court Act became nullified. Although the Court could not be formed, it played an important role of reference in the formation of the current Constitutional Court.

After two-year military rule, Korea returned to a presidential system in 1962. The new Constitution introduced the American style judicial review. The new government assigned a high priority to economic development. Protection of human rights were forced to give way to economic prosperity. The executive branch led by the strong President was much more powerful than the Judicial branch. The Supreme Court failed to exercise its new power of judicial review. However, in 1971, the Supreme Court held the State Tort Liability Act which limited the government liability for damages of military personnel unconstitutional. This judgement invoked fury of the President since the Korean government was suffering fiscal pressure.

The President declared a state of national emergency in 1971 and suspended the Constitution. The Constitution was amended in 1972 and made the above Supreme Court's decision of unconstitutionality null and void. This new Constitution reintroduced the Constitutional Committee. The new Committee was designed to be a nominal agency. No review of the constitutionality of a statute has been made in this Committee.

The economy continued to flourish under the authoritarian rule. The Korean economy was rapidly grown in 1980s. The economic growth led to radical political and social transformations. A large constitutional revision was completed in 1987. It was the first time that an amendment took place as a result of people's demand for a system in which they could freely choose their own government. Under this current Constitution, the Constitutional Court of Korea was established and democracy in Korea has been fully realized.

There are about 80 rapporteur judges who are doing research for nine Justices who comprise the Constitutional Court. One of main roles of the rapporteur judges is to explore the foreign and international law. In 2011, the Constitutional Court established the Constitutional Research Institute. The Institute has conducted research on the Constitution and contributed to the accurate and prompt adjudication by the Court. The Institute has studied and analyzed foreign cases that the Constitutional Court might refer to in its decision. As a result, the decisions of the Constitutional Court contain many citations of foreign and international law and cases.

3. The Venice Commission and the Korean Constitutional Court

The Berlin Wall came down in 1989 and German reunification concluded in 1990. Many Koreans who craved the reunification of Korean peninsula paid great attention to this event. When the Venice Commission was established, the Constitutional Court and many Korean scholars felt great interest in the Commission. The Commission's role of assisting Eastern European countries in adopting and operating a westernized Constitution seemed to be an excellent reference for the at-that-time feasible reunification of South and North Korea.

The second President of the Constitutional Court, Yong-joon Kim, took part in the 11th Conference of the European Constitutional Courts in 1999. There he met the President of the Venice Commission and asked for help in fostering cooperation between the Commission and the Constitutional Court. The Venice Commission extended an invitation to the Korean government and Korea became an observer. President Kim attended the 43rd plenary session and made a speech in 2000. The third President, Young-chul Yun, attended the 60th plenary session and gave a speech in 2004.

In 2006, Korea became an official member State of the Commission. Since the Constitutional Court has had an initiative to participate in the Commission, it has been a tradition to choose a member of the Commission among nine Justices of the Court. The Ministry of Justice which had an interest in studying the transition process of Eastern European countries to constitutional democracies has nominated a substitute member.

The first Korean member was Justice Kong-hyun Lee who served from 2006 to 2011. Justice Lee was elected as a member of the Bureau in 2009. He played a role of rapporteur in preparing the opinion on draft amendments to the Law on the Constitutional Court, the Civil Procedure Code and the Criminal Procedure Code of Azerbaijan,[2] the opinion on the Draft Amendments to the Constitution of the Republic of Azerbaijan[3] and the opinion of the Draft Law on additions to the Law on the Status of Municipalities of the Republic of Azerbaijan.[4]

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[2] Venice Commission, CDL-AD(2007)036, Report on the Effectiveness of National Remedies in respect of Excessive Length of Proceedings.

[3] Venice Commission, CDL-AD(2009)010, Opinion on the Draft Amendments to the Constitution of the Republic of Azerbaijan.

[4] Venice Commission, CDL-AD(2009)049, Opinion on the Draft Law on additions to the Law on the Status of Municipalities of the Republic of Azerbaijan.

When Justice Lee retired from the Court, Justice Young-joon Mok was chosen as a member of the Commission. Justice Mok served as a member until he retired from the Court and Justice Han-chul Park was designated as a new member in 2012. Justice Park was appointed as the President of the Constitutional Court on April of 2013 and he tendered his resignation to the Commission. After his resignation I became a member.

I was elected as a Co-President of the Joint Council on Constitutional Justice in 2014 and became a Bureau member in 2015 and reelected in 2017. I took part in several projects as a rapporteur, such as joint opinion on the Draft Law on the Status of Municipalities of Azerbaijan,[5] *Amicus Curiae* Brief of the Constitutional Court of Moldova on the Law on Professional Integrity Testing,[6] Joint Opinion on the Draft Law on Introduction of Changes and Amendments to the Constitution of Kyrgyz Republic,[7] Preliminary Opinion on the Draft Modification to the Constitution of Azerbaijan,[8] Report on Term Limits.[9]

In April 2015, I participated in the International Conference on International Experience on Introducing Constitutional Amendments and on Constitutional Revisions which was held in Bishkek, Kyrgyz Republic, in the capacity of an individual member of the Venice Commission. I made a presentation about the Korean experience on constitutional amendments. Also, I made comments on the Kyrgyz government's plan of constitutional amendments. After listening to my comments, a Kyrgyz participant said that it felt like they finally saw the light after a long tunnel. He also told me that my comments based on Korea's recent experience of democratization gave Kyrgyz participants clearer vision and hope than the advice by delegates from Europe, which felt too far away from them. I realized Korea could play a unique role in the Venice Commission, especially in bridging traditional democracies in Western Europe and new democracies in Asia.

My term of office as a Justice of the Constitutional Court expired in 2018 and I offered my resignation to the Venice Commission. Justice Suk-tae Lee was appointed as a new member in 2019. Justice Lee was a

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5 *Ibidem*.

6 Venice Commission, CDL-AD(2014)039, *Amicus Curiae* Brief for the Constitutional Court of Moldova on certain provisions of the law on professional integrity testing.

7 Venice Commission, CDL-AD(2015)014, Joint Opinion on the draft law "on Introduction of changes and amendments to the Constitution" of the Kyrgyz Republic.

8 Venice Commission, CDL-PI(2016)010, Azerbaijan - Preliminary Opinion on the Draft Modifications to the Constitution submitted to the Referendum of 26 September 2016.

9 Venice Commission, CDL-AD(2018)010, Report on Term Limits - Part I - Presidents.

famous human rights lawyer in Korea. He was appointed as a Justice of Constitutional Court in 2018. His term of office will be ended in 2024.

Since 1996, the Venice Commission has established cooperation with a number of regional groups of constitutional courts. The Constitutional Court took the initiative to create the Association of Asian Constitutional Courts and Equivalent Institutions (hereinafter, "AACC") to develop democracy and realize the principle of the Rule of Law, as well as to protect basic human rights in Asia. In 2007, the Preparatory Committee of the AACC was established at the 5th Conference of Asian Constitutional Court Judges in Seoul. From 2008 to 2010, four preparatory meetings for the AACC were held in Seoul. In 2010, the Jakarta Declaration on the Establishment of the AACC was adopted. In 2012, the Constitutional Court of Korea hosted the Inaugural Congress of the AACC in Seoul. The Venice Commission strongly supported the establishment of the AACC throughout the whole process.

In 2016, a consensus was achieved among members of the AACC to establish a Secretariat for Research and Development (SRD) in Seoul. The AACC's objectives are the protection of human rights, the guarantee of democracy, the implementation of the Rule of Law, the independence of constitutional courts and the cooperation and exchanges of experiences and information among members. The AACC SRD plays a vital role in the achievement of these goals and acts as a channel of communication of AACC member institutions. Again, the Venice Commission has given a full support to the AACC SRD.

The Venice Commission acts as the Secretariat of the World Conference on Constitutional Justice (hereinafter, "WCCJ"). In 2014, the 3rd Congress of the WCCJ was held in Seoul. As a member of the host court, I worked as Chair of the Preparatory Committee for the 3rd Congress. Asia is an only continent which has no regional court of human rights. Under the leadership of the President Han-chul Park, the Constitutional Court of Korea started studying possibility of the creation of the Asian Court of Human Rights. The Constitutional Court wanted to get support from the WCCJ on this study. With the substantial assistance of the Venice Commission, the Seoul Communique was adopted at the 3rd Congress of the WCCJ. In this Communique, the participants encouraged participating Asian Courts to promote discussions on the possibility of establishing an Asian Human Rights Court based on international human rights norms.

In 2013, the Ministry of Justice of Korea requested adjudication on dissolution of the Unified Progressive Party, arguing that the objectives of the Party stated in the platform and the activities of its members were

against the fundamental democratic order. This case was the first case of party dissolution brought before the Constitutional Court of Korea. Both the petitioner, the Ministry of Justice, and the respondent, the Unified Progressive Party, alleged that the Guidelines of the Venice Commission on prohibition and dissolution of political parties and analogous measures[10] should be applied in this case. The Constitutional Court of Korea consulted these guidelines in dealing with the case and received useful reference materials from the Venice Commission. The Constitutional Court of Korea ordered the dissolution of the respondent party in 2014.

I usually looked up the opinions of Venice Commission whenever I handled relevant cases in the Constitutional Court. In 2016, I organized the study group of the opinions of the Venice Commission with dozens of rapporteur judges. We met regularly and discussed the important and suggestive opinions and guidelines. In 2017, we selected 8 reports of the Venice Commission and translated them into Korean. In 2018, the Constitutional Court published these translations for a reference material.

4. Conclusion

Korea is a leading country in the field of constitutional justice in Asia. The culture, social structure and economic situation of Asia are significantly different from those of the Western countries. The Korean experience in constitutional globalization and cooperation with the Venice Commission is a valuable asset for the Asian people.

The Constitutional Court of Korea has been very active in securing meaningful ways of assisting Asian neighbors in their effort to implement or improve a constitutional adjudication system. Participation in the Venice Commission has enabled the Constitutional Court to take its responsibility more seriously. The 3rd World Congress of the WCCJ marked a turning point of development of the Constitutional Court of Korea. Since then, the Constitutional Court of Korea and the AACC SRD has studied the possibility of establishing a human rights court in Asia. An Asian human rights court will be a historical monument to enhancement of protection of human rights in Asia. Because of tremendous diversity in Asia, it will take a significant time and effort to establish a regional human rights court in Asia. However, well begun is half done.

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[10] Venice Commission, CDL-INF(2000)001, Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures.

In this globalized world, we all share the same idea of democracy, human rights and Rule of Law. Korea has been achieving real democracy and Rule of Law in a relatively short period of time. If all Asian neighbors promote democracy altogether, the establishment of durable peace and Rule of Law in Asia will be realized. I believe, with the support of the Venice Commission, a dream of establishment of the Asian Human Rights Court will come true in not so remote future.

Tanja Karakamisheva-Jovanovska[1]
Gordana Siljanovska-Davkova[2]

The world of global constitutionalism and the role of the Venice Commission – Challenges and Perspectives

Abstract

In the past three decades, the Venice Commission has acquired a reputation as an authoritative consultative and expert body on constitutionalism and democracy. Established by eighteen Western European member States in 1990s, in 2002 when the Committee of Ministers of the Council of Europe amended the Statute, the Venice Commission became a family of many non-European states as a full member.

Today, the Venice Commission is gathering individual representatives coming from 62 member States, persons of high standings in the field of constitutional and international law, or political sciences, constitutional court judges, etc. who are contributing in making a wealth of global constitutional knowledge and experiences based on three broad principles: respect of fundamental rights and freedoms, democracy, and the Rule of Law.

For fundamental rights, the basic instrument followed by the Venice Commission is the European Convention on Human Rights and the interpretation of its provisions by the Strasbourg Court (the case-law), for democracy, the main attention is on *inter alia* organization of regular and free elections as guaranteed under the First Protocol to the ECHR as well as in national constitutions of the member States, and the Rule of Law mainly, or in a general sense, as it is elaborated in the Rule of Law Check's list adopted by the Venice Commission in the June's Plenary session, 2016.

The global constitutionalism is merely comprised of identical three basic principles mentioned above. Rule of Law, separation of powers, fundamental rights and freedoms protection, democracy, and solidarity together with institutions and mechanisms securing and implementing these principles as main parameters to inspire strategies for the improvement of the legitimacy of all legal state orders, as well as the European and International order.

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[2] Former Macedonian member of the Venice Commission (2016-2020).

The paper will be focused on analyzing all sides of this interconnectivity, inter-relations, and main experiences of the Venice Commission's work, on one side, and the work of other international organizations in the field of improving democracy, Rule of Law, and human rights in the national and global constitutional field, on the other side.

The Venice Commission has already established a solid track record as a competent advisor on constitutional matters. This has had an impact on the inclination of other international organizations (such as the EU as a political system *sui generis, OSCE-ODIHR), European Court of Human Rights in Strasbourg, Court of Justice of the EU,* and the national states to seek the Commission's opinion in appropriate cases as well as the practical implementation and operation of the new constitutional arrangements. Effects coming from the Venice Commission's work arise on a variety of levels. Some of the effects can most readily be measured by the conclusions drawn by the parties to whom opinions are addressed, such as implementation of, or non-compliance with recommendations. And the effects from the Venice Commission's work can also manifest themselves in decisions made by other bodies of the CoE as well as by the ECtHR. There is probably also an influence on decisions of the European Union, particularly since in a number of instances the European Commission has taken the initiative to win over the Venice Commission for its activities.

The aim of this paper is to present the objective role and the work of the Venice Commission, as well as its impact on transnational constitution-making broadly conceived. The very fact that there is an institution, which is independent and can draw on the legal expertise of highly qualified members in order to proffer advice to countries or to the international organizations concerning the compatibility of their constitutions, legal documents and laws with the precepts of democracy, human rights, and the Rule of Law, is a force for good.

1. Global Constitutionalism v. International Public Law – Trigger v. Puzzle, or Legal Symphony?

The term "global constitutionalism" aims to cover the norms, principles and institutions on which the so-called global constitutional law is based, respecting the basic democratic principles in the international order, as well as in the national legal orders - the Rule of Law, protection of human rights and freedoms, separation of power, democracy and solidarity.

Many authors used the so-called compensatory constitutionalism as a second name of the global constitutionalism, which according to their views is based on three fundamental constitutional elements.

The first one is directly related with the views of emergence of the global constitution. Although this element is considered very often as utopian solution, some authors[3] defined it to be an ongoing and long-lasting process, rather than an *ad hoc* event.

The second element is the existing of a formal dimension of the global constitutionalism which denotes existing of some procedural and institutional norms, and the third element is that a global constitution must have a substantive effect, the material dimension must be associated with the output side of a policy process guaranteeing fairness and security. Mentioning three elements of the global (compensatory) constitutionalism, I would like to underline the essence of the civil and political integration of the national systems, as well as negative and positive integration in the global order.

Generally speaking, the constitutionalism *per se* is not a nationalist nor a Western or exclusively European or a German or any other nation´s concept.

Constitutionalism is born as a result of the global understanding of the way to ensure the good governance with meaning that the government works for the people, empowered by the people, with independent courts to ensure fair proceedings, from elections to forming a government and appointing judges, to passing laws, and with an implemented guarantee of fundamental human rights, including dignity, liberty and equality, that democratically elected majorities have to respect.[4]

As such, constitutionalism is based on institutions that do this job wisely.

Without implementation, it becomes fake decorum.

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[3] See: Abbott, Kenneth W., Keohane, Robert O., Moravcsik, Andrew, Slaughter, Anne-Marie, Snidal, Duncan (2000): The Concept of Legalization, in: International Organization, vol. 54, no. 3, p. 401-419.

[4] Venice Commission, CDL-JU(2017)002, Challenges to Constitutionalism: The Role of Constitutional Courts.
Prof Pavlos Eleftheriadis from the Oxford University has argued that Kant's concept of the egalitarian civil condition, based on the recognition of the equal status of free individuals which is the principle of the utmost meaning for the constitutionalism, can also figure as the first cosmopolitan principle of international law. From this claim, Eleftheriadis derived the argument **that prior to any** theory of global substantive or distributive justice, there needs to be a theory on the legitimacy of global institutions that safeguards the principles of reciprocity and mutual respect. This implies a step back from the direct assimilation between constitutionalism and distributive or substantive justice. See more details on: www.jus.uio.no/pluricourts/english/blog/guests/2016-02-11-van-den-meerssche-glob-constitutionalism.html (accessed on 15 December, 2019).

On the other hand, the term global constitutionalism is considered not only as a formal legal determinant, but also as a content which seriously moves aside the existence of the traditional concept of international public law, and particularly the idea of the evolution of the international order based on the principles of state sovereignty and consensus.

Seen as an intellectual movement "global constitutionalism" have reconstructs some features and functions of international law (in the interplay with domestic law) as "constitutional" and even "constitutionalist" (positive analysis), and seek to provide arguments for their further development in a specific direction.[5]

The dominance of the fundamental principles of constitutionalism in the international order is an obvious matter that does not jeopardize the existence of the international public law, although they give added value to the international law as a tool for improving the quality of the protection of the rights and freedoms of citizens regardless of which country they live in, which race they belong to, which religion they (do not) support.

The constitutionalisation of the international public law is a process that gains on weight and meaning with every passing day. This is especially evident in the strengthening of the basic norms that have a constitutional function in the international legal system, in the norms that have the character of "constitutions" in the international organizations, as well as in the norms undertaken or reinforced in the constitutions of the national law.

It is not by coincidence that the international organizations are said to be the creators of the term constitutionalization and global constitutionalism.

If we go back, we will see that it is the former Economic Community, today's EU, then the World Trade Organisation and the UN[6] are among the

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[5] See: M Craven, (2005), "Unity, Diversity, and the Fragmentation of International Law", 14 Finnish Yearbook of International Law, p. 3-34. See also: Bruce Ackerman (1997), *The Rise of World Constitutionalism,* **83** VA. L. REv. 771, p. 775-78. (accessed on 5 December 2019).

[6] "The United Nations is a constitutional organization, the argument goes, whose constituent Charter delegates certain powers to various constituted organs, e.g. the UNSC, the General Assembly (UNGA), and the Secretariat. Therefore, from the point of view of constitutionalism, it should not be possible for the organs to act *validly* beyond the ambit of their constitutionally delegated powers. Action in excess of delegation is simply void. Of course in general the constitutionalist position is absolutely right. However, seemingly irreconcilable controversy over "constitutionality" arises in any particular instance where the UNSC appears to act near (or beyond) the limits of its competence. The Charter delegates and limits the powers of the Council in very vague and open textured terms, making it far easier to spell out what the body can do than to identify what it cannot do. Resolving the constitutionality of any particular Council action seems a vague and ill-defined endeavor-perhaps prohibitively so in the absence of any body with ultimate

first to promote the term of global constitutionalism by putting high the fundamental constitutional principles determined in the national constitutions and by thus giving them a higher, deeper meaning at international level.

These principles are today considered as basic features by which the success of world trade, the success of human rights protection and the success of other policies based on these constitutional principles are assessed. For these reasons we are witnessing a strong turn to globalized constitutionally-defined international relations and policies, which in a political context can cause a potential conflict in the implementation of the constitutional norms, principles and procedures.

Such a situation may also raise the question of whether and to what extent national constitutional principles are appropriate to the process of understanding and applying supranational constitutionalism. In the absence of a specific global rule with the global system, any reference related with the three constitutional principles in the international relations, in the international theory and the discourse of the international law represents simultaneously a system of checks and balances in the global constitutionalism. In doing so, it is necessary to make an important distinction between the concepts of constitutionalism and constitutionalization.

While "constitutionalization" means a process by which institutional activities, the activities of specific institutions of international organizations in the global reality receives a constitutional quality, which as a process often happens spontaneously and in a less coordinated manner, the "constitutionalism" is a theoretical approach, a framework in which a shift from globalized to constitutionalized international relations is made.

In this context, it must be kept in mind that the theory of constitutionalism always reflects a certain context of existence in terms of time, space and institutions, and hence it is possible to talk about different types of constitutionalism, such as American, European, Asian, Modern, Classic, and the like.

The debates on constitutionalism in the international public law intensified when the co-operation between the states and the international organizations

interpretive authority over the Charter, and the conformity thereto of the actions of the UN organs. Nevertheless, the constitutionalist critique remains important, in order to assess whether the organization and its bodies exercise power appropriately, within limits, and in conformity with the Rule of Law. I want to suggest that it is possible to shed some light on the question of the Council's competences by reassessing how to conceptualize the constitutional analysis." See more details in: Julian Arato (2012), Constitutionality and constitutionalism beyond the state: Two perspectives on the material constitution of the United Nation, International Journal of Constitutional Law, Volume 10, Issue 3, 1 July, p. 627–659, https://doi.org/10.1093/icon/mor079. (accessed on 15 September 2019).

in the international sphere increased, and the use of international legal language in the process of rationalization of such cooperation got strengthened. From these debates, in fact, the terms "global governance", "global Rule of Law", etc. appeared, in order to unite all the global actors under one umbrella.

The constitutionalism itself is actually treated as a huge theoretical umbrella under which all international organizations are located, a legal umbrella that implies greater cooperation at the international level and greater legal cohesion of the global constitutionalism.[7]

We are witnesses of many international regimes or regional cooperative frameworks which are now delivering constitutional or quasi-constitutional functions. For example, the Charter of the United Nations is described as a Constitution for the international community, and the World Trade Organization as an economic charter.

Even a regional, mainly economic compact, such as, the North America Free Trade Agreement[8] is characterized by some as being "constitutional".

Furthermore, many international human rights instruments that are now entrenching domestic legal orders serve constitutional functions.

On the one hand, certain rights have become *"jus cogens"* (binding law) or "obligation *erga omnes"* (a protecting duty for all states) while others obtain the status of customary international law.

On the other hand, the domestic "constitutionalization" of international treaties has facilitated this trend and not surprisingly, fueled intense debate. Some national constitutions, for example, Constitution of Belgium, Constitution of Netherlands, Constitution of Luxembourg, etc. directly embrace international laws to be part of their laws and many more national judicial bodies have referred to international treaties or transnational norms to which their national political counterparts have not yet agreed. Not to mention, the transnational judicial dialogue that seems to create a constitutional regime merely through conversations between judges.[9]

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[7] There is no single recognized global constitution. Rather there are a number of visions of what a global constitution is and should be and what is spurring constitutionalization in the international sphere. More details in: Christine E.J. Schwőbel (2010), Organic Global Constitutionalism, 23 Leiden J. Intl, L. (LJIL), p. 529-553. (accessed on 10 October 2019).

[8] The North American Free Trade Agreement is a trade agreement among Canada, the United States, and Mexico that became effective in January 1, 1994. For its text, see: www.nafta-sec-alena.org/DefaultSite/index-e.aspx?DetaillD=78, (accessed on 28 July, 2019).

[9] https://elibrary.law.psu.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1240&context=psilr. (accessed on 28 July, 2019).

2. The essential dimensions of global constitutionalism

According to the ideas on which the category of global constitutionalism is based, it is considered that there are five key topics that simultaneously appear as pillars in any contemporary debate, which are in fact the central principles of the liberal-democratic tradition of constitutionalism.

As already mentioned above, the key constituent ideas of the constitutionalism are: the idea of restrictions over the government by institutionalizing the political power, control over the functioning of the institutions, determining accountability for decision-makers, the idea (vision) for the political future based on social values, the idea of systematization and harmonization of the law, and the idea of recognition and concrete protection of individual rights and freedoms of the citizens.

These ideas explain the four key dimensions of the constitutionalism: social[10], institutional[11], normative[12], and analogical constitutionalism[13] attempts to bring into focus the prevalent ideas which they entail.[14]

Namely, the social constitutionalism aims to pinpoint key topics related to the principle of power-sharing and the restrictions in the power of the government. The institutional dimension of the constitutionalism views as crucial the topics related with the process of ruling and managing with the political system, as well as the role of the institutions in the execution of the obligations and rights that come from the political power.

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[10] Social constitutionalism is a vision of global constitutionalism that views the international sphere as an order of coexistence. Concerns about participation, influence, and accountability are at the center of these visions.

[11] Institutional constitutionalism looks to where power is situated in the international sphere and seeks to institutionalize this power. Questions of institutionalization largely concern the accountability of decision makers. Power is not only thought to require limiting, but also allocating.

[12] Some authors of international law identify specific norms as possessing a global constitutional character. Distinct from institutional constitutionalism, the legitimacy of these norms is derived from their inherent moral value for society rather than their procedural value in the allocation of power. While the central themes of the limitation and institutionalization of power, as well as the systematization of law, have been discussed already, normative constitutionalism introduces the key themes of idealism and pays particular attention to individual rights.

[13] The final dimension of global constitutionalism draws analogies between features of the international sphere and features of domestic and regional constitutional orders. Scholars contributing to this dimension of global constitutionalism identify constitutional principles of particular legal orders (mostly of their own national or regional legal orders) and find parallel principles in the international sphere.

[14] https://academic.oup.com/icon/article/8/3/611/623473/Situating-the-debate-on-global-constitutionalism. (accessed on 28 September, 2019).

The normative dimension of constitutionalism puts the emphasis on the system of common normative values as well as on the protection of the individual rights and freedoms, while the analogue constitutionalism analyses the different types of constitutional systems in the world that provide the basis for the international legal order.

By analyzing the different types of the global constitutionalism and the corresponding themes that emerge from them, specific patterns of constitutionalization can be identified that include the specific dimensions of constitutionalism in a political context.

3.Venice Commission's role in shaping the global constitutionalism

If we have in mind the fact that the global constitutionalism is based on the traditional constitutional principles which serve as foundation for organization, integration and stabilization of the political community then we might say that the traditional constitutional law has a key influence on the processes for creation of the modern constitutionalism.

Particularly important elements in these processes are the principles of the rule of the law, the political accountability of the holders of office, the democracy, the fundamental protection of the human rights, the principle of checks and balances and the solidarity.

These principles of the Venice Commission constitute the content of the European common constitutional heritage,[15] and their protection is a

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[15] The Venice Commission's role is elaborated in Article 1.1 of the Revised Statute, which mandates the following objectives:
- strengthen the understanding of the legal systems of the participating states, with a view to bringing them closer;
- promote the Rule of Law and democracy; and
- examine the problems raised by the working of democratic institutions and their reinforcement and development.

Article 1.2 instructs the Venice Commission to give priority to work concerning: the constitutional, legislative, and administrative principles and techniques, which serve the efficiency of democratic institutions and their strengthening, as well as the Rule of Law; fundamental rights and freedoms; and the contribution of local and regional self-government to the enhancement of democracy.

The reality is that the Venice Commission works in three broad areas: Rule of Law, democratic institutions and fundamental rights. The crucial areas of the work of the Commission concerns democratic institutions and fundamental rights, which includes: the relations between the different branches of state power; inter-institutional co-operation; the Rule of Law; judicial reform; protection of fundamental rights; protection of minorities; emergency powers; parliamentary immunity; ombudsman institutions; decentralisation; federalism and regionalisation; and the interplay between international law and human rights.

Constitutional reform is central to the Venice Commission's work, including the drafting of constitutions, constitutional amendments, and legislation of a constitutional nature.

primary goal for the existence and the work of this Commission. The notion of the term European constitutional heritage is not stated in clear and detailed form in any international document, but has to be elaborated on the basis of the constitutional and legal experiences of the Western European States and of some international instruments which are dealing with the human rights protection. Venice Commission is using its internal strengths and knowledge of its members to compare those different experiences and to draw principled conclusions from the domestic choices of the European countries.[16]

And not by chance the full name of the Commission is European Commission for Democracy through Law, a combination of two elements: "democracy" and "law". The fact that the process of democracy building is undoubtedly a political process often puts the Commission in a position to seek legal solutions to very sensitive political issues.

For example, finding best/highest quality constitutional solutions for countries whose political systems are in a phase of transformation, from, say, authoritarian to democratic political system, this is probably the most difficult task that stood before the Venice Commission.

There are number of examples in European and non-European countries in which the Venice Commission, through use of best comparative practices and European constitutional standards, as well as in the field of democratic development, democratic values and the rule of the law, has created studies which were later transformed into successful models of political governing, or successful models of organisation of their legal systems.[17]

In this context, particularly important study is the Commission's Rule of Law Checklist, adopted at the 2016 June plenary session. This is a complex study which covers the most important elements that fall under the rule of the law.

Although the idea itself is not authentically of the Venice Commission, having in mind the fact that the "need for universal adherence to and implementation of the Rule of Law at both the national and international levels" was endorsed by all Members States of the United Nations in the 2005, Outcome Document of the World Summit (§ 134), and the Rule of

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The Venice Commission is also concerned with the functioning of political institutions, the balance of power between the main state organs, and the legal framework of national judicial systems.

[16] See: Sergio Bartole, (2014), "International Constitutionalism and Conditionality. The Experience of the Venice Commission", AIC, Rivista, No. 4/2014, p.5, www.rivistaaic.it/download/.../4-2014-bartole.pdf. (accessed on 28 December, 2019).

[17] See: Abbott and Snidal (2001), 'Hard and Soft Law in International Governance', in J.L. Goldstein *et al.* (eds), Legalization and World Politics.

Law, as expressed in the Preamble and in Article 2 of the Treaty on European Union (TEU), is one of the founding values that are shared between the European Union (EU) and its member States,[18] the importance of this study still has a historic character.[19]

The Rule of Law is mentioned in the Preamble to the Statute of the Council of Europe as one of the three "principles which form the basis of all genuine democracy", together with individual freedom and political liberty.[20]

The next significant role of the Venice Commission is development of the legal standards as very dynamic process which takes into account not only existing bodies of rules, shared values, and traditions but also how the substance of standards is structured. The Venice Commission develops standards that it derives from hard law, such as ECHR, but also Commission have a role to identify best practices through a comparison of the bodies of rules and concepts in place to various member States.

The standards are intended to serve as a guide in developing the Rule of Law and democracy, both for the Venice Commission's own work as well as for the practical application by states.[21]

The Venice Commission also aims to disseminate and to develop the constitutional justice particularly through the exchange of information between European and other constitutional courts, ordinary courts and ombudspersons in the field of constitutional justice.[22]

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[18] See, for example, FRA (Fundamental Rights Agency) (2016), Fundamental rights: challenges and achievements in 2015 – FRA Annual report 2013, Luxembourg, Publications Office of the European Union (Publications Office), Chapter 7.

[19] Let us remind that in its 2014 New Framework to Strengthen the Rule of Law, the European Commission recalls that "the principle of the Rule of Law has progressively become a dominant organisational model of modern constitutional law international organisations /…/ to regulate the exercise of public powers" (pp. 3-4). In an increasing number of cases States refer to the Rule of Law in their national constitutions**.** The Rule of Law has been proclaimed as a basic principle at universal level by the United Nations (for example, in the UN Rule of Law Indicators), at the regional level by the Organization of American States (in the Inter-American Democratic Charter), in the African Union (in particular in its Constitutive Act). References to the Rule of Law may also be found in several documents of the Arab League.

[20] Venice Commission, CDL-AD(2016)007, Rule of Law Checklist.

[21] Example of express elaboration on the development of standards can be found in the Report on the Independence of the Judicial System (Part 1). Here the Venice Commission drew on the ECHR, Article 10 of the Universal Declaration of Human Rights, and standards developed by the UN for the independence of the judiciary.

[22] The second area in which the Venice Commission works is constitutional justice. From its early years, the Venice Commission facilitated dialogue between constitutional courts, as manifest in the 1992 creation of a documentation centre to foster mutual exchange of information between the courts, and to inform the public about their decisions.
The Commission established a network of liaison officers with constitutional courts. They

The last but not least Venice Commissions' role is to provide legal advice with particular focus on states who seek to bring their legal and institutional framework into line with regional and international standards in the fields of human rights, and democracy. The opinions may be requested by member States, the Council of Europe and other international organisations, including both the EU and the OSCE.[23]

Apart from its primary role as an advisory body, the Venice Commission facilitates the Council for Democratic Elections, which is a joint institution with PACE and the Congress of Local and Regional Authorities dedicated to enhance the cooperation and promotion of common values and standards in the field of electoral law.[24]

Common to all Venice Commission opinions is the fact that they are not legally binding.

They are at most soft law.[25] The concept of soft law includes norms that are legally non-binding, or binding to only a very limited extent, and lack sovereign enforceability and sanctionability, but nevertheless provide other stimuli for compliance and thus for enabling effectiveness.

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contribute three times per annum to the Bulletin on Constitutional Case-Law and the Commission database CODICES. There is a facility, the 'Venice Forum,' which fosters information exchange between the courts on current issues. Cooperation between the constitutional courts and the Venice Commission was institutionalized post-2002, through the Joint Council on Constitutional Justice (JCCJ).

[23] The Commission's main task is to issue opinions on its own initiative or, as usual, at the request of institutions authorized to ask for an opinion. Opinions are prepared by working groups of rapporteur over the course of an inclusive and participatory process which engages national authorities, civil society, NHRIs and other stakeholders.

[24] The third area in which the Venice Commission is active concerns elections, including referendums and political parties.The electoral work is undertaken under the auspices of the Council for Democratic Elections (CDE) which is a tripartite body composed of members of the Venice Commission, the Parliamentary Assembly of the Council of Europe, PACE, and the Congress of Local and Regional Authorities of the Council of Europe. The CDE and Commission co-operate with OSCE/ODIHR. CDE opinions, like other Commission opinions, are subject to approval by the plenary of the Venice Commission.
The Council for Democratic Elections proffers advice and gives opinions on electoral legislation. The Venice Commission has adopted approximately 120 opinions and issued sixty texts of a general character on elections, referendums, and political parties. Considerable attention has been devoted to codes of good electoral practice, analogous documents concerning referendums, and guidelines that relate to political parties. The Commission also organises the annual European Conference of Electoral Management Bodies, provides training for those involved in electoral work, and participates in some electoral observation missions.

[25] The work of the Venice Commission provides examples for the general observation that the increased internationalization of the law is accompanied by a growing fragmentation of norms referring to a "fragmented system of national, international and private norms". Traditional hard law is increasingly complemented and/or replaced by soft law.

Soft instruments can implement soft law, as well as hard law, and /or add to its efficacy.[26]

Examples of soft law instruments include recommendations issued by the Committee of Ministers, the Parliamentary Assembly of the Council of Europe and its committees.

But, on the other side, the Venice Commission develops standards that it derives from hard law, such as the ECHR, UN Universal Declaration of Human Rights, other human rights covenants, interpretation and application the hard law documents by the European Court of Human Rights, etc. This law constitutes the absolute minimum standard for the Venice Commission.

4. Venice Commission's "case-law"

The Venice Commission creates opinions that, despite their non-compulsory character, have strong expert value.

The value of these opinions and studies comes from the expert authority of its members who, according to the Statute of the Commission, have the obligation to act independently and impartially from their own views, and also from the influence of any other foreign government or other official political entity.

The leading idea for the positions of the Commission is contained in the European tradition built on the basis of the experiences of the democratic countries aimed to create and apply constitutional and other legal solutions in favor of the development of the quality of the democratic systems.

The Commission is sometimes faced with the task of creating new standards originating from the existing standards and practices, and in some cases to propose new democratic solutions that its members feel would be more suitable for application in a particular country.

Thus, for example, in 2012, the Venice Commission gave an opinion to the official authorities in Romania in which, in response to a request from the competent authorities, proposed a solution for greater constitutional loyalty and cooperation among political institutions, as well as a concrete constitutional solution to overcome the conflicts and inconsistencies that are continually emerging in the mutual relations between the President, the Government and the Parliament of Romania. Of course, this opinion did not

[26] When it comes to developing general standards, the Venice Commission tends to deal with the ECHR and international treaties, such as the human rights conventions and other sources of law. Also, the Venice Commission relies on shared legal traditions because the standards become enshrined not only in written law but also in practices and traditions and in practical experiences of states and the international community.

violate the role of the Constitutional Court of Romania, who is still authorized to resolve disputes in the event of a conflict between the state institutions.[27]

In some cases, the Commission was in a difficult and complex position to act as mediator amongst, on the one hand, the traditional principles of constitutionalism, and certain institutions in the analyzed countries, on the other. Such a specific case was the Commission's opinion on introducing the Prokuratura in Russia or Ukraine.

By analyzing the complex political, cultural and social relations and connections within the states and by analyzing them through the prism of the European standards, often, through its expert opinions, the Venice Commission has influenced and embedded itself within the global constitutionalism as a generator of principles and standards that were later used by other international organisations as good practices.

The opinions of the Venice Commission have strong influence and are applied not only in the bodies of the Council of Europe, but also in the work of the Court of Human Rights in Strasbourg, in the EU bodies, in the work of the Court of Justice of the EU, as well as in the work of the organs of other international organizations. They are considered to be democratic guidelines worthy of respect worldwide.

Particularly interesting is the place and role of the Venice Commission in building and advancing the so-called transnational legal order as a formalized set of legal norms, set of organisations and subjects which through their authority (and the Venice Commission has that authority!) to understand and practice the law at trans-national level.[28]

The concept of order in transnational framework includes norms and institutions oriented towards certain social expectations, behaviors and communications, while the legal order includes legal norms that are accepted and institutionalized within the national legislations.

In this sense, the transitional legal order includes international or transnational legal organizations or networks that are directly or indirectly involved in the national and local legal institutions and which have a

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[27] See more details: Venice Commission, 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 the Law no. 47/1992 regarding the organisation and functioning of the Constitutional court and on the Government emergency ordinance on amending and completing the Law no. 3/2000 regarding the organisation of a referendum of Romania.

[28] See more details: The Commission's Activities, Council of Europe: Venice Commission, (2014). www.venice.coe.int/WebForms/pages/?p=01_activities&lang=en.

notable legal form.[29] This order is studied within a transnational theory that integrates the knowledge and experience from the production of the law to its application within the framework as a single framework.

If we keep in mind that the opinions of the Venice Commission are very often practiced in the countries from Central Asia, Latin America, the south-Medditerranean countries etc, then we can easily conclude that the influence of the Commission in the maintaining and strengthening of the quality of the transnational legal order is vast. The Commission, through the development of its programs for the countries of Central Asia, through the development of constitutional assistance projects, by extending the constitutional justice in this part of the world, by reforming their judiciary systems, by introducing new practices in electoral systems and political parties, contributes to concrete integration of the European standards and the principles in the global law.

The most significant cooperation of this sort took place in 2009.

Namely, the Venice Commission together with the EU promoted the initiative for the rule of the law and for incorporating of this principle in the legal systems of five different countries, by providing specific legal assistance aimed to strengthen the independence of the judiciary, the division of power, and to provide reforms in the electoral rules and in the administration, as well as to help in the fight against the organised crime and corruption in Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan.[30]

Particularly noticeable is the cooperation between the Venice Commission and the countries of the Southern Mediterranean Basin focused on the assistance and support of the Arab states in the period before, but especially in the period after the Arab Spring. The Venice Commission fosters very close relations with regard to the legal cooperation with Tunisia and Morocco.[31]

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[29] For Halliday and Shaffer, the legal dimension of transnational legal order does not, however, require a "single hierarchy of norms, nor is it always formally binding, nor is it invariably backed by coercion." A legal order thus defined is transnational insofar as it orders social relationships in some way that transcends the nation state. It is clear, moreover, that "TLOs span legal orders that vary in their geographic scope, from bilateral and plurilateral agreements to private transnational codes to regional governance bodies to global regulatory ordering." See: https://scholarship.law.uci.edu/cgi/viewcontent.cgi?article=1012&context=ucijil.

[30] See: Venice Commission, Joint Programme with the European Union: EU – Central Asia Rule of Law Initiative, http://venice.coe.int/WebForms/pages/?p=03_CARoLInitiative (last visited Nov. 4, 2016)

[31] This can, as in the context of Central Asia, take the form of bilateral exchange, or regional support. The former is exemplified by Commission support, following a request from Morocco in 2014 for assistance in the preparation of two organic laws concerning the High Judicial Council and the Status of Judges.

An excellent example of cooperation and exchange of experiences and opinions is the cooperation between the Venice Commission and the Latin American countries, especially with Brazil, Mexico, Peru and Chile, where the Commission has a strong influence in directing the processes of democratic transition, in creating a climate for better constitutional justice, improvement of their electoral legislation, etc.[32]

The examples of established fruitful cooperation between the Venice Commission and the member States of the Council of Europe, as well as with countries from other continents around the World indicate that the Commission has a strong influence on the creation and strengthening of the democratic standards and rules which are vital part of the global constitutionalism as a concept. The opinions and studies of the Venice Commission, which have a form of recommendations and advice to the concerned states on improving the perception, as well as the quality of the democracy, the protection of the human rights and the Rule of Law within these countries, are strongly modeling the global constitutionalism.

Through its intellectual and interpretative activity, as well as by comparing different experiences in democratic countries, the Venice Commission enhances the constitutional wealth in Europe, but also broader as an extraordinarily important service to democracy. Although the Commission has no capacity to impose its decisions and recommendations as mandatory for the authorities in the States whose laws are being reviewed and analyzed, it still creates space for dialogue and exchange of experiences between experts and national authorities, and through this dialogue concrete quality solutions can be found.

It is this influential authority of the Commission that opens the doors for dialogue with the national authorities, and in almost all cases the dialogue creates solutions that overcome the conflicts between the internal political powers. The standards developed by the Venice Commission can also be found in the recommendations of the Parliamentary Assembly of the Council of Europe, in the decisions of the national constitutional courts and in the decisions of the Human Rights Court in Strasbourg. An analysis of the decisions and judgments of the ECtHR from 2001 to mid-2012 shows that the Venice Commission was cited in some 71 rulings, frequently in those by the Grand Chamber but also in important holdings by other chambers.[33]

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[32] Venice Commission, CDL-AD(2013)021, Opinion on the Electoral Legislation of Mexico.
[33] Reference has been made, *inter alia*, to 20 opinions and 19 guidelines/reports, with electoral law issues being the most frequent subject matter (40 citations in nine documents). Citation of opinions has increased in matters dealing with the judicial system (15 citations in 10 documents), political parties (16 citations in seven documents), freedom

Although while deciding on specific cases, the Strasbourg Court does not rely on the opinions of the Venice Commission, it still uses them as sources of inspiration and information.

On the other hand, most of the opinions of the Commission are created in accordance with the practice of the Court in Strasbourg.[34]

5. Conclusion

The global constitutionalism undoubtedly creates a constitutional order composed of universal principles common to all democratic nation states, as well as for the international organizations that have the power of authority in the realization of the democratic processes.

Within the global constitutionalism, besides the European, the American model also finds its place, as they are both based on the same universal principles: the rule of the law, democracy, respect for the human rights, the principle of check and balance, accountability.

In the scientific theory, the Venice Commission and its recommendations and opinions are viewed as a "soft law", but it evidently has strong influence on the shaping of certain national constitutional solutions, quality boost of the constitutional justice, in the transformation of the national judicial and administrative systems etc.

Besides the positive echo that the Venice Commission creates in the national legal orders and in the international system, there is also criticism present. For example, *De Visser* is more generally critical of the Commission, stating at the outset that her study reveals "gratuitous inconsistencies in the manner in which the substantive evaluation of domestic constitutional texts is carried out and, in a related vein, highlights missed opportunities to give optimal guidance to national constitutional drafters".[35]

Suffice it to say at the outset that talk of "gratuitous inconsistencies" is either misplaced, or de Visser is setting the bar very high to sustain her allegation of inconsistency qualified by this adjectival form, especially given that it is based on evaluation of only four opinions prepared by the Venice Commission.

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of religion (four citations in one document), and freedom of assembly (two citations in one document). See: www.ejil.org/pdfs/25/2/2511.pdf, p.7

[34] Venice Commission, CDL-AD(2002)34, Opinion on the Implementation of the Judgments of the European Court of Human Rights.

[35] http://scholarship.law.uci.edu/cgi/viewcontent.cgi?article=1012&context=ucijil.

There are three related points that should be made in relation to this critique.

First, the line between constitutional principles and their operationalization is not always easy to draw.

If constitutional principles remain at too high a level of abstraction they risk becoming empty vessels, capable of justifying almost any constitutional arrangement, democratic or otherwise.

Second, the Venice Commission acknowledges the central concerns voiced by de Visser, and has always done so. The previous extracts from members of the Commission and the secretariat reveal awareness of the tensions between universality and plurality.

They repeatedly counsel against the idea that there is a one-size-fits-all constitutional model. They articulate the distinction between hard and soft law standards, whereby the state has greater latitude in relation to the latter. This is accepted chapter and verse in Commission thinking, and is a standard feature in Commission opinions.

Third, the reality is that states refer issues to the Commission to gain specific guidance on the constitutional acceptability of specific laws.

On the other side, there are dangers of over-estimation of the Venice Commission's role in the transnational legal order. There are equally dangers of under-estimation, denying that change can be causally associated with the work of a particular institution. We should be equally mindful of the need for balance when considering the workings, procedural and substantive, of any particular institution including the Venice Commission.

It is axiomatic that all institutions are imperfect to some degree. We should therefore be ready to engage in critical scrutiny. We should, by the same token, subject critiques to careful evaluation. The aim of this paper was to present the objective role and the work of the Venice Commission, as well as its impact on transnational constitution-making broadly conceived.

The very fact that there is an institution, which is independent and can draw on the legal expertise of highly qualified members in order to proffer advice to countries concerning the compatibility of their constitutions and laws with the precepts of democracy, human rights, and the Rule of Law, is a force for good.

The Venice Commission has a great influence in shaping the system of global constitutionalism.

It has an active and substantive role in upgrading the current standards makes them better, more visible, and with greater quality than in the past. Effects coming from the Venice Commission's work arise on a variety of levels.

The effects from the Venice Commission's work can also manifest themselves in decisions made by other bodies of the Council of Europe as well as by the ECtHR. There is probably also an influence on decisions of the European Union, particularly since in a number of instances the European Commission has taken the initiative to win over the Venice Commission for its activities.

The Venice Commission's soft law and soft instruments are of significance not merely to its member States but also to other states that cooperate informally with the Venice Commission. States are looking for more than just suggestions on how to develop their own legal system they also want to share in the esteem that comes with being part of a community founded on human rights, democracy and the Rule of Law.

The Venice Commission affords states the opportunity to add to their esteem by contributing to the Commission's work as well as by the way in which they handle recommendations as part of their sovereign responsibility to their respective legal systems and societies.

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16. Wolfgang Hoffmann-Riem (2014), The Venice Commission of the Council of Europe-Standards and Impact, The European Journal of International Law, Vol. 25, No. 2, Published by Oxford University Press.

Useful web-site's links:

- https://academic.oup.com/icon/article/8/3/611/623473/Situating-the-debate-on-global-constitutionalism.
- http://scholarship.law.uci.edu/cgi/viewcontent.cgi?article=1012&context=ucijil.\
- http://www.mpil.de/en/pub/research/areas/public-international-law/global-constitutionalism.cfm.
- https://academic.oup.com/icon/article/8/3/611/623473/Situating-the-debate-on-global-constitutionalism.

Taliya Khabrieva[1]

Russia and the Venice Commission of the Council of Europe

The Russian Federation joined the Council of Europe in 1996; five years later Russia also became a full member of the European Commission for Democracy through Law (Venice Commission). However, cooperation between Russia and the Venice Commission started in 1992 when the Russian Federation prepared the draft Constitution.

The Venice Commission had to launch an extensive work aligned with its significance for Russia and works with various drafts of the new Russian Constitution.

The preparation of the drafts of the 1993 Constitution had two "mainstream" directions and two main competing sources. The Commission noted this fact as a "constitutional problem", which was a struggle between the executive and legislative branches. The Constitutional Commission of the Congress of People's Deputies of the RSFSR prepared the very first draft of the Constitution ("deputy's draft"). Further, the preparation of the basic law was carried out as a part of the Constitutional Assembly convened by the President of the Russian Federation (the "presidential draft"). It was the draft prepared by the Constitutional Assembly, which was sent for examination to the Venice Commission.

A general assessment of the 1993 Constitution by the Venice Commission confirmed the compliance of the Russian Constitution with international legal standards. This fact had fundamental legal significance. The Venice Commission concluded that "the Constitution of the Russian Federation, adopted by referendum on 12 December 1993, to the effect that the text is in line with the principles of a democratic state governed by the Rule of Law and respectful of human rights".

Among the amendments made to the initial draft of the Constitution based on the Venice Commission's recommendation were modifications related to the institution of citizenship and extradition of Russian and foreign citizens. Thus, on the Commission's recommendations, the previous draft's wording on *jus soli* as the only principle of acquiring citizenship (Article 6, part 1) was removed. In addition, the extradition of persons who were unreasonably prosecuted by the state of citizenship was no

[1] Member of the Venice Commission in respect of the Russian Federation.

longer based on the reciprocity principle (Article 63, part 2). These changes were aimed at increasing the level of legal protection in relation to Russian citizens and foreigners.

One of the most important provisions of the national Constitution, according to the Venice Commission, was the provision on the possibility to apply to the Constitutional Court of the Russian Federation (Article 125) by individuals. At the consideration stage of the draft Constitution some experts of the Commission (in particular, its "father" A. La Pergola, Italy) recommended transferring the authority to interpret the Constitution to the Constitutional Court, and not to the Supreme Judgement Seat, which was taken into account in the final version of the Constitution.

In general, the Commission, in its Opinion on the new Russian Constitution, repeatedly returned to the role of the Constitutional Court, noting, in particular, that "where there is a constitutional court to read the fundamental charter and determine how power has been distributed, constitutional democracy is protected by an additional safeguard".

At the same time, the collective opinion of the Commission's experts was designed to focus on the problematic issues in the constitutional text.

The Commission expressed the view that the provision in the Article 13 of the Constitution, which stated that "no ideology may be established as a state or obligatory one", contradicted other provisions of the Constitution. The proclamation at the constitutional level of such values – as freedom of competition, private property and the concept of a social state, according to the Commission, represented a certain "ideology" and could be considered as the ideological foundation of the Constitution. Nevertheless, this provision of the Constitution was politically justified in a historical context: many provisions of the Constitution were a denial of the practice in recent past, including the consolidation of the monopoly of Marxist-Leninist ideology and the leading role of the CPSU in the previous Constitution.

Another omission in the basic law's text, according to the Commission, was the lack of regulation of issues related to the referendum. This issue was resolved in 2002 in the Constitutional Law "On basic guarantees of electoral rights and the right of citizens of the Russian Federation to participate in a referendum", as well as in the Russian constituent entities' legislation.

The Commission noted the excessive abstractness of the wording in the Article 32 part 5 "Citizens of the expenditures shall have the right to participate in administering justice". The Commission considered that it was necessary to explicitly provide for the right of citizens to sit on the jury,

since the existing wording was very vague and potentially undermined the judicial function. In 1993, a jury in Russia received legislative regulation in the Code of Criminal Procedure.

A number of Commission's comments related to the federal structure of the Russian state. In its Opinion the Venice Commission indicated that the modern theory of federalism was based on the following principles: a) equality of the components, b) federal supremacy, c) maintaining unity in economic and monetary matters and foreign policy and defence issues. According to the Venice Commission in the version provided for by the Constitution of Russia "despite equality in principle, there seems to be a difference in status between the republics and the other components of the Federation". Without questioning the formal legal conclusions of the Commission, in this case it should nevertheless be noted that the so-called "asymmetric federation" was a historical legacy of Russian statehood and had proved its viability.

The Commission traditionally elaborated on issues of the functioning of justice, since "access to the courts" and "independence of the judiciary" were the most important components of the state of law and the Rule of Law. In this regard, it is necessary to note the well-known position of the Commission regarding the activities of the courts and prosecutors, which often appears in the conclusions of the Commission regarding the constitutions and laws of the of former socialist countries. It is about the overly broad functions of the prosecutor's office to "supervise over observance of the Rule of Law" although in the Opinion of the Commission the role of the prosecutor's office should be reduced to the functions of criminal prosecution. Another recommendation in this area was the desire to minimize the "supervisory functions" of higher courts in relation to lower courts, where they are defined in the constitution and (or) laws. "Any deviation from the rule of exclusive jurisdictional functions and appellate jurisdiction does not seem to be desirable." According to the Commission, the principle of independence of justice should be implemented, in particular, in a manner, where the courts of higher instances exercise only judicial control and only by examining appeals against decisions of lower courts.

In this regard, it can be noted that in 2015 Federal Law No. 2202-I of January 17, 1992 On the Prosecutor's Office of the Russian Federation was amended to clarify the functions of the prosecutor's office. As for the Russian justice system, thanks to (including) the recommendations of the Venice Commission and the rulings of the European Court of Human Rights on the Russian Federation, the judicial system was substantially reformed: from October 1, 2019, new appeal and cassation started to function.

Thus, many of the comments made by the Venice Commission on the draft of the first Russian liberal-democratic constitution were fully or partially taken into account by its developers. A number of other opinions of the Commission, which have not lost their relevance today, were periodically discussed by Russian academicians and legislators.

With regard to the current legislation, in general, most of the 20 Opinions of the Venice Commission for Russia were in various degrees accepted in both legislative activity and law enforcement practice. A directory of these changes is quite extensive, so a special research is required.

Russia and the Venice Commission are actively cooperating in the field of comparative law: on the basis of the Institute of Legislation and Comparative Law under the Government of the Russian Federation, annual international Congresses on comparative law are jointly organized. The last such Congress devoted to "Legal Values in the Focus of Comparative Law" was held in December 2019.

The head of the Russian delegation to the Venice Commission, member of the Russian Academy of Sciences Taliya Khabrieva, repeatedly acted as the main speaker or co-rapporteur on the new constitutions and legislation of several CIS countries (Armenia, Kazakhstan, Kyrgyzstan).

One of the important forms of interaction is periodically published books and collections by the Secretariat of the Russian delegation in the Venice Commission that popularize the legal positions of the Venice Commission in Russia and the CIS countries. Among them there are – "The Venice Commission: One Hundred Steps to Democracy through Law – in Russian and in English (2014)"; "Venice Commission: on Constitutions, Constitutional Amendments and Constitutional Justice" (2016); "The Venice Commission as a Person for Interpretation of Law" (T.Y. Khabrieva, 2018, in Russian and in English), "The Venice Commission: on the Problems of Justice in the Modern World" (2018). Publication of the new one book "The Venice Commission on electoral systems and electoral technologies" was devoted to the 30th Anniversary of the Commission; it has been published in September 2020.

Information on holding plenary meetings of the Venice Commission with a review of accepted recommendations is regularly published in periodicals and journals of the Institute of Legislation and other academic research centres.

Appendix: List of Venice Commission conclusions in Russia

CDL-AD(2016)020, Russian Federation – Opinion on federal law no. 129-FZ on amending certain legislative acts (Federal law on undesirable activities of foreign and international non-governmental organisations)

CDL-AD(2016)016, Russian Federation - Final Opinion on the Amendments to the Federal Constitutional Law on the Constitutional Court

CDL-AD(2016)005, Interim Opinion on the amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation

CDL-AD(2014)025, Opinion on Federal Law n. 121-FZ on non-commercial organisations ("law on foreign agents"), on Federal Laws n. 18-FZ and n. 147-FZ and on Federal Law n. 190-FZ on making amendments to the criminal code ("law on treason") of the Russian Federation

CDL-AD(2014)004, Opinion on "Whether Draft Federal constitutional Law No. 462741-6 on amending the Federal constitutional Law of the Russian Federation on the procedure of admission to the Russian Federation and creation of a new subject within the Russian Federation is compatible with international law"

CDL-AD(2013)022, Opinion on the issue of the prohibition of so-called "Propaganda of homosexuality in the light of recent legislation in some Council of Europe Member States

CDL-AD(2013)003, Opinion on Federal Law No. 65-FZ of 8 June 2012 of the Russian Federation amending Federal Law No. 54-FZ of 19 June 2004 on Assemblies, Meetings, Demonstrations, Marches and Picketing and the Code of Administrative Offences

CDL-AD(2012)016, Opinion on the Federal Law on Combating Extremist Activity of the Russian Federation

CDL-AD(2012)015, Opinion on the Federal Law on the Federal Security Service (FSB) of the Russian Federation

CDL-AD(2012)007, Opinion on the Federal Law No. 54-FZ of 19 June 2004 on assemblies, meetings, demonstrations, marches and picketing of the Russian Federation

CDL-AD(2012)003, Opinion on the law on political parties of the Russian Federation

CDL-AD(2012)002, Opinion on the Federal Law on the election of the Deputies of the State Duma of the Russian Federation

CDL-AD(2010)052, Opinion on the Federal Law on the Amendments to the Federal Law on Defence of the Russian Federation

CDL-AD(2005)030, Comments on the Draft Law on the Parliament of the Chechen Republic (Russian Federation)

CDL-AD(2005)014, Opinion on the Federal Law on the Prokuratura (Prosecutor's Office) of the Russian Federation

CDL-AD(2004)042, Opinion on the Draft Federal Law amending the Federal Law "On General Principles governing the Organisation of Legislative (Representative) and Executive State Authorities of Constituent Entities of the Russian Federation" and the Federal Law "on Fundamental Guarantees of Russian Federation Citizens' Electoral Rights and Right to Participate in a Referendum"

CDL-AD(2004)035, Opinion on the Draft Federal Constitutional Law "on modifications and amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation"

CDL-AD(2003)002, Opinion on the Draft Constitution of the Chechen Republic

CDL(1998)017, Revised Opinion on the legal problems arising from the coexistence of the Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States and the European Convention on Human Rights

CDL(1994)011, Opinion on the Constitution of the Russian Federation

Vladimir Lafitsky[1]

Traditional family values in the constitutional, comparative and demographic dimensions

Personal Testimony

My participation in the work of the Venice Commission remains as a brightest page in my professional and scientific career. Unfortunately, it was too short. Besides, there were some other circumstances preventing me from working in the Commission more intensively.

This scientific contribution partially compensates the aforesaid gap and softens the sadness of separation with the colleagues and friends in the Venice Commission.

1. Constitutional Dimension of Traditional Family Values: Origins and the First Century of Development

For thousands of years, the issues of family relations have been the subject of religious (spiritual) regulation based on the canons of holy scriptures: the New Testament - in the Christian world; the Qur'an and Sunnah of the prophet Muhammad – in the Muslim countries; the Torah – in the Jewish communities; the Rigveda and other Vedic texts - in the Hindu tradition; the sacred texts of Buddhism, Confucianism, Shintoism – in other spiritual teachings.

The *New Testament* stated: "A man will leave his father and mother and be united to his wife, and the two will become one flesh… So, they are no longer two, but one flesh. Therefore, what God has joined together let no one separate".[2]

Six centuries after the birth of Christ the *prophet Muhammad* will say: Allah "created wives for you from yourselves, that you may find tranquillity in them, and He established affection and mercy between you".[3]

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[1] Former Substitute Member of the Venice Commission in respect of Russia (2013 -2017).

[2] The New Testament. The Book of Matthew. Chapter 19. Verses 5-6. Jesus repeats the verse of Torah (Tanakh. Book of Bereishit – Genesis. Chapter 2. Verse 24) but supplements it with a commandment emphasizing the sanctity of marriage and prohibiting its dissolution at the whim of individual persons and secular communities.

[3] The Holy Qur'an. Surah 30. Ar-Rum (The Romans). Ayat 21.

Ten centuries before the birth of Christ the Jewish book of *Proverbs of Solomon* taught: "He who finds a wife finds what is good and receive favour from the LORD".[4]

And twenty centuries before the birth of Christ, the Hindu sacred *Rigveda* called with a plea: "O, Agni, give us women as companions… Filling them... with honey.[5]

And all sacred scriptures praised not only the sanctity of marriage, the necessity of defending it and ensuring the stability of its material basis, but also the duty of raising children as the legacy and gift of God.[6]

Thousands of years, such sacred precepts have been preserving and developing the Christian, Islamic, Jewish, Hindu, Buddhist, Confucian, and other branches of human civilizations.

Secular law rarely interfered in this sphere, limiting itself mainly to the issues of dynastic marriages, succession of royal power, upbringing heirs of kingdoms.

Such self-restriction started to change with the adoption of the French Constitution of 1795 and the Civil code of Napoleon of 1804.

The *Constitution of 1795* noted that "no one is a good citizen unless he is a good son, good father, good brother, good friend, good husband" (Article 4 of the Declaration of the Rights and Duties of Man and Citizen) and described in detail the role of education and instruction of children (Title X "Public Instruction").[7]

The *Civil Code of 1804* confirmed the main part of the Christian family values making them an integral part of the secular law:

"A man before the full age of 18, and a woman before the full age of 15, are incapable of contracting marriage... There can be no marriage where there is no consent… A second marriage cannot be contracted previously to the dissolution of the first… The son who has not attained the full age of 25 years, the daughter who has not attained the full age of 21 years, cannot contract marriage without the consent of their father and mother; in case of disagreement, the consent of the father is sufficient… Children of a family… are required, previously to contracting marriage, to demand, by a respectful and formal act, the advice of their father and mother…" will... (Articles 144, 146–148, 151).

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[4] Tanakh. The Book of Mishlei (The Old Testament. The Book of Proverbs). Chapter 18. Verse 22.

[5] Rigveda. Mandala 1. Hymn 14. To All Gods. Verse 7.

[6] See: The Old Testament. Psalms. Psalm 127. A Song of Ascending. Verse 3.

[7] Constitution du 5 Fructidor An III (22 août 1795) // www.conseil-constitutionnel.fr/les-constitutions-dans-l-histoire/constitution-du-5-fructidor-an-iii; the English translation see: Constitution of the Year III, translated by Frank Maloy Anderson (1908).

"Married persons owe to each other fidelity, assistance and aid… The husband owes protection to his wife, the wife obedience to her husband. The wife is obliged to live with her husband, and to follow him to every place where he may judge it convenient to reside: the husband is obliged to receive her, and to furnish her with everything necessary for the wants of life, according to his means and social standing..." (Articles 212 – 214).[8]

The broad approaches of the French constitutions of 1795 and 1848 were not accepted by the authors of other basic laws of that era. The family issues were not considered in the constitutions of the Kingdom of Sardinia (1848), Switzerland (1848), Argentina (1853), the Netherlands (1887), Japan (1889), Iran (1906), Greece (1911).

Some other basic laws, including the Constitution of the German Empire (1849), the Constitutional Charter of Prussia (1850), the Basic law of Austria (1867), the Constitutional Act of Canada (1867) and the Constitution of Bulgaria (1879), regulated only the issues of children's school education.

2. The Constitutional Development in the First Half of the XX century

The full-fledged secular regulation of family relations started only after the First World War, when the ruined social life of the European states revived the "demon people" described in the Vedic Song of the God ("Bhagavat-Gita») as the "enemies of the world threatening its destruction…".[9]

In an attempt to stop these forces, the *Weimar Constitution of Germany of 1918* proclaimed new constitutional law principles protecting marriage as the basis of family life; supporting large families; ensuring the guarantees of upbringing, educating and care for the physical and moral development of children and youth; aspiring to provide for decent and healthy living conditions for all citizens of Germany, and securing other social obligations of the state.

It declared:

"Marriage, as the foundation of the family and the preservation and expansion of the nation, enjoys the special protection of the Constitution. It is based on the equality of both genders.

It is task of both the state and the communities to strengthen and socially promote the family. Large families may claim social welfare.

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[8] www.napoleon-series.org/research/government/c_code.html#book1.

[9] Bhagavad Gita The Song of God. Chapter 16 // https://www.holy-bhagavad-gita.org/chapter/16.

Motherhood is placed under state protection and welfare" (Article 119);

"It is the supreme obligation and natural right of the parents to raise their offspring to bodily, spiritual and social fitness; the governmental authority supervises it" (Article 120);

"The distribution and usage of real estate is supervised by the state in order to prevent abuse and in order to strive to secure healthy housing to all German families, especially those with many children…" (Article 155).[10]

The "Weimar" constitutional model of regulating family relations had been inspiring the authors of many basic laws of that time, in particular of Czechoslovakia (1920), Poland (1921), Lithuania (1922), Greece (1927), Spain (1931), Portugal (1933), Ireland (1937) and others.

For instance, the *Constitution of Ireland of 1937* stated:

"The State recognizes the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.

The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.

In particular, the State recognizes that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.

The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.

The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack… No law shall be enacted providing for the grant of a dissolution of marriage" (Article 41).[11]

Another approach for defending traditional family values was implemented in the Constitution of Mexico of 1917,[12] which declared:

- that "all debt obligations of workers and their families shall be considered fully fulfilled from the date of the entry into force of the Constitution" (Article 13 of the Transitional provisions);

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[10] Die Verfassung des Deutschen Reiches («Weimarer Reichsverfassung») 11 August 1919 (Reichsgesetzblatt 1919, S. 1383) // www.uni-wuerzburg.de/rechtsphilosophie/hdoc/wrv1919.html. The English translation see: Constitutions that Made History. Ed. by Albert P. Blaustein and Jay A. Sigler. New York. 1988. P. 359–387.

[11] https://en.wikisource.org/wiki/Constitution_of_Ireland_(original_text)

[12] Constitución Política de los Estados Unidos Mexicanos // www.diputados.gop.mx/LeyesBiblio/ref/cpeum/CPEUM_orig_05feb1917.pdf; Constitutions that Made History. *Op. cit.* P. 285–336

- that "the state may restrict the right to private property by taking necessary measures to plan and ensure… the development of small-scale land ownership" (part 1 of Article 27);
- that "laws of the Federation and individual states should… provide for granting land plots to the disadvantaged individuals, and that local laws should determine the composition of family property that will have the status of inalienable and safe from to seizure or any other encroachments" (subparagraph "f" of part 7 of Article 27);
- that "every Mexican must ensure that his or her children under 15 years of age are educated in public or private schools" (part 1 of Article 31);
- that "marriage is a social contract and that all other legal actions concerning the civil status of persons are the exclusive authority of the state" (Article 130).

Such constitutional approach was followed by the authors of several other basic laws of Latin American states, including Peru (1933) and Honduras (1936).

3. The Constitutional Law Models of the Postwar World

The end of the Second World War gave new impulse to the development of the constitutional regulation of family affairs.

The tradition of broad regulation of this sphere was followed by basic laws of Ecuador (1946), Brazil (1946), Panama (1946), Bolivia (1947), Costa Rica (1949), El Salvador (1950), Uruguay (1951), Guatemala (1956), some other Latin American states.

Another wave of extended constitutional regulation of family affaires spread over many states of Eastern Europe, which fell after the Second World War into the sphere of control of the Soviet Union. As a rule, they were following the samples of the Constitution of the USSR of 1936, but almost all of them rejected to accept its totalitarian approach of neglecting the family and emphasizing the direct links between the state and each individual.[13]

The extended regulation of family affaires was implemented by basic laws of Albania (1946), Bulgaria (1947), Czechoslovakia (1948), Hungary (1949), German Democratic Republic (1949), Poland (1952).

For instance, the Constitution of Czechoslovakia of 1948 pointed out that marriage, family and motherhood shall be protected by the state; that "the state takes care that the family become healthy basis for the development

[13] http://doc.histrf.ru/20/konstitutsiya-sssr-1936-goda (the text is in Russian).

of the people"; that large families shall be supported by special benefits and allowances; that the state guarantees that children shall be treated with special care and protection and that the state shall systematically conduct activities that benefit the increase of population; that the state guarantees all young people the opportunities for full physical and spiritual development; that the social origin of a child shall not have impact on his rights and that the state ensures that everyone may educate and learn according to his abilities and with account of the needs of society; that women and youth shall have special working conditions and that women are entitled to special support during pregnancy and motherhood (Articles 10 – 12, 26, 29 of Detailed Provisions of the Constitution).

The end of the Second World War paved the way to the development of constitutional regulation of family issues in other law traditions.

For instance, the *Constitution of Japan of 1946* stated that marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the equal rights of husband and wife as a basis; and that the laws regulating the issues pertaining to choice of spouses, property rights, inheritance, selection of domicile, divorce and other matters pertaining to marriage and the family shall take into account the requirements to preserve individual dignity and the essential equality of the sexes (Article 24); that all people have an obligation to provide for ordinary education for all boys and girls under their protection and that such compulsory education shall be free of charge (Article 26).[14]

The *Constitution of the Republic of Korea of 1948* guaranteed that "marriage and family life shall be entered into and sustained on the basis of individual dignity and equality of the sexes" and that "the State shall do everything in its power to achieve that goal" and to protect mothers (parts 1-2 of Article 36); and that all citizens who have children shall be responsible at least for their elementary education and other education as provided by law (part 2 of Article 31).[15]

The *Constitution of Syria of 1950* declared that family as the basic element of society is under the patronage of the State and that the State is obliged to promote and protect marriage and to eliminate the material and social circumstances impeding its conclusion (Article 32).

[14] www.constituteproject.org/constitution/Japan_1946?lang=en.
[15] www.constituteproject.org/constitution/Republic_of_Korea_1987?lang=en.

The *Constitution of the Kingdom of Libya of 1951* proclaimed that family is the foundation of society and that the state must protect it and encourage marriage (Article 33).[16]

The *Constitution of the Empire of Ethiopia of 1955* pointed out that "family, as a source preserving and developing the Empire and a primary basis of education and social harmony" shall be under the special protection of law (Article 49).[17]

More broad framework was established by the *Constitution of Rwanda of 1962* which contained a separate chapter describing the following fundamentals of civil and family society *(Des bases de la société familiale et civile)*:

- "The family, consisting of three constituent elements – man, woman and children, is the primary basis of the "Rwandese society" and the State and public collectives are obliged to create conditions favourable for the normal development of the family" (Article 26);
- "Father and mother have a natural right to raise their children" (Article 27);
- "Only the civil or church monogamous marriage is recognized by the Constitution. The rules for its registration shall be prescribed by law (Article 28);
- A man and a woman have equal standing in law. A man is a natural head of the family (Article 30).[18]

The Constitution also contained a comprehensive set of provisions devoted to the sphere of education and declared the following principles of economic and social policy: "The national economy shall be organized in accordance with the plans based on the principles of social justice, promotion of family, development of the country's productivity and improvement of the living standards of the population" (Article 44).

In the Western Europe of the three post-war decades the constitutional wave of broad regulation of family relations was supported by only two states.

The *Constitution of Italy of 1947* proclaimed:

- that the "Republic recognizes the rights of the family as a natural union founded on marriage based on the moral and legal equality of spouses and guarantees its unity" (Article 29);

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[16] Конституция Королевства Ливии от 7 октября 1951 г. // Конституции государств Африки. Том 1. Под ред. И.Д. Левина, З.И. Луковникова, Ю.А. Юдина. М., 1963. С. (in Russian).

[17] Конституция Эфиопской Империи от 4 ноября 1955 г. // Конституции государств Африки. Том 3. Под ред. Я.А. Малика. М., 1966. С. 681-710. (in Russian).

[18] The Constitution de la République Rwandaise // https://dl/wdl.org/2559/service/2559.pdf.

- that "it is the duty and right of parents to support, raise and educate their children, even if born out of wedlock" (Article 30);
- that "the Republic assists the formation of the family and the fulfilment of its duties, with particular consideration for large families, through economic measures and other benefits" (Article 31).[19]

The Basic Law of Germany of 1949 formulated five principles of constitutional support of family:

"1. Marriage and the family shall enjoy the special protection of the state.

2. The care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them. The state shall watch over them in the performance of this duty.

3. Children may be separated from their families against the will of their parents or guardians only pursuant to a law, and only if the parents or guardians fail in their duties or the children are otherwise in danger of serious neglect.

4. Every mother shall be entitled to the protection and care of the community.

5. Children born outside of marriage shall be provided by legislation with the same opportunities for physical and mental development and for their position in society as are enjoyed by those born within marriage" (Article 6).[20]

The restrictive approaches of constitutional law drafting started to change in the early 1970s under the pressure of destructive social riots aimed to overthrow traditional political and family values and to establish on their ruins an order based on the priority of personal over the general interests.

Counteracting these forces, the *Constitution of Greece of 1975* proclaimed:

"1. The family, being the cornerstone of the preservation and the advancement of the Nation, as well as marriage, motherhood and childhood, shall be under the protection of the State.

2. Families with many children, disabled war and peace-time veterans, war victims, widows and orphans, as well as persons suffering from incurable bodily or mental ailments are entitled to the special care of the State.

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[19] *Costituzione della Repubblica Italiana*. Gazzetta Ufficiale 27 dicembre 1947, n. 298. www.liberliber.it/mediateca/libri/i/italia/costituzione_della_repubblica_italiana/pdf/italia_costituzione_della_repubblica_italiana.pdf. English translation see on Constitute Project Site: https://www.constituteproject.org/constitution/Italy_2012?lang=en.

[20] *Grundgesetz für die Bundesrepublik Deutschland* (8. Mai 1949) // https://www.gesetze-im-internet.de/gg/GG.pdf. English translation see on Constitute Project Site: www.constituteproject.org/constitution/German_Federal_Republic_2014?lang=en.

3. The State shall care for the health of citizens and shall adopt special measures for the protection of youth, old age, disability and for the relief of the needy.

4. The acquisition of a home by the homeless or those inadequately sheltered shall constitute an object of special State care" (Article 21)

"Education constitutes a basic mission for the State and shall aim at the moral, intellectual, professional and physical training of Greeks, the development of national and religious consciousness and at their formation as free and responsible citizens" (part 2 of Article 16).[21]

The model of wide regulation of family affairs was implemented also in the constitutions of Portugal (1976),[22] Spain (1978),[23] and several other basic laws of the Western Europe.

4. Constitutional Regulation of Family Affairs in the Struggle of Civilizations for Survival

The last decades of the XX century crystallized several constitutional models reflecting different approaches and values formed by the Christian (mainly western liberal and Latin American branches), Muslim, Hindu, Buddhist and other religious or ideological traditions.

Among the basic laws of the western liberal states it would be appropriate to note the *Constitution of Finland of 1999* and its innovative provisions obliging public authorities to support families so that they have the ability to ensure the wellbeing and personal development of children (Article 19); emphasizing that the general principle of equality before the law requires that "children shall be treated equally and as individuals" and that they "shall be allowed to influence matters pertaining to themselves to a degree corresponding to their level of development" (Article 6).[24]

The *Constitution of Switzerland of 1999* substantially reinforced the legal status of family by proclaiming that the Confederation and the cantons shall, as a complement to personal responsibility and private initiative, endeavour to ensure that families are protected and encouraged as communities of adults and children; and that children and young people are encouraged to

[21] https://www.constituteproject.org/constitution/Greece_2008?lang=en..

[22] *Constituição da República Portuguesa* (2 de Abril de 1976) // https://dre.pt/constituicao-da-republica-portuguesa.

[23] *Constitución Española* (27 de diciembre de 1978) // https://boe.es/legislacion/documentos/ConstitucionCASTELLANO.pdf.

[24] www.constituteproject.org/constitution/Finland_2011?lang=en

develop into independent and socially responsible people and are supported in their social, cultural and political integration (Article 41).[25]

The content of these provisions was significantly enlarged by a number of other basic laws of Western Europe, in particular by *amendments of 2014 to the Constitution of Belgium of 1831*, which declared the following "bill of rights" for children:

- "Each child is entitled to have his or her moral, physical, mental and sexual integrity respected.
- Each child has the right to express his or her views in all matters affecting him or her, the views of the child being given due weight in accordance with his or her age and maturity.
- Each child has the right to benefit from measures and facilities which promote his or her development.
- In all decisions concerning children, the interest of the child is a primary consideration…" (Article 22bis).[26]

We may also note significant improvements of the constitutional regulation of family affairs in a number of Latin American basic laws, in particular of Brazil (1988), Columbia (1991), Paraguay (1992), Peru (1993), Ecuador (1998, 2008), Venezuela (1999), Bolivia (2004), Dominican Republic (2015).

This remark may be illustrated by the *Constitution of the Dominican Republic of 2015* which in order to confirm that that "the family is the basis of society and the fundamental space *(espacio básico)* for the integral development of people", and that "it is formed by natural or legal ties, by the free decision of a man and a woman to enter into marriage or by the responsible willingness to conform to it", prescribes the following principles:

> "1. All persons have the right to form a family, in whose formation and development the woman and man enjoy equal rights and duties and owe one another mutual understanding and reciprocal respect.
> 2. The State shall guarantee the protection of the family. The good of the family in unalienable and unattachable, in accordance with the law.
> 3. The State shall promote and protect the organization of the family on the basis of the institution of marriage between a man and a woman. The law shall establish the requirements to enter into it, the formalities of its celebration, its personal and patrimonial effects, the causes of separation or dissolution, and the regime of the property, rights, and duties between the spouses.

[25] www.constituteproject.org/constitution/Switzerland_2014?lang=en.
[26] www.constituteproject.org/constitution/Belgium_2014?lang=en.

4. Religious marriages shall have civil effects in terms established by law, without prejudice to that dictated in international treaties.
5. The singular and stable union between a man and a woman, free from matrimonial impediment, that form a real home, creates rights and duties in their personal and patrimonial relationships, in accordance with the law.
6. Maternity, whether the social condition or the civil state of the woman, shall enjoy the protection of the public powers and causes the right to official assistance in the case of need…
9. All sons and daughters are equal under the law, have equal rights and duties, and shall enjoy the same opportunities for social, spiritual, and physical development…
10. The State promotes responsible paternity and maternity. The father and the mother, even after separation and divorce, have the shared and non-renounceable duty to feed, raise, train, educate, support, and provide safety and assistance to their sons and daughters. The law shall establish the necessary and appropriate methods to guarantee the effect of these obligations.
11. The State recognizes work at home as an economic activity that creates aggregate value and produces social richness and well-being, therefore it shall be incorporated into the formulation and execution of public and social policies…
13. The value of young people as strategic actors in the development of the Nation is recognized. The State guarantees and promotes the effective exercise of their rights, through policies and programs that assure, in a permanent manner, their participation in all spheres of national life, and in particular, their training and access to first employment" (Article 55).[27]

The Islamic basic laws do not contain such comprehensive regulation of family affairs, still leaving this sphere in the main to sharia law based on the norms of Qur'an and hadith. Nevertheless, their role is becoming more and more visible.

The *Constitution of Iran of 1979* was the first to present revived Islamic approach by declaring the following principles:

"The family is the fundamental unit of society and the main centre for the growth and edification of human being.

[27] www.constituteproject.org/constitution/Dominican_Republic_2015?lang=en.

The compatibility with respect to belief and ideal, which provides the primary basis for man's development and growth, is the main consideration in the establishment of a family.

It is the duty of the Islamic government to provide the necessary facilities for the attainment of this goal (Preamble).

The content of these principles is revealed in many constitutional norms, for instance in Article 10, which states:

> "Since the family is the fundamental unit of Islamic society, all laws, regulations, and pertinent programs must tend to facilitate the formation of a family, and to safeguard its sanctity and the stability of family relations on the basis of the law and the ethics of Islam".[28]

The Islamic model of regulation of family relations was implemented in a number of other constitutions of Islamic states, in particular, of Yemen (1991), Saudi Arabia (1992), Oman (1996), Bahrain (2002), Qatar (2003), Afghanistan (2004), Iraq (2005).

Their own vision of appropriate regulation of family affairs was presented by states of other religious and spiritual traditions.

The *Constitution of Bhutan of 2008* proclaims that Buddhism is the spiritual heritage of Bhutan, which promotes the principles and values of peace, non-violence, compassion and tolerance (part 1 of Article 3), and expanding these principles to the sphere of family relations states, that the "State shall endeavour to promote those conditions that are conducive to co-operation in community life and the integrity of the extended family structure" (part 19 of Article 9).[29]

The *Constitution of Thailand of 2017* confirming its commitment to the values of Buddhism, requires that "all forms of education shall aim to develop learners to be good, disciplined, proud in the Nation, skilful in their own aptitudes and responsible for family, community, society and the country" (Article 54).[30]

The *Constitution of Nepal of 2015* with the aim of reinforcing the Hindu tradition states: "It shall be the socio-cultural objective of the State to build a civilized and egalitarian society by ending all forms of discrimination, oppression and injustice…; to develop socio-cultural values based on… dignity and tolerance, by respecting cultural diversity and maintaining communal harmony, solidarity and amity" (part 2 of Article 50).[31]

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[28] www.constituteproject.org/constitution/Iran_1989?lang=en.
[29] www.constituteproject.org/constitution/Bhutan_2008?lang=en.
[30] www.constituteproject.org/constitution/Thailand_2017?lang=en.
[31] www.constituteproject.org/constitution/Nepal_2016?lang=en.

The socialist ideas were embodied in the *Constitution of Viet Nam of 1992*, which proclaimed the goal of building socialism (Preamble) and obliged the State and society to provide favourable environment for the construction of the Vietnamese family which is well off, progressive, and happy; create the Vietnamese people who are healthy, cultural, profoundly patriotic, solidary, independent, and responsible" (part 3 of Article 60).[32]

Until recently the socialist model was represented by at least 20 states. In our days only several socialist states remain, though some of them, like China with its doctrine "One country, two systems", may be called socialist only conventionally. The other socialist states disappeared in the struggle of the civilizations for survival.

It is the least but not the last loss taking into account rapidly developing demographic processes.

5. Constitutional Regulation of Family Affairs in the Reflection of Demographic Development of the Modern World

The XX century triggered the process of tectonic shifts changing the demographic landscape of the modern world by erasing national (ethnic) communities, and even the civilizations that gave them life.

According to the UNESCO's statistics, about 50% of the estimated 7 000 languages will be extinct by the end of the XXI century.[33] This forecast concerns mainly small ethnical communities, which are disappearing more and more rapidly in the age of globalization.

The cultural and legal space of actually each state is constantly changing under the influence of migration waves and often it is sharply split by territorial enclaves of ethnic and religious communities, which was brilliantly illustrated by the report of the World Economic Forum on migration and its impact on cities.[34]

The national composition of many states of the world is also rapidly changing. For instance, in France out of 759 000 children born in 2018 nearly every third child had overseas "origin" (16.5% - both parents born in foreign states; 15.4 % - one of the parents born in France; 68.1 % - both parents born in France or in the French overseas territories).[35]

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[32] www.constituteproject.org/constitution/Socialist_Republic_of_Vietnam_2013?lang=en
[33] Atlas of the World's Languages in Danger. Ed. By Ch. Moseley. UNESCO Printing, 2010
[34] World Economic Forum. Migration and Its Impact on Cities. Geneva, 2017 // www3.weforum.org/docs/Migration_Impact_Cities_report_2017_low.pdf
[35] Institut national de la statisques. Naissances selon le pays de naissance des parents en 2018 // www.insee.fr/fr/statistiques/2381382.

Significant changes are evolving on the global level. In 1950 the regions with predominantly Christian population (Europe, North and South America, Australia and New Zealand) totaled about 35.5% of the world population. 70 years later, in 2020, the aforesaid proportion decreased by more than 10%.[36]

With the aim to prevent or to mitigate the consequences of such negative demographic processes, many states launched the constitutional reforms with the aim to restore and defend their national heritage, including the traditional family values.

Currently, the constitutions of more than 40 States (about one in five states) have established provisions stating that marriage can only be concluded between woman and man. Among them:

- 10 post-Soviet States: Belarus (Article 32); Ukraine (Article 51); Lithuania (Article 38); Latvia (Article 110); Moldova (Article 48); Armenia (Article 35); Kyrgyzstan (Article 36); Tajikistan (Article 33); Turkmenistan (Article 40); Russia (Article 72);
- 4 post-socialist States of Eastern Europe: Hungary (Article L); Poland (Article 18); Bulgaria (Article 46); Croatia (Article 61);
- 9 Latin American States: Bolivia (Article 63); Brazil (Article 226); Colombia (Article 42); Nicaragua (Article 73); Ecuador (Article 67); Peru (Article 5); Paraguay (Article 49); Suriname (Article 35); Dominican Republic (Article 55);
- 14 African States: Central African Republic (Article 7); Angola (Article 35); Eritrea (Article 22); Ethiopia (Article 34); Gambia (Article 27); Kenya (Article 45); Malawi (Article 22); Namibia (Article 14); Rwanda (Article 17); South Sudan (Article 15); Somalia (Article 28); Swaziland (Article 27); Uganda (Article 31); Zimbabwe (Article 78);
- 5 Asian and Oceanic States: Cambodia (Article 45); Japan (Article 24); South Korea (Article 36); Laos (Article 37); Seychelles (Article 32).

Practically all constitutions contain provisions defending the life and rights of children; providing for material support of families with children; promoting the development of social services, health care, educational and cultural institutions.

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[36] См.: United Nations. World Population Prospects 2019 (File POP/1-1: Total population (both sexes combined) by region, subregion and country, annually for 1950-2100 (thousands) Estimates, 1950 – 2020) // https://population.un.org/wpp/Download/Standard/Population.

But this is not a panacea, which is demonstrated by the negative demographic development (natural population decline) of about one half of the European states, including Belarus, Croatia, Finland, Germany Greece, Hungary, Italy, Latvia, Lithuania, Poland, Portugal, Moldova, Romania, Russia, San Marino, Serbia, Slovenia, Spain, Ukraine.[37]

To solve such problems, it is necessary to use not only constitutional (or legal) means, but also other social regulators, in particular religious, bearing in mind their role in the birth, nurturing and development of the national states as a part of appropriate community of nations, Christian, Muslim, Buddhist…

As for Europe, the best and may be the saving option is to follow the commandment of its draft Constitution, calling to draw "inspiration from the cultural, religious and humanist inheritance of Europe".[38]

This inheritance, without any doubt, includes the traditional family values.

[37] Population and Vital Statistics Report. Statistical Papers Series A Vol. LXXII January 2020 // https://unstats.un.org/unsd/demographic-social/products/vitstats/sets/Series_A_2020.pdf.

[38] Draft treaty establishing a Constitution for Europe // https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:C2004/310/01&from=EN.

Abdelaziz Lamghari[1]

Les Ateliers interculturels de la démocratie[2] Une réalisation de la Commission de Venise

Avant d'être une réalisation, les Ateliers interculturels (ci-après, « AI »)[3] ont été d'abord une idée. L'idée a donné lieu à des rencontres scientifiques marquées à la fois du sceau de la réflexion et de la convivialité. C'est bien le label de la Commission d'avoir été constamment à la fois au diapason de l'examen et de l'humain. Au sein de ces rencontres ont été débattus des thèmes, de la part de sensibilités différentes, selon des approches différentes et sous des cieux différents. Un véritable apport de la Commission - mais de caractère indirect car les AI sont à dissocier des travaux des sessions – découle de ces thèmes et débouche sur des perspectives.

En trois temps donc, essayons de témoigner de la naissance de l'idée, d'exposer son déploiement et d'apprécier son apport[4].

I. L'idée

Il s'agit essentiellement d'un témoignage, doublé même de l'expression d'une émotion. L'accueil et l'organisation du premier Ateliers interculturels ont été en effet une chance qui a incombé à la partie marocaine. Une chance, car il s'agissait pour cette partie de donner concrétisation (académique) à une idée de la présidence de la Commission, validée et mise en œuvre, par la suite, par la Commission en tant que telle.

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[1] Ancien membre suppléant de la Commission de Venise au titre du Maroc (2008-2015).

[2] Même si dans les documents de la Commission il est fait usage de ce triptyque, l'on se contentera la plupart du temps du seul diptyque Ateliers Interculturels, tout en notant que les développements qui suivent impliquent la donne démocratique comme noyau central de ces ateliers.

[3] Désormais on utilisera AI pour abréger Ateliers interculturels. Par simple convivialité, comme on vient de le dire, ces AI ne sont pas à confondre avec les Appareils idéologiques de Louis Althusser. Ces derniers sont idéologiques et sont pour l'auteur des Appareils idéologiques d'État (AIE), au moment où les Ateliers de la Commission impliquent un questionnement de l'idéologie par justement le qualificatif ouvert d'*interculturels,* et une référence, sur cette base, non pas à l'État mais au Droit, concept qui permet dans son principe de se prémunir contre l'idéologie. La Commission vise justement à la *démocratie par le droit* et non à la *démocratie par l'État*. Ce serait déjà là un thème pour un Atelier interculturel !

[4] Il ne s'agira pas donc d'une analyse de fond purement académique, mais d'un recoupement entre témoignage et essai de réflexion.

Dans son discours inaugurant son mandat à la tête de la Commission[5], le Président, fraîchement élue, évoque la nécessité pour celle-ci d'organiser des AI. Le but en sera de mieux cerner la circulation de l'idée de démocratie et des standards démocratiques dans les différents systèmes constitutionnels et politiques des États membres de la Commission. Il en sera aussi celui de construire un échange enrichissant à partir des différences culturelles qui marquent ces systèmes. Échange cependant de quelle nature et jusqu'à quel seuil ? Une question qui sans y être soulevée explicitement, est nécessairement implicite dans l'idée d'AI. Notons ainsi qu'au moment de lancer celle-ci, le Président avait exprimé le désir de voir écartée du vocabulaire utilisé au sein de la Commission, l'expression d'« *États de vieille démocratie* », qui a toujours servi à distinguer les systèmes des pays de l'Europe de l'Ouest de ceux du reste de l'Europe. À cette suggestion, il avait joint celle de prendre en considération dans la réflexion les situations particulières des États des autres régions d'Afrique, d'Amérique latine et d'Asie. Dès lors, d'autres questions seraient à ajouter à la précédente :

- Que pourraient impliquer ces suggestions dans les travaux de la Commission ?
- Pourraient-elles (allaient-elles) augurer d'un éventuel fléchissement des standards européens en matière de démocratie juridique et politique ?
- Ou ne devraient-elles signifier que réflexion sur les voies et moyens d'insérer sans heurts les systèmes hors standards démocratiques dans la logique de ces derniers ?

En elle-même, l'idée d'AI n'est pas sans dimension objective. Une dimension qui apparaît tout d'abord dans sa substance, relative à la composition de la Commission et à l'évolution de cette composition, et ensuite dans les perspectives qui devraient se dégager au fur et à mesure de son application. La Commission de Venise de son vrai nom *Commission européenne pour la démocratie par le droit* a été créée comme conseil consultatif du Conseil de l'Europe sur les questions constitutionnelles. Mais créée en 1990, elle a vu donc le jour dans un contexte de transition démocratique, notamment pour les pays européens issus de régimes communistes. Ces pays ont constitué dès le départ, au sein de la Commission, des projets de nouvelles démocraties à côté des anciennes démocraties européennes. La Commission devait – au moyen de son statut affirmé d'expert indépendant – rattacher ces démocraties en gestation au patrimoine juridique et politique de l'Europe démocratique. L'assistance qui leur était accordée sur leur future

[5] 81ème session, décembre 2009.

construction juridique démocratique – aussi bien constitutionnelle, législative qu'institutionnelle – était une démarche constante dans ce sens. Non sans difficultés, ni même sans accrocs. Le long passé communiste et les traditions historiques et culturelles propres à chacun des pays concernés, faisaient de leur adaptation juridique et politique aux normes et aux standards européens, une entreprise parfois complexe et laborieuse[6]. Une telle entreprise ne pouvait que prendre des proportions encore plus importantes lorsqu'on considère les adhésions à la Commission de pays en dehors de l'Europe, issus aussi bien de l'Afrique, de l'Asie que de l'Amérique latine. Le cercle des adhésions ne cessant de s'élargir, l'éventail des adaptations à la démocratie européenne et à ses standards ne pouvait, en principe, que se diversifier et donner lieu, parfois et de façons variables, à des réflexes défensifs de la part de membres qui pourraient même aller jusqu'à l'interpellation des méthodes d'examen et de recommandation de la Commission.

L'idée d'AI ne pouvait donc qu'avoir ses hypothèses et ses implicites en termes de questionnement des travaux de la Commission et de leur orientation. L'examen des thèmes des AI successifs, intitulés et déploiement, est de nature à mettre en discussion cette problématique[7].

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[6] Citons à cet égard, les réactions qui furent exprimées dans ce sens par certains desdits pays, à titre d'exemple la Hongrie et la Pologne à propos des standards démocratiques en matière d'indépendance de la justice, principe central de l'État de droit démocratique. D'une façon générale, voir la somme impressionnante des textes de la Commission sur la justice et ses normes, qui s'échelonnent du Commission de Venise, CDL(1991)03, Séminaire d'experts de la CSCE sur les institutions démocratiques au CDL-AD(2020)001, Moldova, République - Avis conjoint de la Commission de Venise et de la Direction générale des droits de l'homme et de l'État de droit (DGI) du Conseil de l'Europe sur le projet de loi modifiant et complétant la Constitution en ce qui concerne le Conseil supérieur de la magistrature du 2 mars 2020.

[7] C'est peut-être ou sûrement dans cet esprit, qu'était intervenue la volonté exprimée par le Président de la Commission, directement à l'adresse de la partie marocaine au sein de la Commission, de voir le premier atelier interculturel organisé dans un pays du Maghreb. En effet, c'est en aparté, lors de la 82ème session plénière de la Commission, que Monsieur Gianni Buquicchio, en présence de Monsieur Schnutz Rudolf Dürr, chef de la Division de la Justice constitutionnelle à la Commission, a tenu à exprimer ce souhait à la partie marocaine dans la perspective de passer à la concrétisation d'une proposition faite par lui dans le cadre du discours qu'il a prononcé lors de la 81ème session suite à son élection à la présidence de la Commission. C'est l'occasion de souligner que l'organisation du premier atelier en mars 2012, l'a été en partenariat avec l'Association Marocaine de droit constitutionnel, présidée par le membre suppléant de ladite partie. Mais c'est aussi l'occasion de souligner que le deuxième AI l'a été également, de la même manière, au Maroc, une année plus tard, en mai 2013.

II. Le déploiement

Entre mars 2012 et octobre 2019, la Commission a pu organiser, avec les partenaires concernés sept AI. D'un point de vue quantitatif, ce n'est ni excessif ni insuffisant : à raison approximativement d'un atelier par an (sept pour huit ans), la Commission a été dans les normes du crédible et du sérieux, sachant que la préparation intellectuelle de l'activité pouvait être programmée pour la partie organisatrice bien à distance de la date convenue. Qualitativement, c'est tout un tableau de thèmes et de problématiques sous-jacentes, dont le choix et la perception par rapport aux compétences de la Commission méritent appréciation et réflexion.

Comment le choix des thèmes a-t-il été opéré ? La question peut et mérite d'être posée. L'auteur de ce papier, témoin de la naissance du premier ainsi que du deuxième AI, peut affirmer que le choix des thèmes de ces ateliers a été laissé à la partie organisatrice. Une autonomie qui a été conditionnée tout naturellement par une règle de conduite et par deux repères. La règle de conduite n'est que la nécessaire et évidente concertation avec la présidence de la Commission, en vue donc de l'accord de celle-ci, qui intervient en fait spontanément tant les deux repères mentionnés s'imposent d'eux-mêmes. Il s'agit d'une part, de la prise en compte des domaines de travail de la Commission ; et d'autre part des motif et objectif à la base de l'idée d'AI, donc de l'esprit qui la sous-tend. L'affirmation peut donc être avancée qu'à la base de la thématique des AI il n'y a pas de stratégie préconstruite, mais un choix et une programmation au fur et à mesure de la concertation avec les parties organisatrices. Pour un observateur du travail de la Commission, ce n'est pas une défaillance méthodologique, mais le choix d'une pratique de participation et d'inclusion. Les thèmes des différents AI méritent donc examen, même succinct, à la lumière des deux repères.

1. Concernant le premier repère, la Commission travaille, selon son descriptif,[8] dans trois domaines:

- Les Institutions démocratiques et droits fondamentaux;
- La Justice constitutionnelle et la justice ordinaire;
- Les Élections, les référendums et les partis politiques.

Dans le premier domaine, sont insérables successivement les thèmes des premier, deuxième, quatrième et sixième AI, à *savoir* respectivement:

- « Processus constitutionnels et processus démocratiques: expériences et perspectives »;

[8] *À propos de nous,* Site de la Commission, www.venice.coe.int.

- « Le nouveau constitutionnalisme du monde arabe: les processus d'élaboration des constitutions dans un contexte de changement»; «Transparence et État de droit comme conditions préalable au développement équitable et durable »; et
- «Le rôle et la place des instances indépendantes dans un état démocratique»[9].

Seuls les premier et deuxième thèmes peuvent, cependant, appeler une observation : les processus constitutionnels en rapport avec les processus démocratiques, puis le nouveau constitutionnalisme en rapport avec le paradigme du *changement*, sont au fond de nature à s'étendre à l'ensemble de la thématique des trois domaines. Les Constitutions, leurs processus et leurs interactions, constituent en effet le réceptacle de tout élément qui relève de cette thématique. Le texte constitutionnel est à la fois la Constitution et la constitutionnalisation des différentes composantes de la démocratie et du jeu démocratique[10].

Dans le deuxième domaine, s'insèrent les thèmes des cinquième et septième AI, à savoir respectivement :

- « Interaction entre les cours constitutionnelles et les juridictions similaires et les tribunaux ordinaires » ; et
- « Les Conseils supérieurs de la magistrature et l'indépendance de la justice »[11].

L'adéquation des deux thèmes est parfaite avec la justice constitutionnelle et la justice ordinaire, thématique de ce deuxième domaine, bien qu'au-delà des deux thèmes cités, les problématiques de caractère juridique et démocratique restent ouvertes et diversifiées.

Dans le troisième domaine, enfin, un seul thème a été éligible, au titre du troisième AI, sous cet intitulé :

- « Partis politiques, facteurs clé dans le développement politique des sociétés démocratiques »[12].

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[9] Respectivement, à Marrakech en mars 2012 puis en mai 2013, à Rome en octobre 2014 et à Tunis en novembre 2018.

[10] La démocratie par la Constitution et ses implications est discutée, à titre d'exemple, par Dominique Rousseau : « *Constitutionnalisme et démocratie »,* in (sur le net) La vie des idées, Collège de France. Le rapport entre Constitution et démocratie est à lier au phénomène de la Constitutionnalisation du droit : Pour le passage de la Constitution au centre du système juridique, voir l'étude synthétique (sur le net) de Luís Roberto Barroso : « *Le néoconstitutionalisme et la constitutionalisation du droit - Le triomphe tardif du droit constitutionnel* » ; Dominique Terré : « *La constitutionnalisation du droit »* in *Les questions morales du droit* (2007), PUF, pages 137 à 165 ; et l'étude stimulante d'Ariane Vidal-Naquet : « *La constitutionnalisation des branches du droit et l'impérialisme du droit public* » in L'identité du droit public, s/d de Xavier Bioy.

[11] Se reporter à la note 6 supra.

[12] Institutions couvertes par : Les lignes directrices sur la réglementation des partis poli-

Par rapport à la thématique du troisième domaine, le thème des Élections et celui encore plus spécifique des Référendums, restent encore à couvrir par des AI qui leur seraient dédiées en propre, d'autant plus qu'ils pourraient s'inscrire dans la problématique de l'évaluation critique de la démocratie représentative[13].

2. S'agissant maintenant du deuxième repère, il paraît pertinent au préalable de se reporter, dans le descriptif de la Commission[14], à la mission de celle-ci et à la contribution attendue d'elle. La mission consiste pour la Commission à « procurer des conseils juridiques à ses États membres et, en particulier, d'aider ceux qui souhaitent mettre leurs structures juridiques et institutionnelles en conformité avec les normes et l'expérience internationales en matière de démocratie, de droits de l'homme et de prééminence du droit ». Elle consiste aussi à contribuer « à la diffusion et au développement d'un patrimoine constitutionnel commun », et à fournir « une «aide constitutionnelle d'urgence» aux États en transition ». En remplissant ces missions, la Commission vise in fine au partage « des standards et des bonnes pratiques adoptés au sein de l'espace Conseil de l'Europe au-delà de ses frontières, notamment dans les pays du voisinage ».

Pour apprécier, au regard de ces missions, les sept AI organisés et les thèmes qui y ont été débattus, il convient bien entendu de les démarquer par rapport aux activités statutaires de la Commission, principalement les *Avis* qu'elle rend à la demande des États membres, ainsi que les Études et autres documents de fond, tels que les Compilations et les Codes de bonne conduite, qu'elle élabore assez régulièrement. Avec ces différentes sources, statutaires comme on vient de les qualifier, la Commission est au cœur de sa vocation et de sa doctrine. En répondant à des exigences de fond, les sources en question doivent nécessairement assurer la traduction des principes qui sous-tendent les missions de la Commission. Il s'agit des principes que celle-ci inscrit au fronton de son action en ces termes bien clairs et bien légitimes:

> « L'action de la Commission européenne pour la démocratie par le droit s'inscrit dans le cadre des trois principes de base du patrimoine constitutionnel européen : la démocratie, les droits de l'homme et la prééminence du droit, qui sont les fondements de l'activité du Conseil de l'Europe ».

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tiques; Le Code de bonne conduite en matière de partis politiques ; Les lignes directrices sur l'interdiction et la dissolution des partis politiques et les mesures analogues.

[13] Les élections et les référendums sont couverts par plusieurs documents de la Commission : Avis et études, séminaires, ateliers de formation et missions d'assistance, Base de données électorales « VOTA », Documents de référence sur les élections et les référendums.

[14] *À propos de nous*, précité, sur le site de la Commission.

Avec les AI en revanche, le curseur est à la périphérie de la doctrine de la Commission. Espace de débat, d'échange d'idées et même de contradiction, les ateliers peuvent mettre en veille cette doctrine, en l'interpellant, en la relativisant et même en la rejetant partiellement. Les spécificités, faites de particularités historiques, culturelles ou religieuses nationales, ou même de volonté politique de se démarquer par une voie propre, peuvent se réclamer d'une adaptation ou d'une réappropriation démarquée des principes de base du patrimoine constitutionnel européen, et par ricochet de tout principe qui en découle (telle la séparation des pouvoirs, la laïcité, la liberté de conscience et autres)[15].

Situer ces éléments de démarcation et d'autonomie (prétendues) dans le cadre des sessions de la Commission permet d'aboutir à une meilleure appréciation de leur portée. Au sein des sessions, des «écarts» par rapport aux normes et standards démocratiques de la Commission arrivent à être exprimées par tel ou tel membre, lors d'examen d'avis, relativement à des réformes constitutionnelles ou législatives nationales[16]. Cependant, l'«orthodoxie » des sessions, de même que la « discipline » qui préside à leurs travaux, ne permet nullement à ces « écarts » de trouver place dans les avis, sinon tout au plus en termes de citation contredite et écartée par l'orthodoxie en question. Dans les AI, les « écarts » peuvent être exprimés par les participants, sont notés par la Commission et trouvent même à être publiés sur son site. Ils bénéficient ainsi de la liberté d'expression, principe clé dérivé des principes de base du patrimoine constitutionnel européen, mais ne peuvent franchir le seuil des sessions, dans la matière celles-ci, qu'au moyen de leur « régularisation » par les standards démocratiques.

À partir de l'idée et des motifs qui ont présidé à leur naissance, les AI se présentent, ainsi, comme un lieu de socialisation aux standards démocratiques des systèmes constitutionnels dont les pays adhèrent, en principe, dans ce but à la Commission. C'est une socialisation qui implique donc des degrés de résistance, des hésitations variables et, en tout cas, une volonté de trouver, autant que possible, un compromis des standards

[15] En précisant qu'il s'agit là de ce qui est exprimé, en termes d'analyse doctrinale, par les intervenants dans le cadre des AI, et non des positions des États eux-mêmes qui peuvent faire prévaloir leur propre interprétation, qu'ils soient demandeurs ou non d'avis.

[16] Ma qualité d'ancien membre suppléant m'a permis de relever ce fait concernant certains pays extérieurs au noyau dur de l'espace territorial européen des standards démocratiques (certains pays de l'Europe de l'Est dont la Russie, ou centrale ou autres comme la Turquie); et même, parfois, concernant certains pays pouvant relever de cet espace, telle la principauté de Monaco (Voir: Commission de Venise, CDL-AD(2013)018, L'équilibre des pouvoirs dans la Constitution et la législation de la Principauté de Monaco).

nationaux avec les standards démocratiques tes que présentés et appliqués dans la doctrine de la Commission. Une situation qui est d'autant plus intense que l'écart est important entre les deux standards. Même au prix d'une dose d'interprétation, deux repères peuvent nous éclairer dans ce sens : les parties prenantes des AI et les lieux d'organisation, en recoupement dans les deux cas avec les thèmes débattus.

Concernant les parties prenantes, on lit cette présentation sur le site de la Commission:

> « Sept ateliers interculturels sur la démocratie ont été organisés depuis (2012) qui ont permis à des juristes, des politiques et des académiciens de différents *pays partenaires arabes* et à leurs *collègues européens* d'avoir des échanges productifs sur des sujets tels que les réformes constitutionnelles et leur mise en œuvre ainsi que la liberté d'association dans les partis politiques. Des représentants d'Algérie, d'Égypte, d'Irak, de Jordanie, de Liban, de Lybie, du Maroc, de Mauritanie, de Palestine, de Tunisie et de Yémen ont participé à ces activités »[17].

Le diptyque (souligné par nous) « *pays partenaires arabes* » d'une part, et « *collègues européens* » d'autre part, n'appelle pas nécessairement ici de connotation idéologique, mais permet d'identifier l'écart le plus grand entre les standards nationaux arabes et les standards démocratiques, sans négligence par ailleurs des différences et des nuances entre les pays arabes mentionnés. Il permet par suite, par rapport à ces derniers standards, de supposer, tout en tenant compte des mêmes différences et nuances, la socialisation démocratique la plus exigeante et la plus contradictoire. Dans les deux cas, l'appréciation est faite donc en raison de situations historiques, culturelles et religieuses qui marquent, de manière différente, les pays en question. Devrait-on en déduire nécessairement que l'idée d'AI ne pourrait ou ne devrait prendre comme repères que les pays arabes ? Sans doute, nullement. Force cependant est d'admettre que par rapport à l'espace européen, la problématique de l'interculturalisme ne peut être la même quand on déplace le curseur des ateliers des pays de l'Europe de l'est par exemple aux pays arabes (et, dans d'autres contrastes et nuances, aux autres espaces, latino-américain et asiatique). Le partage des standards et des bonnes pratiques adoptés au sein de l'espace Conseil de l'Europe, que la Commission s'assigne comme objectif, devrait se dérouler dans une

[17] Concernant la Palestine, il est précisé en note dans ladite présentation que « *Cette dénomination ne saurait être interprétée comme une reconnaissance d'un État de Palestine et est sans préjudice de la position de chaque État membre du Conseil de l'Europe et de l'Union européenne sur cette question* ».

interculturalité plus souple et moins heurtée pour les premiers que pour les deuxièmes pays, tous facteurs respectifs de pesanteur historique et culturelle pris en compte. Ainsi, par rapport aux domaines des thèmes des sept AI, tels que le constitutionnalisme, l'État de droit ou la justice, la transition dite démocratique a été comparativement moins accidentée et moins prolongée pour les pays de l'Europe de l'Est que pour les pays arabes[18]. L'exercice intellectuel des AI peut s'avérer ainsi plus riche et davantage mis à l'épreuve de la réflexion et de la proposition, du côté des cas « extrêmes », plus extérieurs à l'espace des standards démocratiques, que des cas qui ne le sont que relativement.

Dans sa propre logique, le repère lieux d'organisation des sept AI peut également éclairer sur ces considérations. Successivement, les sept AI ont été organisés les premier et deuxième à Marrakech au Maroc, le troisième à Bucarest en Roumanie, le quatrième à Rome en Italie, le cinquième en Nicosie à Chypre, le sixième à Tunis en Tunisie et le septième à Strasbourg en France. À première vue, par rapport à la vocation et aux objectifs des AI, il n'y aurait rien de particulier à relever à propos de ces lieux d'organisation. Un équilibre géographique semble se dégager de la liste de ces lieux : quatre ateliers côté Europe (France, Italie, Roumanie et Chypre), et trois côté pays arabes (Maroc et Tunisie). Cependant, tout en admettant (peut-être) un certain fait du hasard dans la répartition de ces lieux (dû au rapport entre offre et acceptation d'organisation), il est possible de construire (même théoriquement) à partir de ces derniers une signification au regard de la vocation et des objectifs en question. Remarquons tout d'abord que si le débat sur l'interculturalité en matière de démocratie n'est pas lié au lieu d'organisation de l'atelier, sa symbolique est plus forte si le lieu est un pays concerné, à un titre ou un autre, par la socialisation et l'adaptation aux standards démocratiques relevant du patrimoine constitutionnel européen.

Du côté européen, la Roumanie pays de l'Europe de l'est et ayant relevé de l'espace communiste, est représentatif, par l'organisation d'un AI, d'un certain indice dans le sens de cette socialisation-adaptation. Pays de pré transition, puis de transition et post transition démocratiques, il offre un cadre adéquat pour le débat interculturel sur la démocratie[19]. Appliqué

[18] En matière de transitions démocratiques (au pluriel, dans la logique du présent papier), voir à titre d'exemple, la série d'articles publiés in SciencesPo-Centre de Recherches Internationales, concernant notamment la comparaison entre transitions post-communistes et celles issues des révoltes arabes, juin 2016.

[19] Durant sa transition démocratique, la Roumanie a été accompagnée par plusieurs avis de la Commission de Venise, dans les domaines constitutionnel et législatif et pour

au cas de Chypre, cet indice ne peut être, comme pour la Roumanie, de caractère politique mais seulement de caractère géographique. Autrement dit, pour l'atelier organisé à Nicosie, la symbolique du débat interculturel sur la démocratie (si on a à le chercher) n'aurait pas pour support (à notre sens) la situation constitutionnelle et démocratique du pays, mais sa situation géographique. Le débat en question a lieu donc dans un lieu décalé par rapport à l'Europe proprement dite, siège des standards démocratiques[20].

Du côté des pays arabes, la symbolique en question est multidimensionnelle. On peut laisser de côté les dimensions déjà soulignées de caractère historique, culturel et religieux, pour mettre en valeur ici celle relative au tournant du printemps arabe. La dynamique sociopolitique qui en est issue est d'ailleurs fortement liée aux dimensions en question. Les deux premiers AI furent organisés au Maroc en 2012 et 2013, au lendemain du Mouvement dit du 11 février en 2011, dans l'intensité encore vive de cette dynamique. Le sixième AI organisé en 2018 en Tunisie, s'inscrit dans les suites de cette dynamique, même à quelques années de l'événement qui a déclenché, à partir de ce pays, le printemps en question. Incrustés dans ce mouvement et à ses suites, les ateliers concernés, notamment ceux ayant eu lieu au Maroc presque au cœur de l'événement, constituent une expression directe de la vocation et des objectifs assignés au débat sur l'interculturalité en matière constitutionnelle et démocratique. En effet, en tant que thèmes de caractère transversal dans ce sens, *les processus constitutionnels et les processus démocratiques* (premier atelier), de même que *le nouveau constitutionnalisme du monde arabe* à partir des *processus d'élaboration des Constitutions dans un contexte de changement* (deuxième atelier), ne peuvent qu'interpeller toutes les normes et les institutions démocratiques, dans un face à face entre doctrine de la Commission et processus démocratiques nationaux[21].

l'organisation de plusieurs institutions. Plus récemment, la Commission pour le respect des obligations et engagements des États membres du Conseil de l'Europe (Commission de suivi de l'Assemblée parlementaire) a demandé des avis à la Commission de Venise sur des projets de lois, dont l'*Ordonnance d'urgence sur les amendements aux « lois sur la justice » de Roumanie*.

[20] Chypre est sans avis jusqu'à maintenant de la part de la Commission. Pays de l'Union européenne, culturellement et politiquement rattaché à l'Europe, il est porteur d'une empreinte extra-occidentale proche qu'il est géographiquement du Proche-Orient et seule île majeure de la Méditerranée en Asie.

[21] Pour cette large interpellation qui correspond au caractère transversal des deux thèmes, voir sur le site de la Commission, les programmes des premier et deuxième AI.

III. L'apport

Peut-on parler d'un apport des AI de la démocratie ? La question devrait être plutôt quel apport peut-on reconnaître à ces ateliers ? On ne peut en effet, sous prétexte que ces derniers se situent à la périphérie des activités statutaires de la Commission de Venise, prétendre à l'inexistence d'un tel apport. S'il ne s'agit dans les AI que d'un échange d'idées, pouvant même parfois donner lieu à l'expression d'argumentations construites sur un questionnement des standards démocratiques, il serait difficile de ne pas tenir compte du fait que l'organisation de cet échange incombe à une partie membre de la Commission, sous l'observation de celle-ci et à l'adresse (indirecte) de ses instances délibératives. Dans la matière des AI, il y a un contenu à relever et à identifier par rapport à la doctrine de la Commission. Mais l'hypothèse envisageable, en plus, est que ce contenu pourrait constituer un prétexte d'interpellation s'il est saisi au regard de contextes qui mettent de plus en plus à l'épreuve la démocratie et le fonctionnement de ses institutions, de même que les perspectives de son modèle.

1. Un contenu – Quel contenu ?

C'est un contenu à deux étages, où se superposent les idées, les réflexions et les questionnements des intervenants sur le thème de l'atelier aux normes démocratiques de référence dont la Commission est gardienne. La liberté des premiers n'a de limite que ce référentiel incontournable. Pour la présentation du contenu en tant qu'apport des AI, il est donc nécessaire de tenir compte de cette superposition qui se résume en quelque sorte en un « laisser-aller » (côté intervenants), couplé à un « ne pas laisser passer » (côté Commission). L'approche idoine ici, dès lors, n'est pas un exposé inutile du contenu « académique » de chaque AI, mais la perception de ce contenu dans le prisme de l'assise de principe des thèmes, telle que conçue par la Commission dans le cadre de sa doctrine de travail.

Une distinction peut, cependant, présider à cette manière de voir : la distinction entre thèmes « hard » et thèmes « soft » des sept AI organisés jusqu'à maintenant. Dans les premiers, la présence de l'assise en question est ferme, car il s'agit dans leur cadre de normes tangibles, se situant au cœur du dispositif démocratique de l'État de droit. Dans les deuxièmes, l'assise est relativement malléable, touchant au fond à des appoints au dispositif en question. Entre les deux, les thèmes qui ont porté sur l'ordre constitutionnel en général sont de nature à donner lieu à une appréciation du contenu qui permet de distinguer entre le « hard » et le « soft ».

Deux AI, le cinquième et le septième, sont concernés par l'orientation ferme de la Commission en portant sur la justice, domaine hard et capital de l'État de droit démocratique. Le premier est peut-être moins pointu dans ce sens que le deuxième, portant respectivement sur « Interaction entre les cours constitutionnelles et les juridictions similaires et les tribunaux ordinaires » et sur « Les conseils supérieurs de la magistrature et l'indépendance de la justice ». Le cinquième atelier, auquel avaient pris part des juges ordinaires et des magistrats de plusieurs pays arabes, avait porté essentiellement sur les différents modèles d'interaction et pouvait, dès lors, admettre que des variations seraient susceptibles d'y intervenir, bien entendu sans impact négatif sur les principes incontournables dans le domaine de la justice. Hormis cette réserve, les modèles d'interaction, variations comprises, ont leur rôle à jouer dans la « *consolidation du fonctionnement démocratique des pays de la région* », comme le confirme la Commission elle-même[22].

Le thème du septième atelier, sa conception et son encadrement sont, en revanche, d'une « orthodoxie » plus élevée. A la base même, son organisation est mieux verrouillée, en ayant été l'œuvre d'une coopération entre la Commission avec le Conseil consultatif des juges européens (CCJE) et la Commission européenne pour l'efficacité de la justice (CEPEJ)[23]. Concernant le contenu de l'atelier, le ton est donné par la Commission, en soulignant que « dans les nouvelles démocraties, la mise en place de Conseils Supérieurs de la Magistrature permet de garantir l'indépendance et l'impartialité du pouvoir judiciaire ». Ils sont, en effet, « les garants de l'État de droit et de démocratie », en vue « de soutenir par un cadre constitutionnel et législatif adéquat, le fonctionnement de ces Conseils et de s'assurer de l'application des normes du Conseil de l'Europe en matière de pouvoirs, de procédure de nomination des membres, de coopération avec le ministère public et d'interaction avec les pouvoirs législatif et exécutif… ». L'atelier renvoie ainsi à un fond, noyau dur, dans la doctrine de la Commission. À citer ici, entre autres : la position du Conseil de l'Europe au sujet de la gestion du pouvoir judiciaire, exprimée, notamment, dans la Recommandation du Comité de Ministres (2010)12 sur les juges quant à leur indépendance,

[22] Voir descriptif des Ateliers interculturels (AI) par la Commission.

[23] Le lieu d'organisation lui-même, Strasbourg, siège du Parlement européen, est d'une forte symbolique dans le sens de l'orthodoxie en question, dans la mesure où c'est la loi, de caractère démocratique, qui consacre et protège les principes incontournables qui fondent l'indépendance de la Justice. (L'évocation précédente de la symbolique des lieux d'organisation des AI, l'a été uniquement à propos des pays concernés par ce qu'on avait appelé la « socialisation » à la démocratie, certains pays européens, et pays arabes notamment).

efficacité et responsabilités; l'Avis 10 (2007) du Conseil Consultatif de Juges Européens (CCJE) sur l'obligation des Conseils «à garantir à la fois l'indépendance du système judiciaire et l'indépendance de chaque juge » ; les deux rapports adoptés en 2010 par la Commission relativement aux standards européens les plus importants applicables au pouvoir judiciaire, qui constituent une référence clé pour la Commission dans l'évaluation des législations nationales régissant le système judiciaire et des garanties mises en place pour assurer son fonctionnement indépendant. L'atelier renvoie aussi, implicitement, à la confirmation de ces éléments par divers avis récents de la Commission, entre 2017 et 2019, qui ont porté sur la législation relative aux Conseils de la magistrature et les organes similaires dans un certain nombre de pays membres, tels la Roumanie, la Macédoine et le Moldova[24].

Les AI à thèmes soft ne contredisent pas la doctrine de la Commission, mais se situent à la lisière des normes dures de la démocratie. Il s'agit autrement de principes et d'institutions complémentaires aux principes et institutions de base du dispositif démocratique. À titre d'exemple, la bonne gouvernance n'est pas la séparation des pouvoirs, et les instances indépendantes ne sont pas les organes constitutionnels correspondant aux trois pouvoirs. La Commission a pu organiser ainsi trois AI dans ce sens : le troisième sur les partis politiques, le quatrième sur la transparence et le sixième les instances indépendantes.

Dans le troisième AI, les partis politiques ont été traités en tant que facteurs clé dans le développement politique des sociétés démocratiques. Il a réuni, de façon significative, des membres de parlements nationaux et des académiciens, venus essentiellement de pays arabes. L'échange a eu lieu sur leurs expériences dans le domaine des standards internationaux et des législations et pratiques nationales dans le domaine des partis politiques. Les partis politiques et le développement politique n'étant pas à la base des notions d'ordre juridique, la Commission ne pouvait que faire place à l'expression de la diversité des situations nationales. Dans le cadre du pluralisme politique, principe de base d'une société démocratique, les États ne sont tenus que par le respect des règles qui garantissent ce pluralisme, tel l'égalité devant la loi, et non par des formes et des modalités prédéterminées de pluralisme. Sous réserve de ce respect[25], le rapport entre partis et développement politique est une dynamique qui dépend du contexte national et de l'état, en son sein, de la compétition politique.

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[24] Descriptif, précité.

[25] Voir notamment les Lignes directrices sur la réglementation des partis politiques et le Code de bonne conduite en matière de partis politiques, précités.

Dans le quatrième AI, la réflexion a porté sur la transparence en relation avec l'État de droit et le développement équitable et durable. La transparence, notion éthique et humaine, ne peut trouver une enveloppe juridique que dans le cadre de l'État de droit, afin de permettre la réalisation de l'objectif développement équitable et durable. En la matière cependant, les processus nationaux ne peuvent être que variables, liés d'abord au soubassement humain et culturel, comme c'est le cas pour le phénomène de la corruption. Les discussions ont pu d'ailleurs y relever la convergence des principes démocratiques avec certaines valeurs, comme l'importance de la dimension culturelle, dans l'appréhension et le traitement de ces questions. Le rapport de la Vice-Présidente de la Commission des Nations-Unies pour le droit commercial international sur l'état de droit et le développement durable a pu dégager, dans ce sens, une perspective non seulement économique mais essentiellement humaine à la notion de l'état de droit[26]. La Commission ne peut, dès lors, dans ce domaine exiger une orthodoxie juridique pure et dure, ici et maintenant, sans tenir compte du recours des États, candidats à la socialisation démocratique, à des normes adaptées et préparatoires, en l'occurrence dans des contextes comme ceux de pays de la rive Sud de la Méditerranée, ayant pris part à l'atelier.

Dans le sixième AI, les débats ont porté sur les Instances dites indépendantes. Le caractère soft de ce thème et son rapport à la doctrine de la Commission peuvent être vus à travers deux éléments. Le premier élément renvoie au cadre d'organisation, le Programme conjoint Conseil de l'Europe-Union européenne pour « Assurer la durabilité de la gouvernance démocratique et des droits de l'homme dans le Sud de la Méditerranée ». L'esprit de cette recommandation apparaît directement dans l'intitulé de l'atelier, qui en a pris note ainsi « Le rôle et la place des instances indépendantes dans un État démocratique ». La liaison ainsi faite entre ces entités et le caractère démocratique de l'État, renvoie au fond à leur indépendance par rapport aux organes constitutionnels de pouvoir de ce dernier. Ce qui constitue une problématique démocratique supplémentaire à la problématique démocratique centrale relative à l'organisation des organes en question selon des principes incontournables, telle la séparation des pouvoirs et la hiérarchie des

[26] Voir condensé des débats du 4ème AI, Commission de Venise, CDL-PI(2014)001syn, Transparence et état de droit comme conditions préalables au développement équitable et durable.

normes. Une échelle de priorité qui paraît devoir d'abord jouer au profit des fonctions des organes en question, en ayant son impact sur le degré de rigueur de la doctrine de la Commission dans le cadre de l'une ou l'autre problématique. D'où, la nécessité de la précaution, implicite dans le deuxième élément, portant (ayant porté dans ce sixième atelier) sur l'examen et la construction de relations adéquates entre les instances indépendantes et les pouvoirs exécutif, législatif et judiciaire. Un modèle de rigueur n'existant pas en principe en la matière, il est dès lors possible de considérer que la conception et le déploiement de ces relations et de l'indépendance qui en découlera pour les instances, peuvent emprunter des voies variables et adaptées[27]. Les exigences (plus ou moins incontournables) pour la structuration desdites relations, dans l'exercice et l'accomplissement des fonctions des instances concernées, ne valent pas en principe les exigences (incontournables) qui s'appliquent aux organes du régime constitutionnel et aux principes qui les gouvernent.

Les premier et deuxième AI, enfin, relèvent à la fois des deux caractères soft et hard. En portant, concernant les pays arabes, sur les Processus constitutionnels et processus démocratiques, puis sur Le nouveau constitutionnalisme du monde arabe: les processus d'élaboration des constitutions dans un contexte de changement, ils empruntent à la fois la voie de l'incontournable et de l'adaptable par rapport à la doctrine démocratique de la Commission. S'agissant au fond ici des Constitutions comme référence, il est admis que les dispositions des lois fondamentales, certainement de même valeur constitutionnelle, se répartissent entre dispositions exigibles de façon uniforme et incontournable et celles qui le sont mais de manière variable et adaptable. Dès lors, les principes, les règles et les procédures qui se répartissent entre ces deux volets, ne peuvent que relever de de la même distinction. À plus forte raison, les processus qui conduisent aux Constitutions, à leur élaboration et révision, ou qui président au choix de tel ou tel mécanisme qui doit y prévaloir (mode de scrutin, mono ou bicaméralisme…), ne peuvent en général relever que d'un choix lié aux contextes nationaux. L'examen des

[27] L'on pourrait d'ailleurs constater que cette problématique du sixième AI en question organisé en Tunisie, trouve son prolongement en réflexion (et sans doute en désir d'adaptation) dans la vidéo-conférence qui a eu lieu, le 4 mai 2020, pour le même pays, sur le « Cadre législatif et réglementaire des instances indépendantes tunisiennes: état des lieux et défis ». L'évènement s'inscrit dans le cadre du projet d'appui aux instances indépendantes en Tunisie (PAII-T) qui est un projet conjoint entre le Conseil de l'Europe et l'Union européenne (2019-2021).

questions abordées dans les deux AI permet de voir qu'ils s'insèrent bien dans ces nuances:

- dans le cadre du premier, réforme constitutionnelle, architecture institutionnelle, choix du système électoral, rapports entre Parlement et Gouvernement et définition des éventuels domaines dans lesquels des modifications supplémentaires peuvent être posées ou devraient s'imposer;
- dans le cadre du deuxième, approches utilisées dans la révision des Constitutions, procédures suivies pour leur élaboration et leur adoption, de même que la mise en application des dispositions constitutionnelles à travers de nouvelles législations.

Par rapport à la doctrine de la Commission, les deux ateliers ont été conçus et se sont déroulés dans le cadre du programme de l'Union européenne «Renforcer la réforme démocratique dans les pays du voisinage méridional». Un renforcement qui s'échelonne entre le hard et le soft des quatre objectifs retenus dans ce programme, à savoir, de façon graduée entre l'un et l'autre, l'accroissement de l'efficience de l'indépendance du pouvoir judiciaire par la référence aux standards appropriés en la matière du Conseil de l'Europe ; le renforcement et la consolidation des droits humains dans la ligne des dispositions des conventions pertinentes du Conseil en question ; la promotion des valeurs démocratiques dans la région des pays concernés, suivant les recommandations publiées dudit Conseil ; et, enfin, la promotion de la bonne gouvernance en s'inspirant des standards pertinents du même Conseil[28].

2-Une interpellation – Quelle interpellation ?[29]

C'est une interpellation qui part des contextes devenus mouvants de la démocratie, où de par le monde, dans l'ordre mondial et les ordres nationaux, les crises économiques se superposent aux crises politiques, provoquent des remous sociaux et suscitent des doutes au sein des groupes comme au sein des citoyens. La pandémie actuelle du Covid 19, donnant lieu de la part des

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[28] The South Programme I (2012-2014): *From activities to long term partnership*, dont les dates couvrent celles des premier et deuxième AI. (Mais la remarque peut être faite que l'entreprise de socialisation démocratique des pays concernés et la différenciation, dans ses composantes, entre les hard et les soft standards, se retrouvent dans les Programmes ultérieurs, South Programme II (2015-2017) et South Programme III (2018-2020), visant ainsi, entre autres, dans une *« demand-driven approach »*, à contribuer au renforcement des droits humains, de l'État de droit, de la gouvernance démocratique et de l'indépendance de la justice.).

[29] Nous estimons que les éléments avancés dans ce paragraphe constituent également une conclusion à ce papier.

États à un usage massif des mesures d'urgence, en l'occurrence au niveau juridique, en est une forte illustration[30]. De caractère passager, avec ses conséquences qui seront plutôt plus ou moins durables, elle ne fait au fond que s'ajouter à la crise structurelle et multiforme diagnostiquée et reconnue du modèle démocratique représentatif[31]. Du fait de ces dimensions de crise, le modèle en question devient presque pris d'assaut, par des actions aussi bien en droit qu'en politique. A ces dimensions, l'on pourrait aussi ajouter cette probabilité, de plus en plus admise, de voir d'autres types de crise et d'autres pandémies se succéder, et pousser aussi bien les États que l'ordre mondial (quel que serait son état) à contrarier, même relativement, l'ordre et les standards démocratiques établis.

Dans la logique de ce papier, la question de l'interpellation est à poser ici par rapport aux AI de la démocratie, et non par rapport à la Commission en elle-même dans le cadre de sa mission et de ses fonctions statutaires. Dans ce cadre (avec hypothèse de l'adaptation de sa doctrine envisagée ou non), la Commission est habilitée à répondre aux crises en question, au profit des pays concernés, par l'examen, l'assistance, l'orientation et la recommandation. Pour ce faire, elle est dotée des outils juridiques les plus diversifiés, les conventions européennes de même que son propre corpus allant des avis aux codes de bonne conduite et lignes directrices, en passant par les études et rapports. Mais quid en la matière des AI ? À quel titre et comment peuvent-ils être mobilisés pour contribuer à répondre à l'interpellation ? Quel rôle pourrait-on faire jouer à leurs débats et conclusions dans la formulation de cette réponse ? L'exercice est sans doute sans grande efficacité, mais il n'est peut-être pas sans intérêt. Au fond, il s'agit là d'une mise en perspective des AI, qui fait sans doute partie de la mise en perspective de la Commission elle-même. Des AI de réflexion sur l'impact juridique et démocratique des crises, peuvent constituer une réponse adéquate dans ce sens. On peut même considérer que parallèlement aux AI, la Commission pourrait envisager le lancement d'ateliers dédiés spécifiquement à la réflexion et à l'échange d'idées sur les crises en relation avec l'État de droit et la démocratie[32].

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[30] La Commission y a réagi en publiant son document (daté du 16 avril 2020) *Compilation des avis et rapports de la Commission de Venise sur les états d'urgence,* dans le but de ramener les mesures d'urgence aux normes admises dans les sociétés démocratiques.

[31] À titre d'exemple en descriptif factuel, voir : En Europe, la démocratie en crise, série en six épisodes, publiée dans le journal Le Monde à partir du 20 mai 2019. Quant aux études académiques en la matière, elles sont très nombreuses et connues du lecteur averti. Il importe peu ici d'en citer, au regard de la nature du présent papier.

[32] Ainsi, ACEDD (Ateliers des crises, de l'État de droit et de la démocratie) ou tout autre

L'idée pourrait prendre appui sur la conviction que les crises, de différents types dont celle de la démocratie elle-même, sont devenues, et deviennent désormais, une composante quasi structurelle des ordres étatique et interétatique et qu'à la Commission incombe, dans ce contexte mouvant, la mission de sauvegarder l'ordre démocratique et ses standards juridiques[33]. Il reste possible, cependant, de considérer que les AI de la démocratie, en leur état actuel, ne sont pas loin de cet esprit et de cette fonctionnalité. Il est constatable, en effet, que les crises amènent les États, certains plus que d'autres, parfois avec le consentement de leurs sociétés désemparées, soit à faire l'économie des standards démocratiques, soit à revenir vers leur fond culturel et historique supposé plus efficace pour faire face aux crises, au lieu et place de la « complexité » des normes et des procédures démocratiques[34]. Face à ce comportement des États, dont les États membres de la Commission, les AI constituent un espace adéquat de dialogue, de persuasion et de correction démocratiques. Choisir en priorité les États se socialisant à la démocratie, « déviants » en période de crise, comme lieu d'organisation de cette interaction interculturelle, c'est en faire d'une certaine manière, dans le contexte de crise, des acteurs de cette responsabilisation démocratique. Dans le cadre (et au-delà) de ces AI, la Commission est tenue, dans l'ordre, par deux exigences : celle qui correspond à sa mission de principe d'expliquer et d'orienter vers les standards démocratiques, mais aussi celle de tenir compte, dans le respect de la prééminence du droit[35], de l'impact des crises et des

sigle que la Commission pourrait valider. De toute manière, le Conseil scientifique de la Commission peut être est consulté sur l'opportunité de pareilles suggestions.

[33] Dans le paragraphe introductif du récent document Compilation sur les situations d'urgence - CDL-PI(2020)003, il est affirmé ainsi que « La Commission a par le passé constamment affirmé que seule une démocratie qui respecte pleinement l'État de droit peut garantir efficacement la sécurité nationale et la sûreté publique. Même lorsqu'une situation d'urgence est réelle, le principe de l'état de droit doit prévaloir ». C'est ce que confirme le Président de la Commission de Venise dans sa *Déclaration* à l'occasion du 30ème anniversaire de cette Commission : « …de nombreux défis demeurent et la crise actuelle de Covid-19 nous rappelle que les progrès ne sont jamais irréversibles. Nous devons sauvegarder la démocratie pluraliste et empêcher sa dégénérescence en un régime autoritaire, où le vainqueur prend tout ».

[34] Une compétence de la Commission a ainsi relevé que « La crise de valeurs que traverse l'Europe est susceptible de se traduire en un nombre croissant de contestations par les États de leurs obligations internationales de respect de la démocratie, des droits de l'homme et de l'État de droit : le rôle de la Commission de Venise deviendra encore plus crucial ». Simona Granata-Menghini, La Commission de Venise du Conseil de l'Europe : Méthodes et perspectives de l'assistance constitutionnelle en Europe, Les Nouveaux Cahiers du Conseil constitutionnel, 2017/2 N° 55-56, page 77.

[35] Forte de la jurisprudence de la Cour européenne des droits de l'homme, la Commission voit dans la prééminence du droit « une norme européenne fondamentale et commune,

urgences sur le fonctionnement de la démocratie[36]. La participation de tout État membre à ces ateliers, vaudra liberté d'expression sur le rapport entre crise et démocratie, comme elle vaudra aussi responsabilité d'admettre ou non que seule telle ou telle gestion de la crise est conforme aux normes démocratiques et respectueuse de l'État de droit.

Dans tous les cas de figure, les Ateliers interculturels de la démocratie ne peuvent que constituer un éclairage bénéfique, aussi bien pour la Commission que pour ses États membres, dans la réflexion et le débat sur la démocratie et ses épreuves.

capable d'orienter et d'encadrer l'exercice du pouvoir démocratique. ». Paul Schmit, juriste et vice-président honoraire du Conseil d'État du Luxembourg : « Venise veille au grain », publié sur le net, 10.05.2019. Prééminence affirmée dans le Rapport de la Commission CDL-AD(2011)003 rev.

[36] Prise en compte (de l'impact des crises) qu'on pourrait considérer comme permise et encadrée par cette compréhension ainsi exprimée par la Commission dans un de ses avis : «Comme tout avis de la Commission de Venise, l'analyse juridique tiendra dûment compte des spécificités du pays concerné » (CDL-AD(2013)018 relatif à la Principauté de Monaco, précité) ; et notamment par cette méthodologie de la Commission en trois étapes, faite d'équilibre entre compréhension et recommandation : « la compréhension et le rapprochement des systèmes juridiques de ses États membres à travers les techniques du droit comparé; la promotion des normes du Conseil de l'Europe par le biais de ses recommandations visant la modification et l'amélioration des textes constitutionnels et législatifs; une contribution à la solution des problèmes de fonctionnement des institutions démocratiques, par le biais de recommandations basées sur l'expérience comparable et les bonnes pratiques d'autres pays ». Simona Granata-Menghini, précité, page 71.

Suk-Tae Lee[1]

Tasks and cooperation between the Venice Commission and the Constitutional Court of Korea: for the development of democracy and Rule of Law

I. Introduction: Enactment of the New Constitution and Establishment of the Constitutional Court of Korea

1. The 1987 Constitution of the Republic of Korea and the establishment of the Constitutional Court of Korea

Assemblies and demonstrations held by the Korean citizens demanding a substantial guarantee of fundamental rights through the adoption of the Rule of Law principle and displacement of authoritarianism, reinstatement of the country's legislative and judicial authority and constitutional reform for a direct presidential election successfully led to a constitutional amendment and gave birth to the 1987 Constitution. The proposed amendment that manifests aspiration and various needs of the people was passed at the legislature with the consent of the ruling and opposition party, confirmed through a national referendum and promulgated on October 29, 1987.

The 1987 Constitution provides for a constitutional court and an effective framework for constitutional adjudication therefrom. Based on the Constitutional Court Act, the Constitutional Court of Korea came into being on September 1, 1988. For the past 30 years or so since then, the Constitutional Court spared no effort in consolidating the Rule of Law, guaranteeing fundamental rights of the people and ensuring the proper functioning of state agencies. The Constitutional Court largely contributed to social cohesion by practicing constitutional adjudication that consequently resolved social conflicts. Today, the Constitutional Court stands as the most trusted state agency by the Korean people.

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[1] Member of the Venice Commission in respect of Korea.

2. Jurisdiction, composition and operation of the Constitutional Court of Korea

As provided under Article 111(1) of the Constitution of the Republic of Korea, the Constitutional Court has jurisdiction over adjudication on the constitutionality of statutes, adjudication on impeachment, adjudication on dissolution of a political party, adjudication on competence dispute and constitutional complaint.

The Constitutional Court is composed of nine Justices serving for a term of six years. Among the candidates, three are elected by the National Assembly, three are designated by the Chief Justice of the Supreme Court and the remaining three are selected by the President of the Republic of Korea. All nine Justices are then appointed by the President. The President of the Constitutional Court is appointed by the President from among the Justices with the consent of the National Assembly. The principle of checks and balances is well played out in this process as three branches of the government – the legislative, the executive and the judiciary – all participate in the composition of the Constitutional Court. Article 4 of the Constitutional Court Act prescribes that Justices shall adjudicate independently according to the Constitution and laws, guided by their consciences. Article 112(3) of the Constitution ensures that no Justice of the Constitutional Court shall be expelled from office except by impeachment or a sentence of imprisonment without prison labor or heavier punishment and strengthens the guarantee of their status. The people defer to the independence of Justices, and ultimately, the Constitutional Court. Such trust placed by the people is viewed as a mandatory prerequisite for the presence of the Constitutional Court.

As of April 2020, the Constitutional Court has received approximately 40,000 cases that have been decided or are currently in progress. The number of cases, especially for constitutional complaint, tends to increase year by year. The Constitutional Court has around 70 Constitutional Rapporteur Judges assigned to perform investigation and research concerning the review and adjudication of cases and research officers to conduct an investigation on foreign legislation. The Constitutional Research Institute installed within the Court to conduct research in relation to constitutional adjudication from a long-term perspective. The Constitutional Court is also equipped with the Department of Court Administration where hundreds of officers and employees are tasked with ensuring the Court's smooth functioning and continuity of operation. Considering the aforementioned number of cases filed with the Court and the large scale of the workforce, the Constitutional Court of Korea could be assessed as a very 'active' organization.

While putting much effort into conducting research on foreign legislations and case-laws, the Constitutional Court of Korea endeavored to share the Korean Constitution and constitutional case-laws with the world. The Venice Commission, together with the Association of Asian Constitutional Courts and Equivalent Institutions (AACC), has been an essential international organization in the Court's international affairs. Ever since the Republic of Korea joined the Venice Commission as a full member in 2006, every individual Member has been appointed from the Court's Justices without exception. Further, the Constitutional Court designated two liaison officers responsible for facilitating communication between the Court and the Commission. The Visions, objectives and the work scope of the Venice Commission are in line with the Constitutional Court's roles and activities. Undoubtedly, taking part in international exchanges and cooperation activities with the Commission is one of the core tasks of the Constitutional Court's international activities.

II. Role and Activities of the Constitutional Court of Korea

1. Overview

Over the past 30-odd years from its inception in 1988, the Constitutional Court of Korea aspired to guarantee fundamental rights and develop the Rule of Law. Ever since it was established, the Court extensively reviewed constitutional complaints on matters that remain unresolved by existing remedy processes of ordinary courts, and by doing so, succeeded in strengthening fundamental rights of the people. For instance, the Constitutional Court interpreted that treaty, statute, decree, rule, municipal ordinance and the exercise of governmental power inadmissible for administrative litigation are subjects of constitutional complaint, and that executive prerogative power and non-exercise of administrative power are subject to admission for decision. The Court conducted constitutionality review to examine unconstitutionality in laws that govern conflicting relations between traditional values and human rights, human rights protection for the minority and areas where clash of interest is apparent. It also examined constitutionality of governmental power exercised by the State. In retrospect of the Court's decision to declare unconstitutional on the censorship in motion pictures in October 1996 and to uphold the impeachment of the nation's president in March 2017, as seen below, the Constitutional Court of Korea's 30-year history has left a lasting mark on the modern history of Korea.

The Constitutional Court of Korea's commitment to examining cases and taking its decision pursuant to the Constitution and Constitutional Court Act, independent of the legislative, judicial and executive power, is rewarded by the people who find the Court one of the most trusted state agencies. Some of the major decisions by the Constitutional Court that took the attention of the people are laid out in the following paragraphs below.

2. Major decisions of the Constitutional Court of Korea

1. Introduction

For the past three decades, the Constitutional Court of Korea performed constitutionality review that influenced every aspect of Korean society and played a crucial role in social cohesion and the advancement of democracy. The number of cases filed with the Court has increased in parallel with the enlarged influence of the Constitutional Court. This would be a proof that constitutional review is becoming a more reliable guide to resolve social conflicts.

2. Guarantee of the right to freedom of expression and conscience

In the Motion Pictures Pre-Inspection case (93Hun-Ka13, etc., October 4, 1996), the Constitutional Court ruled that a statute that requires pre-inspection on movies by the Public Performance Ethics Committee is unconstitutional as being violative of the constitutional ban on censorship. The constitutional provision that prohibits licensing or censorship – as a means of realizing freedom of press and publication – had once disappeared in the 1972 Constitution amended by an authoritative government but made a remarkable comeback in the 1987 Constitution. Accordingly, predicated on the revived constitutional provision, the Constitutional Court conducted a strict standard of review and rendered the decision of unconstitutionality.

In the case on Conscientious Objectors (2011Hun-Ba379, etc., June 28, 2018), the Constitutional Court found the provision on categories of military service nonconforming to the Constitution on the ground that the provision imposes military duty but does not stipulate an alternative military service system for conscientious objectors, and therefore infringes on the objectors' freedom of conscience. Although the Korean peninsula stayed in peace for the last 70 years, military confrontation between the South and North Korea has remained unsettled, leaving no room for one's conscience, political creed or religious belief to affect the duty of military service. The unconformity decision in this case clearly demonstrates the defining nature of the Constitutional Court, that is, its commitment to protect human rights of a minority group.

3. Protection of the dignity and value of human being, the right to self-determination and etc.

In the case on Same-Surname-Same-Origin Marriage Ban (95Hun-Ka6 etc., July 16, 1997), the Constitutional Court delivered a decision of nonconformity to the Constitution for a provision of the Civil Act that prohibited marriage between two persons who are blood relatives, who share the same family name and come from the same ancestral line. The decision was based on the Court's evaluation that this age-old way of grouping family by his or her surname has lost its validity and rationality in the modern society and no longer conforms to the Constitution, which guarantees the dignity and value of human being, the right to pursue happiness and the establishment and maintenance of marriage and family life based on gender equality.

In the Adultery case (2009Hun-Ba17 etc., February 26, 2015), the Constitutional Court rendered a decision of unconstitutionality on a provision of the Criminal Act that criminalizes a married person who committed adultery and a participant of adultery, on the grounds that the provision restricts the right to self-determination and secrecy and freedom of privacy. Some pointed out that retaining the legal basis for criminalizing adultery would serve to effectively protect a relatively underprivileged female spouses from adultery. Nevertheless, although the Court found adultery to be immoral, it took into account the change in public recognition and concluded that the exercise of criminal punishment by the State on adultery is not valid.

In the case on the Crimes of Abortion (2017Hun-Ba127, April 11, 2019), the Constitutional Court made a constitutional nonconformity decision on a provision of the Criminal Act that imposes punishment on a pregnant woman who procures her own miscarriage and on a doctor who procures the miscarriage of a woman upon her request or with her consent. Pregnancy, giving birth and raising a child are some of the most significant life-changing decisions made by individuals. The decision explicates the Court's perception that a pregnant woman should be able to self-determine whether or not to continue her pregnancy.

4. Establishment of gender equality

In the constitutional complaint case against a provision of the Support for Discharged Soldiers Act (98Hun-Ma363, December 23, 1999), the Constitutional Court decided that giving extra points to veterans who completed their military duties and were discharged in public employee hiring examination violates rights to equality of women and the handicapped. This

decision provoked a heated debate as the duty of military service is only imposed on male citizens under the state conscription system. Ultimately, however, the decision is regarded to have strengthened the value of gender equality.

5. Relocation of the capital

In the Relocation of the Capital case (2004Hun-Ma554 *et al.*, October 21, 2004), the Constitutional Court delivered a decision of unconstitutionality for an Act, which outlined the construction of new administrative capital in a region other than Seoul so as to relocate the nation's administrative function to the region, on the ground that the Act violates the complainants' right to vote on national referendum. The Constitutional Court's view of regarding Seoul's state as the nation's capital under a customary constitutional norm, although not being expressively provided for in the Constitution, stirred up a dispute over its legality. There was an appreciable amount of criticism towards the Court for striking down an Act that intends to resolve a number of social and economic problems derived from the overpopulation in the capital area. Notwithstanding such controversy, the plan to relocate the nation's administrative capital was withdrawn as per the Court's decision. Later, only a few central administrative agencies were relocated to the region.

6. Case on the dissolution of a political party

Meanwhile, upon the request of the petitioner - the government - to dissolve the Unified Progressive Party, the Constitutional Court decided to uphold the petitioner's request on the grounds that the party's "objectives and activities are against the fundamental democratic order" under the Article 8(4) of the Constitution and stripped the party's affiliated lawmakers of their National Assembly seats (2013 Hun-Da1, December 19, 2014). The Court stated that judicial dissolution of political parties essentially serves as a means to prevent a particular party that goes against the basic democratic order from being involved in the formation and realization of the political will of the citizens, and therefore it protects the citizens and safeguards the Constitution. It further asserted that a decision to dissolve a political party found to be unconstitutional arises from the idea of defensive democracy, and in such a situation where democracy is under threat, the status of a National Assembly member as a representative of the nation is unavoidably sacrificed.

7. Case on the impeachment of the President

Lastly, the Constitutional Court conducted two impeachment adjudications on the President over the course of its 30 odd year history. The Court found Article 65 of the Constitution, which stipulates impeachment adjudication against high-ranking public officials including the President, as a statutory ground for a possible motion of impeachment against high-ranking public officials' actions being violative of the Constitution and law, and therefore contributes to preventing such violative actions. Also, the Court viewed that adjudication on impeachment is aimed at securing the normative power of the Constitution and functions as a means to deprive high-ranking public officials of their authority when they abuse that authority. The impeachment process is specified in the Constitutional Court Act as the following: "Where a request for impeachment is well-grounded, the Constitutional Court shall pronounce a decision that the respondent shall be removed from the relevant public office." The Constitutional Court stated that "well-grounded" in the Act does not mean any and all incidence of violation of law, but the incidence of a 'grave' violation of law sufficient to justify the removal of a public official from office. In accordance with this standard, the Court rejected the petition for the impeachment adjudication of President Roh Moo-hyun (2004Hun-Na1, May 14, 2004).

In late 2016, many South Koreans raised candles in a public square to protest against President Park Geun-hye's abuse of her position and authority as President for the interest of her close acquaintances. The citizens spoke with one voice – peacefully but firmly – in demanding the National Assembly to pass the motion to impeach the President. Once again tasked with weighing impeachment charges against the President, the Constitutional Court of Korea relentlessly proceeded with its adjudication for around 90 days and upheld the President's impeachment on March 10, 2017 (2016Hun-Na1, March 10, 2017). Two months after the Court upheld the impeachment of the President, the highest governing authority, presidential election took place as per relevant laws and a new President is sworn into office. The country was under a dire political circumstance for several months from autumn 2016 to spring 2017, but it suffered no damage such as extreme social confusion, bloodshed, violence or civil disturbance. The manipulation of state affairs crisis peacefully ended in accordance with the Constitution and relevant laws, and the Constitutional Court played a central role along the way.

8. Evaluation

It was in 1987 that the Republic Korea ultimately put an end to authoritarian rule and set up an institutional framework that aims to guarantee fundamental rights of the people and mandate state agencies to serve the public. Nevertheless, as the influence of authoritarian remnants persisted throughout the policymaking process, various policies made thereunder were insufficient to substantially guarantee fundamental rights of the people and rectify the abuse of power by state agencies. With regard to this point, it is impressive to observe how the Constitutional Court – established through constitutional amendment in 1987 – has fully served its purpose. In the last 30 years or so, the Constitutional Court strived to substantially guarantee fundamental rights of the people and made sure that governmental power is duly exercised. Such efforts effectively bolstered the normativity of the revised 1987 Constitution. This being the case, the establishment of the Constitutional Court is considered as the most successful end product of the amendment to the Constitution in 1987.

III. Participation and Solidarity for the Global Expansion of Democracy

1. Implications and significance of international activities for the Constitutional Court

A constitutional court is established and operated under a constitution. Taking roots from the Rule of Law principle, constitutions of democratic states place significance in the guarantee of fundamental rights of individuals, political participation of the people, and the appropriate exercises of power by government authorities, as well as the system of checks and balances among state agencies. These are universal features of all constitutions of democratic states that serve as a common basis for the Constitutional Court of Korea to stand in solidarity with other constitutional courts and different forms of judicial institutions around the world, and to stand by extension to every international organization that contributes to protecting human rights.

The Constitutional Court of Korea hosted the Congress of World Conference on Constitutional Justice, fully engaged in the creation and setting up of the Association of Asian Constitutional Courts and Equivalent Institutions, organized a number of the international symposium, and exchanged visits as well as interacting with other constitutional courts and judicial institutions across the world. Frequent mutual visits, exchange of ideas, and sharing of knowledge by Justices, Rapporteur Judges and officers

from the Court Secretariat with the world help deepen the understanding of the universality of human rights and promote the broadening of democratic values and the exchange of ideas on improving operations.

The Constitutional Court of Korea is well informed of the Venice Commission's roles and efforts specific to the expansion of democracy and to the worldwide promotion of the Rule of Law. Giving due respect to the roles and efforts of the Venice Commission, the Constitutional Court firmly believes that closer interaction and cooperation with the Commission will make it easier for Korean people to understand and actively take part in the promotion of democracy at an international level.

2. Contribution and role of the Republic of Korea as a member state of the Venice Commission

The Republic of Korea began to engage with the activities of the Venice Commission on October 6, 1999, as an observer state. Ever since Korea officially joined the Commission on June 1, 2006, it appointed a Justice from the Constitutional Court as a Member and high-ranking public officials each from the Ministry of Justice and from the Constitutional Court as Substitute Members. Designating Constitutional Court Justice to hold the Member position illustrates that Korea acknowledges the importance of the Constitutional Court's role in its participation as a Member State in line with the purpose of the Venice Commission. The Member keeps in close contact not only with the Korean Constitutional Court but also with the Ministry of Justice and, if necessary, works in coordination with the Ministry of Foreign Affairs and its diplomatic missions abroad as well. The Member is fully supported and assisted by the people at the Constitutional Court of Korea in performing his or her duty as a Member, such as attending a plenary session or drafting an *amicus* brief.

All the past and present Presidents and Justices of the Constitutional Court Korea underscored the importance of facilitating interaction and cooperation with the Venice Commission. Inaugurated in September 2018, the new President of the Constitutional Court of Korea Yoo Namseok met with the President of the Venice Commission Gianni Buquicchio during his visit to Strasbourg in October 2019, and expressed hopes for closer bilateral relations and coordination between the Court and the Commission. As specified in the paragraphs below, major international activities by the Constitutional Court i.e. hosting the WCCJ Congress and operating the AACC Secretariat for Research and Development (SRD) were carried out or are underway in close coordination with the Venice Commission. To ensure

smooth communication between the Court and the Commission, one Rapporteur Judge and one officer from the Court Secretariat are designated as liaison officer for the Venice Commission. The liaison officers attend annual meetings of the Joint Council on Constitutional Justice co-hosted by the Commission and the Constitutional Courts participating in the Council, submit three to four case-laws a year to the Commission's case-law database CODICES, assist in research on legislations, and actively engage with the Court's contribution to the Commission.

3. Congress of the World Conference on Constitutional Justice hosted by the Constitutional Court

In September 2014, the Constitutional Court of Korea hosted the 3rd Congress of the WCCJ attended by 109 constitutional adjudicatory institutions from 92 countries. Hosting the WCCJ Congress – the highest-level forum in the field of constitutional justice – is marked as one of the proudest accomplishments of the Constitutional Court. The Seoul Communiqué was adopted at the Congress, which outlined the necessity to vitalize international cooperation in the domain of human rights and extended support to the Republic of Korea's idea on the necessity of establishing an "Asian court of human rights."

Under the Statute of the WCCJ, the Venice Commission serves as a WCCJ Secretariat and takes in charge of preparatory steps for opening the congress. Hence, it was crucial for Korea to closely work hand-in-hand with the Commission to guarantee the success of the 3rd Congress. Thanks to excellent and valuable support provided by the WCCJ Secretariat, the Republic of Korea could successfully host the 3rd Congress of the WCCJ.

4. Invitation program and bilateral cooperation with constitutional adjudicatory agencies worldwide

Since its establishment, the Constitutional Court of Korea interacted with constitutional adjudicatory organs across the border on a regular basis and used the occasion as a steppingstone for its growth. Every year, the Constitutional Court invites an overseas constitutional review institution to Seoul to hold events such as a seminar and round-table talk with Justices and organize a special lecture by the guest institution to the Court. Most recently, in September 2019, the Court invited the President, a Justice and members of the Constitutional Court of the Republic of Italy to share their experiences and knowledge with the Korean Constitutional Court. In December 2016, the Court invited the President and Justices of the Federal

Constitutional Court of Germany to Seoul to exchange ideas and thoughts on various issues. In continuation of the previous talks, President Yoo Namseok, Justices and members of the Korean Constitutional Court visited Karlsruhe on invitation from the Federal Constitutional Court of Germany in October 2019 and held a discussion on issues of their mutual interest. It is noticeable that reciprocal visits by the constitutional courts in Korea and Germany tended to be more active in recent years.

5. The Constitutional Court's participation in the AACC and operation of the Secretariat for Research and Development

At the 3rd Conference of Asian Constitutional Court Judges held in Ulaanbaatar in September 2005, the Constitutional Court of Korea initially proposed the idea of establishing the Association of Asian Constitutional Courts and Equivalent Institutions. The Court hosted the 5th Conference of Asian Constitutional Judges in October 2007, where it led the signing of the Memorandum of Understanding on setting up a preparatory committee for the creation of the Association. Eventually, in May 2012, the Inaugural Congress of the AACC was held in Seoul. As of April 2020, 18 Asian constitutional courts and equivalent judicial institutions have joined the AACC.

Under the AACC Statute, the Association is operated by a Joint Permanent Secretariat composed of the Secretariat for Planning and Coordination, the Secretariat for Research and Development and the Center for Training and Human Resources Development. Of the three offices, the Constitutional Court of Korea operates the Association's research and development organ. The Court has set up an incorporated association for the AACC SRD in December 2016 and the Secretariat commenced its work from early 2017. Located in Seoul, the AACC SRD is composed of research officers recruited by the Constitutional Court of Korea as well as officers seconded from the AACC member institutions. The Secretariat collects data from diverse sources and provides an archive of information including case-laws from the member institutions and Constitutions of the member countries through its webpage. Along with research activities, the AACC SRD hosts various international conferences. The AACC SRD organized the first and the second International Symposium (high-level meeting attended by President/Chief Justice and Justice/Judge) in 2017 and 2019 respectively, and the 1st Research Conference (mid-level meeting attended by Rapporteur Judge, assistant Judge, researcher and etc.) in 2018. The Secretariat is set to hold the upcoming Research Conference

in 2020. Meanwhile, the AACC SRD is committed to delivering research accomplishments through the publication of research books. Recently, the Secretariat published and distributed a research book titled "Jurisdictions and Organization of AACC Members." As shown, the AACC SRD acts as a channel of communication among the AACC member institutions, fostering the exchange of information and social interaction.

Unlike the other parts of the world, Asia was not successful in implementing a regional human rights treaty and a judicial institution liable thereupon. It is thought that differences in territorial location, ethnicity, religion, political system, governmental framework and historical background account for the challenge in achieving a regionally accepted human rights treaty. However, there is a growing need for a regional human rights treaty in Asia and the establishment of a regional judicial body tentatively named the "Asian Court for Human Rights." It was in this respect that Korea officially expressed the necessity of the regional human rights treaty and the human rights court at the 3rd Congress of the World Conference on Constitutional Justice in 2014. For the treaty and the court to come into being, it is very important for the Asian States to deepen knowledge and understanding of each other and stand on a common ground concerning human rights discourse. Along the journey, the AACC SRD's activities are expected to play a crucial role. Serving as a platform for information exchange on Asian Constitutions, statutes and case-laws as well as for social interaction among regional practitioners and researchers in the sphere of constitutional justice, the AACC SRD's activities are anticipated to enrich the implementation process of human rights treaty in Asia.

IV. Challenges and Tasks of the Constitutional Court of Korea, and Cooperation with the Venice Commission

1. Overview

Korea was under Japanese colonial rule for around 30 years in the early 20th century and experienced the Korean War, which broke out of ideological differences, in 1950 that lasted for three years. The country was then under the authoritarian rule, but citizens took to the streets to fight against the authoritarian government and achieved a consolidated democracy. Aspirations and struggles of the people towards democracy gave birth to the 1987 Constitution, and one of the most noticeable changes made in the revised Constitution was the creation of the Constitutional Court.

It was in this historical context that the Constitutional Court was established, and the progress made by the Court for the past 30-odd years is an indicator how democracy has substantially made progress in Korea. The Constitutional Court of Korea empowered the 1987 Constitution to serve as a democratic ground norm. In other words, it largely contributed in making the Constitution function as the highest norm that consolidates the Rule of Law, guarantees fundamental rights of the people and strikes a balance between state agencies, so that the Constitution does not remain a mere declaration of intent – as a 'stuffed book' stored in a glass case. As illustrated, the Court's 30-year history deserves to be remembered in a positive light. However, the Constitutional Court of Korea has to be aware that now in 2020, the Court is tasked to prepare for a new era of work.

2. Strengthening the capacity of research and investigation in areas of comparative law and international human rights law

Most of all, considering the universal nature of fundamental rights, the Constitutional Court needs to strengthen its research and investigation capacity in areas of comparative law and international human rights and utilize this capacity in the field of constitutional adjudication. Currently, the Constitutional Court has legal experts assigned to research on comparative law and provide information on foreign legislations and case-laws in the process of deliberating a case and conduct mid- and long-term research projects on major constitutional issues. Along with research activities, the Court regularly translates case-laws from across the globe. All these research results and translation works are accessible not only to the people at the Constitutional Court but to everyone. Anyone, including scholars in and outside the country, can utilize these materials that are electronically available at the Court and Court library website. The Court also has a society dedicated to the study of comparative law, in which Justices and Rapporteur Judges take part as a member and identify up-to-date foreign legislations and case-laws, as well as trends in the sphere of international human rights law. It would be encouraged for Justices and Rapporteur Judges to take the knowledge of comparative law and international human rights law. To this end, it is necessary for the Court to foster personal interaction between and among the people at the constitutional adjudicatory agencies around the world.

3. Sharing the Court's knowledge with the world

Further, the Constitutional Court needs to actively share its experiences on constitutional review and capacity in research and investigation with other constitutional adjudicatory institutions and international courts. The dynamism of modern Korean history expands the possibility for Korea to share its experiences with the other countries. An array of experiences that Korea has gained throughout the history – colonial rule, winning a victory against dictatorship and authoritarianism, civil movement, implementation of democracy, inception and operation of the Constitutional Court, economic advancement and the list goes on – increases the chance for the country to share its knowledge with the other countries interested in getting advice or opinion on respective matters of interest in full or in part.

The Constitutional Court of Korea performs quite many types of constitutional adjudication, and as shown above, has received approximately 40,000 cases that have been decided or are currently in progress. While experiencing a dynamic history, the Constitutional Court was responsible for holding extensive deliberation in the process of its decision-making and therefore accumulated much experience on constitutional adjudication. In this vein, the Court needs to share its experiences in constitutional adjudication and know-how in the operation of the Constitutional Court with its overseas counterparts. The Court is poised to share experiences at multilateral conventions such as the conferences to be held by the World Conference on Constitutional Justice and the Association of Asian Constitutional Court and Equivalent Institutions, as well as with other constitutional courts using bilateral means of communication.

4. Strengthening the level of cooperation with constitutional adjudicatory institutions in Asia

The Constitutional Court of Korea needs to foster cooperation and interaction with constitutional adjudicatory institutions in Asia for tangible improvements in human rights to be seen in the region. As mentioned previously, the Korean Constitutional Court officially recognized the need to install a human rights court in Asia. It is anticipated that a considerable amount of human and material resources is required to prepare for a regional human rights treaty and a court based on the treaty. As a preparatory stage to the treaty and the court, it is necessary to strengthen the research capacity for investigating the actual human rights situation in Asia. The AACC Secretariat for Research and Development operated by the Constitutional Court of Korea shares its research outcome on a regular basis. This is expected to

largely contribute to substantially improving the human rights condition in Asia. The AACC SRD's secondment program - by which research officers from various constitutional adjudicatory institutions in Asia could work at the Secretariat to conduct research activities – will serve as a critical means of social interaction that helps Asian countries deepen mutual understanding. Sharing research findings and encouraging social interaction will propel the demand for setting a common vision and values in Asia.

5. Strengthening the level of cooperation with the Venice Commission

The Republic of Korea is an official member state of the Venice Commission and the country has been engaged in the Commission's global discourse of promoting the Rule of Law and democracy. The Constitutional Court of Korea mainly participates in the works of the Venice Commission, and so various discussions made at the Commission or guidelines it has established in line with the universality of fundamental rights greatly aid the Constitutional Court to identify current issues in global constitutional justice. There is no doubt that the Commission's activities give impetus to the advancement of constitutional justice in Korea.

Also, given that the Venice Commission functions as an effective "hub" for constitutional adjudicatory institutions and regional organizations for constitutional justice, it serves as a great platform for the Korean Constitutional Court to interact and cooperate with other adjudicatory institutions around the world. The Venice Commission has actual experience in the promotion of international cooperation to achieve consolidated Rule of Law principle and democratic improvement. Methodological steps of the Venice Commission in conducting research and investigation and delivering deliberation and decision, therefore, bring much insight to the Constitutional Court of Korea in realizing a cooperation model for constitutional adjudicatory institutions in Asia. The Commission is in full support of the AACC's and the AACC Secretariat for Research and Development's activities, and hence it is indisputable that the depth of cooperation between the Korean Constitutional Court and the Venice Commission remains to be promoted.

V. Conclusion: Sharing of the Vision for the Future

For the past 30 years, the Venice Commission strived to expand the Rule of Law and advance democracy in Europe and beyond to the globe and now it has achieved major progress. Korea concurs with the Commission's goals – the dissemination and consolidation of the Rule of Law and democracy –

and is well aware of the Court's responsibility to spread these to the world. Member institutions of the AACC are expected to cooperate in multifaceted areas such as in research and study on comparative law and human resources development, so as to guarantee the effective protection of human rights of every citizen in Asia. Advices and continued support from the Venice Commission are vital on the Association's road to achieve these goals.

Considering the thirty years' good practices and guidelines of the Venice Commission and sharing its vision for the move developed democracy and rule of law, the Constitutional Court of Korea is expected to actively participate in making efforts to achieve these goals easier and more efficiently. The vibrant social interaction and exchange of ideas based on mutual understanding and respect between the people at the Venice Commission and the Korean Constitutional Court will contribute for such vision to be further realized in future.

Thomas Markert[1]

The Venice Commission and the consequences of the dissolution of former Yugoslavia

The Venice Commission`s approach to the settlement of ethno-political conflicts

The Venice Commission was established in 1990 mainly to assist the new democracies in Central and Eastern Europe in their transition from one-party rule towards a democratic system based on the Rule of Law and respect for human rights. While this transition was a reason for joy and optimism, from the very beginning the concern arose that ethnic tensions, which had been simmering below the surface during the period of communist rule, would erupt into violent conflicts.

This happened in several parts of the former Soviet Union mainly, but not only, in the Caucasus. As the violent conflicts in former Yugoslavia were geographically much closer to the European Union, they received more attention.

From the outset one main idea was to prevent or settle such conflicts by providing strong legal guarantees for national minorities. Therefore, the Venice Commission prepared, as one of its first activities, a proposal for a Convention on the Protection of Minorities and submitted it, in February 1991, to the Committee of Ministers. While the Committee of Ministers did not accept the proposal as such, the text influenced the Framework Convention for the Protection of National Minorities, which was adopted by the Committee of Ministers of the Council of Europe on 10 November 1994.

In parallel, since it was clear that a rights-based approach would not be sufficient to address the issue, the Commission established a Working Party on the Federal and Regional State. In 1997, it adopted a report on Federal and Regional States[2] (which also deals with local autonomy and the concept of asymmetric federalism, which appeared particularly relevant for the areas of ethnic conflict). A number of further reports, on federated and regional entities and international treaties,[3] self-determination and secession in

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[1] Secretary of the Venice Commission (2010-2020). The views expressed are solely those of the author.

[2] Venice Commission, CDL-Inf(1997)005, Federal and Regional States. The documents quoted are accessible on the web site of the Venice Commission at venice.coe.int.

[3] Venice Commission, CDL-INF (2000)003, Federated and Regional Entities and International Treaties.

constitutional law,[4] electoral law and national minorities[5] and the settlement of ethno-political conflicts,[6] directly addressed the legal issues arising in the framework of these conflicts. These reports, on the one hand, took into account the practical experience the Venice Commission had gained when dealing with these issues in a number of countries and, on the other, they provided guidance for its action.

When advising on the drafting of new constitutions in countries such as Georgia, it was obvious for the Venice Commission to take into account existing conflicts. In addition, it was increasingly asked for its assistance with respect to specific legal issues relating to actual or potential conflicts. In Georgia, this concerned the conflict with respect to Abkhazia, where the Venice Commission was involved in an exchange of views between both sides in Pitsunda, in February 20001, the conflict in South Ossetia and the status of Adjara. In the Republic of Moldova, the Venice Commission provided opinions on Gagauzia and was involved in the negotiations aimed at reaching a so-called "federal solution" for Transnistria.

However, no decisive progress was made with respect to any of the conflicts in the former Soviet Union. This was different for former Yugoslavia and the involvement of the Commission proved much more important there.

Croatia

This involvement started in Croatia. Following the end of the war in the country, the efforts of the international community focused on ensuring an appropriate level of protection of national minorities, de facto mainly the Serbian minority. The Parliamentary Assembly of the Council of Europe, in the framework of its consideration of the application by Croatia for membership in the Organisation, consulted the Venice Commission on the constitutional arrangements for the protection of minorities in the country. As a concrete result of the advice of the Venice Commission, international advisers were integrated into the Constitutional Court. These advisers participated in all decisions concerning persons belonging to national minorities. Moreover, the country adopted, in December 2002, after

[4] Venice Commission, CDL-INF(2000)002, Self-determination and Secession in Constitutional Law.
[5] Venice Commission, CDL-INF(2000)4, Electoral Law and National Minorities.
[6] Venice Commission, CDL-INF(2000)016, A General Legal Reference Framework to Facilitate the Settlement of Ethno-Political Conflicts in Europe.

long hesitations, a new Constitutional Law on the Protection of National Minorities, which did not, however, implement all the recommendations made by the Venice Commission.[7]

Bosnia and Herzegovina – Implementing Dayton

While the Commission was consulted by the government of Croatia in 1994 on constitutional aspects of the Washington Agreements, which led to the establishment of the Federation of Bosnia and Herzegovina, and by the Committee of Ministers on the constitutional aspects of the situation in Bosnia and Herzegovina (BiH), it was not represented during the negotiations in Dayton. However, it was soon to play an important role for the implementation of the Dayton Agreement, in particular its Annex IV, which contains the Constitution of the country.

One of the most innovative aspects of the Dayton Agreement was its establishment of the Office of the High Representative (OHR). The High Representative, appointed with the consent of the UN Security Council, received the task of monitoring the implementation of the peace settlement and of coordinating the implementation of its civilian aspects. Article V of Annex X of the Agreement provides that "*The High Representative is the final authority in theater regarding interpretation of this Agreement on the civilian implementation of the peace settlement*". In 1997, the OHR received the so-called "Bonn powers", enabling the High Representative to adopt binding decisions when local parties seem unwilling or unable to agree, and to remove from office public officials, who violate legal commitments or the Dayton Agreement. Especially in the first decade following the adoption of the Agreement, the High Representative proved to be the crucial institution for the effort of making Bosnia and Herzegovina a somewhat viable state.

The various High Representatives soon understood that the Venice Commission could be an extremely useful body to develop legal and constitutional solutions to the complex problems facing Bosnia and Herzegovina and to ensure the legal credibility of these solutions.

At the 27th plenary session of the Commission in May 1996, the OHR asked the Venice Commission to provide an opinion on the compatibility

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[7] Venice Commission, CDL-AD(2003)009, Opinion on the Constitutional Law on the Rights of National Minorities in Croatia. See the Opinion adopted at the March 2003 session of the Commission, More information on the co-operation between the Venice Commission and Croatia on this issue is available on the Commission`s website under Croatia.

of the constitutions of the two Entities, the Federation of Bosnia and Herzegovina (FBiH) and the Republika Srpska (RS), with the Constitution of the State, as it appears in Annex IV to the Dayton Agreement.

After an initial meeting in Paris, with only the representatives of the FBiH, a Commission delegation came to Sarajevo under rather difficult circumstances – there were no regular flights, only military planes, hotels were not working and the atmosphere was extremely tense, especially during the meetings with representatives of the RS. Nevertheless, the RS representatives attended the meeting and entered into a dialogue with the Commission.

The Commission adopted its Opinion[8] in September 1996. With respect to the Constitution of the Federation of Bosnia and Herzegovina, the amendments proposed by the Commission were mainly of a technical nature. The legal situation there was, and is, extremely complex, due to the fact that this federated Entity is itself a federation composed of 10 cantons with wide powers.

For the second Entity, the RS, the issues were much more political, since its Constitution was conceived as the Constitution of an independent state and not the Constitution of an Entity. In its Opinion, the Commission asked for the removal of a number of provisions underlining the sovereign character of RS. The National Assembly of RS adopted several crucial amendments to the Constitution of the Entity in September 1996, removing incompatibilities with the State Constitution, as recommended by the Commission. It did not, however, include a positive reference to the fact that the Entity is part of the State of BiH.[9]

In this Opinion, the Commission also characterised BiH as a federation for the first time, although an unusually weak one. This statement was quite important, since it guided the future interpretation of the constitutional situation in the country by the Venice Commission.

In the following years, the Commission received a large number of requests on constitutional issues in the country from the OHR. The Commission generally tried to interpret the provisions of the Dayton

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[8] Venice Commission, CDL(1996)056final, Opinion on the compatibility of the Constitution of the Federation of Bosnia and Herzegovina and the Republika Srpska with the Constitution of Bosnia and Herzegovina.

[9] Venice Commission, CDL(1996)070, Compatibility of the Constitution of the Republika Srpska with the Constitution of Bosnia Herzegovina following the adoption of Amendment LIV - LXV by the National Assembly of Republika Srpska: Secretariat memorandum. For more detail on the follow-up to the Opinion see the Secretariat memorandum

Agreement in a manner that ensures a minimum viability of BiH as a state without deviating from its text.

Since the catalogue of the responsibilities of the State in the Constitution was extremely limited, and residual competence attributed to the Entities, it was often necessary to resort to general principles to justify a competence of the State level. As an example, an opinion of the Venice Commission[10] was the basis for the establishment of the State Court of BiH, since the Constitution provided explicitly only for a Constitutional Court at the State level.

Bosnia and Herzegovina – Trying to reform Dayton

The lack of adequate competences at the State level is, however, only one of the issues which makes the Dayton Constitution dysfunctional. The other main issue being that the Constitution requires, for practically all decisions, a consensus of the representatives of all three constituent peoples (Bosniacs, Serbs and Croats), establishing e.g. a three-member Presidency instead of a single President and providing for many possibilities for blockage in the bicameral parliament, including a vital national interest veto for the representatives of the three constituent peoples and a veto for Entity representatives.

The two Entities are also extremely heterogeneous. The FBiH is a highly decentralised federation with most powers attributed to the 10 cantons. By contrast, the RS has a centralised structure.

Despite some progress achieved through piecemeal reforms, BiH remains a largely dysfunctional state. The political class approaches politics as a zero-sum game. Since the electoral system is based on achieving support from within a specific ethnic group, politicians see it as their interest to appear as defenders of the interests of the respective group and not of the common weal. Most of the limited progress achieved in the first decade after Dayton would not have been possible without the intervention of the High Representative. It was, however, clearly not a sustainable solution for an international official to take the necessary decisions which could not be agreed by the local politicians.

A more comprehensive reform was therefore needed.[11] As things stood, the State of BiH's powers were too limited and it was too inefficient

[10] Venice Commission, CDL-INF(1998)017, Opinion of the Venice Commission on the need for a judicial institution at the level of the state of Bosnia and Herzegovina.

[11] For more detail cf. Thomas Markert, The impossible reform?, in Swoboda/Solioz (eds.) Conflict and Renewal: Europe Transformed. Essays in Honour of Wolfgang Petritsch, Baden-Baden, 2007, pp. 261 *et seq.*

to undertake accession negotiations with the European Union and become a functioning member of the EU, able to defend its own interests and to implement the requirements resulting from EU membership. EU accession, which was desired by all ethnic groups, was therefore considered the main incentive for constitutional reform.

In 2005, the Venice Commission adopted, at the request of the Parliamentary Assembly, an Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative.[12] In this Opinion, the Commission insists on the need for a gradual, but comprehensive, reform of the constitutional arrangements in the country as "present arrangements are neither efficient nor rational and lack democratic content".

Since the main conclusions of the Opinion remain fully relevant today, it seems worth-while to quote them in extenso:

> *"82. A central element of the first stage of constitutional reform has to be a transfer of responsibilities from the Entities to BiH by means of amendments to the BiH Constitution. This is an indispensable step if any progress is to be achieved in the process of European integration of BiH. This step will be difficult since, as with other constitutional amendments in BiH, it will have to be based on consensus among the representatives of the three constituent peoples. Constitutional reform cannot be imposed. Another element of the first stage should be a streamlining of decision-making procedures within BiH, especially with respect to the vital interest veto, and a reform of the provisions on the composition and election of the Presidency and the House of Peoples which seem either now or following the entry into force of Protocol No. 12 on 1 April 2005 incompatible with the ECHR. The reform of the vital interest veto at the State level could best be carried out in parallel with similar reforms in both Entities.*
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> *83. Another pressing issue is the territorial organisation of BiH. In the view of the Venice Commission, any solution implying abolishing the two Entities seems unrealistic in a medium term perspective since this would not be accepted within the RS. A reform of the structures within the FBiH cannot be put on hold in the vague hope of a change of approach in the RS. The most realistic option for such reform, which would also be in line with general European trends, would be to concentrate legislative responsibilities within the FBiH at the Entity level. At the same time, local government in both the FBiH and the RS should be strengthened. Completely abolishing the Cantons would be an even better solution but this may not be politically possible for the moment.*

[12] Venice Commission, CDL-AD(2005)004, Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative.

84. Further constitutional reforms, changing the emphasis from a state based on the equality of three constituent peoples to a state based on the equality of citizens, remain desirable in the medium and long term. If the interests of individuals are conceived as being based mainly on ethnicity, this impedes the development of a wider sense of nationhood. In this context the people of BiH will also have to decide whether they want to replace their present Constitution negotiated as part of a peace treaty by an entirely new Constitution which would enjoy full democratic legitimacy as the fruit of a democratic constituent process in BiH. "

The Opinion found a broad echo in BiH and was taken up by a former Principal Deputy High Representative, Donald Hays, who, under the auspices of the US Institute for Peace, brought together a group of experts nominated by the main political parties. The idea was to have a first reform package adopted before the October 2006 elections. The experts prepared, with the involvement of the Venice Commission, a package of constitutional amendments addressing the main issues raised by the Commission, although the amendments did not go as far as desirable. The proposals were then discussed with party leaders for several months and introduced by the Presidency into Parliament. Despite strong US pressure for the adoption of the package, it failed to obtain the required two-thirds majority in the House of Representatives.

This failure was due to a lack of support from a part of the Bosniac and Croat political parties. In particular the Bosniac party SBiH led by Haris Silajdžić vigorously opposed the package, since it considered that it did not go far enough. By contrast, most RS-based political parties supported its adoption. This failure was a tragic mistake, since this vote proved to be the last occasion when Serbian political parties were ready to support a significant constitutional reform.

A similar reform package, again prepared with the informal involvement of the Venice Commission, was proposed by US Deputy Secretary of State James Steinberg and Swedish Foreign Minister Carl Bildt on behalf of the EU at Butmir near Sarajevo in October 2009, but rejected by the representatives of the Bosnian Serbs.

A main consequence of the failure to reach an agreement on constitutional amendments resulted with the European Court of Human Rights famous Sejdic and Finci judgment in December 2009, declaring the rules on the election of the State Presidency, which exclude persons not belonging to one of the constituent peoples from being elected, to be discriminatory and in violation of the ECtHR. In its judgment, the Court

notes[13] that the Opinions of the Venice Commission show that there are mechanisms of power-sharing, which do not automatically lead to the total exclusion of representatives of the other communities.

The Venice Commission was also involved in efforts to ensure the implementation of this judgment. In 2013-2014, the Deputy Secretary of the Commission, Simona Granata-Menghini, participated in several rounds of talks under the leadership of the EU Commissioner for Enlargement, Stefan Füle, with representatives of the various political forces in Bosnia and Herzegovina concerning the implementation of the judgment. However, BiH politicians failed to reach a compromise and adopt the required amendments. As of today, the judgment remains unimplemented and the Constitution unreformed.

The experience gained in BiH was important, since not only the Venice Commission but all actors in the region tried to avoid in other parts of former Yugoslavia solutions which had led to the blockage of the system there.

Kosovo

In 1998, there were increasing fears that the conflict in Kosovo would escalate further. The large majority of the population of Kosovo, composed of ethnic Albanians, had practically no political rights and, under the leadership of Ibrahim Rugova, boycotted the official institutions. The 1990 Constitution of Serbia granted only an extremely limited degree of autonomy to the province. This had been completely different under the 1974 Yugoslav Constitution. Although in this period Kosovo had also been part of Serbia, the constitutional basis for its autonomous status had been set forth in the Constitution of the Federation and the Kosovo authorities had directly participated in the Federal institutions. The growing oppression of the majority of the population by the Milosevic regime led to the creation of a guerrilla army, the UCK. In early 1998, serious fighting started in the Drenica valley in Kosovo.

The United Kingdom and the Austrian Chair of the EU encouraged the Venice Commission to work on elements for an Agreement on Kosovo, which could be introduced into future negotiations. A working group of the Commission prepared an outline of main elements for such an Agreement in August 1998. According to the outline, Kosovo would have

[13] ECtHR, *Sejdic and Finci v. Bosnia and Herzegovina*, nos. 27996/06 34836/06, 22.12.2009, para. 48.

its own institutions, competent for most matters, while the institutions of the Federal Republic of Yugoslavia (FRY) would retain some legislative competences and powers related to external relations. The Republic of Serbia would no longer exercise any powers on the territory of Kosovo. Strong guarantees would be provided for the Serbian and other minorities in the region. A special court, with three judges elected by the Assembly of Kosovo, three judges elected by the Chamber of Citizens of the Federal Republic of Yugoslavia and three judges appointed by the European Court of Human Rights would ensure compliance with the Agreement.

The proposal made by the Venice Commission never became part of the negotiations, which were conducted with both sides by the United States.[14] However, the Venice Commission was asked by European countries to comment upon the texts, which were prepared by the Americans for the negotiations, and its contributions were appreciated also by the US negotiators. As a consequence, the Venice Commission was invited as part of the EU delegation to meetings of the Contact Group, composed of the most important states interested by the developments in the Balkans, i.e. the US, the UK, France, Germany, Italy and Russia, when the legal aspects of the status of Kosovo were discussed.

The situation on the ground continued to deteriorate and the foreign ministers of the Contact Group countries summoned the representatives of the FRY/Serbia and the Kosovars to attend peace negotiations at Rambouillet in France, starting on 6 February 1999. The Venice Commission was asked to act as legal adviser to the EU negotiator, Ambassador Petritsch. I attended the conference in this capacity together with, at the beginning, the Belgian member Jean-Claude Scholsem.

The conference took place in a strange atmosphere. The delegation from Kosovo was divided and avoided direct contact with the Serbian/Yugoslav delegation. There were more negotiations within the international community than between the internationals and the parties. With respect to the constitutional aspects of the settlement, the topic most strongly raised by the Serbs was the organisation of the judicial system. For them it was unacceptable that any ethnic Serb should be subject to the jurisdiction of the Kosovo courts. They also insisted on a vital national interest veto in the Kosovo Assembly, which should not be subject to a solution by arbitration or a court decision.

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[14] The negotiations are described from a diplomatic and political point of view by the American negotiator, Ambassador Christopher R. Hill in his book: Outpost. A Diplomat at Work, New York 2014, pp. 120 *et seq.*

The real deal-breaker on their side, however, was the refusal to accept an international presence to enforce the agreement. This was crucial for the internationals, since without it, the agreement was likely to remain a dead letter. The Kosovars insisted that they should have the right to organise a referendum on independence three years after the entry into force of the Agreement. Instead, the Agreement provided that three years after its entry into force, an international meeting should be convened to determine a mechanism for a final settlement. For this reason, the Kosovo delegation did not sign the Agreement approved by the Contact Group at Rambouillet, but only at the follow-up conference in Paris on 18 March 1999. The Serbian/Yugoslav delegation refused leading to the well-known consequences.

Although the Rambouillet Accords never entered into force, the text remained important, since its provisions influenced later solutions. UN Security Council Resolution 1244, adopted on 10 June 1999, explicitly provides that the political process leading towards self-government for Kosovo should take full account of the Rambouillet Accords.

The Accords are a complex document, including an Annex describing main features of the future Constitution of Kosovo. The respective text is largely based on the proposals of the US negotiators, taking into account comments by the Venice Commission.

Main elements of the Accord of interest in this context are:

- The establishment of an international Chief of the Implementation Mission with stronger powers than the High Representative in BiH;
- The FRY and the Republic of Serbia could exercise in Kosovo only those (very limited powers) specified in the Agreement,
- Kosovo was to be a parliamentary democracy with a parliament composed of deputies elected by all citizens and other deputies elected by members of national communities. Other posts would also be distributed among members of different national communities.
- National communities[15] would be institutionalised on a voluntary basis and obtain important powers of self-government;
- Kosovo would have its own court system, a constitutional court with strong powers and an Ombudsman with wide powers. Appeals to the Federal courts would be possible on points of Federal law and parties in civil disputes could opt for a case to be tried by a court of the Republic of Serbia.

[15] The term minorities has a negative connotation in the Balkans and was therefore avoided.

- International human rights treaties and in particular the ECHR would be directly applicable in Kosovo.

Following the war, on the basis of UNSC Resolution 1244, the United Nations Mission in Kosovo (UNMIK) was established and the Special Representative of the UN Secretary General obtained quasi-dictatorial powers in the region. UNMIK Regulation No. 1 provided: *"All legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative of the Secretary-General."* The first Special Representative, Bernard Kouchner, understood clearly, however, that it was not possible to govern the territory without local input and started as from January 2000 to establish local institutions.

From the very beginning UNMIK co-operated with the Venice Commission and consulted the Commission informally or formally on legal issues. In the early period, a main focus was on local government and the Ombudsman institution.

In May 2001, UNMIK Regulation 2001/9 on a Constitutional Framework for Self-Government in Kosovo was issued. This text provided for Kosovo-wide institutions of self- government, while reserving key responsibilities to UNMIK. Representatives of political parties and national communities were consulted on the text. Briefly a Belgrade representative took part in the discussions. The Venice Commission was represented in the working group preparing the text by myself and, at the beginning, the Irish member Matthew Russell. While UNMIK clearly remained in charge, with the adoption of this text the period of power-sharing had begun. As regards the institutional arrangements, this text was a bridge between the Rambouillet Accords, on the one hand, and the later Ahtisaari proposal, on the other.

In 2006, the Special Envoy of the Secretary General of the United Nations for the future status process for Kosovo, Mr Martti Ahtisaari, regularly asked for informal advice on legal and constitutional issues from the Venice Commission. In consultation with some members, I was closely involved in the drafting of the constitutional and related Annexes. Although the text provided extensive guarantees for the protection of the Serbian and other minorities, independence for Kosovo was unacceptable for Serbia. The country rejected the proposal, which did not receive the support of the Security Council. In reality, however, the Comprehensive Proposal for the Kosovo Status Settlement proposed by Mr Ahtisaari shaped future developments.

This was true, in particular, with respect to the Constitution of Kosovo, which was prepared starting in 2007 with the strong involvement of the EU and the participation of the Venice Commission. The Kosovo representatives understood that, if they wanted the independence of

Kosovo to be internationally recognised, they had to accept guarantees and mechanisms for minority protection. The Constitution therefore fully took into account the Ahtisaari proposal, including the institution of an International Civilian Representative with the authority to ensure compliance with the Settlement Proposal. I took part in several of the meetings and provided written comments on many issues. The Constitution entered into force in June 2008.

In this manner the Venice Commission was closely involved in all the different steps leading to the adoption of this first Constitution of independent Kosovo, which remains in force today.

North Macedonia

North Macedonia, at the time still called Republic of Macedonia and internationally referred to as "the former Yugoslav Republic of Macedonia", had managed under the leadership of Kiro Gligorov to gain its independence without bloodshed. Governments were always coalitions of one party representing mainly ethnic Macedonians and one party representing ethnic Albanians. Despite this participation in government, Albanians complained about discrimination and underrepresentation in the public sector. Both ethnic groups tended to live apart, with few contacts among them. Ethnic Macedonians were worried about the higher birth rate among Albanians, fearing to become a minority in their own country. Moreover, as a young and weak nation with difficult neighbours, they were lacking self-confidence and therefore had difficulty making concessions especially on issues of symbolic importance. As one politician put it: the Greeks contest the name of our country, the Bulgarians our separate language, the Serbs our separate church and the Albanians our borders.

These tensions erupted in early 2001. A guerrilla army, the National Liberation Army (NLA), was established, claiming to fight for equal rights of the Albanians. The Macedonian security forces were unable to deal with this insurgency. The European Union, the United States, NATO and OSCE reacted quickly, in order to prevent the insurgency from becoming a full-fledged civil war. The European Union appointed François Léotard, a former French Minister of Defence as facilitator, the United States James Pardew, a diplomat and former Pentagon official. Upon a request by Mr Léotard for assistance by the Venice Commission I was appointed as legal adviser to him and participated in most of the negotiations.

The official negotiations did not take place between the NLA and the Macedonian government, they took place instead between the political parties represented in parliament – it being tacitly understood that the Albanian parties would informally consult the NLA. In parallel, NATO representatives conducted talks with the NLA on security issues. In fact, the approach of the NLA proved to be surprisingly moderate for a group which had taken up arms without much justification.

In principle, the negotiations were conducted by President Trajkovski, a moderate but politically weak politician. In practice, the international facilitators played the main role in the negotiations.[16] The negotiations were concluded within a few weeks, resulting in the Ohrid Framework Agreement signed on 13 August 2001.

This Agreement provided for major constitutional changes, which were subsequently adopted by the Macedonian parliament according to the procedure required for constitutional amendments.[17]

The main aim of the International Community was to maintain the sovereignty and territorial integrity of the country. Albanian requests for a federalisation or regionalisation, which - it was feared - might later lead to secession, were therefore rejected from the outset. The solution chosen was decentralisation with strong local self-government.

Based on the experience of BiH, the negotiators avoided a vital interest veto in parliament. Instead, the Ohrid Agreement requires a double majority of members of parliament, including the majority of the representatives claiming to belong to non-majority communities, for legislation in the areas of culture, education, use of language and local self-government as well as for the election of the Ombudsman and some of the members of the Constitutional Court and the judicial council. These rules were enshrined in the Constitution and cannot be amended without a double majority.

The Agreement also contains provisions on policing and affirmative action for non-majority communities. The most hotly disputed issues, as typical for the Balkans, were however those with symbolic importance and, foremost, the issue of language. It became clear to the negotiators that it would be impossible to reach an agreement without making Albanian an

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[16] The negotiations are described in the book by the American negotiator, James Pardew, Peacemakers: American Leadership and the End of Genocide in the Balkans, Lexington 2017, pp. 255 *et seq.*

[17] A good analysis of the Agreement is contained in the paper by Boshko Stankovski, Peacemaking and Constitutional Change: Negotiating Power-Sharing Arrangements and Identity Issues, Berghof Foundation 2020, accessible at www.berghof-foundation.org/pmcb.

official language, although not with the same status as the Macedonian language. This was strongly resisted by the Macedonian side. In accordance with the Agreement the Constitution now provides that "*Any other language spoken by at least 20 percent of the population is also an official language written using its alphabet, as specified below.*" Albanian is thus not mentioned explicitly, but it is in fact the only other language spoken by at least 20% of the population.

The implementation of this constitutional article remains controversial to this day. Official use of Albanian gradually increased. In 2018, the biggest Albanian party DUI obtained, as a price of it entering a new coalition government, the adoption of a new language law, making the public administration in the country largely bilingual. This was considered by the Albanians as the last step required to implement the Ohrid Agreement, but went clearly beyond what was envisaged at the time. The Venice Commission adopted an Opinion criticising this Law.[18]

Despite these continued difficulties, the Ohrid Agreement was one of the few unqualified successes obtained by the International Community in the region. The armed conflict ended and the country stabilised. At the moment, the country seems the likeliest candidate to enter into membership accession negotiations with the European Union.

The end of the Federal Republic of Yugoslavia

When the Socialist Federal Republic of Yugoslavia was dissolved in 1992, only two of its member Republics, Serbia and Montenegro, joined the new Federal Republic of Yugoslavia (FRY). Under the new leadership of Milo Djukanovic, Montenegro increasingly distanced itself from the Milosevic regime, and in particular its policy on Kosovo, and started to act more and more independently. As of 8 July 2000, the Montenegrin Assembly decided to no longer recognise any acts of the Federal authorities. Instead, the Montenegrin authorities aimed for the independence of the Republic based on a referendum. This was rejected by the Federal authorities, by Serbia and the Montenegrin opposition. The fact that Milosevic was overthrown by a revolution in Serbia in October 2000 did not change the approach of the Montenegrin authorities.

At the request of the Parliamentary Assembly of the Council of Europe, the Venice Commission adopted a report in October 2001 on

[18] Venice Commission, CDL-AD(2019)033, Opinion on the Law on the Use of Languages of North Macedonia.

the constitutional situation of the Federal Republic of Yugoslavia.[19] The Commission expressed concern at the lack of secure constitutional foundations, which were impeding necessary democratic reforms at all levels and caused an atmosphere of uncertainty. It called on the authorities to start official work on new constitutions as soon as possible. As regards the question of the future status of Montenegro, it noted that solving this issue by way of a referendum alone presented difficulties in terms both of the legality and the legitimacy of such a solution. The Commission therefore urged the interested parties to try to reach a common proposal through bona fide negotiations, which could then be submitted to a popular referendum and confirmed by the relevant decisions.

The European Union took the initiative to broker such negotiations. The EU was worried that a unilateral move towards independence by Montenegro could further undermine stability in the region. In particular, while the majority of the population of Montenegro seemed to support independence, this was only a slight majority and largely due to the fact that the minorities, in particular the ethnic Albanians, strongly supported independence. Traditionally, the links between Serbia and Montenegro were strong and both peoples felt very close.

In January 2002, High Representative Solana asked for the assistance of the Venice Commission in the negotiations. As a result of this request, I participated in several negotiations, commented proposals for solutions from both sides and presented various legal options to the EU. The negotiations in the Federal Palace in Belgrade took place in a somewhat surreal atmosphere. It was an enormous building, but largely empty since, de facto, most powers were exercised by the Republic of Serbia and not by the Federation.

The Montenegrin side wanted a minimum of powers for the Federal level and a maximum of influence. The Federal and Serb side was ready to grant a lot of influence to Montenegro in the Federal institutions. It seemed always questionable whether this approach was sustainable in the long term. Serbia had a population of over seven million inhabitants, Montenegro only six hundred thousand. To grant nearly equal rights to Montenegro in such a situation seemed possible only if the Federation had no real powers.

A basic agreement was reached on 14 March 2002, when the leaders of the Federation, the Republic of Montenegro and the Republic of Serbia signed a document called "Proceeding Points for the Restructuring of Relations between Serbia and Montenegro". The signing was witnessed by High Representative Solana.

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[19] Venice Commission, CDL-INF(2001)23, Interim Report on the Constitutional situation of the Federal Republic of Yugoslavia.

This basic agreement left, however, many issues open. Negotiations and discussions lasted for nearly a year, until the Constitutional Charter of the State Union was adopted on 4 February 2003. Together with the UK member of the Venice Commission I provided further input on the legal aspects in these negotiations.

Since the State Union did not survive very long, it seems unnecessary to go into details on the Constitutional Charter. The crucial Article of the Charter proved to be Article 60: *"Upon the expiry of a 3-year period, member States shall have the right to initiate the proceedings for the change in its state status or for breaking away from the state union of Serbia and Montenegro. The decision on breaking away from the state union of Serbia and Montenegro shall be taken following a referendum. The law on referendum shall be passed by a member State bearing in mind the internationally recognized democratic standards. …"*

In May 2005, the Parliamentary Assembly of the Council of Europe asked the Venice Commission to provide an opinion on the compatibility with applicable international standards of the existing legislation on referendums in Montenegro. Two issues were crucial in this respect: which majority should be required for a referendum on independence to be successful and whether Montenegrin citizens living in Serbia (about 260.000) should have the right to vote?

With respect to the first question the Commission noted:

> *"In the light of the Commission's knowledge of the practice in many countries, and in the absence of any compelling evidence of international requirements to the contrary, the Commission concludes that the requirement in the present Referendum Law (namely, that the result of a referendum may be decided by a simple majority of those voting in the referendum, provided that at least 50% of the electorate have voted) is not inconsistent with international standards. The Commission would oppose any proposal to simply remove the requirement that at least 50% of the electorate have voted. However, in order that the result of a referendum should command more respect, the Commission considers that the political forces in Montenegro may wish to agree to change the present rules for the proposed referendum, either by adopting a higher percentage rate for participation, or by requiring support for the decision by a percentage of the electorate to be defined. A change of this kind would certainly be consistent with international standards and would help to ensure greater legitimacy for the outcome."*[20]

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[20] Venice Commission, CDL-AD(2005)041, Opinion on the Compatibility of the Existing Legislation in Montenegro concerning the Organisation of Referendums with Applicable International Standards para. 40.

It recommended that *"serious negotiations should take place between the majority and opposition within Montenegro in order to achieve a consensus on matters of principle concerning the conduct and implementation of the proposed referendum, in particular as regards the specific majority that should be required to ensure that the outcome of the referendum is accepted by all major political groups in Montenegro. The European Union, which by virtue of the agreement on amending the Constitutional Charter of the State Union of 7 April 2005 plays a specific role in this respect, could facilitate such negotiations."*[21]

With respect to the right to vote of Montenegrin citizens living in Serbia, the Commission noted that the Republican citizenship is often based on tenuous links with the Republic concerned, that voting rights in the same state are usually based on residence and, as the decisive element, that the current legislation did not provide for such a right. The Commission concluded: *"As regards the issue of the right of Montenegrin citizens in Serbia to vote, the Commission cannot recommend a change of major scope to the present electoral rules which would imply adding more than 260,000 people to the voters' list. Such a change at the present stage would be incompatible with the necessary stability of the voting rules and jeopardise the legitimacy of the referendum as well as the reliability of the voters' list.*"22

The recommendations of the Venice Commission were followed. The European Union appointed Miroslav Lajcak, the current Foreign Minister of Slovakia, as facilitator for the negotiations and I acted as legal adviser to him. While a number of more technical questions had to be settled, the crucial issue remained the majority to be required for a success of the referendum on independence. In the end, Mr Lajcak's proposal was accepted that 55% of those voting had to vote for independence. Miraculously, in the referendum held on 21 May 2006 a majority of 55.5%, just sufficient for the success of the referendum, was reached.

Conclusions

The involvement of the Venice Commission in these issues was unusual in several respects. While the Venice Commission adopted a number of important relevant opinions, and in particular many more opinions on the constitutional situation in BiH than I could mention in this brief contribution, it was also involved in an advisory role in many, often

[21] *Ibidem,* at para. 64
[22] *Ibidem,* para. 65

confidential, negotiations. For practical reasons the main role was played by the Secretariat. Moreover, the Commission could not limit itself to opinions on texts prepared by others, but often had to make proposals of its own.

Yet it was also a situation in which the strengths of the Venice Commission came fully into play. Its expertise in the various fields of constitutional law, such as power-sharing at the national level, territorial organisation, minority protection, constitutional justice and electoral legislation, as well as its knowledge of international law and international standards, made it uniquely qualified to make a substantive contribution. The fact that the Commission had much practical experience in the countries of the region ensured that its approach always remained realistic. Thanks to its reactivity, pragmatic approach and flexible working methods, its contributions were always timely and useful for practical purposes. Its role came to be highly appreciated by the diplomats involved, not only from European countries, but also the US.

It is clear that the Commission could only assist in finding a solution. The main role had to be played by others. Without political will, conflicts cannot be settled. If the Commission was able to contribute to the settling of conflicts in the Western Balkans, but not in the former Soviet Union, this was due to the fact that the countries of this region have a far more realistic perspective of becoming members of the European Union. This provided a powerful incentive for the politicians, but also the general population, to accept compromises in order not to jeopardise this long-term objective.

Bertrand Mathieu[1]

La Commission de Venise confrontée aux mutations du principe démocratique

C'est une expérience intéressante que d'être nommé membre d'une commission intitulée la « démocratie par le droit » quelques mois après avoir publié un ouvrage intitulé « le droit contre la démocratie ?[2] » (le point d'interrogation ne doit pas être négligé !). L'analyse théorique est alors confrontée à une pratique. C'est de cette confrontation que veut rendre compte cette brève analyse.

Si cette expérience a conforté un constat, c'est bien celui de l'importance qu'occupe cette institution dans le champ juridique et politique européen. Vitrine des débats constitutionnels européens, la Commission de Venise traduit une mutation profonde des systèmes institutionnels et politiques. Ce sont ainsi tous les éléments structuraux du droit constitutionnel classique qui subissent des mutations considérables. Directement liée à la construction européenne, du fait qu'elle accompagne l'intégration des pays d'Europe centrale dans l'Union européenne, et celle de certains pays de l'Europe de l'Est dans le Conseil de l'Europe, la Commission de Venise constitue un outil supranational visant à une certaine uniformisation des règles constitutionnelles et à une promotion des droits individuels. En cela son action s'inscrit difficilement dans le cadre de la souveraineté étatique. Les constitutions nationales passent sous la toise des standards européens et l'individu est essentiellement appréhendé au travers de ses droits et secondairement en sa qualité de citoyen d'un État. La séparation des pouvoirs, qui constitue l'un des fondements du constitutionnalisme moderne, connait une révolution copernicienne, alors que la *summa divisio* des pouvoirs ne s'opère plus, au sein du pouvoir politique, entre le pouvoir dit exécutif et le parlement, mais entre le pouvoir politique et le pouvoir judiciaire ou juridictionnel (ce dernier incluant tant les juridictions européennes supranationales, que les juridictions constitutionnelles, administratives et judiciaires nationales). Enfin, j'y reviendrai c'est l'objet même de la commission, à savoir la démocratie qui subit des mutations conceptuelles profondes. Ainsi non seulement la Commission exerce sa mission dans un contexte particulier, dans un temps

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[1] Membre de la Commission de Venise au titre de la Principauté de Monaco.
[2] Lextenso, 2017.

de transformations et de ruptures, mais encore elle constitue un artisan particulièrement efficace au service de ces évolutions.

Cependant alors qu'au temps de sa création l'idée de la promotion de la démocratie par le droit était assez communément admise du fait que le modèle démocratique était assez bien défini et semblait être à terme universalisable, aujourd'hui le paysage politique et institutionnel a changé ce qui conduit la Commission à intervenir dans un contexte assez différent que celui en vigueur lors de sa création. Cette situation constitue un nouveau défi pour la Commission. Elle rend à la fois plus nécessaire son intervention en tant que gardienne d'un modèle menacé, mais elle conduit également à repenser, voire à refonder, la logique dans laquelle elle inscrit son action à savoir le développement de la démocratie par le droit.

I. Les mutations de la notion de démocratie

Il convient de s'attarder quelques instants sur ce que recouvre aujourd'hui le terme de démocratie avant d'analyser la crise à laquelle doit faire face la démocratie libérale.

1.Démocratie et libéralisme

En réalité, le système occidental que l'on appelle aujourd'hui démocratique est un système mixte démocratique et libéral.

Il est démocratique en ce qu'il fonde la légitimité du pouvoir dans le peuple qui manifeste sa souveraineté, en élisant ses représentants chargés d'exprimer la volonté générale, en adoptant sa Constitution, c'est-à-dire les règles de gouvernement et de vie commune, et le cas échéant en se prononçant par référendum.

Le système est libéral, en ce qu'il prévoit des mécanismes de contrôle et de contrepoids visant à limiter l'exercice du pouvoir, à le modérer. Relèvent de cette logique, la séparation des pouvoirs, notamment les mécanismes de contrôle juridictionnel, mais aussi de nouvelles instances, telles les autorités administratives indépendantes ainsi que l'affirmation et les mécanismes de protection des droits fondamentaux.

Or l'utilisation contemporaine du terme démocratie confond ces deux aspects du système occidental, masquant ainsi les contradictions qui peuvent opposer la démocratie et le libéralisme. De ce point de vue la notion d'Etat de droit, par ailleurs si féconde, constitue un ensemble d'exigences, démocratie, droits fondamentaux, séparation des pouvoirs, transparence, prééminence du droit…, qui sont susceptibles d'entrer en conflit.

Il est inutile de développer ici l'idée selon laquelle la présence de règles juridiques est, bien évidemment, une condition nécessaire à l'existence d'un régime démocratique. Ainsi, dans sa forme représentative, qui est la seule possible dans une société politique étendue, elle implique, pour l'essentiel, des élections libres et disputées à intervalles réguliers, la liberté d'expression, l'existence d'une opposition qui puisse aspirer à devenir la majorité. Le bon fonctionnement de la démocratie exige cependant d'autres conditions : une égalité entre les citoyens, formant le corps électoral, une éducation suffisante pour participer aux décisions politiques, un contrôle par un juge indépendant de la régularité des opérations électorales[3] et une responsabilité des représentants devant le peuple. Cette responsabilité se traduisant, a minima, par des élections à intervalles réguliers.

2. La crise de la démocratie libérale

Cette crise se manifeste de plusieurs manières qui ne peuvent être qu'abordées très superficiellement ici. Cette crise touche d'abord les « vielles démocraties » européennes. Par ailleurs, d'autres modèles qui se déclarent démocratiques se posent en concurrent du modèle européen de démocratie libérale.

S'agissant de la crise affectant les démocraties libérales, de manière caricaturale, elle peut être illustrée par une crise de confiance. Cette crise tient en partie au fait que les organes politiques, dont la légitimité est fondée sur l'élection, donc sur le processus démocratique, ne disposent plus vraiment de la réalité du pouvoir. Ce pouvoir s'est déplacé vers d'autres structures publiques ou privées, organisations supranationales, ONG, juridictions, pouvoirs financiers, GAFA…Ainsi les citoyens peuvent avoir le sentiment, non dénué de fondement, que le vote n'embraye plus sur la décision.

S'agissant de la concurrence d'autres modèles qui se veulent démocratiques, c'est bien sûr la référence à la notion de « démocratie illibérale » qui vient d'abord à l'esprit, mais la typologie des régimes qui se proclament démocratiques tout en assumant une rupture, ou une absence d'adhésion, au modèle de démocratie libérale est plus complexe.

En 1992, un an après la chute de l'URSS, Francis Fukuyama affirmait dans son livre *La Fin de l'histoire et le dernier homme*[4], que débarrassée du communisme, la démocratie libérale restait le seul modèle politique et

[3] M. Luciani, L'interprétation de la Constitution face au rapport fait-valeur, Revue Constitutions, 2011, n° 2.

[4] Flammarion, Champ Essai, 2009.

idéologique ayant un avenir dans le monde. C'est, ne l'oublions pas, le contexte dans lequel est créée la Commission de Venise. La réalité a apporté un démenti à ce pronostic. Ainsi des pratiques ont pu être observées dans certains pays d'Amérique du Sud ou du Maghreb qui connaissent un régime à la fois démocratique et autoritaire. Un mouvement se dessine qui voit des États, qui s'inscrivaient dans la logique de la démocratie libérale subir la tentation d'une rupture avec le libéralisme politique, comme la Turquie, par exemple.

En Europe, c'est, toutes choses égales par ailleurs et dans une moindre mesure, la logique dans laquelle s'inscrivent des gouvernements comme ceux de la Hongrie ou la Pologne. Ainsi, en Hongrie, c'est en s'appuyant sur une forte majorité, plus des deux tiers, que le gouvernement a limité, par la loi, ou en recourant à la révision constitutionnelle, voire au référendum, le poids des contre-pouvoirs, justice, presse, association, entreprises étrangères… et des contraintes européennes. Ce modèle s'inscrit donc dans une logique strictement démocratique, tout en réduisant le caractère libéral du système politique.

Très différente est la situation des États issus du démembrement de l'Union soviétique qui sont passés directement d'un système autocratique et de parti unique à l'adoption d'un modèle démocratique à l'Occidental. Si les Constitutions ont pu assez facilement se plier aux exigences propres à ce régime, il s'agit assez largement d'une façade qui masque un exercice autoritaire du pouvoir. Tel est le cas de la Russie. Si la démocratie libérale s'est bien acclimatée dans des petits États, comme les Pays baltes, l'instaurer dans des pays qui n'ont aucune tradition en la matière était une gageure. Plus encore la démocratie libérale n'est plus conçue comme un modèle par certains de ces pays.

Ces régimes politiques très différents ont cependant en commun d'être inscrits dans une logique qui veut que la légitimité du pouvoir relève du vote populaire. Ils fonctionnent cependant de manières très différentes. Il convient de distinguer plusieurs formes de démocratie non libérale.

Le modèle le plus proche de celui de la démocratie libérale est un système dans lequel la démocratie se conjugue avec l'État de droit et le respect des libertés fondamentales, simplement l'équilibre entre ce qui relève de la démocratie *stricto sensu* et du mode de gouvernement libéral est modifié au détriment du second. C'est le cas par exemple de la Hongrie de Victor Orban. Un modèle intermédiaire est celui de la Russie dans lequel la place du libéralisme politique est assez réduite et dans lequel l'ensemble

des standards démocratiques (notamment les droits de l'opposition) ne sont pas parfaitement établis. On peut alors parler de « démocratie de l'imitation ». Il s'agit d'une situation où « les conditions sociales et culturelles de la démocratie sont absentes mais où il n'existe pas non plus d'alternative à cette démocratie ... Cette solution de compromis n'est pas une étape nécessaire à tous les processus de démocratisation, mais plutôt un type de régime singulier… dans les démocraties d'imitation la politique et une lutte constante entre les formes démocratiques et une substance non démocratique »[5] A l'autre extrémité du spectre, qu'un système comme celui de la Chine, gouvernée par un système triangulaire, État, parti (unique), armée, n'est aucunement démocratique.

II. Les nouveaux défis auxquels est confrontée la Commission de Venise

Le paradoxe auquel est alors confronté la Commission de Venise tient à ce que son pouvoir d'influence s'est considérablement renforcé alors que le contexte politique et idéologique dans lequel elle intervient est beaucoup moins consensuel que lors de sa création.

1. Le rôle majeur de la Commission de Venise

Rappelons très rapidement que la Commission européenne pour la démocratie par le droit, dite « Commission de Venise », a été créée par une Résolution(90)6 relative à un accord partiel du Comité des ministres du Conseil de l'Europe. L'article 17 du statut du Conseil de l'Europe stipule que « *le Comité des ministres peut constituer, à toutes fins qu'il jugera désirables, des comités ou commissions de caractère consultatif ou technique* ». Les compétences de la Commission de Venise sont fixées par son statut adopté par le Comité des ministres du Conseil de L'Europe. C'est, aux termes de l'article 1 de ces statuts, « *un organe consultatif qui coopère avec les États membres du Conseil de l'Europe* » ainsi, notamment, qu'avec les « *États non-membres intéressés* ». Elle a en particulier pour objectifs de renforcer la compréhension des systèmes juridiques des États participants, « *notamment, en vue du rapprochement de ces systèmes* » ; de promouvoir l'État de droit et la démocratie et d'examiner les problèmes posés par le fonctionnement des institutions démocratiques. Ses membres sont désignés par les États. Elle possède un pouvoir d'auto-saisine en matière d'études générales, elle peut donner des avis à l'initiative de divers organes du Conseil de l'Europe, ou d'un

[5] Cf. I. Krastev et S. Holmes, Le moment illibéral, Fayard, 2019, p. 147.

État, étant entendu que si la demande d'avis d'un État concerne un autre État, la Commission doit informer ce dernier et, en principe, soumettre la question au Conseil des ministres.

Il résulte de ce statut que le champ d'intervention de la Commission est très large. Elle a, notamment, une mission idéologique qui consiste à diffuser les « *valeurs fondamentales de l'État de droit, des droits de l'homme et de la démocratie* ».

L'objet des remarques de la Commission de Venise touche tant le champ des valeurs que celui de l'organisation politique, c'est-à-dire les éléments essentiels qui relèvent, dans un État, d'un processus démocratique. D'abord, la vocation de la Commission est clairement idéologique, il s'agit de faire bénéficier les États d'Europe centrale et orientale de son assistance pour « *faire pleinement partie de la famille des nations démocratiques* »[6]. Ainsi la formulation d'un modèle constitutionnel à vocation européenne est clairement affichée. Il ne s'agit pas seulement de veiller à ce que les États respectent des conditions minimales relatives aux exigences démocratiques mais de formater un modèle constitutionnel commun. Par une démarche similaire à celle de la Cour européenne des droits de l'homme qui n'a, en principe, pas de compétences en matière institutionnelle, la Commission vise à la création d'un modèle normalisé d'institutions étatiques.

Ensuite, la Commission, procédant selon la même logique que la Cour Européenne Droits de l'Homme, détermine ce qui relève du patrimoine commun européen, en prenant en compte l'acceptation par une majorité d'États, de l'exigence en cause. Par exemple, s'agissant de la définition du mariage, la marge laissée au constituant hongrois tient au fait que les États qui reconnaissent le mariage homosexuel ne sont pas « encore » majoritaires. De même, s'agissant du contrôle de constitutionnalité des lois, alors même que ce contrôle n'est pas généralisé, la Commission considère que « *cela n'exclut pas que dans un avenir prévisible, le contrôle de constitutionnalité… devienne un élément du patrimoine commun constitutionnel à tout le continent* »[7]. Ainsi, la Commission décide du moment où certaines pratiques, ou certains principes, deviendront des éléments du patrimoine commun constitutionnel européen échappant ainsi à la compétence des États et donc à la détermination relevant d'un mécanisme démocratique.

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[6] Cf. G. Buquicchio, P. Garrone, Vers un espace constitutionnel commun ? Le rôle de la Commission de Venise, *in* B. Aller et a. (dir.), Law in greater Europe, Kluwer, 2000.
[7] G. Buquicchio, P.Garrone, *op. cit.*

Par ailleurs, la Commission forge assez librement la substance des normes de référence de son contrôle. Ainsi, elle déclare évaluer la nouvelle Constitution hongroise au regard de sa compatibilité avec la Convention EDH, ainsi qu'avec les principes de la démocratie, de primauté du droit et les valeurs fondamentales communes aux États membres du Conseil de l'Europe. Les normes de références peuvent également résulter de la seule appréciation de la Commission. Ainsi prend-elle une position de principe selon laquelle « *le bon fonctionnement d'un régime démocratique repose sur sa capacité d'évolution permanente* ». En ce sens, la Commission prend parti en faveur du relativisme s'agissant des valeurs inscrites dans l'identité nationale. Elle veille, d'abord, à ce que certaines valeurs, souvent celles qui suscitent de sa part des réserves plus ou moins explicites, puissent être, juridiquement, facilement remises en cause. Dans son avis relatif à la Constitution hongroise, elle proclame qu'« *une Constitution doit éviter de définir ou de fixer une fois pour toutes des valeurs dont diverses conceptions justifiables peuvent avoir cours dans une société* ». De la même manière et dans le même contexte, elle affirme que les matières culturelles, religieuses et morales, notamment, ne doivent pas être « *verrouillées dans des lois organiques* ». Plus précisément, la Commission, tout en reconnaissant que, selon le droit européen, le point de départ du droit à la vie relève de la marge d'appréciation des États, ajoute, par une incidente de nature idéologique, que ces États « *se déterminent en fonction des circonstances et des besoins de leur population* ». Ce relativisme ne vise cependant pas certaines exigences. Ainsi, toujours dans l'avis rendu à propos de la Constitution hongroise, la Commission fait injonction aux juges de ne pas interpréter la Constitution d'une façon qui relativise son contenu normatif au nom de besoins concrets moraux et économiques.

La Commission, comme la Cour européenne des droits de l'homme, peut procéder par un mécanisme d'auto-référencement visant à faire évoluer le droit commun, pas à pas, dans le sens qui lui paraît convenir, sans qu'une réflexion ne soit réellement conduite sur la pertinence et l'acceptabilité par les États et les citoyens de telles évolutions. Il en est ainsi, par exemple, d'une prise en compte volontariste de plus en plus réduite de la condition de citoyenneté, au nom d'une conception particulièrement compréhensive du principe de non-discrimination[8].

[8] Commission de Venise, CDL-AD(2019)033, Avis sur la loi de Macédoine du nord relative à l'usage des langues.

La Commission s'érige également en corédacteur des nouvelles constitutions des États européens. Comme le notent Gianni Buquicchio et Pierre Garrone[9], sur le plan pratique, « *l'intervention de la Commission vise avant tout à influer la rédaction du texte afin qu'il respecte pleinement et sans ambiguïtés les standards européens. En cas d'intervention a posteriori, la marge de manœuvre est évidemment plus limitée* ».

Enfin, la Commission ne se borne pas à l'examen des textes, elle place, de fait, les États sous une forme de surveillance : « *seule la lettre des textes ne permet pas toujours d'évaluer avec certitude leur portée, il convient d'examiner avec vigilance leur application concrète pour se déterminer sur le respect des principes fondamentaux du patrimoine constitutionnel européen, tout particulièrement lorsque ces textes se prêtent à plusieurs interprétations* »[10], ce qui implique que le pouvoir d'interprétation du juge constitutionnel soit également soumis au contrôle de la Commission.

Si la fonction de la Commission est exclusivement consultative, de fait, certains de ses avis peuvent se voir conférer une portée contraignante par le truchement de la jurisprudence de la Cour EDH. Dans ce contexte, les avis de la Commission prennent une importance particulière. Ainsi dans une affaire jugée par la Grande chambre le 27 avril 2010[11], la Cour s'appuie largement sur un rapport de la Commission de Venise portant sur les modifications apportées au Code électoral de la Moldavie en avril 2008. Est alors cité au titre des « instruments pertinents », le Code de bonne conduite en matière électorale élaboré par la Commission de Venise[12]. De même en mars 2016, la Commission européenne a fait état de l'importance qu'elle accordait à un avis de la Commission de Venise sur la situation polonaise pour aller plus avant dans une procédure de « mise sous surveillance » à l'encontre de cet État[13]. On peut également relever que la Commission procède par la voie d'« *amicus curiae* » auprès de cours constitutionnelles[14], de même qu'elle peut éclairer l'Assemblée parlementaire du Conseil de l'Europe[15].

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9 *Op. cit.*
10 G. Buquicchio, P. Garrone, *op. cit.*
11 CEDH, 27 avr. 2010, *Tanase c/Moldova*, req. n° 7/08.
12 Cf. M. Guerrini, *in* M.-O. Peyroux Sissoko, P. Kruzslicz (dir.), Constitutions nationales et valeurs européennes, Cahiers du Centre universitaire francophone de l'Université de Szeged, 2015.
13 Cf. *Le Monde*, 29 juill. 2016.
14 Cf par exemple, Commission de Venise, CLD-AD(2019)034, Mémoire *Amicus Curiae* pour la Cour constitutionnelle de Moldova sur le projet de modification de la loi sur le ministère public.
15 Commission de Venise, CDL-AD(2019)030, Rapport sur la conformité, au regard des normes du Conseil de l'Europe et d'autres normes internationales, de l'inclusion d'un territoire non reconnu internationalement dans une circonscription nationale à des fins d'élections législatives.

2. Les difficultés auxquelles l'action de la Commission de Venise doit faire face

La Commission de Venise représente ainsi le lieu et l'instruments privilégiés de défense du modèle européen de démocratie libérale, ce qui répond incontestablement à sa vocation première. Par ailleurs, la qualité incontestable des rapports et avis publiés manifeste la conscience qu'elle a de ses responsabilités.

Néanmoins il appartient à la Commission de se garder de certaines dérives qui, si elles se produisaient, pourraient, dans le contexte européen, affaiblir sa légitimité.

La première tient au fait que le modèle de démocratie libérale n'est pas uniforme. On pourrait ainsi trouver dans la « jurisprudence » de la Commission, certains présupposés susceptibles de constituer des primes déformants.

Il en est ainsi de la manifestation d'une certaine méfiance vis-à-vis de l'expression directe du peuple. Par exemple, à propos de la Constitution roumaine, la Commission estime qu'un système dans lequel « *le choix n'est plus déterminé uniquement par les résultats électoraux, mais aussi par les accords négociés entre les partis politiques au Parlement* » constitue une avancée opportune. S'agissant de la Constitution monégasque, la Commission se félicite de ce qu'aucun mécanisme référendaire n'ait été introduit dans la Constitution. La réalité, telle qu'elle doit être prise en compte, est beaucoup plus diverses. Ainsi, si le système britannique s'inscrit dans la logique de la souveraineté parlementaire, la Constitution française met sur le même plan l'expression de la souveraineté du Peuple par ses représentants et par la voie du référendum.

Autre exemple, la Commission exprime souvent sa préférence pour un modèle démocratie fondé sur un système parlementaire moniste accompagné d'un système électoral proportionnel. Or, d'une part, un système présidentiel, ou un système parlementaire dualiste, comme le système français, peut être tout autant démocratique. Par ailleurs dans certaines « jeunes démocratie » relevant de pays qui n'ont pas réellement de traditions démocratiques (on peut penser de ce point de vue à certains États issus du démembrement de l'Union soviétique) où les partis politiques ne sont pas structurés, un régime plutôt présidentiel et un système électoral majoritaire peuvent constituer des instruments d'efficacité et de transformations sociales. De même, la résistance de certains États à adopter des modes de nomination pour les membres de certains organismes à une majorité qualifiée et non relative, règle à laquelle la Commission attache une réelle importance, devrait conduire à faire un état des lieux du suivi de cette recommandation et de son caractère opérationnel.

S'agissant du pouvoir judiciaire, si les travaux de la Commission sont particulièrement éclairants quant à l'évolution qui fait de la justice un véritable pouvoir ayant vocation à limiter et à contrôler le pouvoir politique, dans une optique libérale, il convient de considérer qu'un trop grand tropisme en faveur d'une autogestion de ce pouvoir peut également engendrer des dérives qu'il convient de prévenir et que l'indépendance des juges vis-à-vis du pouvoir politique, si elle constitue un impératif majeur, ne doit pas masquer l'exigence d'impartialité qui implique d'autres formes d'indépendance, notamment vis à vis d'engagements politiques ou idéologiques.

Par ailleurs, l'un des défis majeurs que pose la question de l'acceptation et de la démocratisation des instances européennes est celui qui conduit à distinguer ce qui relève de l'identité commune européenne et ce qui relève de l'identité nationale, tant en ce qui concerne l'Union européenne que le Conseil de l'Europe. Une réflexion devrait s'engager sur ce point, notamment au sein de la Commission, afin de fonder solidement une défense ferme des principes et règles relevant de l'identité commune, tout en laissant, pour le reste, une large marge de manœuvre aux États. A défaut, le risque d'un rejet ou, tout du moins d'un affaiblissement, de l'ensemble du projet européen n'est pas à exclure.

Enfin, la Commission est de plus en plus souvent conduite à trancher ou à intervenir, à son corps défendant, dans des conflits politiques internes aux États (saisine par le président du Sénat polonais à propos d'une législation polonaise relative à la justice[16], ou conflit entre le président et l'assemblée parlementaire péruviens[17]) ou des conflits entre États (conséquences institutionnelles de l'annexion de la Crimée ou restrictions à l'utilisation de la langue russe en Ukraine[18]). C'est en général avec beaucoup de prudence que la Commission intervient sur ces questions préservant ainsi son impartialité. Il n'en reste pas moins qu'alors que la Commission fonctionne en principe sur le mode du consensus, certaines fractures, ou tout du moins certaines fissures, se manifestent par exemple lorsque sont en cause les logiques moins libérales dans lesquelles s'inscrivent des politiques menées par certains pays

[16] Commission de Venise, CDL-AD(2020), Avis conjoint Urgent sur les amendements à la loi sur les tribunaux ordinaires, à la loi sur la Cour Suprême et à certaines autres lois de Pologne.

[17] Commission de Venise, CDL-AD(2019)022, Opinion on linking constitutional amendments to the question of confidence (English and Spanish).

[18] Cf par exemple le rapport sur les élections parlementaires en Ukraine et la représentation de la Crimée à l'Assemblée parlementaire du Conseil de l'Europe, (Commission de Venise, CDL-AD(2019)030, *op. cit.*) Commission de Venise, CDL-AD(2019)032, Ukraine - Avis concernant la Loi relative au soutien de la fonction de langue officielle de l'Ukrainien.

d'Europe centrale. La Commission doit se montrer, de ce point de vue, très attentive à ne pas donner l'impression qu'elle se montre tolérante à des pratiques suivies par des « vieilles démocraties » et plus exigeante vis à vie d'autres pays considérés comme relevant de « démocraties adolescentes » qu'il serait nécessaire de mettre sous tutelle.

S'agissant des méthodes de travail de la Commission, Elles connaissent nécessairement leurs limites tenant à ce qu'au regard du nombre des rapports et avis produits et donc de la charge de travail, la connaissance du substrat, historique politique et social des États dont le droit fait l'objet d'un examen par la Commission ne peut être que superficielle, malgré des visites sur place nécessairement trop rapides, bien que souvent fructueuses, et en tous cas indispensables. Si le mode de décision par consensus, qui a été relevé, constitue un acquis précieux qu'il convient de conserver et si l'existence d'opinions dissidentes pourrait cristalliser des fractures remettant en cause la nature même et l'efficience de la Commission, il n'en reste pas moins que la part laissée au débat doit être importante, alors même que le nombre de participants aux réunions de la Commission ne facilite pas toujours l'organisations de tels débats. De ce point de vue les échanges organisés dans des sous-commissions ouvertes constitue une bonne alternative. Dans le même sens, si les rapports ou avis sont nécessairement conduits à retenir une position, l'exposé des raisons pour lesquelles d'autres positions alternatives sont possibles, ou doivent être au contraire être écartées, peut conduire à favoriser l'acceptation des conclusions retenues. Il convient également de saluer la grande richesse des échanges entre la commission, et au premier titre les rapporteurs, et les représentant des États concernés par les rapports ou les avis. De ce point de vue encore, le maintien d'une certaine souplesse dans les méthodes de travail doit être apprécié de manière positive.

En conclusion, il convient de relever que si la Commission est, comme toute institution, parfois conduite à comprendre sa mission de manière extensive, son action contribue de manière particulièrement efficace à la promotion du modèle de démocratie libérale, la qualité de ses travaux se traduit par une influence de plus en plus grande qui se manifeste non seulement par les références à ses travaux dans les médias, mais aussi par le fait qu'ils deviennent indirectement source de droit sous forme de *soft-law*. Cette qualité repose non seulement sur les membres de la Commission, mais aussi sur ses structures scientifiques et administratives d'une efficacité et d'une compétence que l'auteur de ses lignes se plait à saluer. L'institution a su aussi

depuis plusieurs années s'incarner dans la figure de son président, Gianni Buquicchio dont la compétence, le sens de la diplomatie et le dévouement à l'institution ne sont plus à démontrer. Il n'en reste pas moins que si la Commission s'inscrit dans une action militante en faveur d'un certain type de démocratie, celui de la démocratie libérale, qui mérite d'être défendu au regard des apports majeurs qui ont été les siens pour les peuples qui l'ont adoptée, elle doit s'adapter au pluralisme des modèles politiques, sans renier son ADN.

Ugo Mifsud Bonnici[1]

Establishing democratic standards of government: the task of the Venice Commission

The Venice Commission for Democracy through Law, with its finality and composition as we know it, constituted, perhaps, a complete novelty when proposed and introduced in 1990. The experiment was conceived in the fecund imagination of Antonio La Pergola at the precise conjuncture of events and conditions which made it possible and feasible. It was compounded of several elements, which are not usually brought together. What made the establishment of the Commission welcome was the enduring feeling and conviction that common legal traditions could make of Europe a proper living space for democracy, the safeguard of human rights and the Rule of Law.

It was not new for Nations to send their accredited representatives to meetings to agree on an armistice settlement, or on arrangements for some political peace, or on many other occasions, sometimes, alas, with very short-lived benefits. There had been Conventions to regulate internationally some new communications invention, or even to establish some pious limitation to the savagery of war and the use of certain weapons. Copyright had been legislated upon by Convention. These laudable attempts at international legal collaboration were, however, very occasional, and *ad hoc*. The plenipotentiaries attending the conventions were authorized and accredited officially by their Governments and agreed to the decisions within the limits of their delegated vires. Moreover, though Human Rights safeguard and other juridical considerations might have moved Nations to agree on international precepts, thus enriching International Law, the internal constitutional and institutional law of independent States had always been jealously shielded. It was not as yet universally accepted, in Europe as elsewhere, that the affairs of any independent nation should be officially subjected to scrutiny and democratic evaluation, by citizens of other nations: for a long time, this was seen as unforgivable meddling with the internal affairs of other countries.

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[1] Former Member of the Venice Commission in respect of Malta (2002-2013). Former Vice President of the Venice Commission (2002-2007).

Though the League of Nations had been set up and met, in the years between the two great wars, in Geneva, that other experiment was essentially political and not specifically directed towards the Law and the Rights of Man. The League was aimed at preventing war and failed dismally. No one, before had ever thought of entrusting the tripod of democracy, human rights and the Rule of Law to a permanent, Europe-wide Standing Commission. Nevertheless, Europe did possess an ingrained humanism, a common legal tradition, as well as a culture of democracy; even if these values had received so many recent *vulnera*. The time had come to realize, as experience had shown, that the breakdown in the democracy of a neighbouring nation presented a threat to one's own.

The resulting composition of the Commission presented yet another novelty, which was also intended. It was not common for academics to alternate their long hours of study and research with sitting alongside judges and politicians. In addition, theoretical noblesse had it that men and women of the Bench, even when retired, should stand apart from the men and women of the Executive branch of Government, even when these were no longer in active service. University Professor Jurists would say with Horace: *odi profanum vulgus et arceo* when meeting with mere politicians and legal practitioners. In turn, in the viewpoint of men and women coming from the rough and tumble of politics, the jurists and judges could be seen as people who had peevishly retired into convenient protected enclosures, shying away from the soiled rough traffic of daily life and the pressing urgencies of popular needs.

Then again, the tools of ethical-political evaluation were not common to all Europe, either. The Continental legal culture had remained separate, at some intellectual distance from that of the Common Law of the British Isles and of its former English-speaking colonies. It seemed, of course, that the Anglo-Saxon Common Law had distanced itself further from the truly common matrix of Roman Law. Even the legal languages, the terminology and the essential concepts, besides the spirit, no longer completely matched.

It was only after the devastating incandescence of total war followed by, in many senses, a bloodcurdling 'cold' war, and after the Continent-wide experience of the totalitarian regimes of Fascist and Communist inspiration and execution, which had put to the direst test the long evolving traditions of law and civilized living on the whole continent of Europe, that one could propose the lowering of the dividing national barriers and a return to a *jus commune*, albeit *institutionalis* or *constitutionalis*.

Antonio La Pergola, that tall Sicilian man of Law, Judge of the Constitutional Court, was aided and seconded by a flamboyant Venetian chemist and politician, Gianni De Michelis. La Pergola came from an island people who had Phoenician, Greek, Roman, Arab, Norman, Angevin and Spanish ancestry, but he had ventured culturally further North and embraced wholeheartedly the acquis in poetry, drama, style and legal pragmatism, coming from the British Isles.[2] Siting the Commission in Venice, perhaps an accidental 'political' arrangement, became a further instigation towards an opening of wider horizons, typical of that city, "sitting in state, throned on her hundred isles!" as Lord Byron saw her (Canto IV of Childe Harold's Pilgrimage).

What was envisaged was not simply a symposium of scholars, or a crucible into which one poured the different legal and political traditions of the whole of Europe, but a **standing** Commission with the mandate of review of submitted problems, a monitoring of situations and the **mission** of building a compendium or digest of the best practices in the tripod of democracy, Rule of Law and respect of human rights, so as to provide a standard for the whole of the continent, and beyond.

During its first years, the Commission was mostly reviewing the situations in the post-communist countries of eastern Europe, as also the detritus left by the Fascist and Military dictatorships: tasks which occupied a great part of the Commission's time and attention. However, as events evolved, finer points of correct democratic governance from the older democracies began to come more and more to the fore. Although the Commission was intended to be advisory, and so it has been and remained, it built an authoritative position, which made its avis reverberate as an admonition. The consistent grounding of the avis in sound constitutional law and tradition made of its pronouncements something nearing the oracular.

When one attended personally the sessions of the resultant congress of personalities from the various nations and with the most varied of life-histories behind them, meeting in the Sala Grande of the Scuola San Giovanni Evangelista in Venice, one admired the fact that all the members, whether sent by Russia, Great Britain, Germany or France or by Andorra, San Marino, Monaco, Albania or Malta were given equal right of intervention; and weight was accorded to their contribution for its intrinsic worth, with no

[2] Stentorian quoting of Shakespearian verse became one of the added charms of his presiding style.

reference to the political or economic standing of their respective countries. It was understood that the members were not given political instruction by their Governments. They were representative of schools of learning and traditions, not representatives of Governments.

If the aim was that of mixing the abstract scientific scholarship of academics with the practical commonsense of seasoned politicians, and the fastidious attention of judges, especially constitutional judges, one must admit that the aim was very consistently achieved. The rich conglomeration of juristic scholarship and practical judicial and political experience found for consideration, and then advice, a perhaps, as richly varied an assemblage of situations and problems: in the conduct of elections, in minority rights protection, in the maintenance of law and order, in the rights of assembly and of association, in the participation in political and public life of persons with disabilities,[3] in the standards of administration and legislation, and other vital 'political' matters.

The members were invariably assiduous in their attendance and attention. The organization of the sessions by the Secretariat was impeccable. There was very little loss of time in unnecessary argument, and this was due, most decidedly, to the consistently able presiding skills from the chair and the intellectual caliber and careful preparation before intervention on the items of the longish agenda, by the members.

Again, the feared chasm between the Anglo-Saxon Common Law and the Continental schools of legal reasoning was often bridged, firstly on the pure academic level and then, in the light of recent historical experience. Store was made of the great and long Common Law traditions in Criminal procedure and substantive law, which were being newly appreciated within continental Europe, whilst on the other hand, contemporaneously, British and American Universities were discovering the profound philosophical grounding of the legal faculties of German, French and Italian Universities, as also of those of the smaller Nations. This was a task rendered easier, earlier on, by the contributions of continental scholars who had fled the anti-democratic and specifically, the anti-Semitic persecutions in Germany, in occupied France and in Italy.

In the Venice Commission one could see that the last preceding decades had managed to bring about a reciprocal understanding. So, for example, when the eloquent Jeffrey Jowell from the United Kingdom was writing, together with the brilliant Pieter Van Dijk from the Netherlands,

[3] Regional Seminar Croatia, Zagreb, November 2012.

the formidable Gret Haller from Switzerland, and the ponderous Kaarlo Tuori from Finland a Report on the Rule of Law, which was adopted by the Venice Commission at its 86th plenary session (Venice, 25-26 March 2011), each contributor would be observed entering smoothly into the web that produced a wonderfully balanced, and often quoted, study.

The Commission showed no European hubris and extended its activities beyond our continent. Although I, personally, took part in very few missions outside Europe (Palestinian Elections, situation in Libya, familiarization with democratic methods in Jordan and Azerbaijan, problems in Tunisia, remote voting in the Asian regions of the Russian Federation) the reports submitted by other members on missions outside our continent, were invariably of a very high level and indeed illuminating. The *avis* sent by the Commission to the European countries which had requested them were, in the very great majority of cases, well accepted. Even when the opinion was invoked from outside, the avis were taken to be, and most decidedly would be, objective and impartial.

The experiment of sharing philosophies of law, science of the conduct of public affairs and the experience of Constitutional Courtrooms, Legislative Chambers, and corridors of power, throughout the length and breadth of the countries of the Council of Europe has, in my view, worked. The corpus of constitutional *sapientia* that was accumulated, has served not only all Europe, but also countries in other continents, which have, wisely, sent observers.

The opinions agreed to by consensus acquired the value of a standard or mean, and then began being considered, Europe-wide as almost 'soft', 'non-enacted' law. It was an illustration of the philosophical 'imperative of the ought'. Many an avis of the Venice Commission prompted changes in the domestic constitutional or institutional laws of its members. Countries outside the European Continent also listened.

Throughout the history of the last two centuries, in which the principle of the people's universal participation in self-government included: having a separate, democratically elected, legislating body; in parallel, with a democratically elected executive; and an independent judiciary, in most cases selected by the Executive, law-making had also become too heavily influenced by partisan politics. Theoretically, the three functions were separate, but in actual fact, legislating parliaments were run by political parties seeking to obtain, or retain, power. If principle is above contingent political needs, what was happening, in reality, was that partisan interests were, in the Constitutional arrangements of most European democracies, taking over.

Pan-European principles of democratic propriety and subservience to the human rights of every person, had to be introduced in some form as an antidote to excessive concession to partisan self-interest.

In addition to performing the tasks for which it was instituted, the Venice Commission has managed, time and again, to remind transgressors, or would be transgressors, of the basic principles and of the supreme values of the Rule of Law, Democracy and Respect for Human Rights, all based on the bedrock of law.

The Venice Commission has, throughout the years, been spared internally, the partisan political divides. Ex-politicians, such as myself, shed political and ideological affiliations and consciously, but very consistently, examined matters through the prism of the best legal and philosophical traditions of all Europe. Academicians fortified this tone because the world of universities has an inbuilt tendency towards the rationally justifiable and historically tested principles.

The spirit of this conclave[4] of jurists has consistently been that of advising on the particular case but establishing universal values for the democratic, human rights respecting, regulation and government of European countries. Ex-politicians, like myself, accustomed to executive action when in office, joined academics who might have felt the frustration of impotence, and the consciousness of limited power possessed of judges, into the realization that building the civilization of the optimum in humanity's self-government, had to be done by the best resource of scholarship, tradition, experience and in total cooperation, with the explicit exclusion of imposition.

Without the fanfare of publicity, but simply by judicious publication of its findings, the Venice Commission has managed to bring about changes in the running of the institutions of Government in most of the component States. Even the most traditional, and conservative of Nations, such as the United Kingdom, may have been prompted into passing the Constitutional Reform Act of 2005, which in its Part 3, Section 23(1), established the Supreme Court of the United Kingdom, taking over the former judicial functions of the House of Lords, which House had also, primarily, legislative functions. This Supreme Court came into being on the 1st October 2009, thus removing the anomaly of the accumulation in one body (in infringement of

[4] The description fits as the general public does not, in fact, though not formally excluded, attend the deliberations of the Commission at the *Sala Grande* of the *Scuola San Giovanni Evangelista*.

the principle of the Separation of Powers) of the legislative and judicial functions, within the Mother of Parliaments.

More mundane changes were brought about, rectifying injustice and improving the machinery of government in many of the countries of the European continent, by the moral suasion exercised by a Commission Avis.

The Venice Commission has definitely strengthened the input of reason and humanity into the culture of Government on the Continent of Europe.

In conclusion: the peoples of Europe have learnt that democracy had to be achieved and democratic standards maintained, by every single people of Europe, in its own country: it was not a matter of imposition. However, there were threats to a people's democracy in the breakdown of democracy in other countries. So, every European country was also interested in the maintenance of democracy in the other countries of the continent.

The peoples of Europe have also learnt that there are common problems in government and in the maintenance of standards. Lessons learnt in one country in withstanding the threats to human rights safeguards, to the Rule of Law, to simple democracy, and to efficient and fair government, are definitely of great assistance in withstanding similar challenges in other countries. The sharing of the problematics, as well as of the successful methods of dealing with the challenges, is definitely not only useful, but also vital in an age of mass communication of the ideas and movements that could present threats. We have also learnt that there is much to be gained from listening to the opinion of others on the fundamentals of civilization.

Myron Michael Nicolatos[1]

Democracy, the Rule of Law and the Independence of the Judiciary. An experience of over forty years at the Bar and on the Bench

The ancient Greek Philosopher Aristotle, in his book "On Politics" recognised the existence of three distinct Powers of the State: Executive, Legislative and Judicial.

Many centuries later the French Political Philosopher Montesquieu in his book "De L' Esprit des Lois", developed the modern theory of Separation of Powers.

Today, in Western Democracies, Judicial Independence is considered as the cornerstone of the Rule of Law.

Without an independent Judiciary, there can be no proper administration of Justice and when Justice is not properly administered, there is no guarantee for Human Rights.

Independence of the Judiciary means that nobody interferes with the Judge's task to decide his cases on the basis of the relevant facts and law, without consideration for other extraneous factors.

Independence implies institutional independence and individual independence. Institutional independence dictates that the other Powers of the State do not interfere with the administration of Justice, which is in the exclusive domain of the Judiciary.

Individual Independence means that the Courts' structure does not permit interference of hierarchically higher Judges, with the Judicial duty of lower Judges. Higher Courts have Jurisdiction, on Appeal, to check the Judgments of Lower Courts. Also, Judges are subject to disciplinary proceedings by the appropriate Judicial Authorities, but a Higher Judge has no right to dictate to a lower Judge how he should decide his case.

Judicial Independence requires descent salaries and conditions of work for Judges, Security of tenure, irremovability except for specific serious reasons, guaranteed emoluments, independent Budget for the Courts, and

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[1] Member of the Venice Commission in respect of Cyprus.

Immunity (Civil and Criminal) for acts and omissions, in the exercise of the Judicial Duties.

The Rule of Law demands that nobody is above the Law and that everybody is equal before the Law.

Furthermore, the law should be administered by independent, impartial, honest, competent and courageous Judges, with an impersonal system of allocation of cases. Unfortunately, respect for Judicial Independence is not absolute, in all countries in Europe and beyond. In Western Democracies, Judicial Independence is reasonably guaranteed. But attempts to erode it occur in various countries, even democratic and developed.

The system of appointment of Judges is not always free of political interference. Judges, of course, should have democratic legitimacy, but their appointment should be based on merit and not on political affiliation. Judges should also feel that they are independent officers of the State, exercising state power. They are not civil servants and they should not be treated as such.

The Role of Ministers of Justice should be performed, always, with respect for Judicial Independence. Ministers of Justice may be responsible for Court Buildings, Facilities provided to the Courts, changing or enacting laws concerning Courts or the Judicial System, but they should never behave as "Bosses" of the Courts or as Ministers "responsible" for the Administration of Justice. The responsibility for the Administration of Justice, lies with the Judiciary.

Cyprus is an example of Judicial Independence. Personally, in my many years on the Bench, I have not felt any interference, by anyone, in the performance of my Judicial Duties. I have tried not to be influenced by extraneous factors and to do my duty as best as I could, without fear of prejudice or hope of advantage. I reminded myself time and again of what the ancient Greek Philosopher Socrates had said: "Judges should listen politely and patiently, answer wisely, think seriously and decide impartially".

I have also tried not only to be impartial in every case, but also to look impartial to all concerned. Subjective as well as objective impartiality are very important for a just and fair system of administration of Justice. The distinguished English Judge, Lord Denning, in the case of the Church of Scientology of California, decided to recuse himself, showing great sensitivity, after remarks by the Church's advocate, that he (Lord Denning) had made, in the past, adverse remarks about that Church.

As member and substitute Member of the Venice Commission for fifteen years, I have seen (and occasionally I have participated in) the

good work done by the Commission in various countries, in establishing or strengthening their Democratic Institutions, and, in particular, the Rule of Law and the Independence of the Judiciary. The work done by the Commission in this respect, especially in countries of Central and Eastern Europe, the New Democracies that emerged from totalitarian regimes, is formidable.

I have observed great differences in mentality and culture between the various Members from different countries and I have come to the conclusion that whatever Constitutions and Laws the Countries may have, Democracy, Rule of Law, Independence of the Judiciary and Human Rights are more questions of mentality and culture rather than anything else. And it takes much more time and effort to create or cultivate the proper mentality and culture, than to make a New Constitution or enact new laws.

Matti Niemivuo[1]

Some memories from the early years of the Venice Commission

1. The founding meeting

The first time I visited Venice was in 1975, on an excursion arranged in connection with the Verona Opera Festival. The trip was a disappointment. The sun was beating down on us so hot we could hardly breathe, there were crowds of tourists everywhere and the lines were so long I couldn't get into any of the museums I wanted to. I thought to myself, "It's going to be a long time before I come here again".

I came back on a January day in 1990. After a motorboat ride from the airport to the heart of town, docking right at my hotel, the Danieli, I needed little convincing that everything was different. The air was clear and cool, and the city looked like something straight from a fairy-tale.

That time I was in Venice as a representative of the Finnish Ministry of Justice at an international conference convoked by the Italian Government. The purpose of the gathering, held on 19 and 20 January, was to establish the Commission for Democracy through Law. The other members of the Finnish delegation were Ambassador *Dieter Vitshum* (chair) and *Antti Suviranta*, the then president of the Finnish Supreme Administrative Court.

The conference was held in the palace *Scuola Grande di S. Giovanni Evangelista,* which later became the regular venue for meetings of the Venice Commission. The participants were numerous and prestigious, including as they did almost all of the delegations sent by member States of the Council of Europe. Our host country's delegation consisted of the Minister of Foreign Affairs, *Hon. Gianni De Michelis*, and two other ministers. Austria and Portugal were represented by their respective foreign ministers. The Cypriot, Maltese and French delegations were comprised of ministers. The member States whose delegations did not include ministers sent high-ranking members of government, judges, as well as constitutional and other experts.

Of states that were not members of the Council of Europe, Bulgaria, Yugoslavia, Poland, the Soviet Union, the Holy See, Romania, the German Democratic Republic, Czechoslovakia and Hungary sent their representatives

[1] Former Subtitute Member of the Venice Commission in respect of Finland (1998-2010).

as observers. Also in attendance were the presidents of the Court of Human Rights of the Council of Europe and of the European Commission of Human Rights as well as representatives of the Parliamentary Assembly of the Council of Europe and of the European Community. The Secretariat of the Council of Europe was also well represented at the conference, having sent a large number of high-ranking officials, among them the Secretary General of the Council of Europe, Mrs *Cathérine Lalumière*.

The conference began on Friday, 19 January, with a festive opening ceremony in the presence of the President of the Italian Republic, Hon. *Francesco Cossiga*. Chairing the occasion was Foreign Minister De Michelis. The proceedings began with greetings from representatives of the City of Venice and of the Veneto Region. The programme then continued with introductory speeches by the Minister for Coordination of Community Policies, Hon. *Pier Luigi Romita*, Secretary General of the Council of Europe Lalumière and the Portuguese Minister for Foreign Affairs, *Joao de Deus Pinheiro*. Everyone addressing the conference stressed the importance of establishing the proposed commission and the timeliness of doing so in the light of the changes seen in Eastern and Central Europe in 1989. In concluding this opening session, Foreign Minister De Michelis, who had chaired the proceedings, contributed a look at the establishment of the Commission from the perspective of global development.

The conference proper began with the selection of the chair. This responsibility was entrusted to Senator, Professor *Gino Giugni*. This procedure was followed by a spirited discussion on the establishment of the Commission. Of the Council of Europe's member States, Switzerland, France, Austria, Malta, England and Spain each took the floor and made a statement through their respective representatives. Not a single one questioned the need for the proposed commission. Each speaker pointed out, albeit citing varying priorities, that the Commission was justified, important and timely. Numerous contributors lauded Italy for its initiative, and acknowledged the contribution of the originator of the project, Professor *Antonio La Pergola*.

Of the observer states from Eastern and Central Europe, contributions were heard from Hungary, Yugoslavia, Czechoslovakia, Poland and the Soviet Union. Each examined its development at the time and expressed support for establishing the Commission. One speech I have found particularly memorable was that given by the Hungarian Minister of Justice, Professor *Kálmán Kulcsár*. I had met him quite a few times the previous May, when accompanying Finnish Minister of Justice *Matti Louekoski* on a fact-finding trip to Hungary.

Preparation of democratic reforms was well under way in the country at that time. Not a whisper could be heard when Minister Kulcsár spoke. He considered efforts to establish the Commission particularly important with regard to the reform of the constitutions of the countries in Eastern and Central Europe. He also emphasised that one task of the Commission should be to examine the legal status of ethnic and other minorities.

The first day of the conference concluded with a banquet hosted by Foreign Minister De Michelis in the Hotel Danieli. I can't recall ever having eaten such a rich variety of dishes.

On the second day, Saturday the 20th, we knew the drill, so to speak. The first item of business was to unanimously approve the Final Act of the conference, in which a number of modifications had been made. Thereafter, 16 of the member States of the Council of Europe announced their candidates for membership in the Commission, and these were chosen at the end of the discussion. Finland's representative was to be President Antti Suviranta. At the same time, a decision was taken that the Commission could begin its work.

The next item of business was to choose the president of the new Commission. A number of countries took the floor and proposed that Professor Antonio La Pergola be elected to the position. No other names were put forward as candidates for the office, and La Pergola chosen unanimously. The newly elected president gave a wide-ranging speech thanking the assembled delegates and representatives, and sketched the tasks that lay before the Commission.

Following the election, the newly selected Commission withdrew for its constitutive meeting. The conference went on, continuing the discussion that it had not had time to finish the previous day. All of the speakers who took the floor emphasised the importance of the Commission. When the discussion ended, Senator Giugni, who had chaired it, thanked the organisers. In his closing remarks he noted that everyone had spoken in much the same way of democracy, using the same language.

The Venice Commission had gotten off to a strong start.

2. The meeting on Cyprus

As the plane approached Cyprus, I was stirred from my thoughts when the captain came on with an announcement. I couldn't make out what he was saying. The passengers started clapping with glee. The person sitting next me told me that it was raining on the island for the first time in a year and a half – a long wait indeed. Our party, the "Task Force on Constitutional

Drafting", appointed by the Venice Commission, was treated to a rainy but warm welcome in Nicosia.

The meeting in Nicosia (14–15 December 1990) had been agreed at a meeting of the Commission in October. Extending the invitation to the Task Force was the Commission's Cypriot member, Attorney General *Michael A. Triantafyllides*. As decided in October, the focus of the meeting was the drafting of that country's new federal constitution.

The Turkish member of the Commission, Professor *Ergun Özbudun* objected to the meeting being held on Cyprus. In a letter sent to President Antonio La Pergola, he stated that he would not be attending the meeting for reasons relating to the agenda. In his reply, President La Pergola assured Professor *Özbudun* that the meeting would not be taking up any matters pertaining to Cyprus.

Indeed, the meeting centred around a discussion of the preparation of the constitutions of Romania, Poland, Hungary and Bulgaria as well as situation reports on these countries from their respective representatives. Also on the programme was a report by *Erik Harremoes*, director of the legal division of the Secretariat of the Council of Europe, who briefed us on the October 1990 fact-finding trip to Romania by Commission representatives and experts appointed by the Council of Europe. Another contribution was that of secretary of the task force, Gianni Buquicchio, who provided us with an account of the President's and his visit to Bulgaria in November 1990. The general impression we ended up with was that work on reforms was in its very early stages and that many central constitutional issues were still on the table. A decision was taken to continue participating in the drafting work on the constitutions of the Eastern and Central European countries, and rapporteurs were appointed to monitor the progress in that regard.

The representatives at the meeting had an opportunity to meet the Cypriot president, *Giorgios Vassiliou*, and minister of foreign affairs, *Alekos Michelides*. The meeting was given extensive coverage in the press and on television. The *Cyprus Mail* titled its article on the Venice Commission "Council of Europe offers legal helping hand".

3. Statement on the constitution of the Russian Federation

The Venice Commission was called upon to take timely actions in constitutional matters. A particularly apt example was when it was asked to take a position on the constitution of the Russian Federation.

I had received an invitation on short notice to be in Strasbourg on 10 March1992 for a meeting of the Task Force on Constitutional Drafting. We had been called together to discuss a statement we had to submit on the constitution of the Russian Federation; the deadline was the end of the month. A day before the meeting, the Finnish Ministry of Justice received a document titled "Constitution de la Fédération de Russie", which comprised 143 articles. By late that evening I had some idea of the strengths and weaknesses of the draft.

Attending the meeting in Strasbourg were President *Antonio La Pergola*, as well as the representatives from Cyprus, Norway, Luxembourg and Finland. Among the officials from the Council of Europe taking part were Director *Erik Harremoes*, Secretary of the Task Force *Gianni Buquicchio* and Deputy Secretary Roberto Lamponi.

President La Pergola noted that the Russian Federation had requested a statement from not only the Commission but also the Council of Europe. Moreover, plans called for the Russian Federation to publish both statements. According to the President, the Secretary General of the Council had expressed a wish that the statements be drawn up collaboratively.

Director Harremoes explained that on the previous day the Russian Federation had sent a new draft of the constitution, which was in the process of being translated. He added that the secretariat would send the members of the Task Force a version of the draft indicating any changes vis-à-vis the one published earlier.

When the draft became available, a general discussion ensued on it that included consideration of how the statement of the Venice Commission should be drafted. All of the members of the Task Force complained that they had had too little time to familiarise themselves with the draft; another problem they cited was that the only draft available was in French. In general terms, the draft constitution was considered quite modern, one clearly drawn up in keeping with Western tradition.

A decision was taken at the meeting that the statement to be issued would focus on certain basic questions, these being federalism, a constitutional court and the courts in general, the principles underpinning and the fundamental rights enshrined in the constitution, civil society, and provisions on a state of emergency. The last of these concerns was the one for which I was responsible for drafting. The texts had to be submitted to the secretariat by 19 March 1992, which then, together with the President, would draw up the final statement in the form of a letter.

As there was no representative of the Russian Federation at the meeting, the President decided to place a call to Moscow. When no one suitable could be located at the other end, he concluded the meeting.

4. Off to Kyiv

Representatives of the Venice Commission visited Kyiv from 31 May to 2 June 1993. The members of the delegation were *Hans Ragnemalm* (Sweden), *Sergio Bartole* (Italy), *Theodor Scheisfurth* (Germany), *Matti Niemivuo* (Finland), as well as *Roberto Lamponi*, who took part as representative of the Commission's secretariat.

The trip was undertaken to give the representatives an opportunity to provide comments on the draft Ukrainian constitution. It was the latest phase in what had been long-term cooperation; in two meetings held in Venice, the Commission had commented on a draft of the constitution dated 10 June 1992, which had been drawn up by a constitutional committee appointed by the Ukrainian Parliament. The present discussion focused on the new draft, dated 28 January 1993, in which a number of changes were made following wide-ranging civil dialogue.

The first day of the trip, 31 May, included a meeting with representatives of the working group of the Ukrainian constitutional committee. Most were professors of law. The chair of the working group, Professor *Leonid Yuzov*, began the meeting by handing out copies of the new draft constitution, in Ukrainian, and explaining the changes that had been made in it. The appearance of the new draft seriously hampered discussions, as none of us had an up-to-date English version of the document to work with.

The discussion centred on the draft constitution's provisions on fundamental rights as well as questions relating to the checks and balances of power among different state institutions. One problem in particular was that certain fundamental rights were restricted to Ukrainian citizens. With regard to the division of power, the principal problem was the subordinate position the government had vis-à-vis the president and the extensive range of powers the president was given. Also of note was that the latest version of the draft constitution no longer contained provisions on a parliamentary ombudsman. This same range of issues came to the fore again when the representatives of the Commission met with *Serhiy Holovaty*, president of the Ukrainian Legal Foundation and Member of Parliament.

The key meeting the next day was with Ukrainian President *Leonid Kravchuk*. In opening the meeting, President Kravchuk spoke in general terms

on the stages of drafting the constitution, communication with the Council of Europe and plans for continuing the work. Hans Ragnemalm, speaking on behalf of the Venice Commission, recapped the issues that we had taken up in the previous day's discussion. He also noted that the Commission was ready to continue assisting in drafting the constitution if Ukraine wished it to do so. President Kravchuk indicated that future collaboration would be welcome. He noted that the drafting of the constitution was taking place under very difficult political circumstances but that he considered enacting a new constitution to be absolutely essential for the country's future. The President came out in favour of holding a referendum on the basic principles of the constitution. If this were done, the citizens would have an opportunity to say what kind of state they wished to see created. Apparently, the ultimate content of the constitution would be determined by a national assembly appointed to draft the instrument.

The last day of our trip featured a press conference which attracted numerous members of the press. The event lasted an hour and a half and boasted very lively exchanges. What interested the media most were issues relating to human rights and the division of power. Another question that many were eager to ask was what Ukraine's chances were of becoming a member of the Council of Europe.

5. In conclusion: Round table in Sarajevo

One experience that I recall quite frequently is the round table discussion on property issues organised by the Council of Europe and the Venice Commission in Sarajevo on 30 September 1997. The forum was seen as an opportunity to take up amending the laws on the property of the Federation of Bosnia-Herzegovina, in particular the impact this process might have on fundamental and human rights. This was related to the implementation of the Dayton Accords and of the Constitution of Bosnia-Herzegovina. One aim was to restore in practice the right of refugees and displaced persons to return freely their pre-war homes.

Two things shocked me even before the meeting began. First, the person who met me at the airport was not the one I had expected; the woman who had contacted me regarding the meeting had died in a helicopter crash. Secondly, as Sarajevo seemed familiar although I had never been there before: the centre of town and the *Holiday Inn*, the venue for the meeting, had become familiar sights on the evening news with the scenes of residents fleeing snipers' bullets. Now the streets were being patrolled by peace-keepers. Outwardly at least it seemed peace had returned to the city.

The meeting was attended by over 70 people, among them Bosnia-Herzegovina's highest political leadership, including the speaker of Parliament and prime minister. The representative of Republica Serbski declined to attend, as the political situation had deteriorated at the end of the summer. Presiding over the meeting was Ms Helen Moore from the Secretariat of the Venice Commission.

After the chair had opened the meeting, Prime Minister *Edhem Bikucic* reported that the laws on property had not yet been passed but he assured us that they would be on the agenda of the Federation's Government and Parliament in the coming weeks. Following my introductory presentation, the representatives of the Office of the High Representative (OHR) and of a number of international organisations (UNHCR and OSCE) took up the legislative proposals on property issues from a number of different perspectives. The OSCE representative *Craig Jenness* took the floor and in an uncommonly sharply worded statement demanded outright that the laws be passed quickly. At the same time, however, he said the international community stood ready to help in ensuring that none of the people now living in the homes vacated during the war would end up homeless when the former owners returned. For their part, two of the Federation's ministers, *Dzemaludin Mutapcic* and *Ibrahim Morankic*, presented some of the legal and other reasons why little progress had been made with the legislation. Seconding the prime minister, they stated that the government would be taking up the matter within the next few weeks.

The round table proper began with a bit of watching and waiting: no one wanted to be the first to take the floor. When the dam finally burst, as it were, it seemed like there would be no end to the discussion. Surprisingly many speakers pointed to what they considered shortcomings in the amendments. However, no one called questioned the need to discuss the issue.

In addition to my opening presentation, I gave a concluding comment in which I tried to bring together the salient points that had been covered in the discussion. I took the opportunity to point out that the legislation at issue had to accord with Bosnia-Herzegovina's constitution. The constitution had express provisions on the protection of property and on the right of refugees and displaced persons to return to their home of origin. Likewise, it was essential that the legislation fulfil the provisions of the European Convention on Human Rights and its Protocol No. 1. According to the constitution a human right was directly applicable law and took precedence over all other laws. Moreover, enactment of the laws on property was an

essential condition for the Council of Europe to begin considering Bosnia-Herzegovina's application for membership in the Council. Lastly, enactment of the legislation was important in general to the international community. Any decisions made and measures taken with regard to refugees, investments and other issues would depend on the fate of the laws. In closing, I told the audience I was fervently hoping that the sense of common purpose seen in the successful 1984 Sarajevo Winter Olympics would return to the country in the coming years.

Angelika Nussberger[1]

Achieving the unachievable? The Venice Commission and common constitutional standards for a pluralist world

The "genius loci" – inspiration by the cultural heritage of Venice

Commissions may have many names. But no name is so promising and beautiful as "Venice-Commission". For centuries Venice has been a synonym for beauty and genius, for culture and history, for heritage and uniqueness. "Venice-Commission" is, however, not the real name of the "European Commission for democracy through law" founded in 1990 under the auspices of the Council of Europe. It is something like a famous nick name, known world-wide, used with admiration and awe. It is the name of a commission that has achieved something that seemed to be unachievable – elaborating common constitutional standards for Europe and bringing together East and West after a long period of ideological divide and stand-still during which both sides were more interested in stressing the differences between their legal and political systems than in identifying the common lines of thought in European history and culture.

A new epoch – dreams and visions about free societies

In the immediate aftermath of the fall of the Berlin wall on 9 November 1989 there was a unique chance for a real new start in Europe. The turn-around had – with some sad exceptions – come without violence and full of hope. Those marching on the streets in Prague, Warsaw, Leipzig or Tbilisi had a clear vision of what they did not want any more – wrong promises, oppression and a Big-Brother-State forbidding people to listen to the music of their choice, to read the books they were interested in, to travel to the places they were dreaming of. But the vision of how to bring about these ideals, how to organize a free and open society was vague. A State, however, is like a building; it needs a solid fundament and a clear plan how to construct the different floors, the windows and the roof as well as the sewage system.

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[1] Member of the Venice Commission in respect of Germany. .

There may be many different ways of building, but there are some rigid laws of static and basic needs of those living in the house to accommodate. Not observing them will, sooner or later, lead to a collapse, however beautiful the building might be.

The same is true for democracies. They may have many different faces. Power can be organized and distributed in many different ways. There is not one "ideal" model. Yet, if some basic principles and rules are not observed, it will have no future.

So, there was a real need of good constitutional ideas about how to build up new democratic systems taking into account old and well-entrenched traditions as well as specific experiences. Ideas are no merchandises. They cannot be packed in parcels, stamped and sent to where they are needed. They have to be developed in an open debate. It is necessary to weigh the pros and cons of one approach and to contrast it with another one, going back and forth to different alternatives, struggling to find a compromise acceptable for all.

Such ideas will flourish, spread and develop in assemblies, on marketplaces, in the right fora, comparable to Platoon's philosophy developed in a lively oral exchange in ancient Greece.

The Venice Commission was created for that purpose – for providing a "forum" for the exchange of good ideas on constitutional architecture.

Exchange does not mean a one-sided giving and a one-sided taking, but a movement going back and forth. It is not so much about transferring ideas than about developing them. Democracy is not made out of stone, built to last forever unchanged and to be looked at with complacency. It always has to face new challenges and to respond to them. Even good models can be improved. Therefore, the idea of the Venice-Commission was to collect the best ideas and inspirations, to build up something new based on them, at the same time to strengthen existing models, and to rethink and redesign them if they turn out to be deficient.

Europeanness as identity and project

What had been unimaginable for decades became a new reality at the end of the 1980s, beginning of the 1990s. All of a sudden, "Europeanness" became a new identity, common to all those living in Europe. That is why a foundational Conference was held in Venice from 19-20 January 1990. Based on an optimistic world view a new Commission was founded with the task of strengthening democracy and Rule of Law in all different parts

of Europe.[2] In the beginning it was set up for a transitional period of two years only.[3] But already half a year later, on 10 May 1990, the Committee of Ministers adopted a resolution "On a Partial Agreement Establishing the European Commission for Democracy through Law".[4] This was the starting-point for a success story leading to an organization with sixty-two member States,[5] four observer States,[6] one associate member State,[7] and two more States with a special cooperation status.[8]

Continuation and disruption – decades of ups and downs

But even if it was a success story, the three decades from 1990 to 2020 were not only a period of light and happiness. Already early in the 1990s, War came back to Europe, in the territory of former Yugoslavia, in Georgia, Armenia, Azerbaijan, and Moldova. In Russia the first Chechen War was followed by a second one in the beginnings of the 2000s. European troops were sent abroad to fight in Afghanistan, Syria, Iraq and elsewhere. In the 21st century hostilities broke out even between member States of the Council of Europe. As a consequence, the European Court of Human Rights was often called upon to decide on complaints about human rights violations during armed conflicts.

While some new political regimes were built up in such a manner as to allow power to remain in the same hands for many years, in other revolutions swept away new structures and caused complete turn-arounds. Constitutions

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[2] See, On the origins of the Venice Commission, Gianni Buquicchio, Simona Granata-Menghini, The Venice Commission twenty years on, in: van Roosmalen *et al.* (ed.), Fundamental rights and principles – Liber Amicorum Pieter von Dijk, 2013, p. 241 *et seq.*; Rudolf Dürr, The Venice Commission, in: Kleinsorge (ed.), Council of Europe, 2010, p. 151, 152 *et seq.*; see on Venice Commission's work *Christoph Grabenwarter*, Die Herausbildung europäischer Verfassungsstandards in der Venedig-Kommission, JöR volume 66 (2018), p. 21 *et seq*.

[3] Resolution adopted by the Conference for the constitution of the Commission for Democracy through Law (Venice, 19-20 January 1990); see Information Bulletin on Legal Activities Within the Council of Europe 1991, p. 26.

[4] Committee of Ministers of Austria, Belgium, Cyprus, Denmark, Finland, France, Greece, Ireland, Italy, Luxembourg, Malta, Norway, Portugal, San Marino, Spain, Sweden, Switzerland and Turkey, Resolution (90)6 "On a Partial Agreement Establishing the European Commission for Democracy through Law" (adopted by the Committee of Ministers on 10 May 1990 at its 86th Session); www.venice.coe.int/WebForms/pages/?p=01_01_Statute_old.

[5] The forty-seven member States of the Council of Europe plus the following non-European States Algeria, Brazil, Canada, Chile, Costa Rica, Israel, Kazakhstan, the Republic of Korea, Kosovo, Kyrgyzstan, Morocco, Mexico, Peru, Tunisia and the USA.

[6] Argentina, Japan, Saint Siege, and Uruguay.

[7] Belarus.

[8] The South African Republic and the Palestinian National Authority.

were elaborated and changed, consolidated and reversed. The word "crisis" was omnipresent with the challenges coming both from inside and outside, the most important ones being populism and nationalism, climate change, terrorism and the corona virus.

Mission impossible – the task of the Venice Commission

Against the background of a European history with ups and downs it is fair to ask how a Commission with a beautiful and promising name can accomplish the task of strengthening democracy on the basis of law. Is it not a "mission impossible" to consult States moved by the most diverse political forces on matters of constitutional law? What, if there is no good will to build up an effective democratic system? It might indeed seem to be more than difficult; it might seem to be impossible. Nevertheless, it was not impossible enough for the Venice Commission. Based on cooperation and team spirit, it achieved what seemed to be unachievable – consensus on European standards concerning all important questions such as efficient separation of powers, guarantees for the independence of the judiciary, preconditions for fair elections, adequate approaches to lustration, and safeguards for freedom of the media, to mention just a few. That does not mean that the World is "better" or that essential problems have really been solved. That would mean to demand too much. But defining the basic rules of the statics of a solid constitutional building is the most important precondition for erecting such a solid constitutional building. Explaining best practice, showing the way to go, giving an example of how Europe can speak with one voice – that is a milestone in European legal history.

Collective personality

Monuments are usually erected for individuals, for kings and presidents, poets and composers. Many of them are honored as extraordinary personalities. On the contrary, there is not one name standing for the Venice Commission, even if there were some outstanding figures with visionary ideas pushing the project in the beginning and maneuvering it during difficult times.[9] But the Venice Commission has been strong over the decades above all because

[9] The most important ones were the former Minister for Community Policies of Italy, Antonio La Pergola, and the former Head of the Division of the Legal Advisor and Treaty Office of the Council of Europe, Gianni Buquicchio, both involved in the project from the very "first hour" and both later presidents of the Commission.

of the input given by many, because it was carried on by its members' enthusiasm. The Venice Commission is a collective personality, in the same way as the European Court of Human Rights. Both are represented by changing faces. While the latter is called the "conscience of Europe", the former might be seen as a constitutional engineer, a little bit more in the background, but not less important.

Commission and Court – a good duo

Both the Venice Commission and the European Court of Human Rights work under the auspices of the Council of Europe. Cooperation and interaction are very intense and helpful. The Venice Commission is operating under the European umbrella even if it is reaching out to non-European States who have, one by one, become full members.[10]

The symbiose between the European Court of Human Rights and the Venice Commission is an important element in their respective success stories. Both institutions are different, but both are working hard to achieve the same aims. Questions of State organization cannot be resolved without taking into account the consequences for the individuals' human rights; *vice versa* human rights questions have to be seen in the context of the respective system of State organization. Whenever there is a restriction of one of the rights guaranteed in the Convention such as freedom of expression, freedom of assembly, freedom of religion or respect for private and family life the Court has to analyze if the respective restriction is "necessary in a democratic society". The Court's case-law thus builds up a clear vision of what a "democracy" should look like. In this way it directly supports the work of the Venice Commission. That is true above all for essential matters such as the right to free elections which is a pillar in the work of both institutions. There is a long list of cases where the Court refers to the standards elaborated by the Venice Commission.[11] In so far as the Court directly relies on them in its findings it transforms them from "soft law" to "hard law".[12]

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[10] *Op. cit.*, footnote 5.

[11] See, the overview, www.venice.coe.int/WebForms/pages/?p=02_references&lang=en#ECHR.

[12] See, Angelika Nußberger, Hard law or Soft Law – Does it matter? Distinction Between Different Sources of International Law in the Jurisprudence of the ECtHR, in: Anne van Aaken, Iulia Motoc (Hg.), The European Convention on Human Rights and General International Law, OUP 2018, S. 41-58.

Another field of especially fruitful cooperation is the organization of the judiciary, especially the implementation of the guarantees of independence and impartiality of judges. While the European Court had to decide a whole series of difficult cases concerning disciplinary procedures, sanctions of judges and dismissals[13] the Venice Commission has been active in developing models of "best practice".[14] Quoting one another[15] they mutually enforce their positions. Sometimes it is the Venice Commission who comes first with the elaboration of standards, sometimes it is the Court who decides first on concrete cases where general principles can be drawn from. A good example for the interaction in this context is also the problem of secret surveillance[16] where the Court heavily relied on the expertise of the Venice Commission.[17]

The cooperation does not stop at mutual quoting. The possibility of intervening with *amicus curiae* opinions has been used in important cases in order to ensure a direct dialogue and exchange of opinions, a famous example being *Seijdic and Finci v. Bosnia-Hercegovina*[18] a seminal case of political governance in multi-ethnic communities. There the Court followed the position proposed by the Venice Commission.

On a personal note

The link between the Court and the Venice Commission is not only based on cooperation and mutual exchange on questions of human rights and Rule of Law, but is also fortified by personal ties. Many of the judges of the Court have been members of the Venice Commission before taking up their

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[13] The most important cases are ECtHR: *Oleksandr Volkov v. Ukraine,* no 21722/11, 09.01.2013, *Ramos Nunes de Carvalho e Sá v. Portugal* (GC), nos 55391/13, 57728/13 and 74041/13, 06.11.2018, and *Denisov v. Ukraine* (GC), no 76639/11, 25.09.2018.

[14] Venice Commission, CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges 9 one of the most important general opinion). See the overview over the relevant opinions www.venice.coe.int/webforms/documents/?topic=27&year=all.

[15] In ECtHR, *Volkov v. Ukraine,* no. 21722/11, 27.05.2013,e.g. the Court quotes the Venice Commission, CDL-AD(2010)029, Joint opinion on the law amending certain legislative acts of Ukraine in relation to the prevention of abuse of the right to appeal.

[16] See e.g. ECtHR, *Big Brother Watch and Others v. the United Kingdom,* nos 58170/13, 62322/14 and 24960/15, 13.09.2018 (not final).

[17] *Ibidem*, para. 210.

[18] See on the one hand, ECtHR: *Sejdić and Finci v. Bosnia and Herzegovina* (GC), nos. 27996/06 and 34836/06, 22.12.2009 and, on the other hand, Venice Commission, CDL-AD(2008)027, *Amicus Curiae* Brief in the cases of *Sejdić and Finci v. Bosnia and Herzegovina* (no. 27996/06 and 34836/06) pending before The European Court of Human Rights.

mandate in Strasbourg.[19] For me personally, both institutions are close to my heart. While I was a substitute member of the Venice Commission between 2005 and 2010 I had the chance of taking part in the elaboration of many important opinions of the Venice Commission, e.g. on the constitutional crisis in Ukraine and Kyrgyzstan, on sensitive questions concerning the Russian Federation, Moldova and Albania, as well as on general questions such as the independence of the judiciary and access to constitutional courts. In 2010 I had to leave the Commission because of taking up my mandate as a judge elected on behalf of Germany. I was very lucky to be again appointed to the Venice Commission, this time as member, when leaving the Court. Thus I could re-start my cooperation with the colleagues of the Venice Commission many of whom were still those I had been working with in the early 2000s.

Having been involved in decision-making in different Council of Europe institutions I have learnt that it was always the common European spirit that made it possible to arrive at good solutions, whatever difficulties might have been in the way before arriving there.

Europe is colorful and diverse. Societies are different in North and South, East and West, they draw from different historical experiences, they have different idols and heroes and different world views. Therefore, there cannot be one-size-fits-all standards for all questions of constitution building. Rather, while there are core standards to be always observed, differentiation and fine-tuning is necessary as well.

In this sense, the Venice Commission symbolizes "Europeanness" in the best sense of the word – openness to discuss and to understand what "the others" think, intellectual capacity in scrutinizing difficult problems on the basis of teamwork, and, last but not least, deep respect for all the different cultural and legal traditions that form the common heritage of Europe.

[19] During my mandate at the Court I have been working together with Khanlar Hadjiev, Mirjana Lazarova Trajkovska, Gabriele Kucsko-Stadlmayer, Ledi Biancu and Giorgio Malinverni who had all been members of the Venice Commission before.

Janine Madeline Otálora Malassis[1]

Constitutionnalisme et Démocratie

"The history of constitutionalism is nothing more
than man's quest for a limit on the absolute power of its bearers
and an attempt to create a spiritually, morally and ethically
justified authority as an alternative to subservience
to the exiting power's absolutism."
Karl Loewenstein

Introduction.

On a beaucoup écrit au sujet des tensions qui ont toujours existé entre la Justice Constitutionnelle et la Démocratie comme types de gouvernements. Jon Elster, par exemple, a signalé que les termes Constitutionnalisme et Démocratie peuvent avoir l'air d'être des termes opposés. En effet, le premier fait référence « au pouvoir limité et divisé », le second, lui, signifie « unifié et sans restrictions »[2].

La démocratie, du moins d'un point de vue théorique, ne dépendait pas à ses débuts d'une Constitution qui la régissait. Cette manière de gouverner avait pour base la reconnaissance de la dignité de tous les intégrants de la Communauté lesquels pouvaient s'impliquer et participer aux décisions communes, ils étaient ainsi tous co-auteurs des normes qui servaient à régir leurs conduites.

Norberto Bobbio parlait des « quatre grandes libertés des modernes », celles–ci étaient les préconditions libérales de la démocratie : liberté personnelle, liberté d'opinion, liberté d'association et liberté de réunion[3]. La démocratie, telle que nous la connaissons comme « phénomène historique » a dû être déterminée constitutionnellement. Nous pouvons affirmer que si les droits ne sont pas reconnus ou protégés il n'y a pas de Démocratie ; et

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[1] Membre de la Commission de Venise au titre du Mexique.
[2] Voir, S. S. Wolin, *Collective Identity and Constitutional Power*, en The Presence of the Past: Essays on the State and the Constitution (Baltimore: The John Hopkins University Press, 1989), p. 8; cfr. Avec l'analyse présentée par J. Elster and R. Slagstad, eds, *Constitutionalism and Democracy* (Cambridge: Cambridge University Press, 1988).
[3] Salazar Ugarte, P. *El constitucionalismo de Norberto Bobbio: un puente entre el poder y el derecho.* Cuestiones Constitucionales Revista Mexicana de Derecho Constitucional, 1(14). (2006).

sans Démocratie il est impossible d'obtenir des solutions pacifiques pour mettre fin aux conflits. En Amérique Latine, les concepts de Démocratie et Justice Constitutionnelle sont étroitement liés.

La justice Constitutionnelle est un ensemble de procédures qui permettent à certains organes de l'État d'imposer des limites qui sont stipulées par la Constitution aux organismes publiques qui ont agi à l'encontre de ce qui est écrit dans la Constitution[4].

C'est bien dans cette optique, que la justice constitutionnelle cherche à garantir le plein exercice des droits humains à ses citoyens via les institutions juridiques indépendantes et via des critères qui puissent garantir une certitude et une prédictibilité juridiques aux citoyens. Les tribunaux constitutionnels ont le devoir d'émettre des mesures qui renforcent « l'État de droit » et de garantir la sécurité juridique.

A la fin du XX^{ème} siècle et au début du XXI^{ème} siècle, les Constitutions et les tribunaux constitutionnels d'Amérique Latine avaient un rôle central quant aux questions politiques, et transformaient, dans certains cas, la nature et l'application de la démocratie. En Amérique Latine, la justice constitutionnelle s'est développée et a gagné en force, afin d'établir un cadre base de règles relatif à la concurrence politique et à la prise de décisions publiques, en protégeant de cette manière un ensemble de garanties individuelles. Ceci, a évidemment facilité le débat démocratique, le pluralisme politique, et la participation, ce qui a été un facteur déterminant pour consolider les institutions démocratiques.

C'est ainsi que les cours constitutionnelles se sont transformées en Institutions Stratégiques pour l'équilibre, la stabilité, et la gouvernance des pays de la région. Cependant, comme nos démocraties ne sont pas et ne permettent pas encore aux tribunaux constitutionnels de déployer tout leur potentiel, il demeure fondamental d'augmenter leur indépendance et leur légitimité face à la société.

Actuellement, les tribunaux constitutionnels d'Amérique Latine sont des acteurs fondamentaux, non seulement d'un point de vue juridique mais également politique. Dans toute la région, les juges sont chargés d'ajuster et de déterminer des politiques ce qui étaient auparavant uniquement la responsabilité des présidents et législateurs.

Tout d'abord, on peut dire qu'ils comblent des lacunes de la loi, mais, en plus, s'agissant de sujets de controverse et de disputes politiques, sociales

[4] Fix-Zamudio, H., *Veinticinco años de evolución de la justicia constitucional*, México, UNAM, 1968, p. 15.

et même économiques, les tribunaux constitutionnels ont le dernier mot, ce sont eux qui détiennent la raison juridique. Pendant les deux dernières décennies, les litiges qui ont abouti en Cours Constitutionnelles Latino-Américaines, les Cours ont eu le dernier mot[5].

Dans les dictatures, les Tribunaux Constitutionnels, voir tout le système judiciaire, ont fréquemment été victimes du changement de régime, et on en est même arrivé à pointer du doigt les pouvoirs judiciaires comme étant les principaux pions du pouvoir en place. Cependant, même lorsque la démocratie est déjà bien ancrée, beaucoup de problèmes ont pu être identifiés avec ceux qu'avaient les tribunaux sous le régime autoritaire, comme par exemple, un pouvoir exécutif autoritaire, une inertie conservatrice pour maintenir le *statu quo*, le manque d'infrastructures adéquates, un manque de confiance publique, une instabilité politique continue, sont quelques exemples de facteurs soulignés au détriment de ses tâches[6].

Aujourd'hui nous nous retrouvons face à une justice constitutionnelle latino-américaine qui est convaincue que les juges peuvent et doivent assumer un rôle important quant à la configuration de la société, l'assignation de ressources et le contrôle des gouvernements.

De plus, les juges latino-américains jouissent aujourd'hui d'une grande protection institutionnelle, plus importante qu'auparavant, et possèdent différents instruments légaux de contrôle constitutionnel qui leurs permettent désormais d'être un vrai contrepoids du pouvoir en place. Nous assistons aujourd'hui à une pression politique moindre sur les Tribunaux et donc à une plus grande capacité d'influencer en politique.

La création d'un héritage constitutionnel : La Commission de Venise et son impact sur la culture démocratique de la région

Daniel Brinks souligne qu'une des explications sur pourquoi certaines constitutions s'interprètent de manière spécifique est due au fait que les juges constitutionnels ont recours à des sources internationales pour interpréter leurs Constitutions[7].

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[5] Helmke, Gretchen. *Courts in Latin America* Cambridge University Press. New York, p. 21 (2011).
[6] *Ibidem*.
[7] Brinks, Daniel M. *The DNA of Constitutional Justice in Latin America: Politics, Governance, and Judicial Design (Comparative Constitutional Law and Policy)*. Cambridge University Press. New York (2018).

De ce point de vue, les juges constitutionnels peuvent contribuer aux tendances idéologiques globales – comme le néolibéralisme – pour interpréter la législation applicable. Je considère que c'est ce qu'il s'est passé dans la région Latino-Américaine, celle–ci a cherché le soutien de plusieurs organisations internationales au sein de ses organes de consultations, parmi lesquels se trouvent le Conseil d'Europe et la Commission de Venise.

Actuellement, l'idée « d'État de droit » est considérée comme étant essentielle à toute Démocratie ainsi que l'exercice plein des droits humains. Pendant trente ans, la « Commission Européenne en faveur de la Démocratie par le Droit », mieux connue sous le nom de « Commission de Venise », a construit plusieurs ponts entre ces différentes valeurs (État de Droit, Démocratie et Droits Humains) grâce aux opinions, études et autres documents qu'elle a adoptés.

La Commission de Venise rassemble des juristes et des experts provenant des principales démocraties du Monde, qui réfléchissent ensemble et émettent des opinions collectives, des études et autres documents qui serviront de guide et pistes de réflexions constitutionnelles dans différents pays. La Commission de Venise construit un patrimoine commun pour les démocraties du Monde. Aujourd'hui, ces ponts relient des sociétés démocratiques entre elles pratiquement dans le monde entier, avec pour but commun de consolider sa justice constitutionnelle. Actuellement, la Commission rassemble 62 pays membres qui ont ces mêmes objectifs, en plus de ces pays et organisations associées, il y a aussi des observateurs et certaines institutions qui ont un statut particulier.

Comme le signale Hannah Suchocka, suite à l'effondrement du système communiste en Europe, il y a actuellement une tendance globale qui souhaite restaurer les principes traditionnels du Constitutionnalisme Européen[8]. Ces principes ont été considérés comme la pierre angulaire de l'ordre démocratique qui cherchait à se différencier du Constitutionnalisme Socialiste, qui comme le dit Suchocka, préparait la voie vers un système autoritaire. C'est pour cette raison que l'idée de patrimoine Constitutionnel est l'un des principaux points de départ pour construire un régime démocratique[9]. Le premier pas fut de découvrir l'existence de la notion d'héritage constitutionnel commun. C'est

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[8] Suchoka, H., *Constitutional heritage and the form of government, Conference on Global constitutional discourse and transnational constitutional activity*, Venice, (2016). Venice Commission, CDL-PI(2016)017, Géorgie - Avis sur les modifications de la loi organique relative à la cour constitutionnelle et de la loi sur les procédures constitutionnelles.

[9] *Ibidem*.

ainsi que la redécouverte des éléments d'un héritage constitutionnel s'est convertie en une espèce de « mythe de fondation » des nouvelles démocraties en Europe Centrale et Orientale.

Cet héritage constitutionnel comprenait des principes qui étaient l'antithèse de ceux qui existaient sous le régime communiste. Ces principes constituaient le début de « l 'État de Droit », la garantie des droits humains et des libertés basées sur le concept de l'individu et de la dignité humaine, la séparation des pouvoirs et le pluralisme politique, la séparation du pouvoir judiciaire de la justice constitutionnelle**.**

Paloma Biglino Campos appelle cet héritage constitutionnel « le Patrimoine Constitutionnel Commun ». Biglino souligne que celui–ci sert de référence pour évaluer quand un État peut être qualifié de démocratique, s'il respecte les exigences qui sont imposées par cette tradition et ajoute également que la Commission de Venise est, peut-être, l'Institution qui a le plus contribué à construire cette notion d'Héritage Constitutionnel partagé[10].

Je partage cette affirmation et je considère que ce patrimoine correspond aux aspirations démocratiques des pays latino-américains qui lui appartiennent.

Comme le signale Sergio Bartole, une vraie démocratie ne peut pas exister sans un cadre juridique adéquat qui définisse des règles pour le bon fonctionnement de ses institutions démocratiques. Par ailleurs, il faut aussi prendre en considération que la Démocratie n'est possible que si la volonté des personnes peut être exprimée de manière adéquate sous la forme de loi. L'adoption de la forme légale offre une garantie contre le risque du pouvoir arbitraire[11].

Le statut de la Commission de Venise a été un facteur essentiel en Amérique Latine pour améliorer la compréhension mutuelle des systèmes juridiques nationaux afin de les rapprocher et de promouvoir d'État de Droit et la Démocratie. J'insiste sur ceci parce que même si les pays membres ne partagent pas, par exemple, le même système politique, nous nous régissons tous par des principes constitutionnels communs.

Il y a trois activités qui ont été développées par la Commission et qui sont fondamentales pour la région d'Amérique Latine. Tout d'abord, ses opinions et *« Amicus curiae »* par rapport à certaines consultations présentées

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[10] M. Paloma Biglino Campos, *La Comisión de Venecia y el patrimonio constitucional común*, Revista general de derecho constitucional, ISSN 1886-6212, Nº. 28, (2018).

[11] Sergio Bartole, *Final Remarks: The Role of the Venice Commission*, 26 REV. CENT. & E. EUR. L. 351, 351 (2000).

par les pays[12]. Ensuite, les codes de bonnes pratiques sur différentes matières[13]. Enfin, la relation avec les tribunaux constitutionnels de la région. En plus de ces activités, il est important de souligner le travail réalisé par la Conférence Mondiale pour la Justice Constitutionnelle et la Sous-Commission pour l'Amérique Latine de cette même Commission, que j'ai actuellement l'honneur de présider.

Premièrement, la Commission a offert un service d'assistance individuelle aux pays de la région pour des questions constitutionnelles qui les concernent directement. En accord avec l'héritage Constitutionnel qu'elle a développé depuis ses débuts, elle prépare des opinions au sujet de propositions de réformes constitutionnelles et leur réglementation à partir des principes constitutionnels et des standards internationaux applicables.

Deuxièmement, grâce aux études menées et aux rapports faits sur une large gamme d'affaires constitutionnelles importantes, la Commission a mis au point des codes de « bonne pratique » comme par exemple pour le respect de ce qui a trait aux élections, les partis politiques et les référendums, entre autres[14].

Troisièmement, il existe un important lien entre la Commission de Venise et les Tribunaux Constitutionnels en ce qui concerne l'interprétations de dispositions constitutionnelles nationales qui sont d'actualité. Dans cette optique, les tribunaux peuvent demander des *« Amicus curiae »* à la Commission, dans lesquels sera analysé le thème constitutionnel qui est en jeu à partir d'une perspective comparative et internationale, tout en conservant le droit au tribunal sollicitant de déterminer si le raisonnement de la Commission est bien compatible avec l'interprétation constitutionnelle finale.

Lors des trois dernières décennies, la Commission de Venise a gagné une grande renommée en tant qu'organe consultatif sur le constitutionnalisme et la démocratie, ceci grâce à l'indépendance et autonomie de ses membres, son professionnalisme, la qualité réputée de son travail d'analyses et réflexions, en résumé pour avoir accompli pleinement sa mission.

Ceci, facilite l'acceptation de ses opinions au cours des processus d'élaboration d'initiatives de réforme au sein des États Membres, face à celles que pourraient, par exemple, émettre des États Étrangers ou des Institutions

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[12] Commission de Venise, CDL-AD (2013)021, Opinión sobre la Legislación Electoral de México.

[13] Commission de Venise, CDL-STD(2003)034, Code de bonne conduite en matière électorale, Lignes directrices et rapport explicatif.

[14] Venice Commission, CDL-AD(2007)008, Code de bonne conduite en matière référendaire et CDL-AD(2009)002, Code de bonne conduite en matière de partis politiques.

Financières Internationales, qui pourraient ne pas avoir les facultés ou bien être en conflit d'intérêt s'ils se prononçaient sur des thèmes tels que la Sécurité nationale, la législation pénale, administrative ou autre.

Actuellement, les tribunaux constitutionnels des démocraties latino-américaines se sont données à la tâche de transformer certaines disputes au sujet de politiques publiques quant à l'interprétation constitutionnelle qui peuvent se résoudre grâce à des textes, des processus, ou encore des principes et règles qui sont généralement acceptées comme étant légales et non politiques.

Ces tribunaux ont joué un rôle primordial quant à la consolidation de la démocratie : un rôle qui dépend en grande partie du respect des décisions judiciaires, même si celles–ci sont considérées comme impopulaires. Ceci est donc basé sur le fait que les décisions soient légitimes et que les tribunaux soient reconnus comme étant des Institutions appropriées pour interpréter les textes constitutionnels et donner le dernier mot en cas de conflit de grande envergure.

En Amérique Latine, les Institutions Internationales ont eu un rôle fondamental pour assurer le développement correct de la Démocratie, elles ont servi de source de traditions légales et comme standards pour le développement du Droit Public. C'est, par exemple, le cas de la Commission de Venise qui garantit que les normes que les État membres lui demandent de superviser, respectent bel et bien la suprématie des principes constitutionnels et les standards internationaux en la matière.

Le dialogue entre les États membres de la Commission de Venise et des experts, permet, comme le dit Nino, de créer un mécanisme qui permette que la démocratie transforme les préférences qui ont un intérêt personnel en préférences impartiales[15]. C'est ainsi que les initiatives de lois, codes et normes peuvent être évaluées dans une optique de Constitutionnalisme libéral. En d'autres mots, c'est grâce aux échanges entre les Institutions comme la Commission, qu'il y a une liberté quant à l'analyse des thèmes et des contributions, tout comme les informations et arguments pertinents qui permettront d'obtenir des résultats rationnels[16].

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[15] Carlos Nino, *La constitución de la democracia deliberativa*, traducción de Roberto Saba, Barcelona, Gedisa, 1997, p. 202.

[16] Jürgen Habermas, *Facticidad y validez*, trad. de Manuel Jiménez Redondo, Madrid, Trotta, 5ª ed., 2008, p. 214.

La collaboration entre la Commission de Venise et la Région latino-américaine

La coopération de la Commission existe de longue date en Amérique Latine. Antonio La Pergola, Fondateur de la Commission de Venise rêvait d'une Commission « sœur » de la Commission de Venise qui serait chargée tout spécialement de la région d'Amérique Latine. Jusqu' il y a peu, celle-ci n'existait pas, mais depuis l'adhésion de plusieurs pays d'Amérique Latine, la Commission a formé une « sous–Commission » pour débattre des thèmes spécifiques à la région. En juin 2011, lors de la 87ème session plénière de la Commission de Venise[17], à la demande de la représentation de l'État Mexicain, il a été décidé de rétablir une Sous-Commission pour l'Amérique Latine ce qui a contribué à atteindre un des objectifs de cette même Commission à savoir : la consolidation de la Démocratie et de la Justice Constitutionnelle grâce à une coopération internationale.

En analysant les interventions de la Commission dans la région latino-américaine, on se rend compte que toutes font partie des catégories suivantes. Premièrement, on trouve des forums et conférences qui ont été convoquées par la Commission durant lesquels vont interagir des pays qui sont membres et des pays qui ne le sont pas. Au sein de cette catégorie on retrouve les Conférences Mondiales de Justice Constitutionnelles, les séminaires, ateliers et conférences qui sont organisées par thème dans la région. C'est au cours de ces événements que la Commission peut construire un projet commun de Constitutionnalisme Démocratique, en donnant l'opportunité aux juges constitutionnels de découvrir les expériences des autres pays ainsi que leur jurisprudence, et qu'ils puissent à leur tour utiliser ces expériences pour illustrer, convaincre ou dissuader grâce à leurs arguments juridiques.

Remarquons, qu'à deux reprises, en 2013 et 2018, les sessions de la Sous- Commission d'Amérique Latine ont été organisées au Mexique pour délibérer des thèmes exclusifs de la Région, avec la participation de membres renommés de la Commission de Venise.

Deuxièmement, il y a des opinions émises par la Commission sollicitées par des pays non-membres qui lui ont demandé de leurs offrir une assistance. On retrouve ici des opinions proposées à la Bolivie, l'opinion numéro 645/2011 dans laquelle a été abordée le projet préliminaire du « Code de procédés Constitutionnels de Bolivie », ce projet a été présenté à la Commission à pétition du Président de la Chambre des Députés de Bolivie, M. Hector Arque Raconta.

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[17] Commission de Venise, CDL-PV(2011)002syn, 87e Session plénière, Rapport de session.

Troisièmement, il y a des opinions qui ont été émises aux pays de la région latino -américaine qui sont membres de la Commission. On retrouve dans cette catégorie le Mexique[18], le Brésil et le Pérou[19].

Enfin, une quatrième et dernière catégorie, rassemble des consultations récentes comme par exemples celles faites par « l'Organisation des États Américains ». Aussi bien pour des questions concrètes (comme l'Assemblée Constituante du Venezuela) que pour des questions générales (sur le droit humain à la réélection et le rôle que jouent les cours constitutionnelles dans ce débat) comme en témoignent les réalités nationales de la justice constitutionnelle celles- ci peuvent être analysées selon des standards internationaux qui vont pouvoir renforcer l'État de Droit et la Démocratie.

Un bon exemple de ceci, est la demande qu'a faite le Secrétaire Générale de la OEA le 28 octobre 2017 à la Commission pour analyser le droit humain à la réélection. Dans les rapports émis par la Commission, on conclut que la réélection opère en vertu de différents paramètres et mécanismes selon qu'il s'agisse de systèmes présidentiels ou parlementaires ou encore d'élections locales ou nationales. De manière générale, la Commission a émis une opinion sur la rationalité des limites de la réélection et comment celles-ci ne vont pas forcément restreindre les droits des candidats et des électeurs.

Cette opinion démontre une réelle coopération entre deux organismes internationaux qui sont préoccupés par la malheureuse et constante pratique régionale de vouloir modifier la Constitution pendant un mandat afin de chercher à valider la réélection du pouvoir exécutif ou la possibilité de perpétuité du pouvoir présidentiel. Le résultat final, même quand on touche à des sujets très sensibles, est considéré comme une opinion technique, objective et juridique ; et grâce aux analyses juridiques détaillées, le Secrétaire Général de la OEA a demandé que le document soit distribué aux États

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[18] Certains aspects de l'avis sur la législation électorale mexicaine adopté par la Commission de Venise, sur la base des propres décisions du TEPJF concernant le genre, se reflètent dans la réforme constitutionnelle de 2014. Cela peut être interprété comme un processus progressif, itératif et complexe de développement de la justice constitutionnelle, dans un dialogue ouvert avec les acteurs nationaux (comme le Congrès) et les acteurs internationaux (comme la Commission).

[19] Un exemple direct de coopération avec la justice constitutionnelle latino-américaine : la même année, un *« amicus curiae »* a été demandé par la Cour constitutionnelle du Pérou, dans le cas de Santiago Bryson de la Barra et d'autres, concernant des crimes contre l'humanité dans la prison « El Frontón ». Commission de Venise, CDL_AD(2011)041, Projet de déclaration interprétative révisée du code de bonne conduite en matière électorale relative à la participation des personnes handicapées aux élections - sur la base des propositions du Forum Européen de Coordination pour le Plan d'Action du Conseil de l'Europe pour les personnes handicapées 2006-2015 (CAHPAH).

Membres avec l'espoir que celui-ci se convertisse en information essentielle pour aider aux longues discussions sur la réélection dans la région.

Ainsi, lors des processus délibératifs nationaux, à niveau international, les opinions émises par la Commission offrent un paramètre de Droit Public International et de droit Constitutionnel par rapport aux décisions démocratiques qui sont soumises à sa considération, ceci renforce l'institutionnalisation des moyens raisonnables qui permettent la coexistence pacifique de plusieurs versants politiques qui dans un autre contexte pourrait dégénérer en actes de violence.

La Commission de Venise représente un espace pour les pays latino-américains pour rapprocher notre cadre juridique avec les standards internationaux. De cette manière, ses opinions et codes auront un impact transversal au sein des États. Ce sera la tâche des législateurs « d'ajuster » les dispositions internes ; celle de l'Exécutif de les appliquer et de promouvoir des politiques publiques pour faire respecter le Droit Humain ; et au juge, comme cela arrive au Tribunal Électoral du Pouvoir Judicaire, de montrer les meilleures pratiques internationales.

Dans cette même optique, la Commission a été fondamentale pour le renforcement des tribunaux constitutionnels des démocraties d'Amérique Latine et de manière indirecte a eu une influence sur des réformes démocratiques importantes. L'adjudication constitutionnelle de nos tribunaux constitutionnels peut canaliser des initiatives législatives vers des chemins particuliers et reconstituer les contextes d'élections pendant lesquelles sera prise une décision législative et de cette manière faciliter le renforcement de la démocratie.

Si on se penche sur le processus de réforme politique, par exemple, on peut en conclure que les opinions de la Commission de Venise promeuvent des objectifs de consolidations démocratiques en aidant les législateurs à détecter des «voies constitutionnelles » à partir desquelles on peut aboutir à des réformes démocratiques en tenant compte à la fois de l'opinion des experts tout en préservant l'intégrité nationale et en même temps tenir compte de la réalité internationale.

Il est important de souligner que les opinions émises par la Commission ne représentent pas une contrainte. Cependant, comme il a été souligné auparavant, certains facteurs peuvent encourager l'adoption des opinions de la Commission, comme la menace de désapprobation morale d'autres États, ou encore exprimé de manière plus positive le souhait de la part d'un pays de demander une orientation constitutionnelle pour être perçu comme un membre Ad hoc par la Communauté Internationale de Démocraties compromises

avec « l'État de Droit » et les « Droits Fondamentaux »[20]. De plus, d'autres organisations qui ont elles le pouvoir de forcer une action nationale, peuvent avoir dans les opinions pour l'amélioration et les critiques au sujet des réformes constitutionnelles prévues et identifiées par la Commission de Venise.

Finalement, le but est de privilégier la raison au détriment de la force.

Conclusion

Aujourd'hui, la Démocratie est une valeur universelle et la Commission de Venise y contribue amplement. L'expansion géographique de la Commission a entrainé d'importantes conséquences démocratiques. D'une part, ceci signifie qu'aujourd'hui celle- ci n'est plus uniquement une Institution Européenne mais peut désormais être considérée comme une Institution Internationale. D'autre part, ceci signifie que son patrimoine constitutionnel commun a dépassé les limites du continent européen et a influencée aujourd'hui d'autres régions comme l'Amérique Latine. Ceci renforce en conséquence l'idée que ce qu'il se passe en démocratie dans n'importe quel pays du monde aura un impact sur l'humanité tout entière.

Cette expansion a provoqué aux seins de jeunes tribunaux constitutionnels, comme par exemple ceux des démocraties latino-américaines, de prendre en compte les opinions et codes de bonnes pratiques au moment de dicter des sentences. En ayant la Commission de Venise comme source d'informations et d'inspiration, cela a permis de renforcer, à plusieurs reprises l'efficacité des décisions prises quant à l'acceptation et la légitimité de ses propres sentences. De manière générale, une base empirique solide renforce l'objectivité et la légitimité des sentences et donc indirectement celle des tribunaux qui les émettent.

Au cours des dernières décennies, des pays du monde entier ont osé se lancer dans un processus de démocratisation et remaniement de leurs cadres constitutionnels. En adoptant ces projets de réforme, les membres permanents sont à chaque fois plus influencés par des modèles et des idées adoptées dans d'autres pays et sont ouverts à une orientation offerte par des acteurs externes. La Commission de Venise a démontré qu'elle est une institution internationale qui a accompli une tâche extrêmement utile en tant qu'assesseur et garant des principes et valeurs constitutionnelles démocratiques libérales.

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[20] Voir Wolfgang Hoffmann-Riem, *The Venice Commission of the Council of Europe—Standards and Impact*, 25 EUR. J. INT'L L. 591(2014).

Tout au long du XXIème siècle, en Amérique Latine il y a eu de grands changements politiques, et donc en ce qui concerne la garantie de l'État de Droit et la protection des Droits Humains. Cependant, même si les États démocratiques sont de plus en plus nombreux, dans un petit nombre de pays on a vu surgir des leaders populistes qui sont restés au pouvoir au-delà de ce que permettent les limites de la Démocratie, de plus dans quelques pays un régime d'extrême droite est arrivé au pouvoir. Dans ces deux derniers cas, l'unique moyen de contrecarrer sera la Justice Constitutionnelle et les Institutions comme la Commission de Venise qui pourront aider les Tribunaux Constitutionnels à ne pas se laisser soumettre à l'arbitrage du pouvoir politique en place. C'est pour cette raison qu'il est extrêmement important de veiller à l'adhésion de plus de pays à la Sous-Commission pour l'Amérique Latine et de cette manière renforcer la présence de la Commission dans cette région.

La Commission de Venise a démontré que sa mission universelle est d'accompagner et renforcer la Démocratie grâce à la force de la Constitution.

Ergun Özbudun[1]

The Independence of the Judiciary in Turkey: one step forward, two steps back

Obviously, contemporary democracies do not present a uniform character. They all share, however, respect for the rule of law as an indispensable requirement for a democratic regime. Furthermore, institutional independence of the judiciary means very little unless it is supplemented by strong guarantees for the security of tenure for judges. If personnel matters for judges, such as appointments, transfers, promotions, dismissals and other disciplinary measures are left to the arbitrary decisions of political authorities, solemn constitutional declarations about the independence of the judiciary will have little or no practical effect.

Thus, small wonder that the independence of the judiciary and the security of tenure for judges are among the most hotly debated topics in recent decades. Two leading European institutions expert in legal matters (Venice Commission and the Consultative Council of European Judges) have issued detailed and thought-provoking reports on the topic[2]

Venice Commission in its 2007 opinion on judicial appointments observed that "in some older democracies, systems exist in which the executive power has a strong influence on judicial appointments. Such systems may work well in practice and allow for an independent judiciary because the executive in restrained by legal culture and traditions, which have grown over a long time. New democracies, however, did not yet have a chance to develop these traditions, which can prevent abuse. Therefore, at least in new democracies explicit constitutional provisions are needed as a safeguard to prevent political abuse by other state powers in the appointment of judges".[3]

Venice Commission recommends a politically neutral High Council of Justice as an effective safeguard for the independence of judges: "Many European democracies have incorporated a politically neutral High

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[1] Former Member of the Venice Commission in respect of Turkey (1990-2014). Former Vice President of the Venice Commission (1992-1999).

[2] Venice Commission, CDL_AD(2007)028, Judicial Appointments; Consultative Council of European Judges (CCJE), Opinion No. 10, Strasbourg, 23 November 2007.

[3] Venice Commission, CDL-AD(2007)028, *op. cit.* paras. 5 and 6.

Council of Justice ... as an effective instrument to serve as a watchdog of basic democratic principles... Its autonomy and independence should be material and real as a concrete affirmation and manifestation of the separation of powers of the State... (Such) a judicial council should have a decisive influence on the appointment and promotion of judges and ... on disciplinary measures against them. An appeal against disciplinary measures to an independent court should be available".[4]

With regard to the composition of a judicial council, Venice Commission states that "there is no standard model that a democratic country is bound to follow in setting its Supreme Judicial Council... Nevertheless, it is generally assumed that the main purpose of the very existence of a Supreme Council of the Judiciary is the protection of the independence of judges by insulating them from undue pressure from other powers of the State in matters such as the selection and appointment of judges and the exercise of disciplinary functions." The Commission further argues that "a substantial element or a majority of the Judicial Council should be elected by the Judiciary itself. In order to provide for democratic legitimacy of the Council, other members should be elected by Parliament among persons with appropriate legal qualification taking into account possible conflicts of interest. In general, judicial councils include also members who are not part of the judiciary and represent other branches of power or the academic or professional sectors ... (A)n overwhelming supremacy of the judicial component may raise concerns related to the risks of 'corporatist management'" [5]

Venice Commission repeated these views in a later report: "An appropriate method for guaranteeing judicial independence is the establishment of a judicial council, which should be endowed with constitutional guarantees for its composition, powers and autonomy. Such a Council should have a decisive influence on the appointment and promotion of judges and disciplinary measures against them. A substantial element or a majority of the members of the judicial council should be elected by the Judiciary itself... In all cases the council should have a pluralistic composition with a substantial part, if not the majority, of members being judges. With the exception of *ex-officio* members these judges should be elected or appointed by their peers" [6]

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[4] Venice Commission, CDL-AD(2007)028, *op. cit.* paras. 22, 25.
[5] Venice Commission, CDL-AD(2007)028, *op. cit.* paras. 28, 29, 30.
[6] Venice Commission, CDL_AD(2010)004, Report on the Independence of the Judicial System: Part I: The Independence of Judges, paras. 31, 32.

Similar views were also expressed by another leading European institution, the Consultative Council of European Judges (CCEJ). In a 2007 report the Council stated that "the Composition of the Council for the Judiciary shall be such as to guarantee its independence and to enable it to carry out its functions effectively. The Council for the Judiciary can be either composed solely of judges or have a mixed composition of judges and non judges... When the Council for the Judiciary is composed solely of judges, the CCJE is of the opinion that these should be judges elected by their peers. When there is a mixed composition (judges and non judges), the CCJE considers that, in order to prevent any manipulation or undue pressure, a substantial majority of the members should be judges elected by their peers... (E)ven when membership is mixed, the functioning of the Council for the Judiciary shall allow no concession at all to the interplay of parliamentary majorities and pressure from the executive, and be free from any subordination to political party consideration, so that it may safeguard the values and fundamental principles of justice".[7]

It appears that the High Judicial Council model is gaining currency not only in Europe, but in other parts of the world as well. A study has shown that in the beginning of the years 2000, such councils existed, in some form or another, in 60 percent of the 121 countries studied, while this proportion was only 10 percent 30 years of ago.[8]

The Turkish Experience

The first republican constitution of Turkey (that of 1924), even though it carried certain characteristics of an "assembly government" system, recognized the judiciary as separate power (*kuvva-i kazaiye*). It further stipulated that judges were independent in their decisions subject only to law, and that the decisions of the courts could not be changed, altered, postponed, or their implementation could be obstructed either by the Grand National Assembly on the Council of Ministers (Article 54). In a following article (Article 56) it stipulated, however, that all personnel matters for judges would be regulated by an ordinary law. Thus, neither during the single-party (1925-1946), nor the multi-party (1946-1960) period, one could speak about an independent judiciary.

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[7] Consultative Council of European Judges (CCJE), Opinion No. 10, Strasbourg, 23 November 2007, paras. 15, 19.

[8] Garoupa, Nuno, Tom Ginsburg, "Guarding the Guardians: Judicial Councils and Judicial Independence", John M. Olin Program in Law and Economics Working Paper No. 444, 2008: www.law.uchicago.edu/Lawecon/index.html, 1-39, p.3, 26.

The system of a High Judicial Council was introduced in Turkey by the liberal democratic constitution of 1961, and was maintained by its less liberal successor, the Constitution of 1982, with certain modifications. Under the original text of the Constitution of 1982 (Article 138), judges are independent in the discharge of their duties; they render judgment in accordance with the Constitution, law, and their conscientious opinions in conformity with law. No authority or individual may give orders or instructions to courts or judges relating to the exercise of judicial power. No questions can be asked, debates held, or statements made in the legislative Assembly in relation to the exercise of judicial power in a case under trial. Legislative and executive authorities must comply with court decisions. They cannot alter them or delay their execution. Security of tenure for judges and public prosecutors has also been recognized by the Constitution (Article 139) in identical terms with the Constitution of 1961 (Article 133), according to which `judges and public prosecutors shall not be dismissed, or retired before the age prescribed by the Constitution; nor shall they be deprived of their salaries, allowances, or other personnel rights, even as a result of the abolition of a court or a post.'

Personnel matters for judges and public prosecutors, such as appointments, promotions, transfers, disciplinary actions, and dismissals are within the exclusive jurisdiction of the `Supreme Council of Judges and Public Prosecutors (hereinafter, "HSYK"),' itself composed mostly of judges. Under Article 159 of the 1982 Constitution, three regular and three alternate members are appointed by the President of the Republic from among three times as many candidates nominated by the plenary session of the Court of Cassation. Similarly, two regular and two alternate members are appointed by the President from among three times as many candidates nominated by the plenary session of the Council of State. The Minister of Justice is the chairman of the Council, and the undersecretary of the Ministry of Justice is an *ex-officio* member.

While the 1982 Constitution created a High Judicial Council with a clear majority of judges elected by their peers, the system was criticized on several grounds. First, it was argued that the Council did not represent the entire judiciary, but only the two high courts, creating the possibility of corporatist management. Secondly, the Minister of Justice as the chairman of the Council had considerable weight in its functioning. Thus, the Council did not have its own secretariat and all secretarial services were provided by the Ministry of Justice. Furthermore, disciplinary investigations against members of the judiciary were carried out by inspectors attached to the Ministry, not to the Council itself.

The structure of the HSYK was radically changed with the constitutional amendment of 2010. The amended Article 159 stated that the HSYK "shall be composed of twenty-two main and twelve alternate members and shall work in three sections. The President of the Council is the Minister of Justice, and the Undersecretary of the Ministry of Justice is its *ex-officio* member." Four main members shall be elected by the President of Republic, three main and three alternate members by the Court of Cassation, two main and two alternate members by the Council of State, one main and one alternate member by the Academy of Justice, seven main and four alternate members by the judges and public prosecutors of the civil (general) judiciary, three main and two alternate members by the judges and public prosecutors of the administrative judiciary.

Thus, the amendment created a council that will be representative of the entire judiciary, instead of only the two high courts. The Minister of Justice remained as the President of the Council. However, his role was limited to a more symbolic and representative one. About two-thirds of the members were judges elected by their peers, in conformity with the recommendations of the Venice Commission of the Council of Europe and the Consultative Council of European Judges.

Furthermore, the HSYK was given its own budget, own secretariat, own justice inspectors in disciplinary matters, and it was stipulated that its decisions concerning dismissals would be open to judicial review.

No wonder these changes were welcomed by a majority of democrats in Turkey, as well as by European institutions. Thus, Venice Commission, commenting on the new HSYK Law (No. 6087, dated 11.12.2010) prepared along the lines of the amended Article 159, stated that "In general, the amendments are to be welcomed. An important element in the amendments consists of provisions transferring powers of supervision from the Ministry of Justice to the HSYK. These changes are to be welcomed as representing a step in the right direction, albeit a relatively modest one. Another welcome amendment concerns the strengthening of the right of judges and prosecutors to answer disciplinary charges and complaints" [9]

The following story, however, is a perfect confirmation of the well-known maxim that the implementation of a law in much more important than its letter. In the first HSYK elections in 2010, the alliance between the conservative governing party, the AKP, and the Gülen community (a religious / political movement under the moral leadership of a former Muslim preacher, Fethullah Gülen) obtained a comfortable majority in the new HSYK. This was

[9] Venice Commission, CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, paras. 101, 102.

largely a result of a controversial decision of the Constitutional Court which invalidated a provision of the constitutional amendment that stipulated that each elector judge or public prosecutor could vote only for one member of the HSYK. This ruling led to the formation of two rival lists of candidates, one pro-government and the other anti-government, to a fierce fight between them, and an election campaign followed by keen interest by the general public, almost as it was a general elections campaign. The competition resulted in the victory of the AKP-Gülenists alliance as pointed out above.

The following period witnessed certain judicial proceedings of extremely dubious legal validity, such as the intensification of legal proceedings against many high level military commanders, civil society leaders, academics, and journalists on the largely fabricated accusation that they were planning a coup against the AKP government.

The AKP-Gülenists alliance came to an abrupt end in 15-22 December 2013, when certain Gülenist public prosecutors and judges started criminal proceedings against four AKP ministers and their relatives, certain public bank directors and businessmen on various corruption charges. The AKP government reacted very strongly and described the event as an unlawful attempt to oust the legitimate government.

This was followed by the adoption of a series of laws designed to increase the government's control over the HSYK, even though the AKP lacked the constitutional amendment majority (three fifths of the full membership of the Assembly) to change the existing composition of the HSYK [10]One of the most important steps in this direction was the Law No. 6524 dated 15.02.2014 changing the structure and functioning of the HSYK. The Law transferred many powers belonging the plenary of the HSYK to the Minister of Justice. Even a more draconian provision of the Law was the termination of the office of all HSYK personnel with the sole exception of the elected members whose status was based on the Constitution. Even though the Constitutional Court invalidated many provisions of the new Law (Constitutional Court decision, E.2014/57, K. 2014/81), such personnel could not return to their posts because of the retroactivity of the Constitutional Court decisions. In any case, new HSYK elections in September-October 2014, upon the termination of the four-year term of the former members, produced a strong pro-government majority.

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[10] Özbudun, Ergun, "Turkey's Judiciary and the Drift Toward Competitive Authoritarianism", *The International Spectator*, Vol. 50, (2015), 42-55; Özbudun, Ergun, "Problems of Rule of Law and Horizontal accountability in Turkey: Defective Democracy or Competitive Authoritarianism", Cengiz Erişen and Paul Kubicek (eds.), *Democratic Consolidation in Turkey: Micro and Macro Challenges,* (London and New York: Routledge, 2016): 144-165.

Another unusual method used by the AKP government to establish its full control over the judiciary was the adoption of "court-packing" laws to increase the number of judges of two high courts, Court of Cassation and the Council of State (Law No. 6572, 02.12.2014; Law No. 6723, 01.07.2016; and the emergency decree No. 696, 20.11.2017). However, the worse was still to come with the constitutional amendments of 2017.

The Constitutional Amendments of 2017

The death blow to judicial independence in Turkey came with the constitutional amendments of 2017, narrowly approved with a 51.4 percent yes vote in a referendum held during an emergency rule. The amendment law completely changed the structure of the HSK (Council of Judges and Public Prosecutors), significantly dropping the word "High" (*Yüksek*) from its title. Also interesting in the fact that the amendment concerning the HSK took effect immediately with the publication of the referendum results, in contrast to most other amendments that took effect together with the simultaneous presidential and parliamentary elections held in 24 June 2018. This is an indication of the priority given by the government to establish its full control over the judiciary.

Under the amended Article 159, the HSK is composed of thirteen members. The Minister of Justice is its president, and the under-secretary of the Ministry of Justice its *ex-officio* member. Four members shall be appointed by the President of the Republic. Since the minister and the under-secretary are also presidential appointees, the number of members appointed by the President amounts to six. Seven members are chosen by the TGNA with a qualified majority, i.e., a two-thirds majority on the first round, and a three-fifths on the second. If such majority is not obtained, there will be a lot taking between the two highest vote-getters. Even though such qualified majorities may, in theory, help to produce a more pluralistic composition, it had no such effect in the HSK elections following the amendment, since the AKP-MHP block commanded a three-fifths majority. Thus, the present HSK in completely under the control of the government. In place of a Council a majority of which were judges elected by their peers, a body was created in which not a single member is a judge elected by his or her peers. Venice Commission[11] strongly criticizes this system:

> "The Commission finds that the proposed composition of the CJP is extremely problematic. Almost half of its members (4+2=6 out

[11] Venice Commission, CDL-AD(2017)005, Turkey - Opinion on the Amendments to the Constitution, para. 119.

> of 13) will be appointed by the President... (T)he President will no more be a *pouvoir neutre,* but will be engaged in party politics: his choice of the members of the CJP will not have to be politically neutral. The remaining 7 members would be appointed by the Grand National Assembly. If the party of the President has a three-fifths majority in the Assembly, it will be able to fill all positions in the Council. If it has, as is almost guaranteed under the system of simultaneous elections, at least two-fifths of the seats, it will be able to obtain several seats, forming a majority together with the presidential appointees. That would place the independence of the judiciary in serious jeopardy, because the CJP is the main self-governing body overseeing appointment, promotion, transfer, disciplining and dismissal of judges and public prosecutors. Getting control over this body thus means getting control over judges and public prosecutors."

Indeed, control over the HSK is the key to control over the entire judiciary, including the two high courts, since all judges of the two high courts are also appointed by the HSK. If need be, such a process can be speeded up by the frequent court-packing laws as alluded to above. Domination over the high courts, in turn, leads to control over two other highly important constitutional bodies. One is the High Council of Elections (YSK), charged with the duty of the conduct of elections and deciding on electoral disputes. The Council is composed of 11 members, six of whom are chosen by the Court of Cassation and five by the Council of the State. Thus, the independence and impartiality of the YSK has recently become a matter of deep political controversy. Finally, of the 15 members of the Constitutional Court, three are appointed by the President from among nominees of the Court of Cassation, and two from among the nominees of the Council of State. In addition to the four members appointed by the President on his own discretion, this amounts to a strong governmental influence over the Constitutional Court.

Under these conditions, it seems impossible to speak either of the independence of the judiciary, or the separation of powers. Venice Commission[12] has arrived at the conclusion that the proposed amendments "would introduce in Turkey a presidential regime which lacks the necessary

[12] Venice Commission, CDL-AD(2017)005, *op. cit.*, para. 130.

cheeks and balances required to safeguard against becoming an authoritarian one." Thus, it may be concluded that the 2017 amendment was not limited to a simple change in the system of government, but it amounted to a radical "regime change" from imperfect democracy to competitive authoritarianism.

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Péter Paczolay[1]

My decades in the Venice Commission

In 1991 I travelled to Cyprus for an international conference organised by the Venice Commission at the request of Géza Herczegh, its Hungarian Member, and Vice-President of the Constitutional Court of Hungary. Hungary joined the Council of Europe on 6 November 1990 (almost exactly on the 40th anniversary of the signing of the European Convention on Human Rights), so this was my first participation at a Venice Commission meeting and also my first encounter with some important members of the Commission. There I met first of all an extraordinary personality, Antonio La Pergola, who invented and created this body devoted to constitutional aid. It was the first time that I met personally (at the Zurich airport) Gianni Buquicchio, at that time Secretary of the Venice Commission. La Pergola and him formed an inseparable *duo* that really shaped and determined the future of the Venice Commission. It is a great advantage that after La Pergola, Gianni has been elected several times as President of the Commission. At this conference in Nicosia I also met Hanna Suchocka, later Prime Minister of Poland, and curently an Honorary President of the Commission as myself.

1991 was still the beginning of a new era for Hungary and the region. It was really a breakthrough experience to take part in the work of international organisations on an equal basis with representatives of Western democracies, moreover to work and deliberate on the basic institutions of Rule of Law, democracy and human rights.

After the unforgettable *intro* in Nicosia, I started my regular work with the Venice Commission as Liaison Officer in 1993 on behalf of the Constitutional Court of Hungary. I participated at the preparation and editing of the first issue of CODICES, since then the widely used database on constitutional case-law. Besides this regular activity, I had several times the occasion to participate in the Plenary Sessions. In the first years, the substitution of the members was not yet regulated as later by the appointment of a substitute member for each country, so I was present at

[1] Honorary President of the Venice Commission. Former Substitute Member (1998-2005) and Member (2005-2013) of the Venice Commission in respect of Hungary.). Former Vice President of the Venice Commission (2009-2011).

the plenary sessions when the first two Hungarian members, Géza Herczegh and János Zlinszky were not able to attend. I was appointed officially as a substitute member in March 2001 when László Sólyom was the member for Hungary. After he took office as President of the Republic in August 2005, I was appointed member to the Venice Commission, and later reappointed. The substitute member during this period was my university colleague and friend, László Trócsányi.

I continued to serve as a liaison officer as well, later Krisztina Kovács, and after her László Detre took over those responsibilities.

In 2009 I was elected for two years Vice-President of the Commission. My term as member expired in October 2013, and then I was not reappointed by the Government due to conflicts with the Constitutional Court that I was presiding at that time. At my farewell plenary session in Venice, I was elected unanimously by the Commission as its Honorary President, a position created on that occasion (later Hanna Suchocka was elected also as Honorary President).

Among the numerous activities of the Venice Commission I was particularly involved in some fields.

My most obvious link to the Commission was constitutional justice as between 1990 and 2015 – with an interruption – I worked at the Constitutional Court in different positions: advisor, secretary-general, judge, vice-president and for almost seven years as president. I participated in the work of the Joint Council on Constitutional Justice, and I evidenced for decades how useful an institution it is promoting the cooperation of the constitutional courts through meetings of the liaison officers. I contributed to the opinions prepared on the constitutional court acts of several countries (among others Azerbaijan, Armenia, Romania, Russia, Ukraine, Turkey). I was one of the authors of the study on individual access to constitutional justice. I could profit from this work during the drafting process of the new law on the Hungarian Constitutional Court. And I could witness how the mediating work of the Venice Commission developed into a world-wide organisation of constitutional courts. I think we have to pay tribute to László Sólyom who invited first the Venice Commission to the regular Conference of European Constitutional Courts held in 1996 in Budapest, and in his opening speech outlined the importance of the Venice Commission in the further development of the cooperation of European constitutional courts. Since then the Venice Commission played more and more influential role in those conferences. Finally, by interlinking the similar organisations of the other continents and of the francophone countries, the World Conference was created, and held its first meeting in 2009.

Democratic elections were my other main field of activity. I contributed to opinions on electoral laws. The Venice Commission summed up the principles of the European electoral heritage in the "Code of good practice in electoral matters", an important reference document of the Council of Europe. I presented this document at several conferences and seminars. I was member of the Council for Democratic Elections that is in charge of the analysis of draft opinions and studies of the Venice Commission in the electoral field before their submission to the plenary session. The aim of the Council for Democratic Elections is to ensure co-operation in the electoral field between the Venice Commission as a legal body and the Parliamentary Assembly and the Congress of Local and Regional Authorities of the Council of Europe as political bodies in charge of election observation. I took part and lectured in the second conference of European Electoral Management Bodies, held in Strasbourg in 2005. Since then, European Conferences of Electoral Management Bodies have been co-organised annually by the Venice Commission and local electoral management bodies in different European countries.

I worked a lot on the electoral legislation of those two countries that I visited the most often during my missions: Azerbaijan and Ukraine. In 2013 in Ukraine I moderated more round tables with the participation of all political forces and competent authorities to implement new electoral legislation that would permit to fasten the country's access to the European Union. The results of the round tables were promising, basically we did our jop. But as Ukraine declined to sign an association agreement with the EU at the Vilnius summit in November 2013, the outcome was a disappointment; for me also personally.

An interesting part of my work in the electoral field was the participation in electoral observations, namely in Azerbaijan, in Montenegro, and in Russia. The observation mission at the Russian presidential elections in 2012 left in me memories first of all because we visited also the polling station in Yasnaja Polyana, the former home of Leo Tolstoy. In the hall next to the polling station the movie "War and Peace" directed by Bondarchuk was screened all the day, and in a restaurant we met also the heirs of the Tolstoy family.

During the last years of my active membership I dealt with the issue of freedom of association in context of non-governmental organizations. The respective regulations in Egypt, Russia, and Kirgizstan were analysed by the Venice Commission, and also the concerns raised regarding the association of journalists in Belarus can be mentioned here.

All in all, I acted more than forty times as rapporteur.

As Judge of the European Court of Human Rights since 2017, I face in the day by day practice how the Venice Commission defined the standards with respect of Rule of Law, democracy and human rights. Those standards, and also the studies and the individual opinions are often referred to by the European Court of Human Rights and the other organs of the Council of Europe; they serve as reference for the member States and also for international organisations, including the European Union.

And let me mention another link to the Venice Commission, the "Association of Former Members". This association, so close to my heart, is composed of former members and former substitute members of the Venice Commission, and former permanent members of the Secretariat of the Venice Commission. The aim of the association is threefold: to contribute, through the personal experience and the collective reflection of its members, to the promotion of democracy through law; to promote and reinforce contacts and co-operation between its members in the spirit of the aims of the Venice Commission; to maintain close links to the Venice Commission. The association was created in December 2014, and held regular meetings once a year, with varying number of members participating. I serve presently as President of the Association.

Now, as unfortunately the world-wide 'coronavirus' epidemics crossed the plans for the celebration of the 30th anniversary, the Venice Commission remained faithful to its mandate, and published immediately a report on the emergency situations, a subject often dealt with already before.

What have I learned during my decades in the Venice Commission?

First, as all of us, the respect for rule of law, democracy and human rights. To define in practical terms the requirements of Rule of Law.

Secondly, the use of the comparative method in constitutional issues. The comparative approach has been always essential, but we know that the real function and impact of comparison is not always clear in the national constitutional developments and processes. Sometimes comparative arguments do not have decisive role but only a decorative function of presenting, at least in part, the international landscape. Therefore, the Venice Commission had a pioneering role as an institution that not only based its assessment on substantial comparative arguments but used this analysis for standard setting.

Within this framework, I have learned a lot from my work at the Commission: how to manage international and organisational matters, how to fix in a diplomatic way delicate situations and handle sensitive issues, how to balance conflicting interests, how to speak persuasively rather than extensively.

I try to avoid the common place, but I have emphasize that besides the extraordinary professional benefits how great gift has been to me the Venice Commission for the human encounters and friendships with the members of the Venice Commission and of the Secretariat.

And as a *post scriptum* let me add a few lines on the place of these meetings: Venice and the *Scuola*.

I was thinking of what connects Strasbourg and Venice, besides the Venice Commission? The two cities do not have too much in common – unlike Strasbourg and Rome that are bound by several ties: Argentoratum being part of the Roman Empire, and Strasbourg's Latin name is echoed by one of Rome's important places, Largo di Torre Argentina. What I can recall as a tie between the two cities is Attila, the Hun. Attila tried to conquer Western Europe. During this invasion, according the tradition his army forced the population of Adriatic towns of the Roman Empire to escape from the *terraferma* (mainland) to the *laguna* (lagoons), and the fugitives founded the floating city of Venice. And Attila's army arrived in 451 also to Strasbourg, and the siege of the city left long-lasting terrible memories.

It has been an exceptional experience to deal with constitutional issues in the scenery of Venice. To arrive to the *Scuola Grande di San Giovanni Evangelista*, arrive to the court through the marble portal, surmounted by an arch displaying St John's eagle, go up the extraordinary staircase built in 1498 by one of Venice's most appreciated architects, Mauro Coducci. It was destroyed in the 19th century and rebuilt in its original form in the 20th.

To approach the places of our (informal) Thursday and (formal) Friday dinners – usually by walking (even with *aqua alta*), rarely by boat, or going to the *terraferma* by bus from Piazzale Roma.

Let me finish, to join again France and Italy, with a quotation from a French writer, Marcel Proust: *"When I went to Venice, I discovered that my dream had become – incredibly, but quite simply – my address."*

Maria Fernanda Palma[1]

Crimes against religion and the Rule of Law

I. The theory

1. The subject "crimes against religion and the Rule of Law" can be analysed by addressing certain key questions, which can be roughly divided into the following three general issues:

The first and basic issue is what must be protected in order to defend freedom of religion in a state where religion and politics are separate.

The second issue is the question of the hypothetical constitutional duty to use criminal law to protect freedom of religion as a fundamental right. The solution to this will depend on how we answer the first question above.

The third issue is what balance should be struck between freedom of religion and freedom of speech in a state governed by the Rule of Law.

Although these are not three isolated questions, we can attempt to answer them separately due to their logical autonomy.

2. The first question

A democratic and constitutional state is founded on the principle of the separation of law, public power and religion. The state is designed to guarantee freedom, self-satisfaction of interests as defined by each individual and preservation of a community of common interests.

Religion can only be legally protected as a matter of self-identification, of freedom of conscience and of self-development of the personality. Neither the concept of a religion nor the validity of each particular religion, nor the Enlightenment's idea that religion could be an instrument of social cohesion, can fall within the protective functions of the democratic state governed by the Rule of Law.

Freedom of religion is thus a value only by reason of individual self-fulfilment and a person's cultural freedom and is not an absolute value in itself. The state has the duty to guarantee a person's freedom to be religious and to express his religion to others.

Therefore, we can consider that restricting fundamental rights and freedoms through criminal sanctions is justified whenever someone wrongs

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[1] Former Member of the Venice Commission in respect of Portugal (2007-2015).

or offends that religious freedom so defined. The fundamental value is the role of religion in the personality of citizens, since freedom of conscience, dignity of the human being and other values concerning the person are the reason behind, and the goal of, a democratic state governed by the Rule of Law.

One should note, for this purpose, that we are considering a common model embedded in the International Law of the Universal Declaration of Human Rights rather than a particular or historical context.

3. Based on the logic of the constitutional state, governed by the Rule of Law, the answer to the second question can be both general and abstract. Adopting this point of view, we can put forward the principle that the goal of protecting fundamental rights does not require every offence against freedom of religion to be criminalised, as it is important to determine whether criminal sanctions are appropriate and proportional to such attacks.

Only a retributive conception of criminal sanctions could justify such a duty to make every attack on the freedom of religion a crime.

As a matter of fact, freedom of religion might be regarded not only as a subjective right, but also as an objective good or interest of the state, and therefore in some, or even several, cases it might not be necessary to punish, but only to forbid and to protect the freedom of religion by other social measures, for example by promoting certain policies.

However, when the core of a freedom is seriously jeopardised, the democratic legislator may legitimately choose to regulate such situations through the use of criminal sanctions.

Even if one considers the recommendation of the Venice Commission and of the Council of Europe on the need for criminal sanctions for serious attacks on religion,[2] this does not lead us to necessarily conclude that a blanket imposition is required for all incidents and specific situations. We can thus

[2] Venice Commission, CDL-AD(2008), Report on the relationship between Freedom of Expression and Freedom of Religion: the issue of regulation and prosecution of Blasphemy, Religious Insult and Incitement to Religious Hatred. The Venice Commission stated that the Parliamentary Assembly – noting that, in the past, national law and practice concerning blasphemy and other religious offences often reflected the dominant position of particular religions in individual states – has considered that "in view of the greater diversity of religious beliefs in Europe and the democratic principle of the separation of state and religion, blasphemy laws should be reviewed by member States and parliaments" and that "blasphemy, as an insult to a religion, should not be deemed a criminal offence. A distinction should be made between matters relating to moral conscience and those relating to what is lawful, and between matters which belong to the public domain and those which belong to the private sphere."

assume that using criminal law to prevent such attacks is only a political decision in a cultural context of our historical experience at the present moment.

Further insights on how best to answer our question arise if we understand the features of the present moment that justify the imposition with regard to freedom of religion. If these features change, then we can change our understanding of the legitimacy of such an imposition.

If we look at such impositions in their historical context, we can see that the need to punish serious offences is always related to protecting minorities, preventing violence and political conflicts, and preventing serious violence against certain groups of the population.

However, it would not be correct to state that a profound development of the self has always been at the heart of political decisions regarding criminal punishment for serious attacks on religious freedom.

On the other hand, we can distinguish between the ultimate *ratio* justifying a duty to adopt criminal sanctions to guarantee freedom of religion – as a means to prevent violence and conflict – and a weaker justification applied when we are dealing with social activities and other freedoms – such as freedom of speech – where the problem is how to draw the boundaries between freedom of religion and other freedoms or social goals.

Where freedom of religion is offended in the exercise of other rights and while balancing other social goals, we may, in fact, question whether the intervention of criminal law is the best solution.

To conclude this first analysis, we can accept two ideas:

First, there is no abstract and absolute duty to use the law to apply criminal sanctions on attacks on the freedom of religion, as this will depend on the nature and social context of the attack.

Second, a criminal law solution is considered necessary where there is evidence of minorities being sacrificed, or of violence or a rupture in society.

4. The third question is related to the balance between freedom of religion and other freedoms or social values.

Can we, for instance, criminalise attacks made in the press or in speeches against the religion of others without restricting fundamental rights or acting against the Rule of Law in a democratic state?

By putting the question in these terms, we are compelled to recognise that the value of criticism and of freedom of expression cannot be suppressed to satisfy the rights of each religious person or group.

However, if we balance the two rights by attempting to harmonise them and simultaneously protect their core content, we can see some important distinctions.

First, no one has the right to impose ideas or to self-affirm through violence or by destroying the free and peaceful expression of others. Second, freedom of criticism cannot be classified as true violence. Third, both the cultural expression of a religion and the normal exercise of freedom of expression must be separated from the psychological effect they may produce in certain contexts – this means we cannot forbid the exercise of freedoms because they might produce negative effects, whenever this depends on the subjectivity of the receptors of these expressions.[3]

To give some examples, one could say that neither criticism through pictures of Muhammad or the Pope nor, at the other extreme, the potential aggressive effect of minarets on some persons with the Christian faith are considerable attacks on fundamental rights.

5. The questions I have been discussing concern the logical conditions under the Rule of Law for criminalising offences against religion, but we must not forget the inverse question on the legitimacy of criminalising religious practices and objective expressions of freedom of conscience.

A case heard in the United States Supreme Court[4] concerning Native Americans that consumed drugs in a ritual – a practice that violated the ban on consuming drugs in US territory – is a good example for the purpose of our analysis. Sometimes, a certain conduct has different meanings and can be regarded as the exercise of a ritual, on the one hand, or as a crime, on the other.

Deciding whether such conduct is a religious ritual or simply a crime depends on the reason for the prohibition and criminalisation, but also on the proportionality of the response.

In my opinion, the Supreme Court judges who argued that religion should prevail over crime in this case were right to do so, because the harm to society from consumption of the drug peyote was not as great as the consumption of drugs might be under other circumstances. Nonetheless,

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[3] There is an important difference between Dworkin, R. and Waldron, J. on this issue, *The Harm in Hate Speech*, Jeremy Waldron Series: *The Oliver Wendell Holmes Lectures*, 2012, pp. 173-203.

[4] Employment Division, *Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

further discussion of this case, considering more circumstances and arguments, is certainly possible.

My intention in referring to this type of case is only to remind us that protecting freedom of religion through criminal law can be achieved by not classifying the expression of freedom of religion as a crime in certain circumstances.

II. Contribution of the Venice Commission to the Council of Europe on crimes against religion

1. The Venice Commission made an important contribution in finding answers to problems regarding offences against religion in democratic societies. Several reports were written on that subject, including one on the relationship between freedom of expression and freedom of religion – the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred – with a useful appendix of European national laws, published by the Council of Europe in September 2009.[5]

The Venice Commission adopted several documents on these matters during its 76th Plenary Session in 2008 and, in the same year, in cooperation with the Hellenic League of Human Rights, organised an International Round Table on "Art and Religious Beliefs: from collision to co-existence", in Athens.

It is useful to recall the conclusions of the first document concerning criminal law. The Venice Commission stated that "incitement to hatred, including religious hatred, should be the object of criminal sanctions as is the case in almost all European States, with the only exceptions of Andorra and San Marino. The latter two States should criminalise incitement to hatred, including religious hatred" and, in the Commission's perspective, "it would be appropriate to introduce an explicit requirement of intention or recklessness, which only few States provide for".

The Commission explained that "it is neither necessary nor desirable to create an offence of religious insult (that is insult to religious feelings) *simpliciter*, without the element of incitement to hatred as an essential component".

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[5] Venice Commission, CDL-STD(2010)047, The relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred, Science and Technique of Democracy, No. 47.

Thus, for the Commission, in order for criminalisation to be necessary, two main requirements must be fulfilled: an objective element of incitement to religious hatred and a subjective element, an intention (or recklessness) to give that meaning to the conduct. On the other hand, it is quite clear to the Commission that mere insult to religious feelings without this religious hatred and sufficient intention should not be criminalised.

The Commission concludes that "the offence of blasphemy should be abolished (which is already the case in most European countries) and should not be reintroduced".

2. Regarding the extension of powers of the criminal legislator, the Commission adopts what we can describe as the principle of necessity of criminal intervention, based on "public order" offences and on the prevention of incitement to hatred. In this case, the Commission accepted other means than criminal sanctions, affirming that "any legal system provides for other courses of action, which can be used in cases other than incitement to hatred". The general conclusion of this important text is that criminal sanctions are certainly necessary against crimes of incitement to religious hatred, but are not legitimate for other offences against religious feelings.

III. New questions. Conclusions

1. We can now reflect more deeply on whether anything is changing or should actually change with regard to these issues. And we can base this reflection on science, philosophy and the arguments already developed in reports and opinions of the Venice Commission and of the Council of Europe.

As a matter of fact, although traditional constitutional theory is based on the problems of minorities in an open society, today we can assume that new ideas on the place of freedom of religion can be considered in different contexts.

Part of the issue of religion and the Rule of Law is how we understand the personal dimension of religion in the construction of the self. The question is the value of our self-identification not only for ourselves, but also for the community as a whole. Thus, religion today is not only an issue between communities or groups, but also regarding the relationship between the individual and the group or community.

Therefore, what are sometimes seen as subjective feelings may, from other perspectives, be thought as the private sphere and self-development

of the personality, which should be protected. In this sense, a community based on the self-fulfilment of persons is also a strengthened community, a community of respect rather than self-effacement.

The only limitation on this more individualistic perspective are the objective limits for the exercise of the rights and freedoms of others.

Attacks on religion must be seen as attacks on individual persons and therefore be included in possible crimes against freedom of the self.

This reflection leads us to differentiate between a problem of groups and a new problem regarding the conception of the person in an open society. We can also conclude that what is important to the sphere of the self cannot contravene the rights of others: we are not fully ourselves without respect for the other,[6] without the values of a universal community of human beings. Therefore, crimes against religion can be extended to protect new spaces of intimacy, conscience and construction of the self.[7]

2. In addition, when we think about crimes established to protect religion, a different perspective from traditional views centres on the limits to criminalising the external expression of the religious. Nevertheless, it is not legitimate to criminalise blasphemy, a crime that was historically justified to protect the religion of the majority, as we have seen, for that would also be an attack on the freedom of religion insofar as it would forbid or criminalise peaceful ways of criticising the values of religion. That would be a limit that cannot be overstepped purely by arguing that the collective feelings of other groups and even the majority are harmed. Thus, the reason for not criminalising blasphemy – insufficient harm to a constitutional value – leads us to cast doubt on whether it is correct to criminalise certain expressions of religion where only the feelings of others and the feelings of a majority are at issue.

[6] So Lévinas, E., *Totalité et Infini*, 1980, and *Les Droits de L'Homme et les Droits de L'Autrui, in Hors Sujet*, 1987, pp. 159-170.

[7] As a matter of fact, we are already discussing the issue of crimes against the mind as a new category. The mind can be thought of as something to be preserved in itself, i.e. as an autonomous dimension of the person. See Bublitz, C./Merkel, R., *Crimes Against Minds: On Mental Manipulations, Harms and a Human Right to Mental Self-Determination*, in *Criminal Law and Philosophy* 8 (1), January 2014.

Vladan Petrov[1]
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Contribution of the Venice Commission to the Constitutional Reform in Serbia with special reference to the Judiciary

Introduction

The last two decades were marked by intensive joint work between the Republic of Serbia and the Venice Commission. It was only in 2000 that Serbia broke with the former regime and began a lengthy process of transition.[3] The transition into democracy has meant, above all, the process of institution-building which implied increased normative activity as a precondition. After years spent in a state of a certain isolation, one of the main strategic goals of the Republic of Serbia in that overturning moment was its decision to approach the international, particularly European, community through cooperation and membership in international organisations.[4] The Venice Commission has greatly supported and continues to support the Republic of Serbia in that complex task.

Bearing in mind that the assistance in the constitutional reform in Serbia provided by the Venice Commission was comprehensive, the emphasis in this paper will be on the field of the judiciary. Special consideration will be given to the ongoing constitutional reform process, which is currently underway.

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[1] Substitute Member of the Venice Commission in respect of Serbia.
[2] Deputy Director of the Judicial Academy of the Republic of Serbia.
[3] Serbia brought the Constitution of 1990 which introduced almost all values and principles of liberal-democatic constitutionalism such as political pluralism, Rule of Law, separation of powers, the independence of judiciary, constitutionaly garanted human rights etc. Unfortunately, this constitution was only a political instrument. It was a nominal, not a normative constitution (K. Loewenstein).
[4] Cooperation with the Council of Europe firstly has taken place via the Council of Europe Office in Belgrade which started to operate in 2001. It has worked together with the Government of Serbia and other competent institutions in particular within the area of the reforms in the field of the administration of justice, support to the functioning of Parliament and local self-government, improvement of the system of higher education and strengthening the capacity of institutions in combating serious crimes. The Republic of Serbia officially became a member of the Council of Europe on 3 April 2003.

1. The Revival of State Independence (2000-2006)

The relationship with Venice Commission was established in January 2001, when the Federal Republic of Yugoslavia composed of Serbia and Montenegro obtained the status of associate member. From that point on, the opportunity arose for all interested bodies and organs of the Council of Europe and the Yugoslav government itself to turn to the Venice Commission for legal opinions regarding the legislative initiatives and acts in the Federal Republic of Yugoslavia. The assistance of the Venice Commission has proved to be especially valuable in constitutional issues and its precious influence is seen even within the ongoing constitutional reform in the Republic of Serbia.

The first document the Venice Commission adopted relating to the Republic of Serbia was the Interim Report on the Constitutional situation of the Federal Republic of Yugoslavia of October 2001.[5] The initiative for this opinion came from the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe and related to the possible accession of the FRY to the Council of Europe. This document only had an interim character because the Venice Commission concluded that, where the drafting and adoption of a completely new constitutions both at the Federal and the Republican level was announced, it was meaningless and inappropriate to carry out a regular in-depth analysis of the existing Constitution, which would soon be replaced. Therefore, the Venice Commission provided only an interim assessment of the situation, focusing on the main perspectives for the near future. It was noted that, at the time, the essential constitutional issue at the Federal level was the question of the continuation of the Federation between Serbia and Montenegro, considering the complicated relations between the two republics as well as the relations within the republics themselves, particularly with respect to the existence of the different streams in Montenegro.[6] The Venice Commission Report contained a legal assessment of a possible referendum on the status of Montenegro which was an open and burning issue. The procedural aspects of the potential referendum and its relationship with the Constitution of the Republic of Montenegro and its provisions regulating

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[5] Venice Commission, CDL-INF(2001)23, Interim Report on the Constitutional situation of the Federal Republic of Yugoslavia

[6] The first was embodied in the Montenegrin authorities which considered the Federal Constitution illegitimate and disregard it while promoting the idea of independence and the other was unified around the opposition parties in Montenegro that were favorable to maintaining the Federation.

the procedure for a possible change in the status of the Republic, were analysed in detail. With respect to the referendum, the Venice Commission concluded that, first, it would be advisable to introduce a specific majority requirement into the referendum law for referendums on the status of the country, and that, second, in the case of a positive result, a referendum on independence would have to be confirmed by a two-thirds majority of the Assembly of Montenegro, as prescribed by the Constitution as the only legally and legitimate way to solve the issue. As regards the constitutional situation in the Republic of Serbia, the Venice Commission welcomed the intention to draft, as soon as possible, a new Constitution compatible with modern democratic standards, considering that the Constitution of 1990 was outdated and inadequate.

On 14 March 2002, the Agreement on Principles of Relations between Serbia and Montenegro within the State Union known as the "Belgrade Agreement" had been signed and then passed by both republic parliaments. Following adoption by both the federal's and the republics' parliaments, a new Constitutional Charter of the State Community of Serbia and Montenegro came into the force, thus transforming the FR Yugoslavia into the State Community of Serbia and Montenegro. The Community was a loose state union with limited joint state powers. The Constitutional Charter indirectly implied future events by prescribing a chapter named "Withdrawal from the State Community of Serbia and Montenegro". It gave rights to both member States to hold a referendum in three years and decide whether they would remain in the State Union.[7] The Charter prescribed that, upon the expiry of a three-year period, the member States shall have the right to initiate the procedure for a change of status and that a decision to withdraw from the State Community of Serbia and Montenegro shall be made after a referendum has been held.[8] The rules set out in the Charter thus avoided and made unnecessary all the dilemmas discussed before also through the Venice Commission Interim Report relating to the obligation of achieving a two-thirds majority in the parliament at the republican level in order to change the status of the country. The Republic of Montenegro exercised this right in May 2006 and by popular vote decided to leave the State Union and declare its independence. On 5 June 2006, the National Assembly of the

[7] Ružica Mrdaković-Cvetković, International legal continuity of Serbia after The Separation of Montenegro, MP 3, 2006, (str. 326-346), 329.

[8] The Constitutional Charter of the State Community of Serbia and Montenegro, Official Gazette of Serbia and Montenegro No. 1 of 4 February 2003.

Republic of Serbia passed a conclusion that the Republic of Serbia is a state and a legal successor of the State Union of Serbia and Montenegro.

As mentioned above, the debate on the necessity of the adoption of the new Constitution in the Republic of Serbia has begun soon after the fall of the regime of president Milošević. The process of stabilization and association of Serbia to the European Union made it necessary to harmonise the highest legal document with European legal standards.[9] The Government approved a draft of the new Constitution in 2004. The Minister of Justice requested an Opinion by the Venice Commission on the Chapter on the Judiciary in the draft Constitution of Serbia. The Opinion was discussed and adopted by the Venice Commission at its 64th plenary session in Venice on 21 October 2005.[10]

According to the General Comments by the Venice Commission, the examined provisions of the draft Constitution strived to "establish judicial independence and an independent public prosecutorial service". Here it is important to underline a difference between the term "independent" when used to describe the nature of a judge and courts, on the one hand, and to describe a principle related to public prosecution. This difference derives from a different structure, organisation and the role of these authorities. In order to avoid confusion, it was better to use the term "autonomous" in the context of the public prosecution, but this issue will be elaborated further. The first part of the Venice Commission's Opinion lists the most authoritative documents regulating relevant areas. In respect of the independence of the judiciary, it is Recommendation (94)12 of the Committee of Ministers of the Council of Europe on the Independence, Efficiency and Role of Judges (updated by Recommendation CM/Rec(2010)12 on Judges: independence, efficiency and responsibilities) and Opinion No. 1 (2001) of the Consultative Council of European Judges on Standards concerning the Independence of the Judiciary and the Irremovability of Judges. It states that there is no common European standard with respect to the office of the public prosecutor, thus there is a variety of national models, from ones representing a part of the executive to others being part of the judiciary, which affects the prescribed level of their autonomy. Regardless of the accepted model, every country should take into account the essential safeguards identified in the

[9] Vladimir Pavicevic, Vladimir Dzamic, Constitutional Revision in Serbia: Aspects and Possible Solutions, European Movement in Serbia, 2012, p.8.
[10] Venice Commission, CDL-AD(2005)023, Opinion on the provisions on the Judiciary in the Draft Constitution of the Republic of Serbia.

text of Recommendation (2000)19 of the Committee of Ministers on the Role of Public Prosecution in the Criminal Justice System.

The examined part of the draft Constitution is analysed article by article. The Venice Commission, in general, welcomed the concept of the Rule of Law established by this draft document, but also illuminated some points which required greater clarity, modification and reconsideration.

Some concerns were expressed regarding the initial appointment of judges for a period of five years. It is noted that this practice exists in many countries of continental Europe where relatively young and inexperienced lawyers are appointed as judges, but still this issue can represent a threat to the independence of these judges, who might feel under pressure to decide cases in a particular way. Analysing the pros and cons for introducing a probationary period, it concluded that where it is introduced, it is of the outmost importance to also introduce appropriate safeguards. Bearing in mind the importance of the principle of permanent mandate, it also suggested that it is preferable to spell out in absolute clear terms that after a probationary period a judge will be appointed on a permanent basis.

The Venice Commission criticized a solution from the draft Constitution according to which the judges should have the same immunity as deputies, stating that it would be unjustified and, if any, there should only be a limited functional immunity for judges from arrest, detention and other criminal proceedings that interfere with the workings of the court.

The draft Constitution envisaged a Joint Council for judges and prosecutors composed of four judges, four prosecutors, one lawyer and two law professors. It was prescribed that the judges shall be elected to the High Judicial Council by their peers as well as the public prosecutors while the law school professors shall be appointed to the Council by the President of the Republic, having selected one of four candidates nominated jointly by the deans of law schools in the Republic of Serbia and the lawyer shall be appointed to the Council by the Bar Association of Serbia. The Venice Commission welcomed this solution, but recommended that it may be desirable to provide for a broader composition including also a lay element.

Finally, the participation of the National Assembly in the process of judicial appointments and dismissals has been pointed out as the most problematic thing. According to Article 127 of the draft Constitution, judges and presidents of courts shall be elected by the People's Assembly, at the proposal of the High Judicial Council while the President of the Supreme Court of Serbia shall be elected also by the Parliament at the proposal of the President of the Republic, who has obtained the opinion of the general

sitting of the Supreme Court of Serbia.[11] It is indicated that such a solution contradicts Recommendation (94)12 (now updated Recommendation CM/Rec(2010)12 according to which the main role in judicial appointments should be given to an objective body such as the High Judicial Council in order to avoid any kind of politicization.[12] The Opinion states that in the Venice Commission's view, the involvement of the People's Assembly in decisions on the dismissal of judges and permanent appointment of judges following a probationary period is not in line with European standards protecting judicial independence. A better solution is for the President to obtain a more important role in the process of the appointment instead of Parliament. Namely, according to the proposal, candidatures for judges and court presidents (with the possible exception of the President of the Supreme Court) would be prepared by the High Judicial Council and the President would not be allowed to appoint a candidate not included on the list submitted by the High Judicial Council. In respect of the process of the termination of judicial functions, the same arguments regarding the involvement of the Parliament were given and it is recommended that it should be completely excluded from the future Constitution. Primarily, it must be noted that there was a slight confusion in the regulation of the termination of the office and the disciplinary responsibility of a judge in the draft Constitution. According to the draft document, the High Judicial Council shall make a first-instance decision on the disciplinary responsibility of a judge, and a special court organ shall act upon an appeal, while the People's Assembly shall decide on the termination of office of judges and presidents of courts. Therefore, it is not clear what role the Parliament should have in the process of termination of office when it is related to the dismissal. In general, the provisions as to discipline and dismissal including the reasons for dismissal, the procedure and acting authorities were assessed as vague and unclear in the Venice Commission's Opinion.

In the official translation of the Draft Constitution into English, in Article 130, the Office of the Public Prosecutor was defined as "an independent state body" instead of as "an autonomous state body". This error in the translation could have led to some confusion even during the reasoning by the Venice Commission. However, the analysis presented by the Venice Commission on the status of the public prosecution has proven

[11] 2004 Draft Constitution of the Republic of Serbia www.srbija.gov.rs/vest/5628/vlada-prihvatila-nacrt-ustava-republike-srbije.php.
[12] Venice Commission, CDL-AD(2005)023, *op. cit.*

to be very useful even in the ongoing constitutional reform, because the same question has been reopened. In the examined document, it is assessed that a presented model of the public prosecution, not only on the basis of its definition, but also on the basis of the solutions proposed, leans strongly towards independence with a traditional hierarchical structure. According to the draft Constitution, the public prosecutors and heads of their offices shall be appointed by the People's Assembly, at the proposal of the High Judicial Council, while the Supreme Public Prosecutor of Serbia shall be nominated by the President of the Republic, having obtained the opinion of the High Judicial Council. The rules regulating the termination of their terms are envisaged to be the same as for judges. Also, the other principles such as the irromevalibilty, the internal immovability and immunity were set up analogously to those of judges. Assessing whether the high level of independence given to the public prosecution according to the draft Constitution is positive or negative, the Venice Commission stated that, on the one hand, this solution is good for minimizing political influence but, on the other hand, the unaccountability of the public prosecution to any democratically elected institution could lead to different problems. It was concluded that since the offices of the Public Prosecution are hierarchically structured, independence for prosecutors is less important than for judges. The Venice Commission also questioned the importance of the principle of the internal immovability in respect to the public prosecutors, stated that it may even become an obstacle to legitimate considerations of rotation. On the contrary, it suggested that it is of much greater relevance to regulate a situation when a subordinate prosecutor gets instructions which – in his or her opinion – transgress the law, which was missing in the examined document. Through its Opinion and comments, the Venice Commission shed light on the path that Serbia has to take in order to harmonise its legal system with European standards on the judiciary.

2. Towards an adequate constitutional definition of an independent judiciary

2.1 The Constitution of 2006 – an inadequate answer to the question of an independent judiciary

Due to the complicated political situation, the process of the adoption of the new constitution was prolonged again for some time. The cohabitation of Vojislav Kostunica (Democratic Party of Serbia [DSS]) as Prime Minister and Boris Tadic (Democratic Party [DS]) as President prevented the country

from making quick progress in various areas including this one. The draft Constitution examined by the Venice Commission was the text drafted by the experts appointed by DSS. Then in 2005, Boris Tadic as President of the Republic gathered a group of experts who prepared a new working draft of the Constitution. For a while it was difficult to find a consensus between those documents because of the different views on crucial issues related to the organisation of the state, such as the position of autonomous provinces and the change of the Constitution. The activities on the harmonisation of the text of the draft Constitution intensified in the Spring of 2006 following Montenegro's proclamation of independence. This event accelerated the work and stressed the urgency of replacing the Serbian Constitution. The Committee for Constitutional Issues of the National Assembly had reactivated its activities. The result was a new draft Constitution which mostly succeeded to harmonise the two proposals put forth respectively by the Serbian Government and by the Serbian President.[13] The new text was adopted by the National Assembly on 30 September 2006. The Referendum on ratification of the new Constitution of the Republic of Serbia was held on 28 and 29 October. After it was approved by the citizens in the referendum, the new Constitution of the Republic of Serbia was approved on 8 November 2006 in the National Assembly.

Probably due to the decision to accelerate the process of constitutional revision, the Venice Commission was not consulted prior to the adoption of the Constitution. However, the document was examined on the initiative of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe, thus the Opinion was discussed and adopted by the Venice Commission at its 70th plenary session in Venice on 17-18 March 2007.[14]

The main criticism that prevails throughout the Opinion is the hastiness with which the Constitution at the end was drafted and adopted despite the years of previous work. In the introduction it was noted that the document could be seen as a result of the political negotiations of all relevant party leaders while the conclusion of the Opinion questioned the opportunity for its public discussion and accordingly, its legitimacy.

Of course, the adoption of the new Constitution was very welcome. Especially optimistic was the conclusion of the Venice Commission according to which the new Constitution "reflected the democratic ideals of the new

[13] Serbia 2006 Progress Report, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2006/nov/sr_sec_1389_en.pdf.
[14] Venice Commission, CDL-AD(2007)004, Opinion on the Constitution of Serbia.

Serbia". The option for a functional parliamentary system of government, a comprehensive catalogue of fundamental rights, numerous democratic principles set out in detail and provisions concerning the composition and the jurisdiction of the Constitutional Court were particularly accentuated as positive points. It was noted that the new Constitution, in many aspects, meets European standards and that it, in general, implements the Venice Commission's recommendations in its 2005 Opinion regarding the previous draft Constitution in the part of the judiciary.

However, after analysing the Venice Commission Opinion and particularly its conclusion, the last statement remains questionable. Namely, the general criticism of the Venice Commission was that there are still some unclear and contradictory provisions as well as the provisions which are incompatible with European standards. The crucial concern of the Venice Commission was expressed relating to the part of the judiciary reiterating its main position in the 2005 Opinion. The previous suggestions that had been implemented in the adopted text of the Constitution were listed and approved, but the main criticism regarding the potential politicization of the judiciary due to the substantial competences of the Parliament in this area remained unchanged in the new Opinion. The Constitutional Law on the Implementation of the Constitution, which provided that all sitting judges within the Republic of Serbia will be reappointed following the entry into force of the new Constitution, exacerbated the overall impression of an excessive influence of parliament on the judiciary. Despite the remaining reservations regarding the trial period for judges in general[15], the Venice Commission assessed as a positive change the probationary term for judges elected for the first time on a judicial function, which had been reduced from 5 to 3 years after which the High Judicial Council makes the decision on their appointment for permanent tenure, and no longer the National Assembly as was the case in the 2004 draft Constitution. In respect of immunity, the Venice Commission welcomed that according to the 2006 Constitution the judges will enjoy only functional immunity while as regards the incompatibility the introduced prohibition from engaging in political actions was assessed as useful. Accepting the Venice Commission recommendation that the Parliament should be excluded from the decision on termination of a judge's office and that a "special court organ" in charge to act on appeal on the first-instance disciplinary decision should be specified, it was welcomed that 2006 Constitution prescribed that decisions on the termination of a judge's term

[15] Vladan Petrov, *On some "anti-identy" spots in the Serbian Constitution*, Serbian Political Thought, special edition 2017, p.13-29

of office will be taken by the High Judicial Council with the possibility of an appeal to the Constitutional Court. By contrast, a recommendation to include in the Constitution the grounds for the dismissal of judges and clear provisions in respect of the disciplinary responsibility of judges was not accepted. According to the Constitution, the High Judicial Council is composed of eleven members out of which the President of the Supreme Court of Cassation, the Minister of Justice and the President of the authorised committee of the National Assembly are *ex officio* members and the other eight are electoral members- six judges with permanent office and two respected and prominent lawyers with at least 15 years of professional experience, of which one is a solicitor and the other a professor at the law faculty. Due to the reason that all electoral members, including the judges, are elected by the National Assembly, the composition of the High Judicial Council was assessed as unsatisfactory. A disapproval of this solution by the Venice Commission was even stronger in relation to the fact that the National Assembly participates in a double role in the process of the judicial appointment, as a body which elects the members of the High Judicial Council and as a body that elects judges on the probationary mandate.[16] Recognising a threat that lurks from a comprehensive and quick reappointment of all judges and prosecutors, the Venice Commission gave a thorough analysis of the Constitutional Law. Expressing serious doubts about this solution, it suggested that such a process would be acceptable only if it is conducted with the following guaranties:

1. The procedure must be based on clear and transparent criteria and only past behaviour incompatible with the role of an independent judge may be a reason for not re-appointing a judge;
2. The procedure has to be fair, carried out by an independent and impartial body and ensure a fair hearing for all concerned;
3. There must be the possibility for an appeal to an independent court. Unfortunately, the reappointment process was carried out in 2009 without respecting the Venice Commission's recommendations.[17]

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[16] Article 147 of the Constitution of the Republic of Serbia states: "On proposal of the High Judicial Council, the National Assembly shall elect as a judge the person who is elected to the post of judge for the first time."

[17] The European Commission made following conclusion in Serbia Progress Report for 2010: "The reappointment procedure for judges and prosecutors was carried out in a non-transparent way, putting at risk the principle of the independence of the judiciary. The bodies responsible for this exercise, the High Judicial Council and the State Prosecutorial Council, acted in a transitory composition, which neglected adequate representation of the profession and created a high risk of political influence…Objective criteria for reappointment, which had been developed in close cooperation with the Council of

Regardless the positive modifications of some of the solutions in the new Constitution compared to the examined draft Constitution of 2004, the fact that the crucial recommendation of the Venice Commission regarding the role of the National Assembly in the judicial appointment process had not been respected and having in mind the consequences of the unsuccessful reappointment conducted in the Serbian judiciary on the basis of the Constitutional Law, it could be said that Serbia lost some precious time in the process of reaching the highest and desirable level of the Rule of Law principles in the area of the judiciary. All observations and criticisms made by the Venice Commission in its Opinion have remained until now and they could be heard during all these years from both, the EU in almost every annual Progress Report and the Serbian academia and experts. Due to this, the Opinion of the Venice Commission has been taken as a first and basic guideline in the current process of drafting new constitutional amendments.

Finally, taking into account the Serbian ambition for full membership in the EU, the Venice Commission recommended to insert in a future constitutional provision a sentence that will explicitly authorise the transfer of certain powers of the organs of the Republic of Serbia to international or supranational organisations. Analysing the experience of the member States, it is certain that before joining the EU it will be necessary to revise the Constitution in order to insert, *inter alia*, the so-called "integrative clausule".[18] Being aware of it, the Venice Commission in its Opinion raised a question of a purpose of a great complexity of the procedure for altering Constitution prescribed in 2006 Constitution. For example, the 1991 Constitution of Bulgaria was amended four times in relation to the European Union integration's issue and others, particularly, new member States have gone through a similar experience[19]. A remark of the Venice Commission has proven to be justified already within the ongoing process of the constitutional reform in the area of the judiciary which showed difficulties caused by the complicated procedure for amending the Constitution.

Europe's Venice Commission, were not applied", http://europa.rs/upload/documents/key_documents/2010/Rapport%20SR%20TO%20PRESS%20CONF%2008.11.pdf

[18] Abdula Azizi, *The Transfer of State Sovereignty: Analysis of Constitutional Change in Macedonia during the EU Accession Process,* The 9th edition of the International Conference "European Integration - Realities and Perspectives", 2014.

[19] Evgeni Tanchev and Martin Belov, *The Bulgarian Constitutional Order, Supranational Constitutionalism and European Governance*, National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law, 1097-1138 (1099), 2019.

2.2 Towards an adequate constitutional answer regarding the independence of judiciary?

As mentioned already at the beginning of this article, soon after the regime changed in 2000, the Republic of Serbia set as a priority goal of taking an active part in the European community via the membership in the European Union.

The European Union and the Republic of Serbia signed the Stabilization and Association Agreement on 29 April 2008, which came into force on 1 September 2013. The Republic of Serbia applied for EU membership on 22 December 2009. The European Council passed a decision to grant Serbia the candidate status for EU membership on 1 March 2012, while EU accession negotiations formally commenced on 21 January 2014 in Brussels by holding the First Inter-Governmental Conference.

Meanwhile, the enlargement policy of the EU has changed. The EC document named the Enlargement Strategy and Main Challenges 2011-2012 proposed the introduction of a new approach in the negotiations based on the lessons learned from the accession talks with Croatia. The strengthening of the Rule of Law was recognised as a key challenge and priority for countries to move towards the EU membership. Therefore, the Strategy proposed that negotiating chapters on judiciary and fundamental rights as well as on justice, freedom and security should be tackled at an early stage in order to allow adequate time for the candidate country to build the necessary track record of reform.[20] Also, the idea was that these chapters be open on the basis of previously adopted detailed action plans, which render possible regular reporting and presentation of results achieved.

One of the consequences of the new approach was that current and potential candidate countries had to face a process of constitutional revision much earlier than was the case before, for example, with Croatia which changed its highest act just prior to joining the EU inserting all necessary clauses but also the provisions regulating the independence of the judiciary.[21] In line with this new approach, countries are regularly asked by the European Commission to revise and improve a part of their constitutions with regard to the structure and functioning of the judicial branch shortly after

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[20] Maja Prelic, *The Rule of Law in the accession process of the Republic of Serbia to the European Union,* European Union Legislation N°. 69/2019, p. 5-19.

[21] Aleksandar Andrija Pejovic, *Amendments to the Constitution in the area of judiciary in the candidate countries for the membership in the EU - the examples of Montenegro, Albania and Serbia,* The Conference Proceedings of the Seventh International Conference of the European Studies Department, Sofia University "St. Kliment Ohridski", June 2020.

opening Chapter 23 discussions in order to have enough time to monitor the success of the implementation of the judicial reform throughout the negotiations.

The EU Screening of the Serbian normative and institutional framework with the relevant *acquis* within Chapter 23- Judiciary and fundamental rights conducted in 2013 through Explanatory and Bilateral Screening resulted in the publishing of the Screening Report which tackled various issues of substantial importance for the justice reform and Rule of Law in Serbia. Following the recommendation from the Screening Report, the Serbian authorities drafted within an inclusive and transparent process with all relevant stakeholders and civil society organisations, the Action Plan for Chapter 23, which was adopted in April 2016. This strategic document contains clear objectives and deadlines, the necessary institutional framework and costs and served as a "reform road map" for the fields of justice, anti-corruption and fundamental rights.

One of the most important, but also the most challenging, reform steps arising from the EC recommendations is the amendment of the Constitution of Serbia in order to strengthen the independence of the judiciary. Precisely because of its importance, the first activities in the Action Plan for Chapter 23 (APCH23) are dedicated to the process of constitutional amendments. Recognising the role of the Venice Commission, the APCH23 provides that constitutional changes must be done in accordance with the European standards as promulgated by the Venice Commission.[22]

The starting point of the commencement of the work on the constitutional revision was the Analysis of the Constitutional Framework on the Judiciary in the Republic of Serbia done by the Working Group consisted of the professors of Constitutional law prepared in 2014.[23] Unfortunately, in the ensuing period there was no political will to continue the activities regarding this issue. The work proceeded in May 2017, when the Ministry of Justice initiated public consultations, which included all relevant state authorities, judicial organs, professional associations, the CSOs and public at large. The consultations were organised as a multi-stage dialogue and lasted for almost one year. They commenced with the issuing of a public invitation for civil society organisations to submit their proposals for amending the Constitution

[22] It is important to mention that in the period from 2007 to 2014 the Venice Commission has adopted a several opinions analysing Serbian legislation on the judiciary.

[23] Vladan Petrov, Darko Simovic, Irena Pejic, Slobodan Orlovic, *The Analysis of the Constitutional Framework on the Judiciary in the Republic of Serbia,* 2014. www.mpravde.gov.rs/tekst/22785/radna-grupa-za-izradu-analize-izmene-ustavnog-okvira.php

in the part relating to the judiciary. The proposals as well as the first version of the Working text of the draft Constitutional amendments from January 2018 were discussed at roundtables organised throughout the country. In line with the conclusions from the public consultations, in April 2018, the Working text was revised and published by the Minister of Justice and then sent to the Venice Commission. At the plenary session held on 22 June 2018, the Venice Commission adopted the Opinion on the draft Amendments to the constitutional provisions on the judiciary.[24]

In its Opinion the Venice Commission first acknowledged the Serbian efforts in developing and evolving a modern democracy based on European standards and international best practice and reiterated the importance of having an independent, fair and impartial judiciary complemented with judicial integrity. In the context of a potential confusing translation of the constitutional provision defining the relation of the three branches of power, the Venice Commission emphasized that it is essential to ensure a proper separation between the judiciary, the executive and the legislature with all guaranties for the independence of the judiciary applied, on the one hand, but also pointed out the need for respectful discourse and interaction between the state powers, on the other hand. In the general comments, it was recognised that the aim of the draft amendments was to resolve the main problem of the excessive role of the National Assembly with respect to judicial appointments as identified in several previously adopted Venice Commission opinions. This fact is of the greatest importance because it proves that the reform is going in the right direction.

In the analysis of the individual provisions, the Venice Commission provided a number of practical suggestions and guidance on how to improve the quality of the act. Welcoming the principles contained in the draft amendments, it was suggested that some matters included in the draft amendments, such as the status of the judicial assistants, would be better regulated in secondary legislation or bye-laws and *vice versa*. Being aware of the complex relationship that exists between the Constitutional Court and the ordinary courts, especially the Supreme Court of Cassation, arising from the unclear constitutional provisions regarding the review of court decisions in a constitutional complaint procedure, the Venice Commission recommended to alter the text in order to clarify that the Constitutional Court is certainly legally authorised to review the decisions of the ordinary

[24] Venice Commission, CDL-AD(2018)011, Opinion on the draft Amendments to the Constitutional provisions on the Judiciary.

courts and that this right cannot in any way harm the independence of the judiciary, but, on the contrary, it tends to strengthen it. This example shows a great devotion of the Venice Commission to truly comprehend and understand the specificity of each legal system individually.

The next item that drew the attention of the Venice Commission was the provision that prescribed that the method to ensure uniform application of laws by the courts shall be regulated by law. By presenting the European standards and the ECtHR jurisprudence in the field of the uniform application of the law and the harmonisation of case law, it illuminated threats that may arise if this issue is not adequately addressed and recommended a proposal for improvement regarding this part of the draft amendments. The Venice Commission welcomed the intention to have the Judicial Academy as the sole gatekeeper to the judiciary in order to strengthen and preserve the high level of professionalism, but at the same time it advised to provide the Judicial Academy with a firm status within the Constitution for the purpose of protecting the Academy from possible undue influence.

One of the most important novelties of the draft amendments was the removal of the three-year probation period for judges and deputy prosecutors. By the abolishment of the trial period for judges and deputy prosecutors elected for the first time on a judicial function, the constitutional principle of the permanent tenure of office would no longer have any exception prescribed in the current Constitution thus fulfilling the recommendations of the Venice Commission from previous opinions. Following the 2007 Opinion on the Constitution of Serbia where the Venice Commission commented that it would be preferable to include in the Constitution the grounds for the dismissal of judges instead of leaving these to the law, the draft amendments specified the reasons for the dismissal of judges and prosecutors[25]. However, the Venice Commission assessed these provisions to be unsatisfactory and vague, especially the reason for dismissal based on the "incompetence", so recommended their enhancement.[26]

The greatest attention of the Venice Commission has been paid to the issues regarding the High Judicial Council and the High Prosecutorial Council due to the fact that according to the draft amendments, the

[25] Amendment provides for four reasons for a judge's dismissal: 1) being sentenced to at least six months' imprisonment; 2) committing a crime that makes the person unworthy of judgeship; 3) performing judicial functions incompetently, and 4) having committed a serious disciplinary offence.

[26] The same comment applies for the public prosecutors.

election and the dismissal process of judges, court presidents and deputy public prosecutors are completely assigned to these independent bodies and no longer involve the National Assembly. It was prescribed that the High Judicial Council shall have ten members: five judges elected by their peers and five prominent lawyers elected by the National Assembly by a three-fifths majority, with exclusion of all *ex officio* members. Two anti-deadlock mechanism had been proposed. Namely, in case all five members-prominent lawyers are not all elected by a three-fifths majority vote of all deputies, the remaining members would be elected within the next ten days by a five-ninth majority and if the requested majority is not achieved, the remaining members would be elected, from among the proposed candidates, by a commission comprised of the President of the National Assembly, the President of the Constitutional Court, the President of the Supreme Court of Serbia, the Supreme Public Prosecutor of Serbia and the Ombudsman, by majority vote. The Venice Commission concluded that the proposed method of election is not suitable to ensure pluralism within the High Judicial Council since the second round provides that a 5/9th majority which is a low threshold and often at disposal of the government may elect all five members. In addition, it presented to Serbian authorities four options which in its view would be appropriate solutions. The first option was to provide a proportional electoral system that would ensure the minority's right in the Assembly to elect members. The second option was to assign to an outside body, such as the Bar or the law faculties, the task to elect members. The next option was to increase the number of judicial members appointed by their peers while the fourth one was to increase the required majority in the Parliament and if it is not reached then the five-member commission would choose the members from among the candidates who originally applied with the National Assembly. Finding a right deblocking mechanism has proved also, within the experience of the Venice Commission, to be one of the most difficult tasks. It could be seen from the Montenegro's example, where the election procedure of the main judiciary positions with provided anti-deadlock mechanism, even though recommended and approved by the international community, did not bring the expected results.[27] On the

[27] According to 2013 Amendments to the Constitution of Montenegro the National Assembly shall elect and dismiss the judges of the Constitutional Court, the Supreme State Prosecutor and four members of the Judicial Council from amongst the renowned lawyers with the two third majority vote in the first round of voting and the three fifths majority of all MPS in the second round of voting no earlier than one month following the first round.

contrary, the fact that the new members of the Judicial Council and the new Supreme State Prosecutor could not be elected due to lack of required majority in the Assembly jeopardised the functioning of the entire judiciary. As a way of ensuring the continuity of the functioning of the High Judicial Council, the Serbian draft amendments proposed the introduction of a provision according to which in case the High Judicial Council does not make a decision in matters under its jurisdiction within 30 days, the term of office of all members of the High Judicial Council shall cease. The Venice Commission expressed some doubts about this solution considering that it could lead to hastened decision-making or frequent dissolutions of the High Judicial Council, so recommended either its deletion or providing details as to the conditions for dissolution. As regards the President of the High Judicial Council, the Venice Commission suggested to reconsider the rule that the chair of the council come from the non-judicial members, having in mind the even number of the members in the proposed composition of the High Judicial Council.

In respect of the High Prosecutorial Council, the Venice Commission concluded that the proposed composition, according to which out of eleven members four are deputy public prosecutors elected by public prosecutors and deputy public prosecutors and five are prominent lawyers elected by the National Assembly plus the Supreme Public Prosecutor and the Minister of Justice, is not completely satisfactory and that a better solution has to be found to ensure pluralism in the Council. As regards the Public Prosecutor's Office, the Venice Commission repeated that the European standards in this field are still in *statu nascendi* and that regulations on the prosecution service differ much more between countries than regulations on courts. Furthermore, a distinction between the independence of judges and that of prosecutors was analysed, with its system of hierarchic subordination, a topic which was already discussed above. According to the draft amendments, both the Supreme Public Prosecutor and the public prosecutors, i.e. the heads of prosecutors' offices, are responsible to Parliament and are elected and dismissed by the Parliament. The Venice Commission noted that this solution is acceptable only for the Supreme Public Prosecutor, who is responsible for the overall law-enforcement policy and that other prosecutors should have no link to the National Assembly. As for the election of the Supreme Public Prosecutor, the Venice Commission recommended that the general prosecutor be elected by a qualified majority with an anti-deadlock mechanism envisaged and that this was preferable to having a longer, but non-renewable, term. At the end, the Venice Commission offered its

expertise in the process of drafting the secondary legislation concluding that the practical impact of the draft Amendments will depend, to a large extent, on their quality.

The draft Amendments were revised according to the Opinion of the Venice Commission. The last adjustment to the text was done by the Serbian authorities after the new round of public consultations with professional associations and civil society organisations. The final document was published on 15 October 2018 and sent to the Venice Commission for assessment.[28]

The Venice Commission, on 22 October 2018, published the Secretariat Memorandum on the compatibility of the draft Amendments to the Constitutional Provisions on the Judiciary as submitted by the Ministry of Justice of Serbia on 12 October 2018 with the Venice Commission's Opinion on the draft Amendments to the Constitutional Provisions on the Judiciary.[29] In the Memorandum, it was concluded that the recommendations formulated by the Venice Commission in its opinion were followed by the Serbian authorities in the final draft Amendments to the Constitutional Provisions on the Judiciary. The Memorandum contains the detailed analysis of the implementation of the Venice Commission's recommendations in the submitted document. As regards the recommendation concerning the composition of the High Judicial Council, the Venice Commission acknowledged that the Serbian authorities elected the fourth option proposed in the Opinion. Namely, the requested parliamentary majority for the election of the members of High Judicial Council from the category of prominent lawyers has been increased from 3/5th to 2/3rd in the first round while the second round has been taken out. The commission comprised of the President of the National Assembly, the President of the Constitutional Court, the President of the Supreme Court of Serbia, the Supreme Public Prosecutor of Serbia and the Ombudsman is kept as an anti-deadlock mechanism. The recommendation was accepted also regarding the composition of the High Prosecutorial Council. When it comes to the dissolution of the High Judicial Council, it was assessed that the text is in

[28] Venice Commission, VFL-TRG\92018)053, Draft Amendments to the Constitution of the Republic of Serbia.

[29] Venice Commission, CDL-AD(2018)023, Secretariat Memorandum on the compatibility of the draft Amendments to the Constitutional Provisions on the Judiciary as submitted by the Ministry of Justice of Serbia on 12 October 2018 (CDL-REF(2018)053) with the Venice Commission's Opinion on the draft Amendments to the Constitutional Provisions on the Judiciary (CDL-AD(2018)011).

line with the recommendation to tighten the conditions for its dissolution, as it lists the issues on which decisions need to be rendered and increases the period of time for the dissolution of the High Judicial Council if a decision on an issue falling into the list is not made. As the text provides more details and precision with regard to the disciplinary responsibility and dismissal of both judges and prosecutors, this recommendation was fulfilled as well. Regarding the provisions regulating the method of ensuring the uniform application of laws, the new text stating "a judge shall be independent and shall rule in accordance with the Constitution, ratified international treaties, laws and other general acts, taking into account the case law" is in line with the recommendation of the Venice Commission. According to the final draft Amendments, the public prosecutors are no longer accountable to the National Assembly and are elected by the High Prosecutorial Council, as recommended. A separate article regarding the Judicial Academy and its status as an autonomous institution was introduced following the Venice Commission's recommendation.

The official procedure of the constitutional revision commenced at the end of 2018. The Government of the Republic Serbia established the Proposal for the amendment of the Constitution of the Republic of Serbia and submitted it to the National Assembly on 30 November 2018. This Proposal, according to the relevant rules, contained only reasons explaining why the revision of the current Constitution is needed in the part of the judiciary, and not a text of the draft amendments. At its sitting, held on 14 June 2019, the Committee on Constitutional and Legislative Issues of the National Assembly discussed this Proposal and established that the Proposal had been submitted by a proposer authorised by the Constitution and that it had been submitted in a prescribed form, which the Committee reported to the National Assembly where the official process will now be continued. If the National Assembly vote in favour of the constitutional revision by the requested two-third majority of the total number of deputies, the Committee on Constitutional and Legislative Issues will be in charge of preparing the final act on amending the Constitution which further has to be adopted again by a two-third majority of the total number of deputies and verified by a referendum. The Committee on Constitutional and Legislative issues, as the competent committee, will start drafting the proposal for Constitutional amendments, taking as a starting point the draft that the Ministry of Justice harmonised with the Opinion of the Venice Commission. Due to the boycotting of the Assembly's sessions by the opposition and the parliamentary election that was supposed to be held in

April 2020, but has now been delayed due to the COVID-19 pandemic, the whole process of the constitutional revision is put on hold. In any case, we hope that the great effort invested by both the Serbian authorities and the Venice Commission in drafting the constitutional amendments from October 2018 will eventually result in the adoption of a high-quality document as a base for further reform steps in the area of the judiciary. The aim is to obtain a Constitution which will ensure a proper balance between judicial independence and accountability and the need to respect the citizen's right to have access to judicial services of good quality.[30]

Conclusion

It is obvious that the Venice Commission "is today no longer an institutional structure devoted to bringing the countries of Central and Eastern Europe (back) into the liberal democratic told",[31] but rather "a repository and dispensary of liberal democratic constitutional principles and values".[32] In its evolution, during the first 30 years of its life, the Commission has come very close to the status of the guardian of the European constitutional heritage, based on three cornerstone principles – democracy, human rights and the Rule of Law. In that sense, the Commission is one of the most influential factors of the internationalisation of constitutional law.

The influence of the Commission in the process of bringing about the Constitution of Serbia of 2006 was rather limited due to the dominantly vague political circumstances in the period of the revival of the independence. This is one of the key reasons for which the Serbian Constitution has given an inadequate answer to the question of the independence of the judiciary.

Unfortunately, in the part of the domestic constitutional law doctrine and in some non-governmental organisations, the perception of the Commission as an illegitimate factor involved in the formal constitutional reform process still remains. This raises concerns about the positive effects

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[30] Having in mind the importance of the alignment of the subsequent judicial legislation with new constitutional provisions, four working groups were already established in January 2019 by the Ministry of Justice. Their task is, on the one hand, to harmonize the judicial legislation with the future amendments to the Constitution, and, on the other hand, to improve current legislative solutions where it is recognized as necessary and welcoming. The Venice Commission will be consulted on this legislation and its opinion will be valuable for taking next steps.

[31] Maartje De Visser, "A Critical Assesment of the Role of the Venice Commission in Processes of Domestic Constitutional Reform", *The American Journal of Comparative Law,* Vol. 63, 4/2015, p. 1008.

[32] *Ibidem.*

of the Commission's influence on the constitutional reform process in Serbia. It is evident that the success on the road of the future constitutional reform will depend on finding a balance between abstractly understood European values and principles and their normative elaboration that will correspond to specific socio-political circumstances of the country. After all, "a flexible approach" and "finding a balance" are perhaps the main messages the Commission has been sending to national states over the past 30 years. After all, the essence of modern constitutional democracy lies in those words.

Jörg Polakiewicz[1]

The Accession by Kosovo to the Venice Commission

I started working the Council of Europe in 1993. Gianni Buquicchio, then secretary to the newly created European Commission for Democracy Through Law (Venice Commission) was still also head of the central division in the Directorate for Legal Affairs. The so-called central division was in reality the organisation's legal service. It was thus Gianni Buquicchio who introduced me to the law and procedures of the Council of Europe. Gianni Buquicchio struck me immediately as an extremely knowledgeable but also very pragmatic lawyer who was able to identify simple solutions to complex problems. In a certain sense, he personified the famous French dictum "*un bon conseiller juridique doit trouver s'il peut, une solution pour chaque difficulté et non pas une difficulté pour chaque solution*."[2]

For a couple of years, I was working both for the central division and the secretariat of the Venice Commission which at the time was not a separate entity. The situation became however impractical once the Venice Commission's activities increased and it acquired its own posts and positions. After having occupied various functions in the Council of Europe secretariat, I was appointed Director of Legal Advice and Public International Law (Legal Adviser) on 1 October 2013.

Being relatively new in the post, I was confronted, in the spring of 2014, with a legally and politically complex question regarding the Venice Commission. On 24 April 2014, the Minister of Foreign Affairs of Kosovo requested membership in the Enlarged Agreement establishing the European Commission for Democracy through Law. In his letter addressed the Secretary General of the Council of Europe, Mr Enver Hoxhaj argued that membership in the Venice Commission would be a useful tool for ensuring that Kosovo will be successfully undertaking and implementing the ongoing constitutional and electoral reforms. Like for other new

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[1] Former member of the Secretariat of the Venice Commission. This contribution was written in a strictly personal capacity and does not necessarily reflect the official position of the Council of Europe.

[2] G. Guillaume 'Droit international et action diplomatique. Le cas de la France' 2 EJIL (1991) 136 (145).

democracies, membership in the Venice Commission was a strong asset and pillar in strengthening new democratic structures through continuous reform in line with European standards.

The modalities of accession by new members are defined in Article 2(5) of the revised Statute of the Venice Commission:

> "*5. The Committee of Ministers may, by the majority stipulated in Article 20.d of the Statute of the Council of Europe, invite any non-member State of the Council of Europe to join the enlarged agreement. Members appointed by non-member States of the Council of Europe shall not be entitled to vote on questions raised by the statutory bodies of the Council of Europe.*"

At the time, various non-members of the Council of Europe had already become full members of the Enlarged Agreement (Algeria, Brazil, Chile, Israel, Kazakhstan, Korea, Kyrgyzstan, Mexico, Morocco, Peru, Tunisia and the United States of America). Under the terms of the former Statute, Argentina, Canada, the Holy See, Japan and Uruguay had been admitted as observers and Belarus as an associate member. Observer or associate member status were however no options for Kosovo, whose Foreign Minister had clearly formulated a request for full membership.

What had been a straightforward procedure for other non-members of the Council of Europe, was bound to raise complex legal and political issues in the case of Kosovo. In spring 2014, a majority of Council of Europe member States had recognised the independence of Kosovo. There were however also several member States who opposed this independence for various reasons.

The legal implications of Kosovo becoming a member of the Venice Commission thus had to be addressed. Legal implications arose in at least three respects, namely

a. regarding the issue of implied recognition of Kosovo as a state;
b. the obligations of other members of the Venice Commission vis-à-vis Kosovo within the Venice Commission; and
c. the rights and obligations for Kosovo as a member of the Venice Commission.

Under the above-mentioned Article 2(5) of the Commission's Statute only a "non-member State" may become a member of the Venice Commission. UN Security Council resolution 1244 (1999) which was still in force had reaffirmed "*the commitment of all member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia.*" In its advisory opinion of 22 July 2010, the International Court of Justice (ICJ) considered the interim regime in Kosovo introduced by resolution 1244, observing that it did not

itself determine what the eventual status of Kosovo should be.[3] According to the ICJ, nothing in the resolution prohibited Kosovo from making a declaration of independence, given that the authors of the declaration did not act in their capacity as the Assembly of the Provisional Institutions of Self-Government.[4] In consequence, the ICJ concluded that declaration of independence did not violate resolution 1244 or the Kosovo's constitutional framework. However, neither the UN Security Council nor the ICJ had pronounced themselves directly on Kosovo's statehood. In the end, this is a question on which recognising and non-recognising states remain divided.

A central question was therefore whether recognition of Kosovo could be implied on behalf of the Council of Europe or individual states from a Committee of Ministers' decision to invite Kosovo to join the Enlarged Agreement on the Venice Commission. Legally speaking, recognition as a state is usually a unilateral act of a state but may also be included in international agreements. It may be express or implied, but one should be careful not to deduce recognition from acts which do not clearly show an intention to that effect. In principle it is not for international organisations such as the Council of Europe to recognise entities as states. This is the prerogative of sovereign states.

Recognition as a state results from an individual act of a state, the perfect example being the establishment of diplomatic relations. Admission to membership in the Venice Commission on the other hand is a collective act within the legal framework of the Council of Europe. Such collective acts in principle do not affect the position of individual member States.

In that context, a distinction might, however, be made between states voting in favour or against the decision to invite Kosovo to join the Venice Commission. State practice and legal doctrine assert that no recognition can be implied from admission to an international organisation in respect of those opposing admission, even less so from opposing votes to admission to an Enlarged Agreement which, from a formal, statutory point of view, is an activity of the organization in the same way as other programme activities, except only that such an agreement has its own budget and working methods. Recognition might however possibly be implied from a vote in favour of accession. Such a vote could be considered to reflect the assessment that

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[3] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, 403 (paras. 110-114).
[4] *Ibidem,* paras 118-121.

Kosovo fulfils the criteria under Article 2(5) of the Venice Commission's Statute of being a "*non-member State*" of the Council of Europe, as well as other provisions in the Statute which consistently speak of "*member States*". Individual member States may of course make declarations upon adoption of the decision to invite Kosovo to accede, confirming their position of non-recognition which would be included in the records of the Committee of Ministers.

The second legal issue regards the obligations of other members of the Venice Commission vis-à-vis Kosovo. Following Kosovo's accession, all member States, regardless of their vote, would be under an obligation to consider Kosovo as a state for the purposes of the practical work of the Venice Commission. Considering the preamble of the Venice Commission's Statute, Kosovo would participate on an "*equal footing*" with all other members.

Since the Venice Commission is composed of "*independent experts*" serving in their "*individual capacity*" without "*any instructions*" (Article 2(1) and 2(2) of the Statute), it is difficult to see that the practical work of the Venice Commission would affect the individual position of the member States. Equally, it is difficult to argue that the individual position of the member States as to the recognition of Kosovo as a state would negatively affect the work of the independent experts within the Venice Commission, and thus its good functioning.

The third issue in the context of Kosovo's accession concerned the rights and obligations for Kosovo once it was admitted as a full member of the Venice Commission. Under the Statute, Kosovo would be entitled to appoint one expert member and one substitute (Article 2(3) of the Statute) and to request an opinion by the Venice Commission within the mandate of the latter (Article 3(2) of the Statute). This competence would not differ from that of an international organisation or body participating in the work of the Commission (Article 3(2) of the Statute). While Kosovo could request an opinion on a matter regarding another member State, its request, like that of any other non-member of the organisation, would have to be submitted to the Committee of Ministers for decision (where Kosovo does not participate) if the state concerned opposes the request (Article 3(2) of the Statute).

Furthermore, Kosovo would not be entitled to vote on Committee of Ministers' decisions to invite non-member States to join the Venice Commission, nor on "*questions raised by the statutory bodies of the Council of Europe*" (Article 2(5) of the Statute). Pursuant to Article 9(1) of the Statute, Kosovo would also be excluded from the process of amending the Statute

of the Venice Commission. These limitations would, however, result not so much from a particular status of Kosovo within the Venice Commission, but from its status as a non-member of the Council of Europe.

Finally, an additional difficulty arose in respect of the footnote that had been used in the Council of Europe since 2008. All documents referring to Kosovo contained a footnote stating that "*all reference to Kosovo, whether to the territory, institutions or population, in this text shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.*" As regards cooperation projects financed by European Union, a slightly amended footnote was used since 2012, the text of which had been agreed between Belgrade and Pristina: "… *this designation is without prejudice to positions on status, and is in line with UNSCR 1244/99 and the ICJ Opinion on the Kosovo declaration of independence.*" The use of the existing footnotes had been introduced after long and complex discussions; it could certainly not be changed without the Committee of Ministers' endorsement.

Since June 2013, Kosovo was already a full member of another partial agreement of the Council of Europe, the Council of Europe Development Bank (CEB).[5] When acceding to the CEB, there has been no explicit decision to abandon the footnote, but the members unambiguously expressed their wish to proceed in that way by adopting the resolution inviting Kosovo to accede without the footnote, using the denomination "*Kosovo*" (without any footnote).

The CEB enjoys a higher degree of institutional autonomy than any other partial or enlarged agreement of the Council of Europe. It has its own governing bodies, the governing board and administrative council. Its financial services are headed by a governor who is the appointing authority in staff matters and conducts day-to-day business under control of administrative council. On the other hand, the Venice Commission and the CEB are both agreements within the meaning of Statutory Resolution (93(28) on partial and enlarged agreements, thus enjoying a certain autonomy while being part of the Council of Europe and being administered under its supreme authority. While introducing a certain difference in treatment within the same organisation, the CEB's precedent had not led to any insurmountable practical difficulties.

I cannot reveal any details about discussions in the Committee of Ministers since those are strictly confidential (see Article 21(a)(i) of the

[5] Resolution 405(2013) of the CEB's Governing Board, adopted on 14 June 2013 in St Julian's (Malta).

Statute). In the end, the following decision was adopted at the 1202nd meeting of the Ministers' Deputies (10-11 June 2014):

"*The Deputies*

Noting that Kosovo's membership of the Venice Commission is without prejudice to the positions of individual Council of Europe member States on the status of Kosovo*,*

1. agreed to the request by Kosovo[6] to join the Enlarged Agreement establishing the European Commission for Democracy through Law (Venice Commission) and invited Kosovo* to appoint a member to sit on the Commission;*

2. decided that the current practice of using a footnote for references to Kosovo should stop with immediate effect within the Venice Commission.*"

I am happy to have contributed, to a very limited extent, to the successful outcome of this procedure. The solution eventually found dispelled any doubts about the legal consequences of the Committee of Ministers' decision for the individual positions of member states that did not recognise Kosovo as a state. The clause in question was in fact based on the formulation used in the context of Kosovo's accession to the CEB (and also the European Bank for Reconstruction and Development). It is a good example of a pragmatic solution for a difficult legal issue, in the spirit of the above-mentioned French dictum.

[6] *All reference to Kosovo, whether to the territory, institutions or population, in this text shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.

Qerim Qerimi[1]

The Normative Power of Dialogue and Debate about Democracy through Law: Empirical Expressions of the Venice Commission's Role in Shaping Transnational Constitutional Justice

Introduction

This chapter seeks to explore the normative nature of the work of the European Commission for Democracy through Law (The Venice Commission). In so doing, it examines a number of select cases from its practice, within the particular context of constitutional changes and amendments. The main thrust of the contribution could be its attempt at obtaining a vision about the level of observance or compliance with the Commission's Opinions and the body of reasons that motivate positive reaction.

The first part will set the theoretical landscape defining the present inquiry. The second part then offers an overview of the nature, formal and operational, of the Venice Commission. The third and final part engages in more of an empirical scrutiny of the select cases from the practice of Venice Commission (relating to constitutional amendments), with an aim of discerning and demonstrating instances that reveal its unique normative power, emerging from a distinct format of expert-based dialogue and debate about democracy through law. It ends with concluding remarks.

I. Theoretical Considerations: Global Networks and the Venice Commission

In *A New World Order*, Anne-Marie Slaughter speaks of the "globalisation paradox", which she describes as "the need for global institutions to solve collective problems that can only be addressed on a global scale" juxtaposed with "the infeasibility and undesirability" of world government and its concomitant threat to individual liberty.[2] Slaughter's solution, same as that

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[1] Member of the Venice Commission in respect of Kosovo.

[2] Anne-Marie Sluaghter, *A New World Order* (Princeton University Press 2005).

of her many colleagues belonging to the neo-liberal tradition, is governance via transnational networks of national government actors. This is both a descriptive and a prescriptive proposition and a plan for a new world order. This theory can be dubbed as the global network theory. This qualification stems from the very composite elements of its content, which are the growing array of international networks of government officials. Slaughter's fundamental argument is that the relationships embedded in these networks provide an emerging foundation for a new global order, addressing what she calls the "trilemma" of global governance; in other words, the "need [for] global rules without centralized power but with government actors who can be held to account through a variety of political mechanisms,"[3] hence:

1. global rules;
2. decentralized power; and
3. governmental accountability.

Although her thesis is essentially informed by Robert Keohane and Joseph Nye's work on complex interdependence and a neoliberal vision and value structure,[4] Slaughter also engages in a broader constructivist view of world order. Part of her descriptive and prescriptive plan for a new world order is the concept of "disaggregated state" (*i.e.*, the idea that governments are "aggregations of distinct institutions with separate roles and capacities") and the role of international networks as forming its epicentre. The disaggregated state assumption is, in her view, needed because "the analytical lens of the unitary state obscures the very existence of these different government institutions".[5] By way of a wide array of examples, Slaughter seeks to portray a reality composed of an increasing number of governmental networks. She provides examples of a variety of networks that link such nationally-constituted bodies as regulators, judges, legislatures, firms, officers, political-military planners, and politicians.

While her work provides an intriguing examination of the expanding "universe" of international networks and her thesis is presented with abundant empirical evidence, still Slaughter's contribution is defined by governmental exclusivity. Hers is a view of international networks of government officials, unlike the Venice Commission's unique trans-European exclusively expert-based foundations. A missing piece in that broader picture

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[3] *Ibidem.*, p. 10.
[4] Robert O. Keohane and Joseph S. Nye, *Power and Interdependence: World Politics in Transition* (Little, Brown & Co. 1977).
[5] Slaughter (n. 2), p. 13.

of global networking is transnational non-governmental expertise, which far from being isolated, interacts with an ever-growing magnitude with national authorities, as well as with other international intergovernmental or supranational bodies. It is precisely this dimension of a continuing process of dialogue and debate between international experts and national authorities, hence the interaction between the European legal space of a growing global character and national legal orders, that characterize the distinct working method of the Venice Commission and its constitutional assistance project.

A truly global actor, not only by measure of its expanding geographic scope, the novelty presented by the Venice Commission is its actorness in transnational constitution-making in the contemporary era, namely the Commission as a composite modality of contemporary constitution-making at a transnational level.[6] In addition, it represents a novel transnational mechanism that has developed varying powers to support and strengthen constitutional checks and balances. A third distinctive feature, as now suggested, is the exemplary role of its interaction as a transnational expert body with other international actors and with national authorities through a highly distinct phenomenon where "constitutional advice" gets transformed – even if incoherently and certainly imperfectly – into constitutional rule and principle, internalized by the interacting national authorities, through a process of voluntary dialogue and debate, which in turn is enhanced by the power of persuasion, authority and conviction.[7]

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[6] *Paul Craig, 'Transnational Constitution-Making: The Contribution of the Venice Commission on Law and Democracy' in Gregory Shaffer, Tom Ginsburg and Terence C. Halliday (eds), Constitution-Making and Transnational Legal Order (Cambridge University Press 2019), 185 (while evaluating the work of the Commission and its impact on transnational constitution-making, the author notes that "the Venice Commission* is not simply a transnational institution compelling states to comply with a set of norms from above. There is, in addition, a powerful recursive dynamic, whereby the local and national are brought to bear, influencing the elaboration of transnational norms such as opinions and guidelines"). *Even those that look at the work of the Commission from a more critical perspective acknowledge the Commission's rise into a "significant constitutional entrepreneur," whose contributions, in particular with regard to post-communist democracies, are "undeniable and praiseworthy". See Bogdan Iancu, 'Quod licet Jovi non licet bovi?*: The Venice Commission as Norm Entrepreneur' (2019) 11 *Hague Journal on the Rule of Law* 189. *The term "constitutional entrepreneur" is an adapted version of the notion of norm entrepreneurship coined by Cass Sunstein. Cass R. Sunstein, 'Social Norms and Social Roles' (1996) 96 Columbia Law Review 903.*

[7] See, e.g., Jeffrey Jowell, 'The Venice Commission: Disseminating Democracy Through Law' (2001) *Public Law* 675, 676 (noting that the Commission "cannot impose solutions, but nevertheless gives forthright opinions which it seeks actively to implement through dialogue and persuasion"). The dialogue-based process of work and the general acceptance of its outcome is emphasized clearly in this statement on the Commission's website: "The Commission does not seek to impose the solutions set out in its opinions. Rather, it adopts a non-directive approach **based on dialogue** and shares member States' experience

These three elements are the critical formal and operational facets of a transnational expert body that convey normative signals to the otherwise ordinary public and intellectual functions of dialogue and debate:

1. the power of persuasion would be a by-product of both the institution's independent status and the substantive qualities of the method, sources and structure of the work;[8]
2. the authority would emanate not only from its formal source of foundation and status, but also the consolidated heritage inherent to a body personifying and promoting universal values of the rule of law, human rights and democracy;[9]
3. conviction would be the ultimate act, undertaken by national authorities, to effectuate the ensuing result of these soft-power signals into *hard* law-making, at least partly because of the preceding acts of persuasion and authority and partly because of the voluntary engagement in dialogue and debate through formal requests for advice, where a powerful source of commitment resides.

This proposed three-element explanatory scheme intends to provide at least a basic framework for discussion about the normative flow of events at the intersection between the Venice Commission and national authorities in legal and constitution-making processes. Publicity could be added as a complementary element, although the follow-up mechanism of compliance could be further strengthened.

At a more formal and specific level, one could distinguish at least four material sources constantly promoted and utilized by the Venice Commission, which can provide further rationale as to the expectations for, and indeed a large measure of, compliance with the Commission's Opinions.

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and practices. For this reason, a working group visits the country concerned to meet the various stakeholders and to assess the situation as objectively as possible. The authorities are also able to submit comments on the draft opinions to the Commission. The opinions prepared are **generally heeded** by the countries concerned" (emphasis added).

[8] See Valentina Volpe, 'Drafting Counter-Majoritarian Democracy: The Venice Commission's Constitutional Assistance' (2016) 76 *Heidelberg Journal of International Law* 812, 819 (stating that "Over the years, the Venice Commission has been able to build the kind of 'reputational authority' – of which professional independence is an essential component – that advisory bodies need in order to exert a persuasive influence on national public powers.).

[9] *Ibidem.*, p. 819 ("As a matter of fact, state authorities trusted, and continue to trust, the Venice Commission (see the increasing number of requests for opinions from both CoE and extra CoE countries) and this confidence, rooted in the early years of the Eastern European democratic transition, is essential for further increasing the influence of the Commission's constitutional assistance in a sort of virtuous circle").

These refer to:

1. the primacy of international law and
2. respect for the European Convention on Human Rights (hereinafter, "ECHR") standards and ensuing the European Court for Human Rights (hereinafter, "ECtHR") case-law as "externally rooted limits for national democracies"[10] and in some sense also internal sources of obligations, on one hand, and to
3. checks and balances and
4. constraints on direct democracy, as internally rooted limits, on the other.[11]

As put by an author, "All these elements, in line with a European historically acquired distrust towards possible abuse of democratic popular sovereignty, actually operate as a '*check*' on political power at the constitutional level and help define a particular counter-majoritarian model of democracy which characterizes the Venice Commission's constitutional assistance".[12]

Looking at the normative framework and operation in practice of the Commission would significantly support a more complete comprehension of the scale of legitimacy and degree of compliance with the Commission's results or recommendations. This is the subject of the next section.

II. The Work and Operation of the Venice Commission

1. Formal Structure

The Statute of the Venice Commission lays down its constitutional foundations and governing framework. The origins of the current Statute can be traced back to its predecessor act, Resolution 90(6), adopted by the Committee of Ministers on 10 May 1990 at its 86th session.[13] This decision, taken at the Conference for the constitution of the Commission for Democracy through Law (Venice, 19–20 January 1990) conceived of the Commission as a transitional body with a two-year mandate and, formally and geographically, confined within the boundaries of Council of Europe (hereinafter, "CoE") member States only. The Commission was therefore accessible by, or at the service of, the CoE member States only, and was established as a provisional body.

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[10] *Ibidem.,* p. 822.
[11] *Ibidem.*
[12] *Ibidem.*
[13] The Council of Europe's Committee of Ministers established the Venice Commission with Res. 90(6) adopted May 10, 1990, which also contained the original statute of the Venice Commission.

The present (revised) Statute modifies this conception, recognizing the Commission as a body of unlimited duration and enabling states that are not members of the CoE to become members. As a consequence of this change, at the time of writing, the Commission numbers 62 member States, with Canada being the last to join. It comprises the 47 CoE member States, plus 15 other non-CoE member States. This process of geographic and numerical expansion has seen not only the inclusion of non-CoE European countries, but also countries from Africa, North and South America, and Asia. The currently applicable revised Statute (hereinafter, "Statute" or "revised Statute") was adopted by the CoE Committee of Ministers on 21 February 2002.[14]

The Statute defines the Commission as an independent consultative body which cooperates with the member States of the CoE, as well as with interested non-member States and international bodies and organizations. It characterizes the Commission's specific field of action as encompassing "guarantees offered by law in the service of democracy".[15]

There are three underlying objectives set forth in the Statute:

1. to strengthen the understanding of the legal systems of member States, aiming in particular to bring these legal systems or cultures closer together;
2. to promote the rule of law and democracy; and
3. to examine the deficiencies or problems encountered by the working of democratic institutions and their development.

In fulfilling these objectives, the Statute prescribes a number of specific areas to which the Commission will accord priority, namely:

a. the constitutional, legislative, and administrative principles and techniques which are in service of the efficiency of democratic institutions and the rule of law;
b. fundamental rights and freedoms, with an emphasis on those that relate to the participation of citizens in public life; and
c. the contribution of local and regional self-government to the development and strengthening of democracy.[16] The ultimate goal of the Venice Commission is to spread the values of rule of law, human rights, and democracy.[17]

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[14] Venice Commission, CDL(2002)027, Resolution(2002) 3 Adopting the Revised Statute of the European Commission for democracy through Law.
[15] *Ibidem.*, Article 1.
[16] *Ibidem.*
[17] *Ibidem.*, Article 1(3).

Article 2 of the Statute regulates the membership of the Venice Commission. It provides that the Commission shall be composed of "independent experts who have achieved eminence through their experience in democratic institutions or by their contribution to the enhancement of law and political science".[18] The members of the Commission serve in their individual capacity and "shall not receive or accept any instructions".[19]

The Venice Commission is empowered by the Statute to produce reports on its own initiative. Article 3(1) of the Statute stipulates that without prejudice to the competence of the organs of the CoE, the "Commission may carry out research on its own initiative and, where appropriate, may prepare studies and draft guidelines, laws and international agreements".[20] Any proposal from the Commission can then be discussed and adopted by the statutory organs of the CoE. Article 3(2) of the Statute lists the entities that can request an opinion from the Venice Commission:

> *[t]he Commission may supply, within its mandate, opinions upon request submitted by the Committee of Ministers, the Parliamentary Assembly, the Congress of Local and Regional Authorities of Europe, the Secretary General, or by a state or international organisation or body participating in the work of the Commission. Where an opinion is requested by a state on a matter regarding another state, the Commission shall inform the state concerned and, unless the two states are in agreement, submit the issue to the Committee of Ministers.*[21]

From this broad and diverse list of institutions or entities that can engage the expertise of the Venice Commission, in practice, most of the opinions are triggered by requests from a member State of the Commission.[22]

The Venice Commission's expertise can, in addition, be also engaged by a state that is not a member of the Commission by making a request to the Committee of Ministers.[23] The Commission can be assisted by non-member consultants, and it can also hold hearings or invite to participate in its work, on specific cases, any qualified persons or non-governmental organizations that are active in the fields of competence of the Commission and can help the Commission in the fulfilment of its objectives.[24]

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[18] *Ibidem.*, Article 2.
[19] *Ibidem.*
[20] *Ibidem.*, Article 3.
[21] *Ibidem.*, Article 3(2).
[22] Craig (n. 4), 163.
[23] Revised Statute (n. 12), Article 3(3).
[24] *Ibidem.*, Article 5.

2. Operation

Full membership in the Venice Commission was originally reserved exclusively to CoE member States. However, with the 2002 revised Statute, membership has been expanded: states that were not party to the CoE were allowed to become members of the Commission. Conceptually, the Statute, by allowing for membership of non-European states – subsequently followed by a marked increase of the Commission's activities in other regions of the world – created a unique international institutional structure, which aspired to give a universal dimension to its goals and activities. It therefore transformed the Commission from a regional body that sought to bring the post-communist Central and Eastern European bloc into the liberal democratic club, to a global institution with universal reach.

Formally and in relation to the CoE, this transformation falls under the notion of the "enlarged agreement" of the CoE, making the Venice Commission formally associated with the CoE (*i.e.*, necessarily comprising all CoE member States and open for full membership of non-CoE member States),[25] yet having an "independent character" and "flexible working methods".[26]

Notwithstanding the independent expert-based composition that the Statute bestows upon the Venice Commission, it nonetheless shares the same CoE core values of democracy, human rights, and the rule of law. Its service to such values is, however, distinct, flowing from its institutional structure and working methods.

As now suggested, although there are a number of entities and institutions authorized to request opinions from the Venice Commission, in reality – in most cases – opinions are requested from a member State of the Venice Commission. A member State may seek assistance in drafting a constitution or introducing changes thereto, or it may request assistance to address deficiencies in national laws. The reference may also be due to potential tension between different parties within the referring state, *i.e.*, the executive and legislature or the head of state and legislature, or between rival political parties. However, the request from the State Party essentially means a request from the legislature, the government, or the head of state.[27]

Since its inception in 1990, the services of the Venice Commission to advise and assist on constitutional reform projects have been engaged

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[25] Council of Europe, Statutory Resolution No. (93)28 on partial and enlarged agreements, adopted by the Committee of Ministers on 14 May 1993 at its 92nd Session.
[26] Revised Statute (n. 13), preamble.
[27] See generally Craig (n. 4), 163.

with an increased frequency by both European and non-European states, as observed from the opinions issued on individual countries.[28] The Commission's primary task of providing advice is discharged in the form of "legal opinions" on draft legislation or legislation already in force, including constitutional changes, which are submitted to it for examination. It also prepares and publishes studies and reports on topical issues, the number of such studies and reports having so far (at the time of writing) reached the number 142.[29] They have pertained to a diverse range of issues, as conditioned both by specific events of a particular period and substantive interests for the Commission's objectives, including topics from parliamentary immunity to self-determination and secession in constitutional law, and from preambles to constitutions to the principles on the use of digital technologies and elections.

In addition to the standard opinions and topical studies and reports, at the request of a country's constitutional court[30] or the European Court of Human Rights ("ECtHR"),[31] the Venice Commission can provide *amicus curiae* opinions on comparative constitutional and international law issues. The Commission can also issue *amicus ombud* opinions to Ombudsperson institutions, however principally on issues concerning the legislation that governs their work.[32]

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[28] Venice Commission, 'Documents by opinions and studies' www.venice.coe.int/WebForms/documents/by_opinion.aspx?v=all accessed 30 April 2020.

[29] Venice Commission, 'Studies (general or comparative)' www.venice.coe.int/WebForms/documents/by_opinion.aspx?v=studies accessed 30 April 2020.

[30] See, e.g., Venice Commission, CDL-AD(2011)041, *Amicus Curiae* Brief on the case Santiago Bryson de la Barra *et al.* (on crimes against humanity) for the Constitutional Court of Peru; CDL-AD (2015)016, *Amicus Curiae* Brief for the Constitutional Court of Georgia on the non *ultra petita* rule in criminal cases; CDL-AD(2016)015, Republic of Moldova – *Amicus Curiae* Brief for the Constitutional Court on the Right of Recourse by the State against Judges; CDL-AD(2016)036, Albania – *Amicus Curiae* Brief for the Constitutional Court on the Law on the Transitional Re-Evaluation of Judges and Prosecutors (The Vetting Law); CDL-AD(2017)002, Republic of Moldova – *Amicus Curiae* Brief for the Constitutional Court on the Criminal Liability of Judges; CDL-AD(2019)001, Ukraine – *Amicus Curiae* Brief on Separate Appeals against Rulings on Preventive Measures (Deprivation of Liberty) of First Instance Courts; CDL-AD(2019)034, Republic of Moldova – *Amicus Curiae* Brief for the Constitutional Court of the Republic of Moldova on the Amendments to the Law on the Prosecutor's Office.

[31] For a thorough presentation, see Gianni Buquicchio and Simona Granata-Menghini, 'The Interaction between the Venice Commission and the European Court of Human Rights: Anticipation, Consolidation, Coordination of Human Rights Protection in Europe' in Roberto Chenal, Iulia Antoanella Motoc, Linos-Alexandre Sicilianos and Robert Spano (eds), *Intersecting Views on National and International Human Rights Protection/Regards croises sur la protection nationale et internationale des droits de l'homme: Liber Amicorum Guido Raimondi* (Wolf Legal Publishers 2019).

[32] Venice Commission, 'The Commission's activities', www.venice.coe.int/WebForms/pages/?p=01_activities&lang=EN..

3. Impact

A body whose existence drew motivation from the iconic fall of the Berlin Wall and the communist regimes of Central and Eastern Europe, the Venice Commission became a catalyst or a "laboratory" for constitutional engineering and constitutional change across different jurisdictions on a trans-European – and increasingly global – scale. It aimed at generating a convergence of national constitutional approaches which it designed with the cardinal values of the rule of law, human rights, and democracy that it intended to personify and promote.

There has been no systematic survey to date to measure the impact of the Venice Commission in relation to the fulfilment of its statutory objectives. However, the Commission's *tour de force* would seem to come from the very fact of it being an independent institution that can draw on competent and wide-ranging legal expertise in order to proffer advice to member States concerning the compatibility of their constitutional and legal frameworks with the precepts of democracy, human rights, and the rule of law. Additionally, the structure of its membership, encompassing all member States of the CoE and beyond, helps secure a pluralistic approach that is sensitive to context and cultural distinctiveness.

While it might be impossible or indeed unrealistic to avoid instances of contestation with the content of particular opinions, as a measure of this one could look at the subsequent behaviour of the parties to whom the opinions are addressed (*i.e.*, whether the recommendations are implemented or not). There are, however, a number of other ways to assess its impact. For instance, effects of the Venice Commission opinions can be manifest in decisions taken by CoE bodies, including in particular by the ECtHR. The ECtHR has often relied on the Venice Commission in its published decisions – certainly, not as a source of directly applicable law, but as a source of normative and empirical guidance.

The Venice Commission is from time to time also invited by the ECtHR to submit *amicus curiae* opinions, thus gaining an even more direct impact. Upon their request, the Commission also submits *amicus* opinions to constitutional courts of its member States. To date, there are a total of 37 issued *amicus curiae* briefs.[33]

Probable influence could also be exerted on decisions of European Union institutions, as well as on the work of other international bodies and

[33] *Ibidem.*

organizations. One could also refer to the statements made by representatives from member States and international organizations delivered at the plenary sessions of the Commission or outside such sessions, as well as reactions from the media and civil society organizations, as an indicator of the Venice Commission's impact.

Empirically, however, at a *microcosmic* level, the more accurate method of obtaining a precise vision of the level of compliance would be a case-by-case comparative assessment made between the Commission's opinions and the constitutional amendments, laws or bylaws that are subject of the opinion, when adopted. While this might look an enterprise of some massive proportion, in some sense it should not be beyond the reach. And this can also be enhanced institutionally, be it from the Venice Commission or the Commission in partnership with the countries concerned or some other form of institutional arrangement.

In any event, given the space limitations for this contribution, it will generally serve its purpose and principal thesis of the factually normative nature of the Commission's opinions or its process of work that leads to normative outcomes, to assess at least a select number of particular examples. The first would be a 2016 Opinion on the Introduction of Amendments and Changes to the Constitution of Kyrgyzstan. In fact, this is a Joint Opinion issued by the Venice Commission and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR).[34] The specific recommendations made in the Opinion will be compared and contrasted with the actual constitutional provisions, as adopted, so as to assess the degree of compliance. In process, besides confirming the compliance, one could also note the terminology utilized to transmit the *message*. Other examples of constitutional amendments proposed will also be examined in light of the Commission's recommendations and their subsequent treatment by the requesting state. These will include cases from Albania (2018 and 1993), Georgia (2017), and Moldova (2017).

[34] Venice Commission, CDL-AD(2016)025, Kyrgyz Republic - Joint Opinion on the Draft Law "On Introduction of Amendments and Changes to the Constitution", hereinafter, Opinion on Kyrgyzstan.

III. Real-life normative role of the Venice Commission

1. Kyrgyz Republic

The Constitution of the Kyrgyz Republic, accepted by referendum on 27 June 2010, was amended on 28 December 2016.[35] These amendments were subject of examination by the Commission, which resulted in the Joint Opinion of 19 October 2016 (hereinafter, "2016 Opinion").[36] The changes and amendments sought concerned a wide range of issues, including constitutional values, hierarchy of norms and compliance with international human rights standards, the status and role of the Constitutional Chamber, the Supreme Court, the status of Judges and their independence, as well as specific aspects relating to the functioning of the executive and legislative branches and the balance of powers thereof.

An amendment with regard to the executive branch sought to revise Article 68(2) of the Constitution, providing that officials exercising the powers of the President in case of early termination of their mandate and pending the organization of early presidential elections may not run for the office of President in such elections. In the 2006 Opinion's view, this would constitute a restriction of the right of any person to stand for election, as guaranteed by Article 25(b) of the International Covenant on Civil and Political Rights (ICCPR), since "[a]ny restrictions on the right to stand for election must be justifiable based on objective and reasonable criteria to be laid down by law".[37] As such criteria were not apparent in this case, the drafters of the amendment were "**encouraged to delete** this limitation from Article 68(2) of the Constitution".[38] Indeed, the adopted version of the provision confirms that the proposed amendment has been deleted and it is not reflected in the text of the Constitution.[39]

The draft amendments also sought to change the procedure in cases of no confidence in the government. The proposed Article 85(4) would require a two-thirds majority of the total number of deputies of the *Jogorku Kenesh* (the Parliament of Kyrgyzstan) to pass, as opposed to a simple majority. The Opinion reasoned that this change, were it to take effect, could result

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[35] Constitution of the Kyrgyz Republic - reference is made to the English version text as published in the constituteproject.org, www.constituteproject.org/constitution/Kyrgyz_Republic_2016.pdf?lang=en.
[36] Opinion on Kyrgyzstan (n. 33).
[37] *Ibidem.*, para. 82.
[38] *Ibidem.* (emphasis added).
[39] Constitution of the Kyrgyz Republic (n. 34), Article 68.

in a situation where the government remains in power but is no longer supported by the majority in parliament, which could also have a serious impact on the ability of the government to carry out its responsibilities and to pass the laws needed to implement its policies.[40] The Opinion additionally supported its position by reference to other democratic countries, stating that the "qualified majority requirements is … not in line with the practice" in these countries, citing examples from Armenia, Bulgaria, Croatia, Estonia, and France.[41] The final recommendation was that "the simple majority requirement in Article 85(4) should be retained".[42] This majority was indeed retained. Article 85(4) of the Kyrgyzstan's Constitution reads: "The resolution on no confidence in the Government shall be adopted **by the majority** of the total number of deputies of the Jogorku Kenesh".[43]

As part of the proposed amendments, there was a reference to "special measures" that do not constitute discrimination in Article 16(1). With the proposed change, these special measures were to be allowed not only to further equal opportunities, but also to "ensure the highest values of the Kyrgyz Republic".[44] This meant that special measures could be imposed to advance these values, which include "love for the motherland," "honour and dignity," "state sovereignty," "unity of the people," but also "motherhood" and "fatherhood". The Opinion's reasoning has been that, generally, international standards do not object to the adoption of "special measures" in specific areas and under limited circumstances if they are not considered discriminatory. However, since "the potential practical consequences of this amendment are not clear, the vague formulation of a number of the values mentioned in Article 1 of the Constitution …could allow the Government to take a variety of measures, including potentially arbitrary ones, to pursue such values".[45] Therefore, it "**recommended to remove** the reference to 'highest values' from the amended Article 16(1)".[46] Comparing this with the relevant actual provision, once could observe full compliance with the "recommendation to remove" the proposed amendment. This provision in the Constitution now reads: "Special measures defined by law and aimed at ensuring equal opportunities for various social

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[40] Opinion on Kyrgyzstan (n. 33), para. 85.
[41] *Ibidem.*
[42] *Ibidem.*
[43] Constitution of the Kyrgyz Republic (n. 34), Article 85(4) (emphasis added).
[44] Opinion on Kyrgyzstan (n. 33), para. 100.
[45] *Ibidem.*
[46] *Ibidem.* (emphasis added).

groups in accordance with international commitments shall not be considered as discrimination".[47]

These are certainly select parts of an otherwise long list of recommendations, albeit very significant in terms of substance. One can observe the nature of recommendations, the language used, the material sources of reference and reasoning provided, as well as the subsequent behaviour of the State.

2. Albania

Observing other cases, the Albanian Constitution has been subject of relatively frequent amendments or proposed amendments, which have been referred to the Venice Commission for assessment and opinion. The last such initiative concerned draft constitutional amendments enabling the vetting of politicians. In its Opinion of December 2018, the Commission concluded that despite its legitimate aim in the current situation in Albania, which is that of removing offenders and their influence from high-profile governance and political life, the draft constitutional proposal for integrity control of politicians fails to provide appropriate guidance and the safeguards needed, even at the constitutional level, for such a large-scale, complex and sensitive process, with severe implications for the rights of those subject to it.[48] As it was submitted, the Commission considered that the vetting proposal lacked legal clarity and legal certainty, both as regards its intended scope, the grounds for ineligibility and loss of mandate, and its implementation mechanism. In many aspects, the vetting proposal was considered to raise issues of proportionality.[49]

The Commission also noted that it was not clear who was to carry out the vetting of public officials and election candidates and whether this will be done by a judicial or other independent body. Also, it was not clear whether any disqualification was to be permanent or limited in time. Additionally, no safeguards were proposed to avoid the risk that it will be used in a politically-biased or arbitrary manner.[50]

In its intended application to elected officials, the draft law was considered to not be in compliance with the Article 3 of the First Protocol to the ECHR, as the proposed new vetting ground (*i.e.*, having contacts with persons involved in organized crime) provided a very wide possibility to restrict the right to stand

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[47] Constitution of the Kyrgyz Republic (n. 34), Article 16(2).
[48] Venice Commission, CDL-AD(2018)034, Albania – Opinion on draft constitutional amendments enabling the vetting of politicians, para. 90.
[49] *Ibidem.*
[50] *Ibidem.*, para. 93.

in elections regardless of the nature of the "contacts".[51] Further, it did not provide for a court decision or decision by another independent body for the disenfranchisement and the restriction was not of a temporary nature. In this proposed form, it risked leading to yet more examples of abuse of power.[52] As a result of the identified deficiencies, the Parliament of Albania rejected the proposed constitutional amendments relating to the vetting of politicians.

Back in the relatively distant past of 1993, the Venice Commission was involved in assisting the Albanian authorities with regard to the part of the draft Constitution pertaining to human rights. Among the deficiencies identified in the draft, there was one concerning the prohibition of discrimination. The relevant Article 45 of the draft constitutional amendment provided that "All citizens are equal before the law. No-one may be discriminated against on the basis of **sex, race, religion, ethnicity, political opinion or parentage**".[53] The Commission noted that the list of grounds on which discrimination was prohibited diverged from Article 14 of the ECHR and considered it desirable to set forth a non-exhaustive list on the model of the ECHR.[54] It added that "At the very least, discrimination based on language or colour would have to be prohibited".[55] The Constitution of Albania was finally approved in 2008, significantly expanding the list of grounds on which discrimination was prohibited, bringing it in line with Article 14 of the ECHR. The new version of the non-discrimination provision reads: "No one may be unjustly discriminated against for reasons such as **gender, race, religion, ethnicity, language, political, religious or philosophical beliefs, economic condition, education, social status, or parentage**".[56]

3. Georgia

In 2017, Georgia put into motion a process of revising its Constitution. In June 2017, the Venice Commission adopted an Opinion on the draft revised Constitution of Georgia. Following the adoption of this Opinion, an amended version of the draft revised Constitution was submitted to the Parliament of Georgia, which adopted it at the second reading that same month. Another

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[51] *Ibidem*., para. 94.
[52] *Ibidem.*
[53] Venice Commission, CDL(1993)006, Draft Articles for the Constitution of Albania, Human Rights and Freedoms, (emphasis added).
[54] Venice Commission, CDL(1993)013, Working Party on the Chapter of the revised Albanian Constitution relating to Fundamental Rights, para. 29.
[55] *Ibidem.*
[56] Constitution of Albania of 1998 with amendments through 2012, wwww.constitute-project.org/constitution/Albania_2012.pdf?lang=en 9emphasis added).

Opinion was requested of the Venice Commission on the revised draft, as adopted by Parliament at the second reading. The second Opinion was adopted by the Commission in October 2017. Subsequent to this Opinion, the Georgian Parliament adopted the constitutional amendments.

With regard to Fundamental Rights, the draft Article concerning legitimate grounds for restriction of the freedom of faith, confession and conscience provided for a number of grounds that were not in line with the second paragraph of Article 9 of the ECHR. It provided: "These rights may be restricted only by law aiming at ensuring national security and public safety necessary for existence of a democratic society, preventing crime, administering justice or protecting the rights of others".[57] In its second Opinion of October 2017, the Commission noted that national security or administering justice are not legitimate aims in the sense of Article 9(2) ECHR, which is to be strictly interpreted, meaning that the legitimate aims in Article 9(2) ECHR may not be extended by way of interpretation to other notions.[58] More specifically on the national security issue, the Commission made reference to the case of *Nolan and K. v. Russia* (2009), in which case the ECtHR considered that the State cannot use the need to protect national security as the sole basis for restricting the exercise of the right of a person or a group of persons to manifest their religion.[59] Moreover, some other legitimate aims under Article 9(2) ECHR were not included in the new draft text such as "health and morals" and "public order".[60] Considering that the grounds for restriction are subjected to a strict and limitative interpretation, the Commission "**recommended to redraft Article 16(3)** in the light of Article 9(2) ECHR".[61] The revised version of this provision (now Article 16(2)), as adopted by the Parliament of Georgia, reads:

> *These rights may be restricted only in accordance with law for ensuring public safety, or for protecting health or the rights of others, insofar as is necessary in a democratic society.*[62]

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[57] Venice Commission, CDL-REF(2017)039, Georgia – Draft Revised Constitution, as Adopted by the Parliament of Georgia at the Second Reading on 23 June 2017, Article 16(3).
[58] Venice Commission, CDL-AD(2017)023, Georgia – Opinion on the Draft Revised Constitution as Adopted by the Parliament of Georgia at the Second Reading on 23 June 2017, para. 39.
[59] *Ibidem.*
[60] *Ibidem.*
[61] *Ibidem.* (emphasis added).
[62] Constitution of Georgia, Article 16(2), https://matsne.gov.ge/en/document/

In its second Opinion, the Commission also observed that the requirement of full consensus of the plenum of the Constitutional Court when deciding on constitutionality of the conducted elections and the delivery of the judgment of the Constitutional Court no later than seven days from the date of official publication of election results is problematic.[63] The proposed constitutional amendment read: "Judgment on unconstitutionality of the conducted elections is made by full consensus of the plenum of the Constitutional Court no later than seven days from the date of official publication of election results".[64] The Commission recommended its replacement by a requirement of ordinary majority. The adopted version of the constitutional amendments reflects this recommendation.

Unlike the adoption of these recommended changes, another recommended solution by the Commission regarding the election of Supreme Court judges was not reflected in the Constitution. The Commission considered that the appointment of Supreme Court judges directly by the High Council of Justice without the involvement of Parliament, or their appointment by the President (who has otherwise limited powers in the proposed parliamentary system) upon proposal by the High Council of Justice, would better guarantee the independence of those judges.[65] The adopted constitutional version retained their election by Parliament upon nomination by the High Council of Justice.[66] It should be noted here that the Commission did not make any express "recommendation," albeit sufficiently suggesting that the option it preferred "would better guarantee the independence of those judges". On this same matter, it is significant to note that the Commission's previous recommendation on the establishment of the principle of lifetime appointment of the Supreme Court judges has been reflected in the adopted version of the constitutional amendment.[67]

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view/30346?publication=35. For purposes of comparison, Article 9(2) ECHR provides: "Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others".

63 Opinion on Georgia (n. 57), para. 44.

64 Draft Revised Constitution (n. 56), Article 60(6).

65 Opinion on Georgia (n. 57), para. 45.

66 Constitution of Georgia (n. 61), Article 61(2).

67 *Ibidem*. ("Upon nomination by the High Council of Justice, the judges of the Supreme Court shall be elected for life …").

Absent specific instances, such as the case with the election of Supreme Court judges, one could nonetheless observe a high degree of compliance with the Commission's Opinion on constitutional amendments in Georgia. Although *stricto sensu* formally non-binding, in reality, the Commission's recommendations have made their way through the Constitution, thus ultimately becoming not only binding, but also gaining a superior hierarchical legal status within a national legal order.

4. Moldova

In March 2017, the President of the Republic of Moldova requested an Opinion of the Venice Commission on his proposal to amend the Constitution of the Republic of Moldova, in order to provide the President of the Republic with additional powers to dissolve the Parliament.[68] The proposed content of the key constitutional provision that the President sought to supplement is as follows:

> *The President of the Republic of Moldova may dissolve the Parliament in the following cases:*
> *a. following the consultation of parliamentary fractions;*
> *b. the Parliament failed to implement, within a period of 12 months, the will of people expressed through a consultative referendum;*
> *c. the referendum on the dismissal of the President of the Republic of Moldova from office ended with a negative result or the Constitutional Court confirmed the non-validity thereof;*
> *d. the Parliament failed to adopt the Law on State Budget in a period of two months following the beginning of the financial exercise.*[69]

In its Opinion of June 2017, the Commission recommended not to expand the President's powers to dissolve the Parliament through a general clause, neither in case of failure by the Parliament to implement a consultative referendum, nor in response to a failed attempt to call a referendum on the recall of the President. The Commission also recommended increasing the time-limit for the Parliament to adopt the budget, failing which it would be dissolved. The Commission stated, among others, that "Not only does cumulating the existing specific cases of dissolution (and the proposed new ones) with a general clause render the former superfluous – it could even be interpreted as giving the President the power to use dissolution as a tool for

[68] Venice Commission, CDL-REF(2017)026, Republic of Moldova – Proposal by the President of the Republic of Moldova to Supplement the Constitution in order to Enlarge the Powers of the President to Dissolve Parliament.
[69] *Ibidem.*

party politics, in contradiction with his role of *pouvoir neutre* in the current parliamentary regime. It may provoke unnecessary political conflicts".[70]

The presidential decree, which formed the subject of the Commission's Opinion, was challenged before the Constitutional Court of Moldova. On 27 July 2017, the Constitutional Court declared the decree unconstitutional.[71] With regard to the President's decree on holding a referendum aiming at constitutional amendments – having examined separately the questions included in the decree – the Court ruled that the President had no power to do so. Additionally, the Court found that the proposed extension of the President's dissolution powers was incompatible with the logic of a parliamentary system and the President's role as neutral arbiter, thus relying on the Opinion of the Venice Commission, by also making direct references to it. Echoing the Commission's reasoning, the Court highlighted that cumulating existing specific cases of dissolution with new ones may be interpreted as granting the President the right to make of use the instrument of dissolving the Parliament as a tool for promoting party politics, in contradiction with his role of *pouvoir neutre* in the existing parliamentary system.[72] It noted that "This view is also shared by the Venice Commission, within its Opinion on the proposal by the President of the Republic to expand the powers of the President to dissolve Parliament …" In relation to the Commission's Opinion, the Constitutional Court of Moldova further stated:

> *In the above mentioned Opinion, the Venice Commission underlined that conferring the President a discretionary power to dissolve the Parliament renders the other grounds listed in the proposal entirely superfluous. It could be even taken to mean that the general power of dissolution is not linked to the times of institutional crisis, but adds the possibility for the President to dissolve Parliament for purely political reasons – for instance, in the event s/he disagrees with a policy choice made by Parliament and wants new elections. Such an interpretation of the powers of the President to dissolve Parliament alters the neutral role of the President and turns him/her into a political player. This is not compatible with the logic of a parliamentary system.*[73]

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[70] Venice Commission, CDL-AD(2017)014, Republic of Moldova – Opinion on the Proposal by the President of the Republic to Expand the President's Powers to Dissolve Parliament, para. 58.

[71] See Constitutional Court of Moldova, Complaint no. 40a/2017, 27 July 2017.

[72] *Ibidem*. See also the following statement of the Constitutional Court, 'The Decree of the President of the Republic of Moldova on Holding a Consultative Republican Referendum – Unconstitutional,' www.constcourt.md/libview.php?l=en&id=1066&idc=7&t=/Media/News/The-Decree-of-the-President-of-the-Republic-of-Moldova-on-Holding-a-Consultative-Republican-Referendum-Unconstitutional/

[73] *Ibidem*.

Concluding Remarks

This chapter has examined the normative functions of the Venice Commission in legal and constitution-making processes. Indeed, the focus, through a number of specific cases, has been on the processes relating to constitution-making, primarily through constitutional changes and amendments. Through these cases and a broader empirical overview, the chapter has revealed that the role of the Venice Commission in processes of constitution-making is expressed not only in ways that impact, induce or influence the actual content of the constitutions, as observed in the selected cases of Albania, Georgia and Kyrgyzstan, but also as a corrector of unconstitutional initiatives, such as in the case of Moldova. Most of all, they have helped paint a picture that portrays the Venice Commission as a sound and irreplaceable edifice in the transnational arena of constitutional justice.

Although the Commission's Opinions and ensuing recommendations are what they are called, namely opinions and recommendations rather than judgments or some other forms of legally-binding instruments, they are nonetheless observed and complied with, albeit imperfectly, on a relatively large scale of satisfaction. One could also take an alternative route of looking not only at the level of compliance, but also into the significant changes made and effects produced by the opinions or those specific recommendations that are implemented. Going further in the extreme, comparison might lose its meaning if we are to imagine a scenario of the complete absence of those Opinions, say in case the Commission would not exist, and compare it with whatever legal value one attributes to the Opinions, not to speak of their practical, real-life effects.

The most intriguing and powerful aspect of the Commission's recommendations, however, remains their empirically verified transformation into legally-binding domestic constitutional and legal provisions or constitutional judgments. This chapter also theorizes about the gamut of factors that promote and effectuate compliance, emphasizing in particular the power of persuasion, authority and conviction.

Ultimately, the now classic statement of Louis Henkin about States' compliance with international law that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time,"[74] adapted with appropriate nuances to the discrete context of the Venice Commission bears rather significant resemblance.

[74] Louis Henkin, *How Nations Behave* (Columbia University Press 1979), p. 47.

Igor Rogov[1]

Kazakhstan and the Venice Commission of the Council of Europe

The European Commission for Democracy through Law (hereinafter, the "Venice Commission" or "Commission") celebrates its thirtieth anniversary.

Over this time, the Venice Commission has become a centre for uniting the efforts of the international community in the field of legislation. Today, it is regarded globally as a leading expert legal body with a highly influential point of view.

Since 1998, Kazakhstan has had observer status with the Venice Commission. On 13 March 2012, the First President of the Republic of Kazakhstan, Nursultan Nazarbayev, signed the Decree, "On the Membership of the Republic of Kazakhstan in the European Commission for Democracy through Law." This act by the Head of the State followed the confirmatory decision of the Committee of Ministers of the Council of Europe on the relevant application of Kazakhstan. This approval provided evidence of the international community's recognition of the achievements of Kazakhstan in strengthening the Rule of Law.

Kazakhstan's participation in the work of the Venice Commission provides access to advanced legal technologies and creates an additional channel for the Republic to stay current on problematic issues of other participating states in this area. It also provides the Republic with the right to request the opinion of the Commission regarding compliance with regulations governing projects and other activities, thus avoiding unintentional errors. In addition, membership in the Venice Commission enables State bodies to strengthen contacts with relevant European institutions to facilitate the implementation of legal reforms, and to strengthen and develop democracy in the country.

Over the past years, joint efforts of the legal structures of Kazakhstan and the Venice Commission have resulted in the implementation of a number of important projects in the national legal system. At the request of the Kazakhstan delegation, the Venice Commission has consistently provided expert and methodical assistance in reforming individual legal institutions.

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[1] Member of the Venice Commission in respect of Kazakhstan.

In 2007, the Commission prepared an opinion on the legal status of the Commissioner for Human Rights of the Republic of Kazakhstan. The recommendations of the Venice Commission were considered during proceedings for the Constitutional Reform 2017 (discussed below in detail). Whereas, previously the Human Rights Commissioner was appointed by the President of the Republic, now he is elected by the Senate of the Parliament (upper house), and the legal status of this official is determined by law.

In 2009, the Commission, at the request of the Constitutional Council of the Republic of Kazakhstan, issued the opinion on the legal force of acts of the structures of the Customs Union among Belarus, the Russian Federation, and Kazakhstan. The opinion of the experts was taken into consideration by the Constitutional Council and played an important role in the formation of the legal framework of the Customs Union, followed by the formation of the Eurasian Economic Union.

In 2011, the Venice Commission, together with the OSCE Office for Democratic Institutions and Human Rights, issued the opinion on the Constitutional Law on the Judicial System and the Status of Judges in the Republic of Kazakhstan.

In 2016, at the request of the Supreme Court, the Commission issued the opinion on the Draft Code of Judicial Ethics of the Republic of Kazakhstan.

In 2017, the Commission issued the opinion on the draft Law of the Republic of Kazakhstan on Administrative Procedures.

In 2018, the Commission adopted the opinion on the Draft Code of Administrative Procedure and Justice Code. The developers took into consideration the comments of the experts. This Code has recently been adopted by the Parliament and signed by the Head of State.

A special milestone in the legal development of Kazakhstan was the Constitutional Reform 2017, mentioned above. At the request of the Working Group on the Preparation of Constitutional Reform created by the President of the country, the Venice Commission considered the draft law, and proffered its opinion. The Commission emphasised that the constitutional amendments of Kazakhstan represent a step forward in the process of the democratization of the State. The reform sets the right vector in the further development of the country and indicates obvious progress. According to the Commission, the increasing role of the Parliament and its respective chambers, pursuant to the transfer of certain functions of the President of the Republic to the Government to the Parliamentary bodies, strengthens the mechanisms of accountability of the President's

administration. This shift in the balance of authority is a positive change and aligns with the logic of previous constitutional reforms carried out in 1998 and 2007.

One of the economically significant results of the Constitutional Reform for Kazakhstan is the successful functioning of the Astana International Financial Centre (hereinafter, "AIFC") and its legal institutions, created at the initiative of N. Nazarbayev. Within the jurisdiction of the AIFC, the International Arbitration Centre, the AIFC Court, and the AIFC Academy of Law are successfully operating based on the norms and principles of English common law and practice.

The experts at the Venice Commission participated in the preparation of drafts of new Criminal and Criminal Procedure Codes of Kazakhstan, which are based on the progressive provisions of the European continental criminal justice system.

The recommendations of the Venice Commission were considered when Kazakhstan's draft legislative acts were being developed, and when various decisions in the legal sphere were being made.

Mutual visits of the parties contributed to strengthening the cooperation between Kazakhstan and the Venice Commission. The President of the Venice Commission, Mr. Gianni Buquicchio, visited Kazakhstan, where he met with the Head of State, the Secretary of State, and other heads of central government bodies, and he participated in international conferences.

The activities of the Commission, recognized by the international community as the supreme body in the field of constitutional justice, are of great practical interest to the Republic of Kazakhstan as it undertakes to improve methodological approaches and mechanisms in the implementation of constitutional review.

Owing to the efforts of the Venice Commission, the World Conference on Constitutional Justice was established. In 2013, the Constitutional Council of Kazakhstan joined the Conference as a full member. The World Conference, as an international association of constitutional review bodies, aims to achieve close global cooperation among constitutional courts (and equivalent institutions) in ensuring the supremacy of the Basic Laws. The functions of its secretariat are performed by the Venice Commission. The members of the World Conference are constitutional justice bodies in 117 countries.

Since 1997, the Constitutional Council of Kazakhstan has been a member of the Conference of Constitutional Control Organs of the Countries of the New Democracy (until 2011, "Young Democracy"). The

Conference was established as a regional association of constitutional justice bodies of the CIS countries with the aim of promoting universally recognized constitutional values and maintaining a constant dialogue and exchange of experience on issues of ensuring the supremacy of the constitution. In 2019, the Conference was renamed as the Eurasian Association of Constitutional Review Bodies.

Today, the members of the Association are the bodies of constitutional review of Armenia, Azerbaijan, Belarus, Kazakhstan, Kyrgyzstan, Mongolia, Russia, Tajikistan, and Uzbekistan.

On 4 October 2003, a Cooperation Agreement was signed between the Conference of Constitutional Control Organs of the Countries of Young Democracy and the Venice Commission. On March 1, 2011, the Association was renamed as the Conference of the Constitutional Control Organs of the Countries of the New Democracy. The Association has its own printed periodical publication, "Constitutional Justice Bulletin," the editorial board of which includes the representative of the Constitutional Council of the Republic of Kazakhstan. In October 2017, the Chairman of the Constitutional Council of Kazakhstan was elected by the Chairman of the Association.

Since 2013, the Constitutional Council has been a member of the Association of Asian Constitutional Courts and Equivalent Institutions. The Association was established in 2010 as a regional forum of constitutional justice bodies in Asia. On 12 July 2010, in Jakarta (Indonesia), the final meeting of the leaders of the Constitutional Courts and Equivalent Institutions of Indonesia, Korea, Malaysia, Mongolia, Thailand, Uzbekistan and the Philippines took place. Based on its results, the Declaration on the establishment of the Association of Asian Constitutional Courts and Equivalent Institutions and its Statute were adopted.

According to Article 2 of the Constitution, the Asian Association acts as an autonomous, independent, and non-politicized institution. Its functions include holding regular meetings of members, organising symposia, seminars and working visits, ensuring the exchange of experience in constitutional case law, providing information on working methods, rendering opinions on institutional, structural and procedural issues related to public law and constitutional jurisdiction, and providing technical and expert assistance in the consideration of received applications.

Currently, 18 countries participate in the Association: Azerbaijan, Afghanistan, Indonesia, India, Kazakhstan, the Republic of Korea, the Kyrgyz Republic, Malaysia, Maldives, Mongolia, Myanmar, Pakistan, Russia,

the Philippines, Tajikistan, Thailand, Turkey and Uzbekistan. Over the years, the chairmanship of the Association was carried out by the Constitutional Courts of Korea, Turkey and Indonesia. In 2017-2019, the chairmanship was carried out by the Federal Court of Malaysia; and, in 2019-2021, by the Constitutional Council of Kazakhstan.

The Venice Commission is a neutral and independent body that operates with no political leanings. In its work, the Commission exclusively uses customary legal instruments as its mode of official communications. Thus, the opinions of the Commission are generally provided at the request of the States themselves and are adopted by consensus. This process inspires confidence among the international legal community in the acts of the Venice Commission.

Notably, there is substantial continuity between the legal policies of the prior administration of the Republic of Kazakhstan and the country's new leadership. The President of the Republic, K. Tokaev, supports the participation of Kazakhstan in the Venice Commission, and in other beneficial international institutions.

In sum, Kazakhstan and the Venice Commission have reached a qualitatively new level of cooperation, which certainly has a positive impact on the processes of implementing principles of the Rule of Law in the country. Significant progress has been made, and the Republic looks forward to initiating substantial and important new projects. I am confident that, by collaborating on jurisprudential development projects, we can fulfil our shared vision of societies, where progressive systems of law and justice drive the advancement of civilized affairs.

Matthew Russell[1]

Some Early Recollections

The first Member of the Venice Commission for Ireland, Matthew Russell (1990-1998), remains astonished at the shortness of the interval between the unveiling in the old monastery on the Isola S. Giorgio in April 1989 of Antonio La Pergola's great dream and its enthusiastic acceptance by the countries of Central and Eastern Europe. He thinks that it would not be unfair to say that most of the Western European ministers who came to Venice probably had no expectations of anything more than an agreeable meeting in a beautiful city, and then home.

Few of them would have anticipated either the extent of the Great Unravelling which was to come so quickly or the changes for the better in the lives of many peoples because of the work of the organisation that was to be the outcome of that meeting.

For Matthew Russell the single most dramatic moment he witnessed during those exciting '90s was at the meeting when Tomas Ban from Hungary stood up and said in a quiet voice that his country was definitively opening its border with Austria. "There was total silence in the hall for a long minute while his audience tried to take it in. Then an uproar of applause which went on and on. We realised at that moment that the Europe we had known for the previous half century was going, and that things would no longer be the same."

Within months, even as the Venice Commission was being formally established, requests for advice were flowing in from states in Central and Eastern Europe as they strove to give constitutional and legal effect to the new concepts of the rule of law, separation of powers and judicial independence. Indeed, it was remarkable that many of them sought our assistance long (in some cases years) before they became members of the Venice Commission; despite decades of suspicion of outside interference they accepted without question the independence and expertise of the Commission, so eager were they to learn how these new ideas worked in practice. Matthew Russell found it inspiring during those years to meet so many idealistic and gifted people in those countries - people who had none of the jaded cynicism sometimes to be found in the older democracies, and instead were characterised by

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optimism and a selfless wish for their fellow citizens' happiness. (He also recalls the surprisingly large number of ex-ministers of government who confidentially assured him that, notwithstanding their previous actions, they had always been democrats in their hearts!)

The '90s were a fascinating and exciting time to be working in Europe as the old continent refashioned itself into new constructs "- so much so that sometimes it was possible to imagine oneself as participating in a latter-day Congress of Vienna! The work was satisfying because we knew that the work we were doing was hugely important for so many ordinary people's lives. It brought the honour of participating in the proceedings of the Constitutional Court of Croatia. It was exciting to fly into the then hermit country of Albania, to help with its new constitution, while the anti-aircraft guns pointed to the sky at the end of the Tirana runway. In later years on missions to Kosovo one had to be careful when travelling because of land mines, and houses near the hotel would mysteriously burst into flames.

Visits to Belarus were always of special interest."

Ángel J. Sánchez Navarro[1]
Daniel Simancas Sánchez[2]

Exclusion of offenders from parliament: Some problematic issues

I. Introduction

The Venice Commission adopted on its 104th Plenary Session (23-24 October 2015) the Report on Exclusion of Offenders from Parliament (hereinafter, the Report[3]). As it usually happens with the Commission documents, its immediate origin is to be found in the (very particular) context of a sharp political conflict between the ruling majority and the opposition in the Republic of Albania. That situation led to the boycott of Parliament by the opposition and finished with an agreement between both parts, one of whose points referred to the exclusion of offenders from Parliament, thus requiring a legal reform and the introduction of a new cause of ineligibility.

In this framework, the Commission was asked to provide a report about "the issue of people with criminal records who hold or seek to be elected or appointed to a public office". According to the Commission's procedures, the report was prepared by a group of experts; and it is based on comparative data, particularly from some Council of Europe member States, which are organized in two parts. The first one refers to the possibility of legal standards, especially in relation to the limits of the right to be elected. The second explores the legal situation in different States about the possibilities of preventing "sentenced people from standing for Parliament" or excluding "elected members of Parliament… if sentenced.".[4] Afterwards, the report tries to analyse those data in order to draft some general conclusions.

At first sight, the Report may seem very specific. Nevertheless, it deals with a general question which has been posed since the very beginnings of the

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[3] Venice Commission, CDL-AD(2015)036cor., Report on Exclusion of Offenders from Parliament, previously adopted by the Council of Democratic Elections (52th meeting) on the basis of comments by Messrs Bartole, Kask, Sorensen and Ms. Gamper. Quotes will refer to the paragraph number.

[4] *Report*…paras. 1-8.

Political thought. In effect, Plato and Aristotle already considered that decency was a necessary attitude of rulers, otherwise the polis was at risk. And the Report underlines that "the exercise of political power by people who seriously infringed the law… may… endanger the democratic nature of the state: a person who is not eager to recognise the standards of conduct in democratic society, may be unwilling to obey the constitutional or international standards on democracy and the Rule of Law".[5]

Therefore, it is little surprise that the *Report* openly acknowledged at the beginning that "the question whether persons convicted should be allowed to be Members of Parliament is an issue in many countries". An issue that may not be "very highly discussed at the international level as the number of cases is usually low" and "the practices vary",[6] but which quite logically finds nowadays a *prima facie* answer not very different from the one expressed at the origins of our political culture by Plato and Aristotle: "the basis for the restriction on such" persons' rights "to be elected or to sit in Parliament is *inter alia* the occurred violation of democratically adopted criminal law, i.e. of generally recognised standards of conduct". In consequence, these restrictions "should not be considered as limiting democracy, but as a means of preserving it" and can be acceptable according to the doctrine settled by the European Court of Human Rights (hereinafter, "ECtHR") on Article 3 of the First Additional Protocol to the European Convention of Human Rights (hereinafter, "ECHR").[7]

Once all that said, the *Report* makes a very general and categorical statement: "The vast majority of if not all the states addressed in this report recognise the public interest in excluding offenders from Parliament and most of them have adopted legislative measures in order to achieve this result"[8]. However, even though the principles may be widely shared, major differences among national experiences, rules and practices imply that the definition of common standards is not always easy. In fact, one of the main (and not many) conclusions of the document is that "there is no common standard on the cases, if any, in which such restrictions should be imposed. However, the vast majority of the states examined limit the right of offenders to sit in Parliament, at least *in the most serious* cases".[9]

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5 *Report*…para. 139.
6 *Report*…para. 4.
7 *Ibidem,* paras. 139-140.
8 *Ibidem,* para. 141.
9 *Ibidem,* para. 172; emphasis added.

At this point, and five years after the adoption of the document, it seems possible (and even advisable) to pose some additional questions which appear as problematic issues related to the contents and conclusions of this *Report*. Questions that are now –and will be in the near future- particularly relevant in Spain and Europe in relation to the restrictions imposed on the Catalonian nationalist leaders who, after the unilateral and illegal declaration of independence of the Autonomous Community of Catalonia on October 2017, were judicially prosecuted and in some cases convicted by the Spanish Courts.[10] Since then, most of those leaders have consistently and repeatedly sought to participate in elections at different levels (local, regional, national and European). Many of them have been candidates and gained seats in almost all of those elections, thus provoking an important debate about the possible and actual restrictions of the rights of participation of citizens convicted or charged with serious criminal offenses at different moments of the representative (electoral-parliamentary) process.

This debate has already reached (and is already pending on) European Union institutions such as the European Parliament and the Court of Justice of the European Union; and it will undoubtedly have to be dealt with by the ECtHR in the incoming years… or months. In that context, some issues considered in the *Report* may be relevant and possibly deserve further attention, as we intend to analyse in the following pages.

II. Problematic issues: some general thoughts

Effectively, the aforementioned *Report* does not solve some central questions, which remain still open. Questions which are intimately interlinked and are related, first, to the precise meaning of the words used in its title (Who are "offenders"? What "exclusion" means?); and, afterwards, to the prerequisites or preconditions assumed by the document.

Certainly, most of those questions could not be solved just because they do not have a clear solution. In fact, that is what the *Report* acknowledges when it says that "*there is no common standard* on the cases, if any, in which such restrictions [to the right to free elections] should be imposed".[11] However, it is possible to make some additional considerations that may contribute to clarify the implications of different possible answers to those questions.

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[10] See infra, Chapter III.

[11] *Report*…para. 172 (unless otherwise stated, all emphasis in texts literally quoted are added).

In that sense, for systematic and analytical reasons we have tried to distinguish different questions or "problematic" issues. We are conscious that they are so interrelated that it is impossible to completely separate them, even in theory. But we think that this distinction may provide a clearer framework of analysis and serve as a way to better organize our comments. In consequence, we will deal, first, with the subjective element (Who are the *offenders*?); second, with the object of the restriction which is at stake (What does *exclusion* mean?); and, lastly, with the context where that exclusion of offenders may take place.

1. Who are the "offenders"?

The first question is thus directly related to the subjects of the exclusion. In other terms, when we talk about "exclusion of offenders", who are we talking about?

In principle, the *Report* answers to this question: "*restriction[s]* on the right to be elected of criminal offenders… *follow a criminal conviction*, and the severity of the punishment is the ground for disenfranchisement". Of course, if "convicted persons [are] still serving the sentence, there may be additional specific grounds for the disenfranchisement". But, once that principle is set, an additional consideration is made: "In case a *person* has *not yet* been *convicted*, the principle of presumption of innocence would go against the deprivation of political rights. In the Venice Commission's opinion, however, *some exceptions could be legitimate and proportionate*". Among those exceptions, the document expressly mentions the case of "crimes stipulated in the Rome statute of the International Criminal Court". In conclusion, this question receives an open answer: "the deprivation of political rights before final conviction is contrary to the principle of presumption of innocence, *except for limited and justified exceptions*" which, "in practice… are *applied in only a few states* under consideration".[12]

Therefore, when we talk about "offenders" we mean, of course, "criminal offenders"; and, more importantly, "convicted" citizens... in principle. Because after the rule, there are the exceptions. Even though they may be "applied in only a few states", they may also be "limited and justified", "legitimate and proportionate".

The rule seems then to be quite clear, and fully coherent with the content that the well-known *Code of good practice in electoral matters* (hereinafter, the *Code*[13]*)*

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[12] *Ibidem,* paras. 149, 151, 156 and 177.

[13] Venice Commission, CDL-AD(2002)23rev., Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report. The document tries "to compile a list of the underlying principles of European electoral systems" (Introduction, para. iii).

attributes to the principle of "universal suffrage": "all human beings have the right to vote and to stand for election… subject to certain conditions" of age, nationality and residence. But "deprivation of" that right is possible, "*only* subject to the following *cumulative conditions*:

- It must be provided for by law;
- The proportionality principle must be observed; *conditions for depriving individuals of the right to stand for election may be less strict than for disenfranchising them,*[14] [and]
- *The deprivation must be based on* mental incapacity of *a criminal conviction for a serious offence*".[15]

It is clear then that the *Report* basically reiterates, and extends to the parliamentary realm, the basic principle already set up by the Code. Therefore, once a person fully complies with the regular requirements for citizenship (basically, age and nationality) the right to participate in elections, and to fully exercise the mandate won in a given election, can be denied for "a criminal conviction for a *serious* offence".

This formula seems to define a clear rule. But, at the same time, it admits a general exception based on a wide notion which has itself to be defined, thus making confuse the scope of the rule itself. It is then necessary to focus on the reach of the exceptions to be able to clarify the rule, and to precisely define who can be defined as offenders.

Of course, difficulties arise because of the lack of common standards: on the one side, "the deprivation of political rights *before final conviction* is contrary to the principle of presumption of innocence, *except for limited and justified exceptions… applied in only a few states"*. On the other, even though "there is no common standards on the cases, if any, in which such restrictions should be imposed… the *vast majority* of the states… limit the right of offenders to sit in Parliament, at least in the *most serious* cases".[16]

All in all, restrictions to stand for election and to sit in Parliament are *generally* admitted for *serious* offences, and *exceptionally* admitted *before final conviction*, in *limited and justified* cases. Consequently, a distinction can be inferred from the *Report* between two areas: in the first one, apparently bigger, common standards seem to define a clear rule. In the second, and smaller, common standards are missing, and thus exceptions are difficult to precise.

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[14] *Code…,* "Guidelines on elections", para. 1.1.
[15] *Code…,* "Explanatory report", para. 1.1.d.
[16] *Ibidem,* paras. 177 and 172, respectively.

Consequently, presumption of innocence clearly and generally prevails until the final conviction for serious offences, which undisputedly provokes the restriction of both political rights (to stand in elections or to sit in Parliament). But *some* restrictions *may* be justified *before* the *final* conviction, at least in some states (*a few*), which allow for some kind of advanced application of restrictions in limited (the *most* serious) cases.

Offenders are, in sum, citizens finally *convicted* for serious criminal offences. But they can also be, in some cases, those citizens who are *prosecuted* for the *most serious* criminal offences, even *before* their final conviction. The question of course shifts from the subject to the nature of the object (seriousness of offences) which makes admissible such early restrictions.

With respect to the seriousness of offences, the Commission expressly mentions as an example the crimes stipulated in the Rome Statute of the International Criminal Court., which may justify the deprivation of political rights despite the absence of a criminal conviction. However, it also suggests a restrictive application of other exceptions, provided that they must be "legitimate and proportionate".[17]

Nevertheless, beyond that example provided by an International Treaty aimed precisely to fight some conducts widely seen as the most serious crimes, those "additional" exceptions are very difficult to define in objective terms considering only the seriousness of the crimes. Or, in other terms, it is very difficult to objectively define which crimes are "most serious". In effect, the assessment of the special aversion of the crime may vary depending on historical and political traditions, as well as cultural and social factors of the country in question.

These "national circumstances" explain, for instance, why some conducts whose objective seriousness do not seem arguable are punished in only a limited number of states: possibly because in many others it has not been necessary. Few would possibly challenge the radical limitation of political rights foreseen by the Argentinian Constitution adopted in 1994, after the fall of the dictatorship, for crimes "*against the institutional order and the democratic system.*[18] A

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[17] *Report,* para. 156.

[18] "Congress may not vest on the National Executive Power - nor may the provincial legislatures vest on the provincial governors - extraordinary powers or the total public authority; it may not grant acts of submission or supremacy whereby the life, honor, or wealth of the Argentine people will be at the mercy of governments or any person whatsoever. *Acts of this nature shall be utterly void, and shall render those who formulate them, consent to them or sign them, liable to be condemned as infamous traitors to their fatherland*". "This Constitution shall rule even when its observance is interrupted by *acts of force against the institutional order and the democratic system*. These acts shall be irreparably null. Their authors shall be punished

restriction that may seem very remote for European standards… but it is not so far away, at least in some countries.

In this respect, we should possibly remind the French *Ordonnances* adopted between 1944 and 1951 to punish the "collaborationists" with the "regime of Vichy" when convicted –in some cases, just prosecuted- for the crime of "national indignity".[19] A notion that, by the way, recently reappeared in the French political and constitutional debate on the fight against terrorism.[20]

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with the penalty foreseen in Section 29, *disqualified in perpetuity from holding public offices and excluded from the benefits of pardon and commutation of sentences*. Those who, as a consequence of these acts, were to assume the powers foreseen for the authorities of this Constitution or for those of the provinces, shall be punished with the same penalties and shall be civil and criminally liable for their acts. The respective actions shall not be subject to prescription. All citizens shall have the right to oppose resistance to those committing the acts of force stated in this section. He who, procuring personal enrichment, incurs in serious fraudulent offense against the Nation shall also attempt against the democratic system, and shall be disqualified to hold public office for the term specified by law. Congress shall enact a law on public ethics which shall rule the exercise of public office" (Sections 29 and 36; quoted from https://pdba.georgetown.edu/Constitutions/Argentina/argen94_e.html#firstpartch2).

[19] *Indignité nationale*. According to the Decree (*Ordonnance du 26 août 1944 instituant l'indignité nationale),* this crime was commited by any French citizen convicted of directly or indirectly aiding Germany or its allies, or of willingly threatening the unity of the nation, or the freedom and equality of the French » («'tout Français qui est reconnu coupable d'avoir… soit apporté volontairement, en France ou à l'étranger, une aide directe ou indirecte à l'Allemagne ou à ses alliés, soit porté volontairement atteinte à l'unité de la nation, ou à la liberté et il l'égalité des Français», article 1). The punishment was absolutely clear: deprivation of many rights, among them all the political ones (" L'indignité nationale emporte: 1° La privation des droits de vote, d'élection, d'éligibilité, et, en général de tous les droits civiques et politiques et du droit de porter aucune décoration; 2° La destitution et l'exclusion des condamnés de toutes fonctions, emplois, offices publics et corps constitués; 3° La perte de tous grades dans l'armée de terre, de l'air et de mer…, Article 9; see *Journal officiel de la république française*, 28th August 1944, p. 768, in https://allica.bnf.fr/ark:/12148/bpt6k9622107p/f4.image.texteImage). Few months later, this Decree was replaced by another one (*Ordonnance du 26 décembre 1945),* which was in turn modified by a new *Ordonnance (45-199 du 9 février)*, openly aimed at quickly suspending the electoral rights («droits de vote, d'élection et d'éligibilité») of those persons whose "national indignity" has not been declared yet (« En prévision de la prochaine consultation électorale, il importe que soient très rapidement rayées des listes les personnes dont l'indignité devra être constatée» : article 1 and statement of purposes, in https://gallica.bnf.fr/ark:/12148/bpt6k2033504h/f2.item). These effects were limited to a maximum of 20 years (but did not disappear) under a Law of amnesty adopted in 1951 (*Loi du 5 janvier 1951 portant amnistie*, in particular Section 23), which was subsequently reformed in different occasions.

[20] See, for instance, www.lepoint.fr/politique/en-direct-les-deputes-s-echarpent-sur-la-decheance-de-nationalite-09-02-2016-2016555_20.php#; or www.bfmtv.com/politique/les-deputes-ps-favorables-a-la-creation-d-une-peine-d-indignite-nationale-858505.html.

In Italy, we can also mention the provision of the 1948 Constitution, according to which "The members and descendants of the House of Savoy shall not be voters and may not hold public office or elected offices",[21] that was in force up to the adoption of the Constitutional law no. 1 of 23 October 2002.

This kind of rules do not exist in many other countries; but they show that, beyond the realm objectively defined by international treaties, national circumstances play an important role in the definition of the "most serious" crimes, providing a certain margin of national appreciation. A margin that works not only for defining those crimes, but also for the exceptional consequence expressly admitted by the *Report*: the anticipation of the restricting measures.

In addition to the seriousness of the crimes, other national circumstances may hinder the elaboration of common standards, and favour an early intervention of the public powers in the form of deprivation, restriction or suspension of the political rights, to safeguard constitutional assets such as the free expression of the public opinion and the proper functioning of democratic institutions. We will come back later to this point.

2. What does "exclusion" mean?

Once (more or less) defined the subjects, the following question refers to the action: what do we mean when we talk about "exclusion"?

In fact, as we have already pointed out, the *Report* basically extends to the sphere of Parliament the basic principles already set up by the *Code of good practices on electoral matters*, and so it deals with two different kinds of exclusion: first, "ineligibility to be elected"; afterwards, "loss of parliamentary mandate".[22] Both of them are restrictions of the right of political participation, "first aim[ed] at protecting the integrity of these [representative] bodies", even though they "may also be an accessory punishment of individuals who committed offences".[23] In any case, they affect to different spheres and are considered separately.

Certainly, this extension of the principle to the parliamentary sphere does have consequences. The *Code* already admitted that "conditions for

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[21] "Transitional and final provisions", n. XIII, in www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf.

[22] *Report,* para. 170-171. In practice, these rules apply not only to Parliament, but also to other elected (representative) bodies, where the "public interest" is also at stake.

[23] *Ibidem,* para. 143.

depriving individuals of the right to stand for election may be less strict than for disenfranchising them, as the *holding of a public office is at stake* and it may be legitimate to debar persons whose activities in such an office would violate *a greater public interest*".[24] But, once the candidate has gained a seat, the "public interest" may become even more important, and the *Report* acknowledges that "in case the conviction enters into force after the elections and the person has already assumed office… the termination of a mandate following a criminal conviction [could be] more easily admissible than the ineligibility to be elected".[25]

In our view, the reasoning justifying this statement seems at least arguable: it stands on the idea that the voters are "not *necessarily* aware of the pending of the proceedings and of the nature of the offences, in particular if those offences were committed or the criminal proceedings started *after* the elections". The use of italics here tries to point out that those two adverbs ("necessarily" and "after") obviously open the gate to some different (and opposite) possibilities, undermining the validity of the statement *if* the voters *were aware* of the offences, or the proceedings started *before* the elections. It has been the case, for instance, of the Catalan independent leaders which have stood for all the successive elections held in Catalonia since their judicial prosecution started, and have gained (local, regional, national and European) seats in all of them as we will explain later.

Curiously enough, the *Report* departs from the general statement that "The exclusion of offenders from elected bodies does not necessarily require legislative measures. *Ideally*, democratic decision-making should guarantee that these persons are not elected to parliament or at least that their influence is negligible… by the simple functioning of the electoral mechanisms", given certain conditions.[26]

It is obvious that the very existence of the *Report* shows that those "electoral mechanisms" do not suffice, and *in practice* many times "legislative intervention becomes necessary".[27] In that framework, when the *Report* talks about "exclusion" of offenders from Parliament, it refers to those legal measures which are used to avoid the access of citizens convicted for serious crimes (or prosecuted for the most serious crimes) at Parliament. This aim may be legally reached directly (by depriving them of the seat won in the election)

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[24] *Code…,* "Explanatory report", para. 1.1.d.
[25] *Report,* para. 162.
[26] *Report,* paras. 144, 173.
[27] *Ibidem,* para. 174.

or indirectly (considering them ineligible), but both possibilities imply an open restriction of their political rights.

In any case, the general statement about the ("*ideal*") possibility of excluding offenders without any legislative intervention, i.e. by the simple will of the voters when they cast their ballots, deserves some equally (and necessarily) general comments on the circumstances which favour, or just allow, the formal intervention for restricting the political rights of citizens convicted for (or charged with) serious crimes, thus avoiding their access to elective bodies.[28]

3. When the "exclusion of offenders from Parliament" may be justified?

We have pointed out that the *Report* underlines the lack of common standards on this issue. Departing from a clear rule about the universal political rights at stake, the exceptions or causes of exclusion of offenders are very difficult to define in objective terms, and so the *Report* has to refer to different circumstances that may justify the differences existing on this subject. When it deals with the notion of "offenders", it accepts that some countries *may* restrict those political rights *before* a final conviction, especially in the *most serious* offences. When it handles the exclusion of Parliament, it analyses the circumstances which may require legislative intervention. And when it comes to the practice, it highlights the requirements of the authorities in charge of applying of the rules.

Therefore, it seems convenient to make some comments about the circumstances which may condition (and ultimately legitimate) the adoption of legal measures for excluding offenders from Parliament. We have already done it with respect to the notion of offenders, considering that national circumstances play an important role in the definition of what crimes are "most serious", and in the –consequent- eventual anticipation of the restrictions for the offenders. In these spheres, a considerable "national margin of appreciation" should therefore be admissible.

On a different plane, the *Report* defines (three) conditions which may make possible the exclusion of offenders from elected bodies "by the simple functioning of the electoral mechanisms", thus avoiding the need to adopt legislative measures: free media, open lists and political culture.[29]

Regarding first the role that media must play in electoral processes, the Commission considers that they have to act as a "public watchdog",

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[28] Even though the *Report* specifically deals with the question of the "regulatory level" of the provisions concerning this subject (chapter III.A. 1, para. 30 and ff., 179-180), we do not intend to focus on this point.

[29] *Report*…para. 144.

exercising two main functions: on the one hand, they should refrain from acting as propaganda instruments for the parties and carry out their mission under standards of truthfulness and independence; on the other hand, they will have to provide information on the candidates, so that citizens can assess if they grant their support to persons who are prosecuted or even convicted for committing criminal acts. The fulfilment of these two functions would undoubtedly contribute to ensuring the free expression of citizens at the ballot box.[30]

Nevertheless, fulfilment of the previous condition does not suffice to avoid the adoption of restrictive measures of political rights. Therefore, a second condition refers to the decisional proceedings within the political parties: "the influence of citizens on the choice between party candidates may be limited by the internal functioning of the parties or by the electoral system. In other words, in the absence of internal party democracy, a system of closed lists would prevent voters from excluding undesirable characters".[31] The combined effects of both elements (lack of internal party democracy and electoral system of closed list) may reduce the influence of voters in the selection of candidates, thus favouring the access of offenders at elected bodies.

Thirdly, a certain political culture based on democratic principles and values is also required. Even it may be "probable that most citizens would not like serious offenders to exercise power", this may not be the case in certain countries, especially in immature democracies who are threatened by political forces which do not accept the principles of the Rule of Law and of respect for human rights. Those democracies may be more vulnerable to a "spirit of resignation and general suspicion towards the political class" that can lead to the access of offenders to institutions.[32] In this sense, the Commission accepts the resort to legislative intervention as a way to change the mentality of the electorate, and with an intensity of the restrictive measures that should vary depending on the country's democratic strength.

If we consider this latter condition from the perspective provided by the well-known Robert A. Dahl's classification of democracies (non-democracies, fragile democracies and consolidated democracies[33]), legislative

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[30] *Report*…para. 147.
[31] *Report*…para. 146.
[32] *Report*…para. 145. It may be useful to remember many leaders (from A. Hitler to H. Chavez) who won elections after participating in an attempt of *coup d'État*.
[33] Dahl, Robert A. *La democracia*, translation and foreword by F. Vallespín. Barcelona, Ariel, 2012, p. 2.

intervention would be reserved for the second category of countries, which are in the consolidation phase of democracy. This conclusion seems to result from the Commission's report, as far as it conditions the adoption of restrictive measures on the concurrence of a specific scenario — immature democracy, influence of political parties which do not respect the principles of the Rule of Law, atmosphere of mistrust and irritation towards the political class- that may act as a perfect *breeding ground* for the access of offenders to institutions. And it is coherent with the cases previously exposed of countries such as Argentina, France and Italy, which adopted very strict rules to deprive certain groups or citizens of their basic political rights in their way to consolidate their democracies after terrible historical experiences.

However, if we take into account Norberto Bobbio's ideas, the absence of political culture could be a threat not only for fragile democracies, but also for the more mature and consolidated ones, where the "political apathy", defined as the rejection of citizens towards their democratic institutions, could also arise. That could be the case of Italy, where voters continued to participate in electoral calls, but abstention and "clientele vote" did gradually increase.[34]

In conclusion, according to Bobbio's interpretation the possibility of adopting measures that affect to political rights cannot be reserved for those countries with immature democracies, since harmful and antidemocratic conducts may as well appear in democracies as mature as the Italian, posing a serious threat against the proper functioning of the institutions which demands the reaction of public authorities. Once more, national circumstances such as the political culture resulting from the national history may become relevant at the moment of evaluating the necessity, and the scope, of legal measures which restrict political rights in order to exclude offenders from elected bodies.

Finally, the *Report* also underlines another factor which is obviously decisive when assessing restrictive legal measures: "the *independence and impartiality* of the judiciary are therefore a prerequisite to the proper implementation of restrictions to electoral rights".[35] After all, if "restrictions follow a criminal conviction, and the severity of the punishment is the ground for disenfranchisement", the "judiciary… plays an essential role (…) If there is a risk for opposition candidates to be sentenced based on political

[34] Bobbio, N. *El futuro de la democracia*, translated by José J. Fernández Santillán, 1986, pp. 25-26.
[35] *Report*…paras. 149 and 175; emphasis in the original text.

motivation… or if criminal law is adopted by an authoritarian regime and a candidate may be sentenced for an offence which is not against general moral values, restriction to the right to stand for elections would go against democratic standards". What is more: "whereas it may be suitable for legislation to provide for restrictions to operate automatically for the most serious offences or convictions…, discretion for the judges in deciding on the specific case may be suitable in less serious cases and, more generally, where the conviction relates to sitting MPs".[36]

Once more, national circumstances appear as essential when evaluating the possible restrictions adopted for excluding offenders from Parliament. The same rules may be differently applied by different courts in different countries. Therefore, their assessment must take into account not only their wording, but also the context where they have to be applied.

In this respect, it seems necessary to bring up the (relatively recent) judgement of the ECtHR in the case *Demirtas v. Turkey* (No. 2), were the context was decisive for the Court to affirm that "it is understandable that an objective observer might suspect that the extension of the pre-trial detention of the applicant – one of the leaders of the political opposition – was politically motivated, even though the offences with which he was charged were not overtly political". In view of the (national) circumstances of the case, the Court concluded "that although the applicant was placed in pre-trial detention on "reasonable suspicion" of having committed a criminal offence, there was also a political purpose behind his continued detention". What is more: even if "in continuing situations the predominant purpose could vary over time (…) what might initially have seemed a legitimate aim or purpose may appear less plausible as time goes on"; and, "in the present case… several criminal investigations in respect of the applicant had been ongoing for years, but no significant steps had been taken". Finally, and always regarding to the particular circumstances of the case, the Court considered "that the national authorities have *repeated*ly ordered the applicant's *continued* detention *on insufficient grounds* consisting *simply* of a *formulaic* enumeration of the grounds for detention provided for by law".[37]

This decision tangentially mentions another factor which, within this same sphere of the judiciary, the *Report* absolutely seems to omit and is

[36] *Report*…paras. 149 and 180.

[37] ECtHR, *Selahattin Demirtaş v. Turkey* (No. 2), no. 14305/17, 20.11.2018, paras. 264-273. All italics have been added, emphasizing adverbs which point out to specific circumstances of the case which have been considered by the Court relevant enough as to be mentioned in the final reasoning.

essentially relevant when analysing the wording and the working of these rules under consideration: the length of the judicial processes. Effectively, if the rules do respect the essential content of political rights (even though they may restrict some particular rights of some particular citizens), and if they are applied by independent and impartial judges, the goal of protecting the integrity of the elected bodies may be reached… insofar as those rules are timely applied.

In this sense, the treatment (or, better to say, the absence) of this factor in the *Report* is undeniably problematic, basically because it may empty the principles which it defines. In particular, if "deprivation of political rights before final conviction" is not acceptable, it will be (almost) impossible to exclude offenders from Parliament since the moment they become MPs, even when all the other guarantees are met. Suffice it to say, in this respect, that the criminal proceedings in most European countries usually last some years up to the final conviction, and the ECtHR has accepted, as reasonable, proceedings which lasted from almost 3 to more than 8 years, depending on the circumstances of the case.[38]

For this reason, the rule that differs the restriction of political rights to the *final* sentence of conviction may be convenient as long as the criminal proceedings do not last a (too) long time and there is no structural delay in the operation of the judiciary. Otherwise, this requirement can be tremendously onerous and detrimental to public institutions, voiding the effect of the rules established, first and above all, to protect their integrity. This issue would possibly deserve further and deeper reflection, because it is possibly the most relevant factor in the definition of exceptions to the rule, provided that the serious offences are defined by law, and that the judiciary (very especially within the European Union framework) has to be –and should therefore presumed to be- independent and impartial.

III. Problematic issues: some particular comments from Spain

As we pointed out at the beginning of this pages, some of these problematic issues which can be identified on general terms in the *Report* are (and will continue to be) concretely relevant to solve some of the judicial proceedings

[38] See F. Calvez and N. Regis, *Length of court proceedings in the member States of the Council of Europe based on the case law of the European Court of Human Rights,* adopted by the CEPEJ (European Commission for the Efficiency of Justice) in December 2018 (https://rm.coe.int/cepej-2018-26-en-rapport-calvez-regis-en-length-of-court-proceedings-e/16808ffc7b, in particular pages 75-76).

faced by some Catalan pro-independence leaders because of their conduct as head of Catalonian regional institutions in 2017.[39] In this sense, Spain is clearly one of the cases where, in the *Report*'s terms "the question whether persons convicted should be allowed to be Members of Parliament is an issue". What is more: it is a central issue, "very highly discussed" in the last years because it has become a central point at the strategy of those leaders, who have sought to provoke it repeatedly at all national and international levels.[40]

Effectively, after the organization on October 1st of a (so-called) referendum openly illegal, and repeatedly forbidden even by the Constitutional Court, the Catalonian regional Parliament unilaterally declared the independence of the Region.[41] The Spanish Government, supported by an overwhelming majority of the Senate, adopted then the "direct rule" of the region provided for in the Spanish Constitution (Article 155). For their part, the Spanish courts initiated judicial proceedings against some members

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[39] It may be noted that this *Report* was on the table of the ECtHR during the proceedings of the case "*Berlusconi v. Italy*" (no. 58428/13, 27.11.2018). The applicant was the former Italian Prime Minister, Silvio Berlusconi, who had been disqualified from standing for election after a conviction for tax fraud which provoked the invalidation of his election by the Senate, but the *Report* was finally useless because the case was struck out the Court list in November 2018, after the applicant was rehabilitated and withdraw his application.

[40] The literal quotes are taken from the *Report*…para. 4.

[41] Even though this issue clearly exceeds the goals of this paper, the declaration was, in our opinion, clearly unlawful. It was adopted by a short parliamentary majority (53 versus 47% of the seats), which moreover did not reflect an electoral majority (mainly due to the overrepresentation of the rural areas), and it was expressly based on the results of a (so-called) "referendum" forbidden by the Spanish authorities. Consequently, only pro-independence voters cast their ballots (the turnout was only 43 % of the –logically unofficial and *ad hoc*- register of voters), and the results were overwhelmingly one-sided (more than 90 % of the ballots voted "yes"). A general overview of the constitutional and factual context may be found in A. Sánchez Navarro, www.robert-schuman.eu/en/european-issues/0456-regional-elections-in-catalonia-questions-and-answers; the results of the referendum, in www.elperiodico.com/es/politica/20171006/resultados-referendum-cataluna-2017-6319340, last visit on April, 21st).

It did not comply with any of the requirements set up by the Venice Commission, CDL-AD(2007)008rev-cor, Code of Good Practice on Referendums, which firstly highlights some guarantees common to referendums and elections (such as the use of a permanent and updated register of voters, the regulatory levels and stability of referendum law, or the organisation by an impartial body: points I.1.2, II.2 y II.3.1, respectively); and afterwards sets up some specific rules, beginning with the respect to the rule of law: "referendums must comply with the legal system as a whole, and especially the procedural rules. In particular, referendums cannot be held if the Constitution or a statute in conformity with the Constitution does not provide for them, for example where the text submitted to a referendum is a matter for Parliament's exclusive jurisdiction"; emphasising that "texts submitted to a referendum must comply with all superior law (principle of the hierarchy of norms)", and concluding, as if it was necessary, with an outright affirmation: "texts which contradict [those] requirements… *may not be put to the popular vote"*(paras. III.1 y III.3).

of the Catalan regional institutions for their responsibility in the breach of the Constitutional and legislative provisions, and for the misuse of public funds to that effect.

A few days after, the former President of that Government fled from Spain to avoid judicial prosecution and took refuge in Belgium. He was then judicially declared in default, a situation which prevents to be judged in Spain, where trials *in absentia* are not legally permitted. In that legal situation, he led the lists of its party at the regional elections (December 2017) as well as at the European ones held on May 2019. Its former Vice-President, in custody by another court decision, equally led the lists of his party at the same regional and European elections, and also at the Spanish General (parliamentary) elections held in the meantime, on 28 April 2019. They both gained a seat in all these elections, as did other governmental and parliamentary leaders –in custody or in default- at the same elections, and in the local elections which took place on May 2019. In fact, in all elections held in Spain between 2017 and 2019, the main lists of the Catalan independence parties were led by the former members of the Catalonian regional institutions who were in default or in custody for judicial decisions. Most of them gained seats (as regional deputies, local councillors, national deputies and/or senators or members of European Parliament), so recurrently unleashing the debate on the extent of restrictions of political rights for citizens under judicial custody or at default.

The question in fact is not new at all in Spain: it may be worth to remind that at the beginnings of Spanish constitutional regime, the judicially sentenced former Lieutenant Colonel Antonio Tejero Molina stood for Spanish general elections in October 1982, leading the list named "Spanish Solidarity".[42] Although he did not obtain enough votes to gain a seat, the absence of constitutional or legal tools to prevent such a candidacy quite logically triggered an important debate.[43]

This precedent, shortly after the transition from a forty-years Dictatorship initiated after another military putsch which unleashed a Civil War lasting for three years (1936-1939), was for sure present in the legislator's mind when three years later, in 1985, a new electoral law was

[42] Tejero was in prison and expelled of the Civil Guard after being sentenced to thirty years for the attempt of the *coup d'état* in February 1981, when he entered the Congress of Deputies leading a group of some 150 guards and soldiers, and held the congressmen hostage for some 22 hours, before surrendering and being detained and put in custody. However, in October 1982 his conviction was not final yet.

[43] See, e.g., *El País*, 15 October 1982 ("Tejero será candidato, al estimar la Audiencia Territorial de Madrid el recurso contra su exclusión de las listas": https://elpais.com/diario/1982/10/15/espana/403484408_850215.html).

almost unanimously adopted, including new restrictions to the exercise of the right to stand as a candidate for elections.[44]

Consequently, and relating to the definition of the rule and its exceptions, the Spanish Organic Law on the General Electoral Regime (hereinafter LOREG, by its Spanish name) established as the general rule the deprivation of the right to stand for election by *final* judgment (Articles 3.1 of the Penal Code, CP; and 6.2 a) LOREG). Nevertheless, the Spanish legislator, aware of the length of the judicial proceedings and looking after the constitutional values of free expression and proper functioning of democratic institutions, admitted also some exceptions for both spheres, the electoral and that of the public service (thus including the parliamentary): the first, in the same Electoral Law (Article 6.2 b); the second, few years later, in the Criminal Procedure Law (hereinafter, "LECrim", Article 384 *bis*).[45]

The Commission's *Report* alludes only to the first of these exceptions: according to Article 6.2 of the LOREG, "persons convicted for rebellion, terrorism or other offences against public administration are ineligible even if the judgement is not final. In such cases, the judgement must specifically establish the penalty of deprivation of the right to be elected or the penalty of disqualification from public office".[46] However it does not mention the second, which anticipates the restrictions also for those cases where public officers, elected or not, are deprived of liberty and prosecuted for the commission of certain crimes. Thus, Article 384 *bis* of the LECrim establishes that, once the indictment is judicially declared and the pre-trial detention is decreed for crimes related to terrorism or rebellion, the accused serving any public office will automatically be suspended in its exercise while he/she remains in prison. It is not, therefore, a cause of ineligibility, but of suspension (not loss) of mandate or any other public office.

These "advanced" restrictions are then conditioned by the necessary concurrence of at least two factors: first, the serious nature of the offences (which openly attack the basic foundations of democratic societies); second, the intervention of a judicial body who formally initiates the prosecution and, all circumstances seen, decides the pre-trial detention of the accused.

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[44] Only two deputies (in a Congress with an overwhelming socialist majority of 202 out of 350 members) and one senator (out of some 250) voted against the final text of the law; and two more deputies abstained (A. J. Sánchez Navarro, *Constitución, igualdad y proporcionalidad electoral*. Madrid, Centro de Estudios Políticos y Constitucionales, 1998, p. 72).

[45] Adopted by Organic Law n. 4/1988.

[46] *Report*…, para. 52.

Regarding any possible doubts about the "conventionality" of this provision, it may be underlined that Article 3 of the First Additional Protocol, unlike other provisions of the ECHR, does not contain a list of limits allowing to know *a priori* the cases where the exercise of the right to stand for election can be restricted. This peculiarity, which could be related to the original drafting of the rule as a mandate to public authorities and not as a subjective right of citizens, gives Contracting States a wider margin of appreciation than that existing in the rights stipulated in Articles 8 to 11 of the ECHR.[47]

Nevertheless, the ECtHR has established a series of *general* and *specific* conditions that limit the margin of appreciation in Article 3 of the First Additional Protocol.[48] In *general*, measures cannot restrict the right to such an extent as to impair its very essence and deprive it of its effectiveness; moreover, they must be provided for by the law, pursue a legitimate aim and not being disproportionate.[49] Meanwhile, the *specific* conditions refer to those inherent to the right to free elections, namely the protection of the free expression of the public opinion and the prohibition of retroactive changes of the electoral system which may alter the result of the elections, unless there are "compelling reasons for the democratic order".[50]

This provision of the Spanish LECrim aims at protecting the proper functioning of the democratic institutions, on the one hand, by people who are accused of serious crimes[51] and, on the other hand by preventing them from being adulterated by the deprivation of liberty of one of its members. In this sense, and focusing on legislative bodies, "imprisoned persons cannot take part in parliamentary sessions, communicate freely with other MPs or with voters".[52] they cannot meet their voters nor satisfy their demands. Neither of course will they be able to carry out parliamentary functions such as registering bills, asking questions to the Government, presenting amendments, parleying with members of other political forces for the elaboration of norms, intervening in plenary debates or participating in voting on laws. For all these reasons, the law automatically suspends those parliamentarians from their functions.

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[47] ECtHR, *Selahattin Demirtaş v. Turkey*, no. 15028/09, 20.11.2018, para. 237.
[48] Pablo Sánchez Molina, "El margen de apreciación nacional en las sentencias del Tribunal Europeo de Derechos Humanos relativas al derecho a elecciones libres", *Estudios de Deusto*, Vol. 62/1, January-June, 2014, p. 384.
[49] ECtHR, *Ahmed et al. v. United Kingdom*, no. 22954/93, 02.09.1998 para. 75 and *Labita v. Italy*, no. 26772/95, 06.04. 2000, para. 201.
[50] ECtHR, *Paschalidis, Koutmeridis and Zaharakis v. Greece*, no. 27863/05, 10.04.2008, para. 28.
[51] Constitutional Court's Decisions 71/1994, 3 March 1994, 11/2020, 11 January 2020, 38/2020, 25 February 2020 and 97/2020, 21 July 2020.
[52] *Report*…, para. 151.

This consequence does not depend therefore on the decision of the governing body of parliaments, but it directly emanates from the decision of formal prosecution and the measure of deprivation of liberty. In other words, the suspension is in no way due to political reasons, since it is conditioned to the concurrence of the legal requisites for the adoption of pre-trial detention, as well as to the satisfaction of the motivation of the former judicial resolutions.

The proportionality of this measure may also be held since it represents a "fair balance" between the proper working of institutions and other constitutional values, such as the right to exercise public offices and the free expression of voters' opinions.[53] Thus, citizens will only be deprived of their functions while they are in custody. Once this precautionary measure has been lifted or another has been adopted that implies a less burdensome restriction on the right to liberty, they will be fully replaced in their offices and thus they will be able to carry out their functions as holders of them. The measure does not therefore replace the will of citizens at the ballot box: the seat of the suspended parliamentarian will not be occupied by a member of another political force, but it will remain unaltered until a subsequent court decision. However, in case of resignation of the imprisoned MP, the seat would be definitively occupied by other candidate of the same list.[54]

In the case of the Catalan leaders, two different situations have to be distinguished: on the one hand, those who escaped from the courts prosecution and are in other countries have been declared in default, but the Spanish law does not foresee this as a cause of ineligibility. Therefore, some of them have been candidates to the regional and European Parliaments, with different consequences: as they cannot enter in Spain because of the judicial arrest warrant, they had to resign or to leave their seats empty at the regional Chamber, without really sitting. But, in the European Parliament, the Court of Justice of the European Union decided that, once they had been elected, their access to their seats should not be conditioned by the national rules, but would depend on the possible lifting of their immunity, which has to be decided by the European Chamber.[55]

For their part, those who were in custody for a judicial warrant were also eligible and were included in party lists at all levels because they were

[53] The existence of a fair balance between general and individual interests is one of the parameters used by the ECtHR to measure whether the measure restrictive of rights can be subsumed within the national margin of appreciation of the Contracting States. The ECtHR refers to this parameter in the cases of *Kliafas et al. v. Greece*, no. 66810/01, 08.07.2004 and *ZANTE-Marathonisi v. Greece*, no. 14216/03, 06.12.2007.

[54] The Spanish electoral system is based in closed party lists, with proportional representation.

[55] Venice Commission, CDL-AD(2014)011, Report on the Scope and Lifting of Parliamentary Immunities..

not convicted yet. Some of them where elected, but they were immediately suspended *ex lege* by the application of the aforementioned Article 384 bis LECr. The only exception was the former Vice-President of the Catalan Government, who was also elected as a MEP, but being in custody was not allowed to take office. In his case, however, when the CJUE declared the competence of the EP for granting or lifting his immunity, he had already been judged and sentenced to prison by the Spanish Supreme Court, so that he could not occupy his seat.

Obviously, in all these cases the legal situation of the candidates was not only known, but it also was a central element in their campaigns: empty seats, video messages at electoral meetings and other means permitted them to convert the courts proceedings in an electoral message, strengthening their claims about the political prosecution of their ideas. Most of them have provoked many law suits, which are pending at different judicial levels (regional courts, Spanish Supreme and Constitutional Courts, ECtHR and CJUE), and whose final decisions will strongly depend on the interpretation by the different courts of this "problematic" rules and exceptions about the restriction of political rights aimed to *exclude offenders from Parliament*.

IV. By way of conclusion

In sum, the Venice Commission *Report* considers that restrictions of political rights such as the "ineligibility to be elected" or the "loss of parliamentary mandate" to exclude offenders from elected bodies can be justified as legitimate and proportionate *if* they are provided for by the laws, *if* they pursue legitimate goals (such as protecting the integrity of elected bodies), and *if* they do it through proportionate means. In this sense, those restrictions should be applied only for serious or very serious breaches of the law and usually after a final conviction; but exceptionally, they could be justified even before the final conviction when taking into account circumstances such as the exceptionally serious nature of the offence and other factors, among which we consider the length of the judicial proceedings should be also relevant. *If* those basic premises are fulfilled and the application of the exceptions is additionally guaranteed by an *independent and impartial judiciary*, the last words of the *Report* are quite clear: "discretion for the judges in deciding on the specific case may be suitable… where the conviction [or the court decision, we would add] relates to sitting MPs".[56]

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[56] *Report*…, para. 180.

Jean-Claude SCHOLSEM[1]

Commission européenne pour la démocratie par le droit ou Commission de Venise ?

1. L'officiel ou l'officieux ? Le choix a déjà été largement fait en pratique. Quelles en sont les raisons ?

Comme François Mitterrand, lors de ses derniers vœux aux Français, je crois aux forces de l'esprit.

Comment faire autrement devant la beauté incomparable de la Scuola San Giovanni Evangelista, qui depuis le début héberge les réunions de la Commission européenne pour la démocratie par le droit, autrement dit, la célèbre Commission de Venise ?

Fondée en 1261, cette Scuola, la seconde à voir le jour, fait partie des six grandes « Scuola » qui ont intimement partagé toute la vie de la Sérénissime. Association laïque, centrée sur l'entraide matérielle et spirituelle de ses membres, mais aussi- et ceci ne peut échapper au regard- sur l'embellissement de la ville et l'efflorescence des arts. Si on peut se permettre cet anachronisme, un peu des Rotary Clubs avant la lettre.

Comment ne pas s'émerveiller à chaque instant devant ce monument que la générosité des autorités italiennes (qui n'est, à mon avis, pas assez mise en valeur) met à la disposition de la Commission ? San Giovanni mélange tous les styles, du médiéval, de la Renaissance et du baroque. Tout y est surprise. San Giovanni Evangelista n'a certes pas l'éclat extraordinaire de San Rocco, sa voisine pourtant. La plupart de ses toiles les plus célèbres sont maintenant à l'Accademia. Il n'en reste pas moins qu'elle ménage des états d'âme sans pareils.

2. San Giovanni Evangelista est aussi un symbole puissant de la Sérénissime : puissante, impériale, inaltérable dans son dessein et destin, et pourtant si fragile, exposée aux morsures du temps, du sel et des « acque alte ». Les membres de la Commission qui ont partagé la session de décembre 2019 en ont fait l'affligeant constat. Combien d'efforts, de nouveaux financements ne seront-ils pas requis de toute urgence pour sauver tout ce qui peut l'être et pour renforcer la structure du bâtiment ?

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[1] Membre suppléant de la Commission de Venise au titre de la Belgique. Ancien Vice-Président de la Commission de Venise (1997-1999).

Les séances de mars et juin 2020 ont été plus cruelles et éprouvantes encore. Une pandémie mondiale, qui n'est pas sans rappeler d'autres qui se sont abattues sur la ville, a banni tout accès physique à nos chers bâtiments, nous forçant donc à des procédures écrites et des réunions virtuelles.

3. Je ne crois pas un seul instant que les membres de la Commission réagiraient de la même manière, s'ils étaient claquemurés dans des salles anonymes de grands ensembles dits « fonctionnels », coupés de l'histoire. C'est la magie indicible d'une architecture mariée à un passé qu'elle rend presque tangible.

Qui n'éprouve un frémissement devant le fronton extérieur, avec son aigle majestueux, œuvre de Pietro Lombardo, qui coupe des rumeurs de la ville mais entraîne peut-être à plus d'intériorité ? Qui n'a jamais gravi les magnifiques escaliers monumentaux dus à Mauro Condussi, maître de la perspective, qui débouchent sur un dallage en marbre de toute beauté et un plafond évoquant l'Apocalypse.

Réfléchir et discuter dans un tel contexte, où le passé est toujours prégnant, n'est pas, je crois, sans incidence. En tout cas, c'est une sorte de béatitude pour tous les membres de la Commission qui peut revendiquer fièrement le nom de Venise.

4. D'autres que moi feront de cette Commission un portrait beaucoup plus fidèle et détaillé. Ce n'est pas mon objet ici.
Laissez-moi vous dire que l'on ne peut comprendre cette Commission dès sa conception, puis tout au long de son enfance et son adolescence sans évoquer son véritable géniteur, Antonio Mario La Pergola. Il a d'emblée présidé la Commission jusqu'à son décès en 2007, à savoir 17 ans. Un véritable record ! Décrire Antonio La Pergola est des plus simples : il avait d'emblée toutes les qualités requises pour être nommé comme un de ses membres les plus éminents : professeur, président d'une Cour constitutionnelle, ministre, membre du Parlement européen, avocat général à la Cour de Justice des communautés européennes, puis juge dans cette même juridiction. Qui peut dire mieux ! Je dis cela sans flagornerie aucune.

5. Une évocation plus personnelle. Imaginons une session d'été de la Commission. Tout le monde somnole un peu. L'orateur n'est sans doute pas très doué : il s'enfonce dans des détails techniques qui ne semblent intéresser que lui. Il s'exprime peut-être dans un anglais basique que même les traducteurs ont du mal à comprendre. Le temps de midi a aussi

peut-être été trop long (les problèmes d'horaire n'étaient pas la priorité majeure de La Pergola). Et voilà une voix qui frémit, puis qui enfle, fait de longs développements dans un anglais supérieur, académiquement parfait, mais malgré tout doré au soleil méditerranéen, puis cette voix s'éteint. Tout le monde est bien réveillé et le débat repart. Ce « miracle » de La Pergola, combien de fois ne l'avons-nous pas vécu ?

J'ai toujours trouvé un peu étrange que Antonio La Pergola s'adressât toujours à moi en anglais et jamais en français, alors qu'il était un polyglotte avéré, jonglant avec l'espagnol, et qu'en plus il travaillait au sein de la Cour de justice des communautés. C'est là sans doute une marque de son perfectionnisme.

6. La Pergola n'était pas seul. Comme l'albatros de Baudelaire, ses ailes de géant l'empêchaient parfois de marcher. Heureusement, Gianni Buquicchio était là, pour l'aider *et* dans la conception *et* dans la mise en œuvre des idées du « patron». Secrétaire de la Commission, Gianni Buquicchio est comme La Pergola lui-même, un homme de la Renaissance, mais illustrant un autre aspect. Il y avait visiblement une sorte d'affection filiale reliant le « jeune » au « vieux » ou « patron ». Cela se sentait presque physiquement.

Le « jeune » avait, il faut bien le noter, juste un an de moins que moi qui suis, hélas, trois fois hélas, le plus ancien membre de la Commission. Quand je lis l'emploi du temps actuel de Gianni, voyageant de Séoul à Lima en passant par Johannesburg, je ne peux qu'admirer sa perpétuelle vivacité, lui l'ordinateur central de la Commission, connaissant tout de tout et chacun personnellement.

C'est ce qui a créé cet esprit familial qui est au cœur de la Commission de Venise. Loin des lourdeurs administratives qui grippent tant d'organisations, la Commission est toujours restée si l'on peut dire « légère ». C'est le fait des membres, bien sûr. Certains ont laissé des marques notables. Avec quel plaisir les retrouve-t-on ou évoque-t-on leur passage ou leur souvenir ! Bien sûr, il y en a de moins brillants : c'est la vie. Malgré toutes les impulsions données par les dirigeants, les institutions n'en sont que le reflet.

Mais cette légèreté et cette souplesse est aussi le fait d'un secrétariat d'un très haut niveau intellectuel, d'une adaptabilité remarquable et d'une diplomatie à la fois gentille et sans faille. A travers le secrétariat, on ne peut s'empêcher de retrouver le sourire si ouvert et amical d'Antonio La Pergola. Aucune raideur ou vanité chez lui ou chez eux.

7. En 2010, Gianni quitte son poste de secrétaire général pour être élu président de la Commission, élection reconfirmée jusqu'à nos jours.
La direction du secrétariat est confiée à des personnes qui connaissent admirablement tous les ressorts de la Commission : Thomas Markert comme directeur général et Simona Granata-Menghini comme directeur adjoint. Ayant beaucoup œuvré pour la Commission, j'ai eu le plaisir de travailler avec à peu près chacun des membres du secrétariat. Ce fut là un véritable privilège. Les voyages dans le pays qui sont de règle avant un avis ne sont pas seulement une procédure indispensable pour pouvoir saisir la situation politique et juridique de l'État. Elles contribuent aussi à forger des amitiés à la fois durables et fortes.

La Commission européenne pour la démocratie par le droit est aussi cela : un lieu, au cœur de Venise, au cœur de l'histoire, où se forgent tant d'amitiés qui marquent à jamais.

Elle est cela bien sûr, mais aussi bien plus : elle mérite pleinement son appellation officielle de commission européenne pour la démocratie par le droit. Bien que son action s'étende actuellement au monde entier, ses sources d'inspirations sont essentiellement européennes. Elle n'a qu'un objectif : la démocratie et une seule arme : le droit.

Longue vie lui soit donnée ! Et, s'il vous plaît, pas uniquement par des vidéo-conférences !

Marina Stavniychuk[1]

Venice Commission and several problems of the Ukrainian Constitutional Process

The Venice Commission celebrates its 30th anniversary in 2020. The European Commission called "For Democracy through Law" (The Venice Commission) has been functioning as a part of the Council of Europe since 1990 for thirty years. During these years the Commission has gained its respectable position in the area of constitutional building not only among the countries of "young democracy" but in Europe and the world as a whole and renders the methodical legal assistance in effective and efficient strengthening democratic institutions. Due to the Venice Commission's authority, European standards which guarantee the rights and freedoms as well as the Rule of Law and democracy are being developed, implemented and promoted. In this context, it is incredibly necessary to notice that, on the modern stage of European constitutionalism functioning, the European Commission for Democracy through Law has developed an actual modern concept of the rule-of-law which is considered to be the social value and a fundamental law principle. This modern concept has been worked out on the basis of the both generalised constitutional history and its contemporary development as well as the philosophy and theory of law, sociology and practical experience.

It is a matter of common knowledge, that the Venice Commission has approved more than 500 reports, opinions, recommendations during the years of its activity. In our opinion, all of them belong to the documents of the so-called "European soft law". This presumption is made on the premise of the Venice Commission's activity. On the one hand, it has the status of an expert European body and its decisions are to be recommendations. On the other hand, the opinions of the European Commission for Democracy through Law are mainly followed by all the countries due to the unquestioned and accredited international authority of this Commission, whose activity is based on constructive dialogue, searching for adequate political and legal decisions for every country supported by legal assistance etc. Moreover, another positive trend has emerged in the last

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decade. The Commission's legal position has become, so to speak, a form of pressure in a good sense on the development of constitutional democracy in the countries of the European space, primarily because the Parliamentary Assembly, the Congress of Local and Regional Authorities rely on its decisions. The European Court of Human Rights has also been referring to the Commission's legal approach in its decisions since 2002. The Venice Commission's recommendations are used in the European Union's official positions and decisions. The Organisation for Security and Co-operation in Europe (OSCE) also relies on the Venice Commission's judgment, as they very often cooperate on problems of working out the electoral and reference standards, giving recommendations to certain countries about their direct democracy, political parties, public associations etc. The United Nations, which is the organisation on global strategic development and forming democratic standards, rule-of-law, rights and freedoms, also takes into account the Commission's acquis and uses it in its documents.

It's important to denote one more positive trend of the Venice Commission's activity. It is closely connected with the practical realisation of international relations. The Venice Commission's administration, possessing unique experience in that field, is often involved in crisis solving in the range of political and legal situations and constitutional conflicts in many countries and plays the role of highly professional and authoritative mediators. In recent years, the Commission provided its assistance to settle constitutional and legal conflicts in Georgia, Kyrgyzstan, the Republic of Moldova, Poland, Hungary, Turkey and others. The geography of the Commission's cooperation is very wide.

Ukraine is a subject of the Venice Commission's constant attention. Today, it is impossible to imagine the process of the Ukrainian constitutional development without the Venice Commission's participation and using its scientific and expert potential for the formation of the Ukrainian constitutional legislation in accordance with European standards. In all difficult situations, the Venice Commission has always tried to provide support to our country within its competence.

The cooperation between Ukraine and the Venice Commission started in July 1992, when Ukraine applied to the Council of Europe (Ukraine became a full member of the Venice Commission on 7 December 1996). Since then, the Venice Commission's theory-oriented documents as well as its opinions in the area of the Ukrainian constitutional problems have become not only the foundation of the searching for the appropriate normative solution of actual problems in the legislative activity, but also a

subject of numerous scientific research provided by Ukrainian lawyers. It is caused by the fact that the Venice Commission's documents reflect the spirit of modern European constitutionalism, concentrated on the generalisation of the diverse European democracy, its basic values and traditions which were crystallised into a common experience of many states. It is also necessary to denote that the Venice Commission's opinions connected with the Ukrainian constitutional problems are used as important arguments in the forming of legal positions provided by the Constitutional Court of Ukraine and other bodies of judicial power.

Taking into account the genre and scope of this article, we do not have the opportunity to analyse all aspects of the Venice Commission's activity and documents on the constitutional process in Ukraine. So, it makes sense to focus on some priority aspects of the cooperation between Ukraine and the Venice Commission on constitutional issues.

Despite the fact that the real cooperation of the Venice Commission with Ukraine began four years earlier, initially the Venice Commission provided expert assistance in the preparation of legislative acts.[2] The first formalised Opinion of the Venice Commission on Ukraine is dated September 1995. Let us note that since Ukraine gained its Independence, a very complex constitutional process was going on and it was followed by permanent political crises. In its first opinion on the constitutional situation in Ukraine, which appeared after the Constitution Agreement approval, the Venice Commission noted that "making such an Agreement and following it in the situation of a political conflict between the executive and legislative powers is an example of civilised and legal attempt to solve the problem during the transitional period up to the adoption of a new Constitution".[3] Noting Ukraine's progress in working on the Constitution, at the same time, the Commission drew attention to such basic approaches as: human rights provisions should be in line with international standards; the independence of the juridical system must be fully ensured and judicial functions must remain with the courts; the ministerial authority of prosecutors should be reduced to the level of Western European countries; there must be stable norms that cannot be changed unilaterally by participants in the political process.[4]

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[2] Jowell, Jeffrey. The Venice Commission - Disseminating Democracy through Law, Public Law, 2001. p. 678.

[3] Venice Commission, CDL(1995)040, Opinion on the present constitutional situation in Ukraine following the adoption of the Constitutional Agreement between the Supreme Rada of Ukraine and the President of Ukraine.

[4] *Ibidem*.

Taking into account the Opinions of the Venice Commission, on 28 June 1996, the *Verkhovna Rada* of Ukraine adopted the Constitution of Ukraine under the threat of President Kuchma's calling an advisory referendum in which he was going to submit his version of the Constitution. It was preceded by the Venice Commission's Opinion CDL-INF(96)66, dated 17-18 May 1996. In that document the Commission mentioned that any Constitution is a political document that is always an "offspring of political compromise" and treated with understanding the preservation of certain provisions arising from the legal traditions of our state. At the same time, the Venice Commission drew attention to the following "bottlenecks": the presidential powers were excessive; the section of the draft Constitution of Ukraine on Crimean Autonomy contained an insufficient level of autonomy rights protection; it was recommended to include in the Constitution provisions on the rights of legal persons, similar to the German Basic Law, the third paragraph of Article 19 of which states: "Fundamental rights also apply to national legal persons to the extent permitted by the nature of such rights".[5]

The Constitution of Ukraine, adopted on 28 June 1996, was sent to the Venice Commission for another opinion. The result was the Opinion CDL-INF(1997)002.[6] The Venice Commission's general remark on the adopted Constitution of Ukraine was positive. It was stated that the Constitution fixed a strong executive power under actual administration of the President having wide authorities. At the same time, the principle of containment and balance found in the Basic Law, according to the Venice Commission, must prevent making authoritarian decisions.[7] The Commission also denoted that "…the final text takes into account a large part of the Venice Commission's comments made on previous versions", but "certain provisions of the Constitution remain unsatisfactory from a legal point of view". Summing up its Opinion, the Venice Commission noted that: "…The Commission sees more reason for optimism. Although the text of the Constitution of Ukraine introduces a strong executive branch under a strong President, a system of containment and balance is present, and this should prevent the use of authoritarian decisions. The principles of the rule-of-law are well reflected in the text. The introduction of democratic local self-government, as well as the important role

[5] Venice Commission, CDL-INF(1996)006, Opinion on the Draft Constitution of Ukraine..
[6] Venice Commission, CDL-INF(1997)002, Opinion on the Constitution of Ukraine.
[7] *Ibidem.*

assigned to the Constitutional Court, should lead to the establishment of a democratic culture in Ukraine."[8]

The involvement of the Venice Commission's experts in the preparation of the draft Constitution of an independent Ukraine became, in fact, one of the first experiences of close cooperation between Ukraine and the Venice Commission. Subsequently, the Venice Commission was more or less involved in the constitutional process in Ukraine.

It is important to note that the Ukrainian constitutional history, to put it mildly, has two extreme points: either ignoring the norms of the Constitution, or the desire to use the Constitution as a tool in the political struggle through amendments to the Basic Law.

Most of the time accepting and making amendments in the Constitution are caused by certain political crises. As soon as the contractual capacity of the main political players is exhausted, the question of the institutional reorganising of the state and law inevitably arises. On principle, it would not be very extraordinary as the political and legal system functions as a "living law", must constantly adapt to new social reality and create new institutions that provide two-way channels (direct and feedback) between man, society, government. However, unfortunately, I have to state that in our conditions the changes to the Constitution, which also take place mainly in an unconstitutional way, do not indicate the rapid adaptability of the Basic Law to social development, but reflect some immaturity of political elites, their desire for additional political or personal preferences to gain or retain power.[9]

In 2007 the Venice Commission's President, Gianni Buquicchio, described the main symptoms of this Ukrainian disease: "…the presence of strong political polarisation, in which both parties regard their political opponents not as legitimate competitors having the support of a large part of Ukrainian society, but as an enemy against whom any means are allowed; a steady tendency to consider any legal or constitutional issue solely in terms of short-term political benefits and disregarding the country's long-term interests; improper respect for the rule-of-law, the habit to dispense with constitutional norms if they interfere with the achievement of political goals".[10]

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[8] *Ibidem.*

[9] Ставнійчук М. Дефіцит легітимності влади як загроза державності України. URL: https://zn.ua/ukr/LAW/deficit-legitimnosti-vladi-yak-zagroza-derzhavnosti-ukrayini-_.html.

[10] Ставнійчук М. Дефіцит легітимності влади як загроза державності України. https://zn.ua/ukr/LAW/deficit-legitimnosti-vladi-yak-zagroza-derzhavnosti-ukrayini-_.html.

The constitutional reform of 2002-2004 was no exception. In the process of overcoming the political crisis following the presidential election, a decision made in December 2004 was approved with the breach of the procedure for amending the Basic Law. Then, among other things, the PACE expressed "deep regret that the amendments to the Constitution made on 8 December 2004 within the package agreement contain provisions that, as the Venice Commission has repeatedly pointed out, are incompatible with the principles of democracy and the rule-of-law."

The Venice Commission considered the amendments to the Constitution of Ukraine, adopted on 8 December 2004, at its 63rd plenary session and prepared a sufficiently critical opinion CDL-AD(2005)015. In particular, it identified three main shortcomings with appropriate explanations: the amendments to the Constitution actually introduced a "soft" imperative mandate; the public prosecutor's office retained the function of general supervision; excessive President's powers remained, which did not correspond to the proposed parliamentary-presidential model.

Several Commission's opinions on draft laws became a new page in the work on improving the Constitution. There was, in particular, the draft Law amending the Constitution CDL-AD(2008)015 dated 13-14 June 2008, which criticised the very idea of adopting a new Constitution.[11] The Commission recommended Ukrainian legislators to follow the path of adopting amendments to the Constitution; CDL-AD(2009)008 dated 16 March 2009, in which the Commission noted the idea of strengthening the role of parliament, but expressed its concern about the possibility of transforming Ukraine into a "party state" in this case, where full power would belong to the dominant political force;[12] CDL-AD(2009)024, dated 12-13 June 2009, in which the Commission failed to unambiguously assess the innovations regarding the bicameral parliament and criticised the idea of amending the Constitution solely through a referendum.[13]

In the autumn of 2010, the Constitutional Court of Ukraine abrogated the constitutional reform of 2004 and returned the Basic Law of 1996 to the country. The legal quintessence of this decision was the replacement of the country's political system six years after the adoption of the Constitution

[11] Venice Commission, CDL-AD(2008)015, Opinion on the Draft Constitution of Ukraine (prepared by a working group headed by Mr V.M. Shapoval).
[12] Venice Commission, CDL-AD(2009)008, Opinion on the Draft Law amending the Constitution of Ukraine presented by People's Deputies Yanukovych, Lavrynovych, *et al.*
[13] Venice Commission, CDL-AD(2009)024, Opinion on the Draft Law of Ukraine amending the Constitution presented by the President of Ukraine.

in that edition. Due to that the basic institutional connection between the people as a source of power in Ukraine and the parliament and the president as subjects of the constitutional process was undermined.

Of course, the Venice Commission reacted to such a phenomenon immediately. On 17-18 December 2010, the Commission prepared Opinion CDL-AD(2010)044 on the constitutional situation in Ukraine, which emphasised the need for immediate constitutional reform in Ukraine and the establishment of mechanisms to ensure the legitimacy of amendments to the Constitution.[14] The Commission was concerned that the cancel of the 2004 constitutional reform and the return to the 1996 Constitution carried the risks of an authoritarian presidential regime, and the legitimacy of the Ukrainian parliament's activity provided since 2004 actually appeared to be in a doubt. This Venice Commission's Opinion, having a purely legal character, focused on the rather severe political consequences that increasingly distanced us from Europe and the rule-of-law. After that, with the Venice Commission's assistance and with the participation of the author of this publication, as a member of the Commission from Ukraine 2009-2013, the format of the Constitutional Assembly was proposed as a chance to modernise the country on the basis of a well-organised constitutional process with the following priorities: legal judicial reform; local self-government and administrative-territorial reforms; modernisation of institutions of direct democracy, etc. Unfortunately, then the President of Ukraine and his parliamentary majority lacked the legal culture and political will to restore the constitutional *status quo*.[15] The opposition in the Ukrainian Parliament did not have those qualities either.

In the beginning of 2014, the Constitution was again used like a fire extinguisher, as usual. On 21 February 2014, Parliament passed the Law of Ukraine "On Re-establishment of Certain Provisions of Constitution", and that was done "to overcome another deep crisis", "in order to deprive President Yanukovych of dictatorial powers", "for the sake of reaching a consensus of elites" and "fulfilling the demands of the Maidan".[16] That Law returned the Basic Law to the version of 2004. The constitutional changes by which the presidential-parliamentary model of government was

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[14] Venice Commission, CDL-AD(2010)044, Opinion on the Constitutional Situation in Ukraine.

[15] Ставнійчук М. Дефіцит легітимності влади як загроза державності України. https://zn.ua/ukr/LAW/deficit-legitimnosti-vladi-yak-zagroza-derzhavnosti-ukrayini-_.html.

[16] Ставнійчук М. Дефіцит легітимності влади як загроза державності України. https://zn.ua/ukr/LAW/deficit-legitimnosti-vladi-yak-zagroza-derzhavnosti-ukrayini-_.html.

transformed into a parliamentary-presidential one again took place in a way that was obviously wrong in terms of constitutional and legal regulation.

The lack of constitutional and democratic legitimacy cannot last long in the conditions of the ongoing military aggression in Ukraine, the system crisis deepening significantly, humanitarian catastrophe, civil confrontation and anxiety in society.[17] Thus, the need for constitutional reform in Ukraine remained obvious and relevant at that time. The Venice Commission reminded that the Constitution is not only a temporary political act, but it is the legal basis of the state. Amendments to the Constitution must be balanced, and the Constitution itself must be stable. The Coalition agreement of the newly formed parliament was promulgated in October 2014. It indicated that the future parliamentary majority had also declared its intention to carry out constitutional reform. President P. Poroshenko did not understand that profoundly.

In July 2014, cooperation with the Venice Commission in the field of constitutional reform continued with the submission of Opinion CDL-AD(2014)037, dated 10-11 October 2014, on the draft constitutional amendments initiated by the fifth President of Ukraine P. Poroshenko (Registered no. 4178a, dated 2 July 2014).[18] That project introduced changes in the organisation of state power, public prosecutor's office and local self-government. The Venice Commission noted that the bill took into account a number of Venice Commission's previous recommendations. They, in particular, regarded the abolition of the so-called "imperative mandate" and the prosecutor's office's function of general supervision. The Commission also welcomed the changes in local self-government as they would allow the introduction of modern local government according to the European Charter of Local Self-Government principles and spirit. At the same time, the changes proposed by the President, in the Commission's opinion, led to a significant strengthening of the Ukrainian President's powers as he could appoint and dismiss a number of heads and officials in central authorities without Parliament's consent and appoint the representatives in regions giving them supervision functions over local self-government bodies.

The Venice Commission analysed one more bill amending the Constitution. It concerned constitutional changes regarding the abolition of

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[17] Ставнійчук М. Дефіцит легітимності влади як загроза державності України. URL: https://zn.ua/ukr/LAW/deficit-legitimnosti-vladi-yak-zagroza-derzhavnosti-ukrayini-_.html

[18] Venice Commission, CDL-AD(2014)037, Opinion on the Draft law amending the Constitution of Ukraine, submitted by the President of Ukraine on 2 July 2014.

the deputies' immunity and the limitation the judges' immunity. The issue of judicial immunity was solved in the Law on Amendments to the Constitution on Justice which was adopted in July 2016; but the issue of the parliamentary immunity abolition was taken as a basis. However, it should be noted that the Venice Commission in its Opinion CDL-AD(2015)013 dated 19 June 2015 opposed the complete abolition of parliamentary immunity which was proposed in the draft law:[19] "parliamentary immunity can be an obstacle in the fight against corruption", but "the current state of law supremacy in Ukraine does not yet allow for its complete abolition. … In a political system with a vulnerable democracy like in Ukraine the complete abolition of immunity can be dangerous for the parliament functioning and autonomy" (in two previous opinions on Ukraine, the Venice Commission stressed that Ukraine should not abolish the deputies' immunity, CDL-INF(2000)014, pp. 14-17, CDL-INF(2001)011, p. 3.).

Further work on the constitutional improvement was directed to constitutional changes regarding justice and power decentralisation.

With regard to constitutional changes aimed at power decentralising, the Venice Commission issued a Preliminary Opinion on a draft, which was prepared by a working group of the Constitutional Commission, in June 2015. The draft law was elaborated, refined and finalised taking into account the Venice Commission's recommendations. In July 2015, the President submitted it to the *Verkhovna Rada* (Reg. no. 2217a dated 1 July 2015). In October 2015, the Venice Commission approved the final Opinion on the constitutional amendments connected with the power decentralisation. Those amendments were prepared by the Constitutional Commission's working group. One of the key Commission's recommendations on the draft of those constitutional amendments concerned the need to consolidate such a provision in the Constitution according to which "certain categories of administrative-territorial units or special conditions for such administrative-territorial units must be provided only by law." According to the Venice Commission, "such a formula is a neutral but will ensure the implementation of further legal mechanisms in accordance with the Minsk agreements".[20]

And while the issue of constitutional reform in the field of decentralisation has become a new priority in Ukraine's cooperation with the Venice Commission, the constitutional reform of justice has long been

[19] Venice Commission, CDL-AD(2015)013, Opinion on draft constitutional amendments on the immunity of Members of Parliament and judges of Ukraine.
[20] *Ibidem*.

a key point both in Ukraine's relations with the Council of Europe and in cooperation with the Venice Commission. As in the previous case, the Venice Commission provided several Opinions on the various draft options developed within the Constitutional Commission.

That legislative initiative was based on previous significant developments which had been revised and elaborated to some extent. The Venice Commission emphasised on such elaboration and noted that for many years it had been pointing out that the most serious criticism of the judiciary system and the public prosecutor's office of Ukraine was based on certain provisions of the Constitution, and that fact was discussed in the Commission's opinions.

The Final Opinion (CDL-AD(2015)027) was approved at the 104th plenary session of the Venice Commission on 23 October 2015.[21] It supported the deprivation of Parliament power to elect judges without time limit as well as their dismissal; abolition of the first "probationary" appointment of a judge for five years by the President of Ukraine as well as restriction of his power in the field of the judiciary organising and the judges' status; removal from the list of judges' dismissal reasons the one of "violation of the oath"; introduction of the requirement to select judges of the Constitutional Court on a competitive basis; introduction of the institute of constitutional complaint.

At the same time, despite the generally positive assessment of the proposed novelties to the Constitution, the Venice Commission once again issued a reasonable warning: "Effective reform of the judicial system of Ukraine is a question not only of adoption appropriate constitutional provisions but a question of political will and desire to create a really independent judicial system…".[22]

On 2 June 2016, the *Verkhovna Rada* of Ukraine formally completed the process of amending the Constitution of Ukraine in terms of reforming the justice system. Before those amendments were done that day, the Law of Ukraine "On Amendments to the Constitution of Ukraine (concerning Justice)" had been adopted. That Law was based on the relevant draft Law on Amendments to the Constitution of Ukraine (concerning Justice) worked out by the Constitutional Commission of the *Verkhovna Rada* of

[21] Venice Commission, CDL-AD(2015)027, Opinion on the Proposed Amendments to the Constitution of Ukraine regarding the Judiciary.
[22] Venice Commission, CDL-AD(2015)027, Opinion on the Proposed Amendments to the Constitution of Ukraine regarding the Judiciary..

Ukraine on 25 November 2015, registered no. 3524 and that daft Law, despite all the promises of the authorities, was never sent to the Venice Commission.

Despite the difficult work on constitutional issues, Ukraine needs modernisation in all areas of state building. I always draw attention to the fact that fragmentary, segmental reforms, as experience shows, do not work.

The situation has not changed for the better during the presidency of V. Zelensky. On 3 September 2019, the *Verkhovna Rada* of the IX convocation considered one of the first President V. Zelensky's legislative initiatives to amend the Constitution of Ukraine adopting the draft Law "On Amendments to Article 80 of the Constitution (concerning the deputies' immunity)" no. 7203, approved in part by President Petro Poroshenko. By abolishing parliamentary immunity in terms of criminal prosecution the parliamentary majority actually voted to abolish the institution of parliamentary immunity in general. It was done despite the warnings expressed by the Venice Commission in the Opinion on the draft Law on Amendments to the Constitution regarded the deputies' and judges' immunity dated 19 June 2015 (CDL-AD(2015)013).[23]

On this issue, the Constitutional Court has taken the position of the Venice Commission and has concluded that Bill no. 7203 meets the requirements of Articles 157 and 158 of the Constitution. But it also drew attention to the fact that: "when deciding on the abolition of parliamentary immunity, it is necessary to take into account the state of the political and legal system of Ukraine. It means its ability in the conditions of complete absence of the parliamentary immunity institution to ensure the smooth and effective exercise of powers by deputies, the functioning of parliament and the implementation of the constitutional principle of state powers division. In addition, the Constitutional Court has repeatedly stressed that: "…deputy immunity is not a personal privilege but protects the deputy from unlawful interference in his activity and ensures the smooth and effective performance of his functions."

On the same day, the *Verkhovna Rada* sent seven bills amending the Constitution to the Constitutional Court to obtain conclusions on their compliance with Articles 157 and 158 of the Constitution. Those bills were submitted by President Zelensky to the *Verkhovna Rada* on 28 August 2019.

Having considered at plenary sessions the cases on constitutional appeals made by *Verkhovna Rada* about providing opinions on compliance

[23] Website the *Verkhovna Rada* of Ukraine, www.rada.gov.ua/.

the draft laws amending the Constitution (nos. 1013, 1014, 1015, 1016, 1017, 1027, 1028) with the requirements of Articles 157 and 158 of the Constitution, the Constitutional Court has concluded that draft laws nos. 1016, 1017, 1028 do not meet the requirements of Part 1 of Article 157, Article 158 of the Constitution.[24]

In our opinion, that was a kind of "constitutional spam", which was approved by Parliament in the "turbo regime" and which unbalanced the text of the Constitution. It should be noted that the representatives of the current Ukrainian authorities, particularly the Parliament of Ukraine representatives, have never asked the Venice Commission to provide opinions on the above-mentioned draft laws amending the Constitution.

At present, due to unstable, conflicting constitutional processes which lack legal and political culture, Ukraine, despite the thirtieth year of its independence, is still facing the challenge of ensuring the constitutional and democratic legitimacy in state organising. Our analysis of the main stages of the constitutional process in Ukraine shown in this article proves the truth of our statement.

If the current government of Ukraine is able to learn this lesson, it must do everything possible to ensure that constitutional reform takes place in accordance with five following relevant priorities.

The first priority is the real consolidation of the system of human rights and freedoms on the basis of European standards. It is necessary to guarantee constitutionally the whole spectrum of human rights, and above all it is vital to ensure effective and independent judicial protection.

In this context, I would like to draw attention to the fact that most politicians and experts, when discussing constitutional changes, usually focus exclusively on issues of power. They are not concerned with the deep essence of this power origin. Nevertheless, it is important to remember that the system failures in guaranteeing the people dignity led to the social revolutions in Ukraine in 2004 and 2014.

The second priority is expanding and improving the constitutional regulation of the direct democracy institutions.

The third priority is to solve the problem of the efficiency of the mechanism of state authority organisation, ensuring its balance vertically and horizontally, mechanisms of containment and balances, which will protect against the usurpation of power.

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[24] Website the *Verkhovna Rada* of Ukraine, www.rada.gov.ua/.

The fourth priority is to create proper constitutional principles for reforming local self-government and the territorial organisation of our unitary state to establish a real balance of power centralisation and decentralisation.

Finally, the fifth priority is defining and consolidating the international status of Ukraine at the constitutional level, creating appropriate constitutional foundations for its participation in world and European integration processes; and the most important action is creating principles to guarantee the security of our state and protection of Ukraine's sovereignty.

The procedural aspect is also important. The constitutional process and the mechanism for bringing into action the new version of the Basic Law should ensure the legitimacy of the updated Constitution. This legitimacy must not be in doubt. Obviously, such legitimacy can only be achieved if constitutional changes are made after broad, open and free discussions in accordance with the constitutional procedure.[25]

The authorities should consider the future constitutional process as the conclusion of a social and legal agreement, which requires not a behind-the-scenes approach, but a free and open atmosphere. If the constitutional Ukrainian political players do not really realise this situation, the Ukrainian society can prefer not to make formal constitutional changes but require special procedures for a complete revision of the Basic Law. This can be done, for example, through the Constitutional Assembly of a constituent nature in combination with other measures of complete authority system reorganising in Ukraine in order to preserve Ukraine's state sovereignty and its territorial integrity. And in this context, future Ukraine, as well as three decades ago, must rely on close cooperation with the European Commission "For Democracy through Law".

[25] Ставнійчук М. Конституційна асамблея - шанс модернізувати країну, або Методологія демократії «без прикметників». URL: https://zn.ua/ukr/internal/konstitutsiyna_asambleya__shans_modernizuvati_krayinu,__abo_metodologiya_demokratiyi_bez_prikmetniki.html.

Hanna Suchocka[1]

Are the Venice Commission's standards on the Rule of Law still valid?

Plato said: "Where the law is subject to some other authority and has none of its own, the collapse of state, in my view, is not far off, but if the law is the master of government and the government its slave, then the situation is full of promise and men enjoy all the blessings all the gods shower on a state".[2]

These words of the Greek philosopher were the motto of the actions taken in the countries of Central and Eastern Europe at the beginning of the political transformation in the early nineties. One of the first principles that the countries emerging from communism introduced into their constitutions was the rule that the state is governed by law, the Rule of Law.[3] This principle was verbalized in constitutions in different ways. It was already introduced into the Polish Constitution during the December 1989 amendments.

In the first phase of the political transformation that notion – Rule of Law, was used as a kind of symbol. It was a clear declaration of the political intentions to create such a legal system where, in accordance with the words of Plato, the governors will be slaves of the law and the law shall not be treated instrumentally by governors. There was also a clear will that the law would meet required standards. It was however not enough to introduce such a principle to the constitution, but it was important to look for and to find a common understanding, and common interpretation of this principle.

It has been expressed by M. Wyrzykowski[4] that the adoption by the Polish constitutional legislator of the concept of democratic state of law has not meant that at the same time automatically the state of Rule of Law

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[1] Honorary President of the Venice Commission. Former Member of the Venice Commission in respect of Poland (1992-2016). Former Vice President of the Venice Commission (1995-1997, 2001-2003, 2007-2009, 2011-2013, 2015-2016).

[2] Plato, *Laws*, Book IV, 715 d; Complete Works, Cooper, Jonh *et al*., Hackett Publishing Company Inc., 1997, Indiana, p. 1402.

[3] For example: Albania, Armenia, Belarus, Bosnia and Herzegovina, Croatia, the Czech Republic, Estonia, Georgia, Hungary, Moldova, Montenegro, Romania, Serbia, Slovakia, Slovenia,, Ukraine.

[4] M. Wyrzykowski, *Legislacja – demokratyczne państwo prawa – radykalne reformy polityczne i gospodarcze,* w. Tworzenie prawa w demokratycznym państwie prawnym, red. naukowa H. Suchocka, Wyd. Sejmowe, 1992, s. 38-39.

following all the democratic standards characterized the state governed by law, were implemented. It was rather a declaration of the political intentions of the new political authority that all legal regulations being in line with democratic standards would be introduced into the internal system. The application of this provision in the constitutional system has not only meant imposing the duty on public authorities to observe the law, but has also provided the basis for determining material and formal requirements to be met by the existing law.

The reference to the concept of the Rule of Law, was intended to make a clear distinction between the broader concept of the Rule of Law and the narrower concept of legality. As stated in the Copenhagen Conference document from 1990, "the Rule of Law does not mean merely a formal legality, which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression".[5]

The goal of not only Poland, but also of other post-communist countries was the future membership in the European institutions, first in the Council of Europe and then in the European Union. Through the new constitutional formulation of the Rule of Law, these countries have clearly opened up in this direction. The documents of the European institutions are unequivocal when they speak of the attachment of the member States to the spiritual and moral values which constitute the common constitutional heritage[6] of their peoples and a true source of individual freedoms, and the Rule of Law as the basis of true democracy.

Almost simultaneously with the start of the transformation process in 1990 in Central and Eastern European countries, the Council of Europe Commission for "Democracy through Law" – the Venice Commission was established. When the idea to establish such a commission was brought up for the first time in the 1980s by a famous Italian constitutionalist, Antonio La Pergola, there were some doubts concerning this idea. Since constitutional law was perceived as closely linked to national sovereignty, states were reluctant to establish an international body which could interfere in constitutional issues. However, the collapse of the communist system helped to overcome the initial skepticism.[7] The coincidence of the establishment of the Venice

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[5] Copenhagen 29 June 1990, www.osce.org.

[6] A. Pizzorusso, *Europejskie dziedzictwo konstytucyjne*, Wydawnictwo Sejmowe, Warszawa 2013.

[7] G. Buquicchio, S. Granata-Menghini, The Venice Commission Twenty Years on. Challenge met but Challenges ahead, in: van Roosmalen, Marjolein / Vermeulen, Ben / van Hoof, Fried / Oostling, Merten, eds., Fundamental Rights and Principles – *Liber*

Commission with the fall of the Berlin Wall facilitated the involvement of the Commission in the development of the democratic constitutional reforms in the countries of Central and Eastern Europe.[8]

There was a need to create in the Council of Europe system an institution operating in the legal field, whose task would be to provide specific legal assistance to the states in the implementation of the three key principles, democracy, human rights and freedoms, the Rule of Law. It is obvious, however, that even the Commission is not acting in a vacuum. Its work is linked to the political sphere as much in such a sense as legal and especially constitutional matters are connected with politics. But the Commission uses only legal argumentation, considering the political context of the case only as a kind of background information.[9]

It became evident that the countries of Central and Eastern Europe were keen to profit from the democratic experience of the Western European countries and the Venice Commission proved the ideal body for sharing this experience.

One of the fundamental processes at the beginning of the transformation was the process that could be called the discovery of the elements that make up the concept of the common European constitutional heritage. In this context, the role of the Venice Commission became extremely important. The Venice Commission helped the countries to discover what, growing out of the common European legal tradition, became a European legal standard. Therefore, in the general category, the so-called European standard was perceived as a central value. One of the crucial values was the Rule of Law. Hence, referring to it was an important verifier in the process of making changes to the constitution and laws in various countries.

The countries of Central and Eastern Europe have accepted this role of the Venice Commission by joining the Commission on a voluntary basis under the "partial agreemeent" scheme.

In 1993, the European Commission defined the criteria that must be taken into account when amending the law. These included guaranteeing the principles of the primacy of the law, legal certainty, equality before the law,

amicorum Pieter van Dijk, Cambridge, Antwerp, Portland (Intersentia 2013), p. 241.

[8] S. Bartole: *International Constitutionalism and conditionality. The experience of the Venice Commission*, in: Rivista AIC 4/2014., H. Suchocka: *The Venice Commission and the making of Constitutions in the Central and Eastern European Countries*, in Revista General de derecho Constitucional, no 30 Octubre 2019.

[9] H. Suchocka, *Position of the Venice Commission regarding the status of the constitutional judiciary in a democratic state based on the rule of law,* w: Ruch Prawniczy, Ekonomiczny i Socjologiczny 2016, z. 1 pp. 5-8.

accountability before the law, fairness in the application of the law, separation of powers, independence of the judiciary, avoidance of arbitrariness, and ensuring procedural and legal transparency and thus reference to the common values shaped by the European legal culture.[10]

These criteria were not questioned at the time. For the countries joining the Council of Europe and the European Union as a result of their own sovereign decision, it was clear that observance of the Rule of Law is part of the package, an obligation and not an option that can be waived, moreover, that this option is valid, a condition for the whole duration of being a member of the institution, and not only at the moment of accession.[11]

This was clearly underlined by the Secretary of the Venice Commission, Thomas Markert, during a conference held at the University of Poznań on the occasion of the 20th anniversary of the Polish Constitution. He said that in the first period of work on the new Constitutions there was no doubt about the willingness of the so-called "new democracies" to implement these values. This was probably a unique moment in history. Never before were states so open and even keen to be inspired by constitutional principles and solutions from abroad.[12] The reason for this approach was simple and obvious: these European principles and values were not perceived as an alien foreign influence. On the contrary, countries wanted to get rid of the system imposed on them and return to the family of European democratic states to which they had belonged before.

Over time, however, this thinking changed.

There appeared fears that despite the declaration of joining the European institutions, and even the constitutionalisation of the principle of the Rule of Law, many of these countries so-called "new democracies", would be tempted to move towards using certain mechanisms and methods known from the previous authoritarian system. Using the more political method of strength resulting from the obtained majority than dialogue and seeking a compromise with the current parliamentary minority. There was a concern that the law, and in particular certain legislative procedures forming part of the Rule of Law, may be seen in such a situation as an uncomfortable limit to carrying out the arduous process of making reforms.

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[10] Venice Commission, COM(2014)158final, Communication from the Commission to the European Parliament and the Council, 'A New EU Framework to Strengthen the Rule of Law", p. 4.

[11] T. Chopin, *New Beginnings, Europeans face the risk of democratic regression: what can be done?*, Paris Institut J. Delors, Institute Berlin, 2 September 2019.

[12] T. Markert, *The role of the Venice Commission in the process of the preparation of the constitutions of the countries of Central and Eastern Europe*, Ruch Prawniczy, Ekonomiczny i Socjologiczny, 2018 z. 1, ss. 7-11.

The Venice Commission was thus confronted with attempts to re-concentrate executive power, and in particular the executive's assumption of a kind of political "curatorship" of the judiciary. In this respect very significant are the words of the vice-president of the Polish Constitutional Tribunal, also a substitute member of the Venice Commission, who in 2017 wrote that the Prime Minister of the Republic of Poland was right not to publish the Constitutional Tribunal's judgments because if the judicial authority exceeds the powers granted to it, there is nothing left for the executive to correct it.[13] In this thesis, a view was expressed which is going against what has been achieved since the adoption of Magna Charta Libertatum in 1215. The above words clash with what the Prime Minister of Great Britain, David Cameron, said on 15 June 2015 during the celebration of the 800th anniversary of the Magna Charta Libertatum:

> "800 years ago, King John put his seal on a document that changed the world. (...) There was a definition of the limits of executive power, a guarantee of access to court, the belief that there is such a thing as the Rule of Law. It may seem today that these were small things, but it had a revolutionary dimension at the time, allowing to shape the balance of power between those in power and those in power".[14]

Notwithstanding the active role of the Venice Commission, concerns have started to emerge about the misunderstanding of the Rule of Law in individual countries. There is no doubt that if a system of the Rule of Lawbased on European values is broken in any member State, this is tantamount to a collapse of the Rule of Law throughout the European system. This is not an internal matter for a particular member State. It is a problem of the whole European system which can only function if all member States fully respect the principles enshrined in the Treaties.

Clearly dangerous symptoms, not only fears, of weakening the Rule of Law could be seen around 2010. It was then, in connection with the process of changes to the Fundamental Law in Hungary, that important questions and related threats arose concerning the understanding of the Rule of Lawand existing European standards in this area. One could then hear growing voices calling into question at least some of the standards of the Rule of Law, particularly in the judiciary, the role of international (European) institutions in relation to national law. It was also a time when the voices promoting the idea of constitutional identity became stronger.

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[13] M. Muszyński, opinion expressed 21.12.2017 in *Rzeczpospolita*, Rp.pl/opinie/312219975.
[14] www.gov.uk/government/speeches/magna-carta-800th-anniversary-pms-speech.

All the symptoms were indicated when in 2011 the Venice Commission prepared a special report on the Rule of Law[15] adopted in March 2011.

The aim of the report was to find common elements of the Rule of Law, which could help international organisations as well as national and international courts to interpret and apply this fundamental value, which originated from different traditions. The report does not formulate a single binding definition of the Rule of Law, but refers to the elements that make up what is expressed in the concept of the Rule of Law and what, in effect, makes up the state of the Rule of Law. This includes both the sources from the courtroom, the classic British concept of the Rule of Law, and a more formalised concept (the formal Rule of Law) based on the written constitution, the German *Rechsstaat*.

The basic concept presented in this report was to see the Rule of Law as a construction based on two factors:

1. on a legal-formal factor (legalism),
2. on a legal and material factor, which means that the concept of the Rule of Law not only presupposes respect for the law but also determines the democratic and free content of the law.[16]

The dynamic but unfortunately negative situation in some countries members of CoE and EU in the area of understanding and observing the Rule of Law has led the Commission, five years after the first report, to issue a second one that was much more extensive, covering a much wider range of situations that make up the concept of the Rule of Law in a country. It was called "Check list on the Rule of Law" (CDL-AD(2016)006). The report was intended to be an instrument to assist in what we call "control of the Rule of Law" in the member States. Time has shown that although this instrument was developed by the body of the Council of Europe, it has become an extremely important tool of the European Union.

It points to key issues such as the law-making process, principles of decent legislation, legal certainty, prevention of abuse of powers, guarantees of the independence of the judiciary, the role of constitutional justice. The new report based on the checklist formula, was prepared as a concrete operational instrument to assess the situation in different countries, to give a real "operational" opportunity to assess the threats to the Rule of

[15] Venice Commission, CDL-AD(2011)003, Report on the Rule of Law. The origin of this work lies in Resolution 1594 (2007) of the Parliamentary Assembly of the Council of Europe on the Rule of Law ("The Principle of the Rule of Law").
[16] Venice Commission, CDL-AD(2011)002, Draft Opinion on the Draft Law on Judges and Prosecutors of Turkey.

Law in each member State. The aim was to develop objective criteria so that they could be applied in different situations of threat of violating the Rule of Law The preparation of this objectivised report was to free the Venice Commission from the suspicion of formulating *ad hoc* questions in relation to a particular country, freeing it from accusations of favouring certain political tendencies. However, growing authoritarian tendencies in several countries and especially the changing view on the relation between international and internal law, did not free the Commission from negative and unjust assessments expressed by some politicians.

In view of the critical voices appearing in the political debate in the context of the Commission's interference in domestic law, the method of the Commission's approach to the problems always took into account two elements. In each of its opinions (reports), the Commission clearly distinguishes between two subjects, namely:

1. what constitutes the foundation of the European democratic tradition and must absolutely be respected by the member States (and therefore the 'European standard'), and this;
2. what is part of each country's regulatory freedom resulting from its diverse and rich political tradition and could be seen as a part of the constitutional identity of the country.

The Venice Commission always indicates, where possible, the variance of a possible solution. It therefore makes a clear distinction between principles and possible differentiated forms to guarantee these principles. The principle of subsidiarity is key in this respect, but also the concept of a margin of appreciation. The concept of margin of appreciation has been developed in the case law of the European Court of Human Rights, but its importance is demonstrated by the fact that it is proposed in Additional Protocol No 15 to be included in the preamble of the European Convention on Human Rights.

However, not neglecting the idea of constitutional identity and the margin of appreciation theory, there are principles that are axiomatic in nature, rooted in the European legal tradition, and these must be strictly observed. They form the backbone, or even more clearly the load-bearing wall of the entire legal construction. The solutions adopted in the various countries must not undermine the European fundamental guarantees, as this would turn against the value of the European legal heritage. Only on this uniform, stable "scaffolding" can differentiated and detailed solutions be built, taking into account different cultural traditions and providing them with guarantees of protection.

And the Rule of Law is one such matter.

By looking at the detailed list of questions in the Venice Commission's Checklist, it is possible to fully demonstrate that they are relevant, valid and, moreover, that there is a need for further details. The report distinguishes specific components formulated as so-called benchmarks - points of reference, which are the basis for evaluation. For example, as many as 14 specific questions have been formulated concerning the very principle of independence of the judiciary. It should be pointed here that none of them have lost their importance but have even been sharpened. The issue of judicial independence, its separation from politics is in the centre. It is not only an internal matter for the member States. This has been shown on many occasions in the work of the Venice Commission.

Also the Court of Justice of EU is very clear on this issue, i.e. in its judgment of 27 February 2018 concerning the reduction of judges' salaries in Portugal, the Court considered that it has competence to assess whether national law does not undermine the independence of judges. The courts of the member States must be prepared to resolve cases concerning EU law as well. This means that national courts must meet the EU standard of independence, which means, above all, that they are independent of the executive and legislature beyond any doubt.[17]

Among the key elements of the Rule of Law checklist, the Commission also points to constitutional justice. In the political debate in particular, but also supported by the arguments of some lawyers, one can find an opinion that the control of constitutionality and the existence of constitutional courts is not a binding standard of the Rule of Law because there are countries in which such control is not provided for by constitutional courts.

One has to agree that there are different systems. Nobody denies that. The Venice Commission has never imposed a single system of constitutional justice and this is clearly stated in the report. It uses the term constitutional control "if applicable". At the same time, however, despite this position, the Venice Commission recommends the establishment of a Constitutional Court or equivalent body. In modern conditions, in order to ensure the value and importance of the constitution as a fundamental law, the existence of a body that can control the constitutionality of the law, protects the integrity of the principles of the constitution as a model for the evaluation of the law and thus ensures the internal coherence of the law - is indisputable. This type of institution creates a new sphere of equilibrium, which means that even parliament as a legislator can be subject to legal scrutiny.

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[17] ECJ, C-64/16 *Associação Sindical dos Juízes Portugueses.*

Modern European constitutions are not "neutral" texts,[18] they are based on the values listed also in the Council of Europe Statute: democracy, respect for human rights and the Rule of Law. In this respect, the constitutional courts are the guardians of these values at national level and their role is therefore particularly important for the Council of Europe. If there is an independent constitutional court in a State which ensures respect for the principles and values contained in the Constitution, there is no need for international intervention to protect these values. However, if there is no credible court, the involvement of international institutions becomes a necessity.

A specific model is not relevant in this case. What is important is the autonomy and independence of the body that fulfils such control. And this principle is still valid. Where such an authority exists, it must meet the standards of an independent and apolitical court. Therefore, the way in which judges are chosen is crucial. The Commission has always indicated the use of the qualified majority rule in this case. Qualified majority means seeking political compromise and is a way to ensure a balanced political composition.[19] This can undoubtedly be regarded as a truism, but isn't now the time to repeat what appeared to be a truism, and it has turned out that in practice it is not?

One of the crucial issues in the Venice Commission perception concerning the Rule of Law is a law-making procedure. The Venice Commission stated many times that an instrumental approach to the law is one of the chief threats to the Rule of Law. A state order in which the constitution is treated instrumentally as a tool for achieving political aims is a bad state order. A perception of the law solely as a method of achieving one's own group's or party's political objectives is incompatible with the principle of the Rule of Law. The manner (mode) in which some modifications have been introduced into several constitutions in recent years has brought the Venice Commission face to face with the problem of restoring the meaning of mechanisms of proper law-making, including the proper drafting and amending of constitutions.[20] One of the main goals of the transformation had been to break with the concentration of power and allow the voice of

[18] P. Winczorek, *Pięć lat konstytucji*, Res Publica Nowa, Marzec 2002, s. 82.
[19] Venice Commission, CDL-AD(2016)001, On amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, clearly pointed this out.
[20] Venice Commission, 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 the Law N° 47/1992 regarding the organisation and functioning of the Constitutional Court and on the Government emergency ordinance on amending and completing the Law N° 3/2000 regarding the organisation of a referendum of Romania.

minority parties to be heard. Thirty years after the start of the transformation the problem of a "democratic" version of power concentration has made it appearance – concentration achieved as a result of elections and the acquisition of a qualified majority capable of changing the constitution. That gives rise to the temptation of not reckoning with other political forces.

The key to the stability of the Rule of Law is the role of the constitution seen as a common good. That is why the constitution regulates the length of the term of office of the president of the Supreme Court to make him independent from the political pressure of a given parliamentary majority. TheConstitution also regulates the principle of subordination of judges to the Constitution and the law as an expression of their independence as a key element of the Rule of Law. Therefore, disciplinary proceedings cannot be initiated against a judge who wears the Constitution in any form whatsoever (an inscription on a T-shirt?) for the same fact. Wearing the symbol of the Constitution, the judge emphasizes, recalls the constitutional principle that judges in the exercise of their office are independent and subject only to the Constitution and laws. And only this principle guarantees the Rule of Law.

The tearing of the constitution from its axiology by one political option does not produce such a conviction that constitution is a common good.[21] On the contrary, it is seen as an occasional political document, a means of political bidding or even political manipulation in the hands of the ruling majority.

It can therefore be reiterated once again that the Constitution should not only be treated, as argued by C. Schmitt as a purely political instrument in the dispute between political forces. If the fundamental political and social contradictions are very strong, it can easily happen that a party can deny any constitution that does not meet its demands at all".[22]

I once expressed the opinion that the development of constitutionalism will not go in this direction. Unfortunately, one can fear that it will. There have been and are changes in the relationship between power and law. In many countries a main cause for these tensions between democracy and the Rule of Law is the rise of strong populist movements. As correctly said by the Polish constitutional lawyer M. Matczak: the Polish government's narrative presents the dismantling of the Rule of Law as the cure for several social ills, including historical injustice and the dangers of globalisation. Populism does not accept Rule of Law limitations to majority rule: because

[21] J. Zajadlo, *Felietony gorszego sortu, o Trybunale Konstytucyjnym i nie tylko,* wyd. Arche, Sopot 2017, ss. 125-126.
[22] C. Schmitt, *Nauka o konstytucji,* Teologia polityczna, Warszawa 2013, s.77.

populist rule is presented as the correct manifestation of the will of the people.[23] Instead of the law (constitution), the concept of domination of the nation's interest is being put forward. And it might be a sign of the time what has been said by one of te Polish MP during the parliamentary debate in Sejm on 26.11.2015 on the annulment of the election of five judges of the Constitutional Tribunal when he pointed out that law is something important but it is not sacred(…) Above law stands the good of Nation. The law is meant to serve us, the law that does not serve the nation is lawlessness!

Similar voices can also be found in other countries, although dressed more in legal arguments.

Therefore, it is probably worthwhile to refer, to Church social teaching. Pope John Paul II wrote in his Encyclical: "It is therefore appropriate that each authority should be balanced by other authorities and other areas of competence which would keep it within proper limits. This is the principle of the "Rule of Law, in which the supreme authority has the right, not the arbitrariness of the people".[24] Important is Pope Benedict's speech in the German Bundestag on 22 September 2011, where he entitled his speech 'Reflections on the foundations of law'. He said then: "We Germans know from our own experience that these words are no empty spectre. We have seen how power became divorced from law, how power opposed law and crushed it, so that the State became an instrument for destroying law – a highly organized band of robbers, capable of threatening the whole world and driving it to the edge of the abyss. To serve law and to fight against the dominion of wrong is and remains the fundamental task of the politician."[25] This speech is a clear reference to the Platonic concept of law and the relationship to political power, which is deeply rooted in the European legal tradition.

And here we return to the main question. Are the European standards on the Rule of Law still valid? Where are we now, what is a future for the Rule of Law standards?

We, in 2020, face two seemingly unrelated but both dangerous for the Rule of Law phenomena:

1. the coronavirus pandemic and the restrictions on rights and freedoms introduced in this area often by the accelerated parliamentary procedure not in full accordance with the Rule of Law, and

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[23] B. Vermuellen, presentation of the Venice Commission's Checklist on 4th Congress of the World Conference on Constitutional Justice, Vilnius, September 2017.
[24] Encyklika Centesimus annus, p. 44, https://opoka.org.pl>centesimus_1.
[25] www.vatican.va/content/benedict-xvi/en/speeches/2011/september/documents/hf_ben-xvi_spe_20110922_reichstag-berlin.html.

2. completely different, not connected with the pandemic, the judgment of the German Constitutional Court in Karlsruhe from 5 May 2020.

The decision of the German Constitutional Court has been made in a very delicate political moment but also in very delicate situation for the Rule of Law, when in some EU countries there are problems with the acceptance of common European standards and the role of international institutions as guarantors of these standards.

The German Constitutional Court challenged the finality of CJEU judgments by giving the constitutional courts of individual states the opportunity to invoke it. This decision provides a new argument to all those who argue that the final words do not rest with the European court. Paradoxically the decision of the German Constitutional Court opened a way to this kind of interpretation which in effect can lead to the weakening of the European standard of the Rule of Law. As the Court of Justice has explained repeatedly, if national courts could override the Court of Justice, EU law would not be applied equally or effectively across all member States and the entire legal basis of the EU would be called into question.[26]

In 2018 in one of his interviews, the former President of the German Constitutional Court said that "the democratic Rule of Law is well known to us, but it is not something obvious".[27] Is such a statement a sign of the present time? After that judgment there are fears that this finding could become a reality.

But I don't like to be so pessimistic. It should be clearly stated, answering the question posed at the outset, that the standards of the Venice Commission, which are based on the primacy of law over political power, have not become outdated. They are rooted in long European legal tradition, but require further clarification, so as not to seek an "exaggerated" interpretation, and to ensure that the Rule of Law is something which is obvious.

[26] See more in the Letter of Lawyers published in *Verfassungsblog* 25 May 2020.
[27] A. Volsskuhle in *"Die Zeit"*, October 2018.

Herdís Kjerulf Thorgeirsdóttir[1]

Oligarchs - Power unconstrained
a matter of constitutional concern?

I. The term Oligarch and historical perception

It seems dystopic on the 30th anniversary of the Venice Commission to raise the issue of oligarchy or oligarchs' dominance in modern democracies. The term oligarch which derives from Aristotle ought to appear ancient now the first quarter of the 21st century. The notion of oligarchs is however gaining currency due to the political influence which a few citizens in many states have usurped in connection with their enormous wealth – power, which by the constitution shall reside in the people. The emergence of oligarchs is problematic and hardly compatible with our constitutional heritage and vision of democracy based on respect for the Rule of Law and human rights.

The Venice Commission referred to the term oligarch in a recent opinion regarding the media and the public sphere,[2] resorting to a definition used by Reporters without Frontiers in a report on the immense power of media moguls: 'multi-millionaires or billionaires who create or take over media empires to serve their business and/or political interests; there is a worldwide trend towards increasingly concentrated ownership of conglomerates that combine media outlets, such as TV channels, radio stations, newspapers, internet websites etc., with banks, telecoms, property firms and construction companies'.[3]

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[1] Member of the Venice Commission in respect of Iceland. Former Vice President of the Venice Commission (2013-2019).

[2] Venice Commission, CDL(2020)003, Albania Opinion on the Law N°97/2013 on the Audiovisual Media Service.

[3] See a detailed description of the origins of the term "oligarch" in a study prepared by the Reporters Without Borders, p. 15 *et seq.*,: https://rsf.org/sites/default/files/2016-rsf-report-media-oligarchs-gpo- shopping.pdf. Oxfam has reported that eight men, including Facebook's Mark Zuckerberg, Microsoft's Bill Gates, Grupo Carso's Carlos Slim and Inditex's Amancio Ortega, have as much wealth as the world's poorest 3.6 billion people (see: www.nytimes.com/2017/01/16/world/eight-richest-wealth-oxfam.html).

Noblesse oblige or power used unjustly

Aristotle who pioneered the use of the term (literally rule of the *oligoi*, i.e., few),[4] meaning rule of the wealthy, the *deviant* constitutional form of aristocracy, as oligarchy was exercised not by the best but by bad persons unjustly.[5] Aristotle recognized that oligarchy was based not only on numbers and wealth, but on an underlying political ideology, with a unique understanding of justice, worth, and merit. Whereas democrats believed that the equal free status of every adult male citizen of the ancient polis justified equal political power, oligarchs based their more exclusive political privileges on the notion that unequal wealth entailed inequality in the public sphere as well."[6]

Today's terminology of Aristotle's view of the 'bad' is the "winner takes it all'; the corrupt tactic of exploiting the political system for financial purposes. Bad is synonymous not with wealth *per se* but with the corrupt use of it. Samuel Huntington in his well-known work on the American political tradition wrote that money "becomes evil not when it is used to buy goods but when it is used to buy power".[7] Oligarchic possession of wealth is used to constantly strengthen their financial and political position, for instance by funding think tanks to transform tax policy in favour of those who already enjoy the most wealth and not in the public interest; buying national resources or profitable state properties in exchange for favours under non-transparent circumstances without invitation to tender and relocating fortunes to tax havens, avoiding the burden- sharing of upholding the infrastructure in society, enabling the oligarchs to rise above the law.

Oligarchy in the Aristotelian sense and as the topic of this writing is power exercised unjustly. There are wealthy people and elites who do not qualify as oligarchs. A distinction has been made with an example from a country where the ruling elite is traditionally expected to demonstrate *noblesse oblige (Japan)*, which means that due to their privileged position they have duties towards society (more is expected of them, also in terms of

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[4] The word comes from the Greek 'oligarchēs,' made of 'olig' ("few") and 'archēs' ("ruler").
[5] E. Tabachnick and T. Koivukoski (eds.), On Oligarchy: Ancient Lessons for Global Politics, University of Toronto Press, 2011.
[6] Jeremy S. Neill David in Tabachnick and Toivo Koivukoski (eds.), On Oligarchy: Ancient Lessons for Global Politics, University of Toronto Press, 2011.
[7] Luke Mayville, John Adams and the Fear of American Oligarchy, Princeton University Press, 2016. Herdis Thorgeirsdottir, "*Only a virtuous people are capable of freedom",* in Making Peoples Heard, Essays on Human Rights in Honour of Gudmundur Alfredsson, eds., Asbjorn Eide, Jakob Th. Möller & Ineta Ziemele.

behaviour) and that they work for the good of society.[8] In Latin America, many countries suffer under the rule of oligarchs who prosper in a corrupt environment where they can look out for their own interests while they exploit the rest of society.[9]

Civic virtue and the separation of powers

The main institutional forms of democracy found in the world today are based on a small number of models devised in the aftermath of the American and French revolutions.

The underlying vision of those who worked on the theory of the separation of powers was that a republic would not prosper if men were not virtuous. Such vision was held by Montesquieu who in the mid-18th century paved the way for the doctrine of separation of powers[10] as an independent and universal criterion of a constitutional government. In *L'esprit des lois* (1750) one of the great works in the history of political theory and in the history of jurisprudence, Montesquieu divided political authority into the legislative, executive and judicial powers. He asserted that in the state that most effectively promotes liberty these three powers must be confided to different individuals or bodies acting independently. Leaving aside his doctrine on the political influence of climate and the legislator's duty to counteract, Montesquieu was drawing attention to secondary causes which can have harmful effects and thus society must be considered as a whole.

This wide-ranging notion is interesting in light of the growing impact of the oligarchs' wealth on governance and the general tendency, even today, to overlook their uncontained power. The gloomy view of the nature of man expressed by Montesquieu and many more before him and after: "Constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go."[11]

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[8] An example of the mentality is the harakiri suicide ("seppuku"), honour suicides to escape the shame of an immoral action, rooted in Japanese culture since the 12th century.

[9] David Batstone and Eduardo Mendieta (eds.), The Good Citizen, Routledge 1999 (Lester Thurow used the examples of Japan and Latin America).

[10] Montesquieu did not invent the doctrine of the separation of powers, and much of what he had to say in Book XI, Chapter 6 of the *De l'Esprit des Lois* was taken over from contemporary English writers, and from John Locke.1 Montesquieu, it is true, contributed new ideas to the doctrine; he emphasized certain elements in it that had not previously received such attention, particularly in relation to the judiciary, and he accorded the doctrine a more important position than did most previous writers. However, the influence of Montesquieu cannot be ascribed to his originality in this respect, but rather to the manner and timing of the doctrine's development in his hands.

[11] See the discussion of Montesquieu's concept of human nature in W. Stark, Montesquieu: Pioneer of the Sociology of Knowledge, London, 1960, Ch. IV.

The Framers of the United States Constitution shared Montesquieu's doctrine, also that of virtue being the base for any thriving republic. In Federalist No. 51 (1787) written by James Madison (the principal author of the U.S. Constitution) he defends the checks and balances system where each branch of government is framed so that its power checks the power of the other two branches; additionally, each branch of government is dependent on the people, who are the source of legitimate authority:

> *"Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions".*[12]

While Madison feared legislatures because of their proximity to the sovereign people, John Adams who also made significant intellectual contribution to the United States Constitution feared the power of the class he simply called "the few"[13] – which today may be compared with the famous "1%" slogan – the powerful that if left unchecked would undermine the functions of republican government. Hence the separation of powers had to be designed around defeating that threat.[14] The term oligarch is used in relation to 'greed' in a speech in the US Senate in 1838 referring to a

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[12] The Federalist No. 51, at 319 (James Madison) (Clinton Rossiter ed., 2003, Federalist Papers: No. 10 – The Union as a Safeguard Against Domestic Faction and Insurrection. Later, In the above quote Madison speaks of a special relationship between the President and the Senate as an auxiliary precaution against the primary threat to separation powers, namely, legislative tyranny. https://billofrightsinstitute.org/founding-documents/primary-source-documents/the-federalist-papers/federalist-papers-no-10/.

[13] Article 1, Section 9 of the US Constitution provides that: No title of nobility shall be granted by the United States: and no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.

[14] "Sympathy for the Rich." John Adams and the Fear of American Oligarchy, by Luke Mayville, Princeton University Press, Princeton; Oxford, 2016, pp. 95–123. JSTOR, www.jstor.org/stable/j.ctt1q1xr8h.7. Accessed 2 July 2020.
Venice Commission, CDL-AD (2018)028, Malta - Opinion on Constitutional arrangements and separation of powers and the independence of the judiciary and law enforcement.

description by President John Quincy Adams,[15] it is the rapacious spirit described by the elder Adams; and no one understood the true character of a purse-proud, grasping oligarchy better than he did".[16]

The Framers of the U.S. Constitution were aware of history and how power corrupts like Montesquieu who saw each society in the Aristotelian way as possessing an inner structure, an inner dynamic principle or force, which makes it function as it does. In the course of his work on *L'esprit des lois*, when writing on the greatness and decline of the Romans, Montesquieu points out that what caused Rome to decay was the suppression of the 'republican virtue' by personal despotism directly resulting from this sin against the 'inner' principle of the republican structure".[17] Montesquieu's concept of each society's inner structure was not based on empirical observations but on the central notion that individuals and states decay when they contravene the rules of the particular 'inner' constitution.

The sin against the 'inner principle' of the constitutional structure is the prevalence of greed and in Hobbes' words, "the perpetual and restless desire of power after power that ceaseth only in death" and the corrupt, arbitrary private rule of public power, of which there are glaring examples widely over in our time.

II. Oligarchs are key arbiters in political life

The rise of a few business magnates in various countries who exert such influence that they may be said to have taken control of the democratic process has induced the term "oligarchic democracies", a contradiction in terms but descriptive of the fact that the oligarchs function inconspicuously in a *de jure* democratic regime while *de facto* obstructing the balance of power inherent in the constitutional democratic heritage.

A distinguishing feature of the oligarchs (as opposed to wealthy individuals in general) is that their economic power is translated into political power to the extent that it has changed the nature of governance from the ideal of democracy based on respect for the Rule of Law and human rights into an oligarchy, based on the rule of men. The trend of national wealth concentrated in fewer and fewer hands has, despite the presence

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[15] Luke Mayville: John Adams and the Fear of American Oligarchy, p. 23 (Princeton University Press, 2016) – speech on 18th February 1838 in the U.S. Senate.
[16] Luke Mayville: John Adams and the Fear of American Oligarchy, p. 23 (Princeton University Press, 2016).
[17] Isiah Berlin, Against the Current: Essays in the History of Ideas, p. 143, Edinburgh University Press, 1979.

of features central to democratic governance, including universal suffrage, regular elections, freedom of speech and assembly, made it possible for the oligarchs due to their wealth to be positioned as key arbiters in countries' political life. They have substantial independent impacts on government policy, while average citizens and interest groups in civil society have little or no independent influence.[18] While these ultrawealthy individuals are not formally part of the government they are very much in charge of the country's economic, media and political interests.[19]

As the gulf between the haves and the have nots continues to widen, the debate over economic inequality has become a tense political issue in the U.S. and across Europe. Thomas Piketty's study, *Capital in the Twenty-First Century* (2013) revealed that much of the advanced capitalist world has returned to a "new Gilded Age",[20] with the top 1 percent controlling 20 percent of U.S. income to take an example.[21] Available data show that global wealth inequality is extreme and on the rise. If established trends in wealth inequality were to continue, the top 0.1% alone will own more wealth than the global middle class by 2050.[22]

The trend of national wealth concentrated in fewer and fewer hands has despite universal suffrage made it possible for the oligarchs due to their wealth to be positioned as key arbiters in countries' political life. Their influence far outstrips that of ordinary citizens. While these ultrawealthy individuals are not formally part of the government they are very much in charge of the country's economic, media and political interests – usually promoting their own interests at the cost of the principle of equal opportunities[23] and other freedoms compatible with democratic governance.[24] This usurpation of power that ought to reside with the people is no longer only a hypothetical question for constitutional scholars but

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[18] Martin Gilens and Benjamin I. Page, Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens, Published online by Cambridge University Press: 18 September 2014, DOI: https://doi.org/10.1017/S1537592714001595.

[19] https://theconversation.com/what-is-an-oligarch-126244.

[20] A phrase attributed to economist Paul Krugman.

[21] Thomas Piketty, Capital and Ideology (Belknap Press of Harvard University Press), 2020. He criticizes the current focus on inequality on the rise of right-wing populism, appealing to ethnic, religious and national divisions while the rise of elitism and the left's failure to counter-ideology deserves more scrutiny. The political platforms advocated by social democratic parties have become less and less concerned with inequality and redistribution.

[22] https://wir2018.wid.world/part-4.html..

[23] https://theconversation.com/what-is-an-oligarch-126244

[24] Venice Commission, CDL-PI(2016)006, Opinion on the Draft Constitutional Law on "Protection of the Nation" of France.

actually a visible, growing threat as evident from uprisings in many societies, France and the United States where the cause is not only racism but also – and closely related of course – resentment over economic depression, corruption and lack of opportunities.[25]

Rise of oligarchs outside transparency and the Rule of Law

Concentration of wealth and power, even in developed democracies, is partly a result of economic measures, including privatization of state properties, adopted in the late 1980s and 1990s and explains how oligarchs arose and accumulated political power. The World Inequality Report of 2018[26] shows that since 1980, very large transfers of public to private wealth occurred in nearly all countries, whether rich or emerging.

The Venice Commission was created in 1990 after the fall of the Berlin Wall, at a time of urgent need for constitutional assistance in Central and Eastern Europe. The democratic model of government based on human rights and the Rule of Law, which had prevailed in the older democracies in the latter half of the 20th century, was to spread to the new democracies. The free market economy was at the same time embraced by the new regimes. The move from communism to capitalism in Russia after 1991 was supposed to bring unprecedented prosperity. It did not, rather it produced undiluted economic decline.[27]

The contemporary concept of oligarchy was popularized by the Russian experience in the early 1990s. Following the collapse of the Soviet Union, a handful of men seized much of the Soviet Union's natural resource assets in what was the largest sell-off of state-owned property in history.[28] The country was in a disarray and the original oligarchs gained control through the now infamous "loans-for-shares" agreement that Boris Yeltsin made with bankers who agreed to fund his weak campaign for re-election and use media assets to slate his opponent in exchange for shares in some of Russia's biggest companies. The process involved a massive and corrupt transfer of natural resource enterprises disguised as a collateralized loan to

[25] www.project-syndicate.org/commentary/main-street-manifesto-for-covid19-crisis-by-nouriel-roubini-2020-06.
[26] World Inequality Report is a data-rich project maintained by more than 100 researchers in more than 70 countries.
[27] Joseph Stiglitz, The Ruin of Russia, the Guardian, 9 April 2003, accessed on 3 July 2020.
[28] David E. Hoffman, The Oligarchs: Wealth and Power in the New Russia, 2011; see also: Jeffrey Hayes, http://factsanddetails.com/russia/Economics_Business_Agriculture/sub9_7b/entry-5169.html.

the Russian Government by Russian banks.[29] Jeffrey Sachs, economic advisor to the authorities during the transition period says that the privatization which ought to have been quick, transparent and law-based turned out to be outside of transparency and the law. Corruption and insider dealing were rampant, detached from social justice and the Rule of Law.[30]

The Russian oligarchs came to wield unprecedented power over the economy, the state apparatus and the mass media.

The alliance between oligarchs, media empires and politicians

Reporters without Borders (RSF) in a 2016 report describe a worldwide phenomenon, the takeover of entire media groups or even entire media landscapes by oligarchs to extend the scope of their own influence where they can "make and unmake" governments.[31] The nexus between oligarchs and political power goes through the media. In countries such as Russia, Turkey and Hungary and even in what are supposed to be the most open democracies, billionaires put their media acquisitions in the service of their other business activities. The resulting conflicts of interest dispossess journalists of their independence making them resort to self-censorship and at the same time the public is deprived of their right to receive news and ideas of public concern in accordance with the ethics of journalism and the media's prescribed role in jurisprudence on both sides of the Atlantic.[32]

The co-dependent alliance between oligarchs and governments occurs independent of whether the latter are seen as positioned to the left or right.[33] Tony Blair's relationship with media owners came under scrutiny when he visited Rupert Murdoch's holding company News Corp in Australia and spoke at an event there in 1995. Two years later Murdoch's newspaper the Sun endorsed the Labour leader's first general election campaign, which ended in a landslide victory. Prior to the elections the Conservative party had on its

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[29] http://econ.sciences-po.fr/sites/default/files/file/gurievGurievRachinsky.pdf; https://theconversation.com/what-is-an-oligarch-126244.

[30] Jeffrey Sachs, "What I did in Russia", http://jeffsachs.org/2012/03/what-i-did-in-russia/; describing that in 1995 In 1995 the infamous 'loans-for-shares' deal involved a massive and corrupt transfer of natural resource enterprises to the Government's cronies, disguised as a collateralized loan to the Russian Government by Russian banks.

[31] Reporters Without Borders, p. 15 *et seq*.,: https://rsf.org/sites/default/files/2016-rsf-report-media-oligarchs-gpo- shopping.pdf.

[32] H. Thorgeirsdottir, Journalism Worthy of the Name: Freedom within the Press and the Affirmative side of Article 10 off the European Convention on Human Rights, Martinus Nijhoff Publishers, 2005.

[33] Ferdinand Mount, Orwell and the Oligarchs, George Orwell Memorial Lecture, 26 November 2010, https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.1467-923X.2011.02179.x.

agenda to adopt a law on media ownership in order to break up monopolies. Such a law was not adopted after the Labour Party won the elections in 1997 despite its avowed policy to relax cross-media ownership rules.[34] News Corp now owns more media in the UK than would be permitted under U.S. or Australian rules on cross-media ownership[35] Murdoch's influence over politicians secured his media empire in the UK in the 1990s and early 2000s with Tony Blair's support. In 2009 the media mogul switched allegiance to the Conservatives giving them full support in the 2010 general elections. In 2010 the European Commission approved the News Corp merger with BSkyB on competition grounds, yet confirmed that under Article 21 of the EU Merger Regulations,[36] the United Kingdom, "remains free to decide whether or not to take appropriate measures to take legitimate interest in media plurality . . . a media plurality assessment reflects the crucial role the media plays in democracy".[37]

In 2012, former Prime Minister Tony Blair answered questions under oath as a witness in the *Levison inquiry* about his relations as a politician with media figures.[38] He stated that Rupert Murdoch and other proprietors use their newspapers "as instruments of political power, in which the boundary between news and comment is deliberately blurred".[39] The former Prime Minister also described the unhealthy relationship between media moguls and politicians saying that British leaders are forced to court powerful press barons such as Rupert Murdoch or risk savage media attacks which render them unable to govern effectively".[40]

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[34] Des Freedman, Television policies of the Labour Party, Goldsmith's College, University of London, p. 158, Frank Cass Publishers, 2003.

[35] Matthew P. McAllister, Emily West (eds.), The Routledge Companion to Advertising and Promotional Culture, p. 92, Routledge 2015.

[36] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertaking.

[37] European Commission Press release, 21 December 2010: Mergers: Commission clears News Corp's proposed acquisition of BSkyB under EU merger rules https://ec.europa.eu/commission/presscorner/detail/en/IP_10_1767;Matthew P. McAllister, Emily West (eds.), The Routledge Companion to Advertising and Promotional Culture, p. 93, Routledge 2015.

[38] Lord Justice Leveson's inquiry into phone hacking and the ethics and culture of the UK media. In an interview with the BBC after David Cameron set up the committee in the wake of an outrage over hacking by the News of the World, Tony Blair said: "The sensible thing now is to have an investigation in which we put everything out there and where the politicians explain their problems when they're dealing with incredibly powerful media people."

[39] With Murdoch's the Sun and Daily Mail being the two most powerful newspapers - www.theguardian.com/media/2012/may/28/blair-murdochCnstruments-political-power.

[40] www.france24.com/en/20120528-liveblog-former-british-pm-tony-blair-faces-leveson-grilling-london-godfather-murdoch.

British government ministers are not an exception in being in an undemocratic, and in fact unconstitutional relationship with oligarchs. Sometimes the oligarchs themselves hold high political offices. Silvio Berlusconi who was Italy's Prime Minister for three terms is still one of the country's richest men and owner of a media empire. During his reign as Prime Minister, the Parliamentary Assembly of the Council of Europe requested an opinion from the Venice Commission (2005) on the compatibility of the Italian 'Gasparri' and 'Frattini' laws with European standards. The Commission highlighted weaknesses in the Frattini law in that it did not tackle the incompatibility of media ownership and public office.[41]

New media empires with an interdependent relationship with elected authorities are emerging in various countries where they are not already existing. The public sphere – which was long ago dubbed the fourth estate in the checks and balances process to hold authorities accountable- is now part of the establishment.[42]

The resulting consequences of this concentration goes hand in hand with growing authoritarianism, increased inequality leading to widespread unrest crumbling the foundation of democracy. Self-censorship is pervasive and those who are expected to hold authorities accountable do not have the capacity or audacity to do so. With their financial power combined with their control of the media corporations and thus the public sphere the influence of oligarchs is almost limitless and far removed from the principles set forth in jurisprudence of the international and regional human rights regimes.

Stressing the principle of pluralism in the media landscape as the EU Commission does at the same time as it provides its blessing over a mega merger as in the case of Murdoch's media empire mentioned above is an example of limited resistance to immense financial power.

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[41] Italy is not the only country in western Europe where a billionaire businessman and politician owns a media group. France's fifth richest billionaire, Serge Dassault (died in 2018) headed the Dassault Group, a family firm passed from father to son, Oliver Dassault who is deputy member of parliament while the firm is a major player in the arms industry and in the civil and military aviation sectors.

[42] In the U.S. since 2013 the oligarchs have been able to buy up prestigious outlets, including the *New Republic* in 2012, the *Washington Post* in 2013, the *Atlantic* in 2017, and *Time* in 2018. www.nytimes.com/2018/09/19/business/media/newspapers-billionaire-owners-magazines.html.

III. Legal environment enabling oligarchs to take over the public sphere

The financial power combined with their control of media flagships gives oligarchs almost limitless influence, one far removed from the journalistic principles and press freedom jurisprudence.[43] There are many examples of legislation in the Council of Europe member States in recent years aiming at silencing critical voices, limiting citizens´ access to information and targeting individuals, journalists and bloggers, clearly incompatible with international obligations.[44] Media companies have been submerged by the powers they are expected to hold accountable; as more money has flooded the political system the outcome of elections can literally be bought.

Tactics used by authoritarian leaders to strengthen their position is to weaken the checks and balances on government power needed to preserve human rights and the Rule of Law, such as an independent judiciary, a free media, and vigorous civic groups. Even the world's established democracies have shown themselves vulnerable to demagoguery and manipulation[45] and to the control of oligarchs.

No democratic institution is exempt from oligarchic control if it exists in the first place: the media, courts, legislative bodies, the executive branch and academia.

Opening up the floodgates for oligarchic wealth to "buy" elections

There are court decisions that have in general worked in favour of oligarchs, such as the much disputed Citizens United ruling of the U.S. Supreme Court opening up floodgates of wealth into the public sphere and on the other side of the Atlantic the CJE ruling on the right to be forgotten.

The political clout of billionaires has soared since the Supreme Court's 2010 Citizens United decision, which determined that the First Amendment prevented federal government from placing limits on independent election-spending by corporations and individuals.[46] The Supreme Court's recent

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[43] Study prepared by the Reporters Without Borders, https://rsf.org/sites/default/files/2016-rsf-report-media-oligarchs-gpo- shopping.pdf.

[44] Foreign Agents laws in Russia, Hungary, law on higher education, etc.

[45] www.hrw.org/world-report/2019/country-chapters/global.

[46] This began as a dispute over whether a non-profit organisation Citizens United could air a film critical of Hillary Clinton. A lower court had ruled that the film breached provisions of the law commonly known as McCain-Feingold. The Supreme Court reversed the lower court's ruling and struck down those provisions of the Act that prohibited all corporations, both for-profit and not-for-profit, and unions from broadcasting "electioneering communications."

decision, *McCutcheon v. FEC*, granted further political influence to the "1 percent", enabling them to spend as much as they wish influencing political campaigns. It followed the Court's 2010 ruling, *Citizens United v. FEC*, allowing the rich to spend unlimited sums on political advertising.

There have been series of legal decisions which led to the current rules on campaign finance. In the constitutional law case of *First National Bank of Boston v. Bellotti* (1978)[47], which defined the free speech right of corporations for the first time, the U.S. Supreme Court held that corporations have a First Amendment right to make contributions in public referendums. Dissenting Chief Justice William H. Rehnquist warned of "special dangers in the political sphere".

As the Venice Commission has stated, "in the run-up to a crucial referendum it is particularly important to have a healthy and pluralistic media scene where opposite points of view can be discussed without fear of reprisals".[48]

The possibility of buying an election outcome is no longer an unrealistic goal – for oligarchs.

An 'Orwellian' decision enabling the corrupt to rewrite history

The European Court of Justice (hereinafter, "ECJ") delivered what some label an Orwellian judgment on 13 May 2014 regarding data protection and the "right to be forgotten" on the Internet, in the case of Google against Spain.[49] The ECJ ruled that individuals have – under certain conditions – the "right to be forgotten" and that Google must delete "inadequate, irrelevant or no longer relevant" data from its results when a member of the public requests it. Failure to do so can result in fines.

There is a genuine concern on the part of many that their personal lives have become over-exposed in the era of the Internet. There are ways to tackle that, quite a few under the control of the individual. In emphasizing the important right of privacy, the ECJ disregarded the right to access information of public interest. The ruling referred only to Articles 7 and 8 of the EU Charter of Fundamental Rights – the rights to privacy and data protection. It did not mention Article 11 of the Charter of Fundamental

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[47] *First National Bank of Boston v. Bellotti*, 435 U.S. 765.
[48] Venice Commission, CDL-AD(2017)007, Turkey - Opinion on the Measures provided in the recent Emergency Decree Laws with respect to Freedom of the Media, para. 21.
[49] ECJ, Case C-113/12, *Google Spain SL, Google Inc. v. Agencia Espanola de Proteccion de Datos (AEPD) and Mario Costega Gonzáles*, 13.05.2014.

Rights or Article 10 of the European Convention on Human Rights (ECHR) protecting freedom of expression. Furthermore, it did not, surprisingly, link its statements about the balancing test to the European Court of Human Rights´ case law balancing privacy and freedom of expression.

The ruling acknowledged the importance of journalism, but not the significance of the huge marketplace of ideas in relation to the democratic ideal of a robust, wide-open public debate. The Internet provides the tool for the public's right to impart and to receive information and ideas of all kind, which is essential for the right to know and for increased transparency of the conduct of power holders and other forces shaping society. Access to all kinds of information and ideas through search engines on the Internet is an indispensable element of modern opinion formation.

It is evident from the case law of the European Court of Human Rights (hereinafter, "ECtHR") that the internet is entitled to maximum protection under Article 10 of the ECHR on freedom of expression. The ECJ may have taken a dangerous step in this ruling throwing into jeopardy the right of the public to receive information and ideas from the Internet which, despite its threats to privacy rights in many respects, is the most democratic forum for the exercise for freedom of expression that exists.[50] This judgment raised serious questions about the balance between privacy and freedom of expression in the digital environment. It may have repercussions beyond Google, paving the way for compromising the openness of the internet and giving a private corporation editorial powers in a forum "owned by nobody".[51]

The ECJ reasoning that Google and other search engines are controllers of information (real live publishers) comes into conflict with the principle of net neutrality, which is the principle that governments and internet service providers should not discriminate between data on the internet on the basis or user, content or site. The ECJ´s view of the search engine provider's role gives the impression that authorities are enlisting large companies as the government's collaborators in deciding what is of public interest.[52]

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[50] Venice Commission, CDL-JU(2014)014, Herdís Thorgeirsdóttir: "Emergency Challenges to the Right of Privacy", Report, 4th Black Sea Regional Conference, 5 July 2014.

[51] The US Supreme Court the 1997 judgment *Reno v. American Civil Liberties Union* described the Internet as a "vast library" of millions of publications and "the most participatory form of mass speech yet developed" as it enabled anyone connected to it to become a publisher in his/her own right.

[52] Venice Commission, CDL-JU(2014)014, Daniel Fisher, 'Europe's right to be forgotten clashes with U.S. Right to Know, in Forbes 16 May 2014, ", Report, 4th Black Sea Regional Conference, 5 July 2014.

Anyone who feels that information which is no longer 'relevant' to their current situation – for example past involvement in financial scandals – will be in a strong position to approach Google and request that the page listing that information be de- indexed. While the content itself remains online, it cannot be found through online searches of the individual's name.

The ruling contains language exempting information published "solely for the purpose of journalism," but that is thin protection and vulnerable to abuse. Oligarchs may be able to erase their perhaps dubious achievements and authoritarian governments could cover up human rights abuses. Hence the ECJ judgment may weaken the most powerful research tool of journalists and other participants in the political debate.

The 2014 ruling was seen as Orwellian in the sense that it paved the way for the rewriting of history. After France's highest administrative court asked for clarification in relation to the 2014 ruling in Google Spain, the ECJ in 2018 in the ruling of *Google LLC v. Commission Nationale de l'informatique et des Libertés* held that the EU law only requires valid "right to be forgotten" "de-referencing" requests to be carried out by a search engine operator on search engine versions accessible in EU member States, as opposed to all versions of its search engine worldwide.

David v. Goliath battle

There are related issues deserving more research such as whether corporations can claim a right to reputation under the ECHR.[53] The dominance of large corporations over the public sphere has been dealt with in cases on both sides of the Atlantic[54]. The famous McLibel case in the 1990s which followed a libel action brought by U.S. fast food giant McDonald's against Helen Steel, David Morris and three others[55] over a leaflet they had distributed criticising the company's practices displays a David v. Goliath battle. The economic disparities between the parties were enormous; McDonalds with an army of lawyers and estimated legal cost at £10m and Steel a part time worker and Morris unemployed. The UK judge ruled that the pair had libeled the corporation and ordered them to pay £60,000 damages, reduced on appeal to £40,000.

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[53] D.J. Acheson, Corporate reputation under the European Convention on Human Rights - Journal of Media Law, 2011 (www.tandfonline.com/doi/abs/10.1080/17577632.2018.1464536). www.tandfonline.com/doi/full/10.1080/17577632.2018.1464536?needAccess=true.

[54] ECtHR, *Appleby and Others v. the United Kingdom*, no. 44306/98, 06.05.2003, referring to similar cases before the United States Supreme Court.

[55] The three apologized and were not sued.

The ECtHR[56] found that denying legal aid to Steel and Morris deprived them of the ability to present the case effectively. Hence, it breached their right to a fair trial under Article 6 of ECHR. The message was clear: "inequality of arms could not have been greater".[57] McDonald's economic power outstripped that of many small countries (they enjoyed worldwide sales amounting to approximately USD $30 billion in 1995). Although they were not journalists, the ECtHR found the freedom of expression rights of Steel and Morris to have been violated as the more general interest in the free circulation of information and ideas - particularly about the activities of powerful commercial entities - and the possible "chilling effect" were also important factors to be considered.

IV. The global oligarchy of internet giants and the silencing of dissent

The inequality of arms demonstrated in the McLibel case pales in comparison with the divide between the present-day member of the public and the global domain of Facebook, Google and other Internet giants, which is unmatched in history. Public concern over the ethics of large corporations is growing not least with the dominance of the global oligarchy of social media and the Internet. Amazon, Apple, Facebook, and Google are four of the most influential companies in the world.[58] Their growing power, notes a recent World Bank Study, is built on "natural monopolies" that adhere to web-based business, and have served to further widen class divides not only in the United States but around the world.[59]

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[56] ECtHR, *Steel and Morris v. the United Kingdom*, no. 68416/01, 15.05.2005.
[57] ECtHR, *Ashingdane v. the United Kingdom*, no. 8225/78, 28.05.1985.
[58] Google controls nearly 90 percent of search advertising (www.businessinsider.com/how-google-retains-more-than-90-of-market-share-2018-4?r=US&IR=T), Facebook (www.word-stream.com/blog/ws/2017/11/07/facebook-statistics) controls almost 80 percent of mobile social traffic, and Amazon (https://blog.publishdrive.com/amazon-ebook-market-share/) about 75 percent of US e-book sales, and, perhaps most importantly, nearly 40 percent (www.datacenterdynamics.com/en/news/synergy-aws-dominates-the-public-cloud-market-across-the-world/)of the world's "cloud business." Together, Google and Apple (https://gs.statcounter.com/os-market-share/mobile/worldwide) control more than 95 percent of operating software for mobile devices, while Microsoft (www.statista.com/statistics/218089/global-market-share-of-windows-7/) still accounts for more than 80 percent of the software that runs personal computers around the world. (Joel Kotkin in New Geography: "The wealth generated by these near-monopolies funds the tech oligarchy's drive to monopolize existing industries such as entertainment, education, and retail, as well as those of the future, such as autonomous cars, drones, space exploration, and most critically, artificial intelligence. Unless checked, they will have accumulated the power to bring about what could best be seen as a "post-human" future, in which society is dominated by artificial intelligence and those who control it".) www.wired.com/story/silicon-valleys-immortalists-will-help-us-all-stay-healthy/).
[59] www.theguardian.com/technology/2016/jan/14/silicon-valley-tech-firms-income-inequality-world-bank.

The Venice Commission has noted that the small number of powerful private actors which literally own the information highways have their own commercial interests which tend to collide with both civil and political rights of individual citizens.[60] These internet providers operate as digital gatekeepers, a role which originally belonged to the traditional media, without however having adopted the ethical obligations of the media. Private technology companies are thus censoring content which they consider "harmful", without them being accountable and their measures being transparent. Moreover, this is done on a voluntary and unregulated basis, without a recognised Rule of Law-based framework.[61] Facebook is in a position to remove pages and accounts of individual journalists and bloggers, who are not linked to mainstream media publications and are not able to contest the swift action, with Facebook providing its own reasoning. Facebook has also had to deal with serious privacy issues. The founder and CEO Mark Zuckerberg testified before the U.S. Congress about a data breach in which Cambridge Analytica obtained the social network users' private info, which was then used to predict and influence the behavior of U.S. voters in the 2016 elections.

This has led Facebook to be termed a dangerous oligarchy,[62] which can only be counteracted with breaking up its monopoly. Social media constitute the predominant platform of political debate and, as such, they are sources of political information. A handful of individuals owns the world's public sphere and that is bound to be of serious public concern.

The freedom to form an opinion includes the right to be correctly informed with private online browsing and the right to make confidential communications on the internet. The monitoring of people's online activity without their consent and for the purpose of understanding and exploiting their behavioral paths undermines these rights.

The public tracks in the digital oligarchy are not guarded by the Rule of Law or respect for human rights. However, in order for the digital oligarchies to stay big and unregulated they need to co-operate with authorities which may bring us back full circle to the "unhealthy relationship" between politicians and those controlling the media and public sphere as Tony Blair

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[60] Venice Commission, CDL-AD(2019)016, Joint Report of the Venice Commission and of the Directorate of Information Society and Action against Crime of the Directorate General of Human Rights and Rule of Law (DGI), on Digital Technologies and Elections.
[61] *Ibidem*, para 145.
[62] Rana Foroohar, *Facebook and the creation of a US oligarch*, The Financial Times, 7 June 2020.

testified before a judicial inquiry panel in 2012.[63] In this unfortunately real scenario, the government is no longer a countervailing force to oligarchic power. It becomes a co-conspirator.

It is a pertinent question how the objectives of democracy, Rule of Law and human rights, which may be summed up as social justice, can be achieved within the existing system of oligarchy? The civil rights activist and writer, Audre Lorde said, "the master's tools will never dismantle the master's house".[64] Global oligarchs are not fit to decide what is in the best interest for those who have not chosen them to lead.

The last straw that breaks the camel's back

When it comes to freedom of expression, an enabling legal and regulatory environment is essential for guaranteeing this important freedom, which is a cornerstone of democracy.[65] Preventive and strict measures are required to fight corruption, which is, as the Venice Commission has underlined, a phenomenon affecting all member States of the Council of Europe (let alone other countries), as revealed in the exposure of the Panama Papers in 2016.[66] The Commission thus stresses the positive obligations that states are under to ensure that their criminal systems are effective in the fight against serious forms of crime, that criminal law constitutes a strong deterrent to commit such offences, and that perpetrators of such offences do not enjoy impunity.[67]

At times the heroic task of exposing corruption is the task of one journalist and on occasions journalists have paid for such a deed with their lives.

One final example, confirming that there are entrenched elements of oligarchy along with official corruption and violence, shaking even seemingly stable democracies, are the recent brutal killings of investigative journalists

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[63] ww.nytimes.com/2012/05/29/world/europe/tony-blair-to-explain-ties-to-rupert-murdoch.html.

[64] Audre Lorde, The Master's tools will never dismantle the master's house, Penguin Modern Classics, 2018 (essay first published in 1984).

[65] Herdis Kjerulf Thorgeirsdottir, "*Keeping journalists safe – what international organisations do*", Global Conference for Media Freedom, London 10 July, 2019. www.venice.coe.int/files/London_%20speech_Herd%C3%ADs_2019.pdf.

[66] Venice Commission, CDL-AD(2018)028, Malta - Opinion on Constitutional Arrangements and Separation of Powers and the Independence of the Judiciary and Law Enforcement, para. 13.

[67] Venice Commission, CDL-AD(2018)021, Romania - Opinion on draft amendments to the Criminal Code and the Criminal Procedure Code.

in EU member States. These killings linked to oligarchs raise troubling questions about freedom of expression, not to mention the right to life and the Rule of Law.

Maltese investigative journalist Daphne Caruana Galizia was killed by a car bomb in October 2017; Slovak investigative journalist Ján Kuciak was shot dead in February 2017; and Bulgarian TV journalist Viktoria Marinov was raped and killed in October 2018. All three were working on exposing corruption or fraud allegations. None of the cases have been resolved at this time of writing. Just two weeks before the murder of Daphne Caruana Galizia the Archbishop of Malta publicly declared that the country's economic growth was creating new forms of disparity, with an oligarchy of the super-rich on the one side and workers unable to afford the rent for their homes on the other.[68] Two years after Caruana's killing the authorities in Malta arrested one of the country's wealthiest businessmen in connection with the murder as he was attempting to flee on his yacht. Shortly after, the Prime Minister along with another cabinet minister and his chief of staff resigned – all with close ties to this oligarch. The Prime Minister's resignation came in the wake of mass protests and pressure from the EU Parliament.[69]

The Slovakian Prime Minister Robert Fico also resigned in 2018 without waiting for the results of an investigation into the murder of investigative journalist Jan Kuciak and his fiancée, Martina Kusnirova.[70] That investigation later focused on the oligarch allegedly involved, who was finally charged with ordering the murder.

Impunity for crimes against journalists or others disclosing information on corruption is an obstacle to upholding the Rule of Law. To be effective in practice the Rule of Law must be rooted in principles such as transparency, impartiality and equality.

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[68] https://timesofmalta.com/articles/view/the-rise-of-the-oligarchs.659464

[69] Motion for a resolution to wind up the debate on the statement by the Commission pursuant to Rule 132(2) of the Rules of Procedure on the Rule of Law in Malta following the recent revelations surrounding the murder of Daphne Caruana Galizia. www.europarl.europa.eu/doceo/document/B-9-2019-0240_EN.html; www.theguardian.com/world/2019/dec/18/eu-parliament-calls-on-malta-pm-joseph-muscat-to-resign-over-daphne-caruana-galizias-case.

[70] Mikuláš Dzurinda, President of the Wilfried Martens Center for European Studies, Prime Minister of Slovakia from 1998 to 2006, wrote an article in Politico on the links between Prime Minister Fico's SMER party and the country's oligarchs stating that inaction by the police, prosecutors and the justice system in the face of corruption scandals and the reports of investigative journalists have caused many in the country to conclude that the Slovak judiciary has lost its independence. www.politico.eu/article/slovakia-black-hole-of-europe/.

The Venice Commission in its opinion on constitutional arrangements in Malta in 2018[71]stressed that a solid system of checks and balances must be in place – institutional settings such as an independent judiciary and an independent public prosecutor are essential to end impunity, which remains one of the most serious threats to free expression and journalists' safety. The Venice Commission furthermore stressed that it is an international obligation of governments to ensure that the media and civil society can play an active role in public affairs holding the authorities accountable.

The chilling effect, self-censorship and corruption

Critical, investigative journalism is crucial for democracy. The Venice Commission's delegation during a visit to Malta in 2018 got the impression that self-censorship was prevailing within the media and civil society. The chilling effect of laws or actions that are intended to deter individuals, whether bloggers or professional journalists, from openly criticizing power holders[72] or from exposing corruption leads to pervasive self-censorship[73] – even on society as a whole as the Venice Commission has stressed.[74] In ECtHR jurisprudence political debate is almost sacrosanct and states have a positive obligation to secure to everyone within their jurisdiction the rights protected under the Convention and the ECtHR case-law, such as the right to life and freedom of expression.

An oligarchic environment does not foster a robust, political debate essential for democratic governance.

V. Incompatibility of oligarchy with democratic aspirations?

Democracy is based on the Rule of Law and respect for human rights; the ideal is that every citizen has equal political rights and that legislation is constitutionally vested in representatives elected by citizens, that there are free, fair and frequent

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[71] Venice Commission, CDL-AD(2018)028, *op. cit.*; the request from the CoE PACE originated in a proposal to seize the Venice Commission by the Rapporteur for the Assembly's report on Daphne Caruana Galizia's assassination and the Rule of Law, in Malta and beyond, ensuring that the whole truth emerges.

[72] Venice Commission, CDL-AD(2016)008, Opinion on the Law on the Protection of Privacy and on the law on the Protection of Whistleblowers of "the former Yugoslav Republic of Macedonia", paras. 77- 79 and 84.

[73] Herdís Thorgeirsdóttir, 'Self-censorship among Journalists: A (Moral) Wrong or a Violation of ECHR Law?' in E. Barendt, Freedom of the Press, Ashgate, 2009.

[74] Venice Commission, CDL-AD(2016)002, Opinion on Articles 216, 299, 301 and 314 of the Penal Code of Turkey, para. 68; see also para. 126.

elections, that citizens have the right to oppose and criticize without fear, that they have access to alternative sources of information, that they can form associations to promote their interests and that democratic citizenry is active.[75] The very moment that democracy loses sight of this, its inspiring principle, it quickly reverts into its opposite, into one of the many forms of autocratic governments, an oligarchy and as worst case scenario, into tyranny.

The Venice Commission reiterated in its Malta opinion 2020 when the Maltese authorities had taken a decisive step toward engaging in constitutional reform,[76] that there should be calls for wide consultations and a structured dialogue with civil society, parliamentary parties, academia, the media and other institutions, in order to open a free and unhampered debate of the current and future reforms, including those for constitutional revision, so as to make them holistic. The process of the reforms should be transparent and open to public scrutiny not least through the media.

At the early stages of shaping the constitutional heritage underlying the current prevailing model, Thomas Jefferson warned: "Every government degenerates when trusted to the rulers of the people alone. The people themselves are its only safe depositories."[77] This in fact is the core principle underlying the need for checks and balances. It has been portrayed how the so-called fourth estate or the public watchdog has been submerged with oligarchic power in most countries; how less than a handful of tech giants control the internet and social media and how this concentration of wealth and power in its proximity to political power has become the main arbiter in political life - is in fact in charge of the public sphere, which by the nature of democracy ought to be the forum for the citizenry to exercise its political input to the country's governance.

The immense injustice stemming from the close nexus between oligarchic power and government is the greatest dilemma any society faces today; whether resulting in authoritarianism, instability, corruption or poverty. Extreme concentrations of economic and political power undermine equal citizenship and equal opportunity. In this way, oligarchy is incompatible with, and a threat to any democracy.

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[75] Cf., Robert Dahl's theories on democracy, Who Governs?, Yale University Press, 1961.
[76] Venice Commission, CDL-(2020)017, Poland - Joint Urgent Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on amendments to the Law on the Common courts, the Law on the Supreme court and some other Laws, when the Maltese authorities had taken a decisive step toward engaging in constitutional reform, and seem to accept the 2018 Opinion as an important basis for such a reform, *cf.*, para. 13.
[77] Thomas Jefferson: Political Writings, p. 259, Cambridge University Press 1999.

The focus of this writing has been on the elements of oligarchy trending in countries with its corollary corruption. It may be disputed to what extent there are oligarchic trends creating not only economic inequality but furthermore political inequality. An assessment to such effect does however not constitute a valid pretext for abandoning the principles underlying the democratic constitutional heritage. It should not be accepted that oligarchic dominance is an unavoidable "iron law",[78] or that it even may be necessary to surrender to autocratic rule in order to "resolve" a bad situation.

Reclaiming power – possible constitutional responses

There is a trend to extend instruments of direct democracy as the Venice Commission has emphasized.[79] These instruments of direct and participatory democracy should be seen as complementing representative democracy, which is however not the only aspect of the democratic process.[80] For citizens to reclaim their power one constitutional reform which may be suggested is to introduce a citizens' initiative at the national level and municipal level as was done in Finland in 2012 and 2015 and Denmark in 2018 and is being widely used in both countries. Such an initiative allows citizens (requiring a certain number/percentage of the population) to make a legislative initiative to be considered by the national parliament (or municipal authorities in their case). Citizens initiatives in Finland have already had a significant impact on the political agenda-setting, shaping the political debate and parliamentary work in important ways.[81]

Other legislative reforms to equalize the political influence of the citizenry should be contemplated. One is to counter the trend of wealth "purchasing" the outcome of elections and another to optimise the role of the media and the internet in election campaigns. Transparency in public administration is an essential part of good governance. Regulation to break up monopolies is of course crucial.

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[78] Cf., Robert Michael, Political Parties, A sociological study of the oligarchical tendencies of Modern Democracy, The Free Press, 1911.

[79] Venice Commission, CDL-AD (2015)009, Opinion on the Citizens' Bill on the Regulation of Public Participation, Citizens' Bills, Referendums and Popular Initiatives and Amendments to the Provincial Electoral Law of the Autonomous Province of Trento.

[80] *Ibidem*.

[81] https://ecpr.eu/Filestore/PaperProposal/b983ec3d-7b39-413d-bc01-0c399ec5ece9.pdf.

Finally, it is important in this context to recall again the basic principles so often forgotten and essential to the operation and functioning of any political culture that aspires to the ideals of democracy, Rule of Law and human rights[82] - that of the 'virtue', an essential theme in the writings of the framers of the U.S. Constitution;[83] the appropriate 'mores' which Alexis de Tocqueville saw as the most important factor affecting the preservation of republics;[84] that of noblesse oblige as an inherent principle for those in power as opposed to greed and self-interest; and that of the 'inner principle' of the separation of powers, eternally linked to Montesquieu's name. When Charles-Louis de Secondat, Baron de Montesquieu was born on a January night in 1689 in a Castle near Bordeaux, a beggar who happened to be passing by the castle was given him as a godfather so that he might all his life remember that the poor were his brothers.[85]

[82] Herdis Thorgeirsdottir, "Only a virtuous people are capable of freedom", in Making Peoples Heard, Essays on Human Rights in Honour of Gudmundur Alfredsson, eds., Asbjorn Eide, Jakob Th. Möller & Ineta Ziemele, Martinus Nijhoff Publishers, 2011.
[83] "Only a virtuous people are capable of freedom". As nations get corrupt and vicious, they have more need of masters." Benjamin Franklin: Letter to Messrs, the Abbes Chalut, and Arnaud, 17 April 1787.
[84] Alexis de Tocqueville, Democracy in America, Random House, 1981.
[85] Isiah Berlin, Montesquieu in Against the Current, Edinburg University Press, 1977 (first published 1959).

Oscar Urviola Hani[1]

Chronicle of an announced dissolution

Antecedents

Try to understand , look for the reasons and find the legal and constitutional protections, if they exist, that led engineer Martin Vizcarra Cornejo to make the decision to dissolve the Congress of the Republic, on the afternoon of September 30, arguing the "refusal factual" of a matter of trust, raised before the Plenary that same day, it is necessary to refer not only to the events that preceded that decision in the weeks or days immediately before it, but it is also important to highlight the constitutional and legal framework in which the democratic institutionality of our country is developed, or should be developed.

Peru emerged into independent life as a unitary Republic, subject to the democratic, representative system of government , characterised by the division of powers,[2] under a presidential regime, inspired by the Constitution of the United States of North America of 1787, which, very early on, led to warlordism and even to internal wars for that great power, which had to be mitigated with a series of figures and especially by the intervention of Parliament, until what has come to be called a mixed system, or parliamentary presidentialism[3] was established.

Indeed, with the influence of the Cadiz Constitution, our 1856 Constitution creates the Council of Ministers and establishes ministerial endorsement; and successively the Constitutions of 1920, 1933, 1979 and the current one of 1993 established the functions of the President of the Council of Ministers, the political responsibility of the ministers through interpellation and censorship, the exposition of the government programme by the President of the Republic, the invitation to inform, the stating of questions, the vote of confidence, and the parliamentary investiture at the beginning of the management, all of which leads us to affirm that the model of attenuated or mixed presidential government demands participation in the government of the country by the two powers of the State, the Executive

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[1] Former Member of the Venice Commission in respect of Peru (2013-2017).
[2] Article 43 of the Constitution.
[3] Valadéz, Diego, The Parliamentarization of presidential systems. Editorial Adrus, Lima, 2009, p.4.

and the Legislature, respecting authority and competence to ensure the full balance that characterises the democratic system, which endows it with those tools.

Since everything is not perfect, the mixed presidential regime led us to the excesses of parliamentary majorities that, making use and abuse of interpellation and censure, not allowed to exercise the government under other principle, also important in the democratic system, as the one of collaboration of powers, as it occurred during the governments of President José Luis Bustamante y Rivero (1945-1948) and Fernando Belaunde Terry (1963-1968), which ended with the *coup d'etat* of General Manuel Odria and Juan Velasco Alvarado, respectively.

The remedy for this alteration of the democratic system, by abuse of the dominant majorities in Congresses at the time, comes with the 1979 Constitution, which established the prerogative of dissolution of the Chamber of Deputies, if it has censured or denied confidence to three Councils of Ministers.[4] tool that the Constitution gives to the Executive to maintain the balance of powers and that is repeated in the 1993 Constitution, with a variation: it is reduced to two, the negative of trust that would lead to dissolution, at the time the Congress of the Republic.[5]

With this constitutional history, we can assure that relations between the two major powers of the state, the Executive and Legislative, from the beginning of the constitutional period of 2016-2021, the Presidency of Pedro Pablo Kuczynki and his current successor Martin Vizcarra Cornejo, have been characterised by a constant confrontation, fuelled by political resentments and magnified by the revelation of corruption at the highest levels of public administration, which prevented the normal development of democratic institutions.

The course of political life of the country, since the installation of the current government, has developed between inquiries and/or threats of inquiries, censorships or threats of censorship to the ministers of State, by Congress, with response of a matter of trust, and the repeated announcements of a second trust issue,[6]with the threat of dissolving Congress, by the Executive, which resulted in a bad image of the institutions of the democratic system and the discredit of the country's political class.

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[4] Article 227.
[5] Article 134 of the Constitution.
[6] The first confidence denied was to the President of the Council of Ministers Fernando Zavala Lombardi on September 14, 2017.

The crisis

Permanent confrontation with an absolute absence of dialogue has led to a serious political crisis which, through the proposed removal of parliamentary immunity, reached the extreme of trying to alter the presidential and parliamentary terms, with the imposition of a constitutional reform for the advancement of general elections, to be carried out on the third Sunday of April 2020, subject to approval by referendum; a project that the Constitution Commission considered unconstitutional and agreed its shelving, aggravating the tension between the two powers.

While the Constitution recognises to the executive power the power of legislative initiative to reform the Constitution,[7] this is limited to the faculty of presenting the respective projects, which may even deserve the urgent procedure recognised by the Constitution[8] and the Congress Regulation,[9] but that does not affect the unique and exclusive faculty of the Congress of the Republic to approve any constitutional reform, as a derived Constituent Power, by mandate of the Constituent Assembly – Originating Constituent Power – that approved the 1993 Constitution , ratified in a referendum.

Before entering the analysis of the question of trust "factually denied", which supported the decision to seriously alter the constitutional order, which in my opinion is considered a real "*coup d'etat*", it is important to note that the intention to advance the general elections, with objectives outside of the State, of political convenience and inability to engage in dialogue, deepened the crisis and sought to alter the historic Constitution, in which there are institutions that have become part of the hard core or unchangeable provisions in the Constitution, as is the Unity of the Republic, representative democratic system, the rights and guarantees of the person, the economic model, among others and to which must be added the constitutional term of government to the Executive and the Legislature, fixed by the Constitution of 1920 to five years, with the single exception of the constitutional period stated in the Constitution of 1933 that was of 6 years.[10]

It has almost been 100 years that our Republic sets a constitutional period of government, for the two important Powers of the State, which govern under the Presidential/Parliamentary system, for no less than five years. This constitutes a guarantee to achieve national objectives of

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[7] Article 206 of the Constitution.
[8] Article 105 of the Constitution.
[9] Articles 31-A, subsection 2 and 76, subsection 1-a) of the Regulations of the Congress.
[10] Articles 90 and 112 of the Constitution.

economic, social and political development, since it will allow to guarantee, in that period, the execution of the government plans of those who reach the responsibility of driving the destinies of the country, as well as guaranteeing the economic agents and the citizens in general a regime of political stability and rules of the game that allow predictability, so necessary for any type of investment, whether national or foreign.

It is also convenient to specify that by express provision of the Constitution[11] the legislative mandate is indispensable, therefore, must be met within the constitutional period set by the Constitution, that is to say within five years.

We must also keep in mind what the Constitutional Court has said about the reform of the Constitution , but not before pointing out that the same Constitution has recognised to the President of the Republic, with the approval of the Council of Ministers, only the reform initiative.[12]

Indeed, the Constitutional Court has clarified the scope of a constitutional reform under the 1993 Constitution, on the following basis.[13]

> "84. Article 206 of the Constitution regulates the power to reform the Constitution, conditioning its exercise to the observance of its procedure. Namely, that it must be approved by Congress with the absolute majority of the legal number of its members and, subsequently, be submitted to a referendum. Or, that the referendum can be omitted, provided that the agreement of the Congress is obtained in two successive ordinary legislatures with a favourable vote, in each case, exceeding two-thirds of the legal number of congressmen. In any of the supposed cases, the constitutional reform law cannot be observed by the President of the Republic".
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> "85. In this way, Article 206 of the Constitution has entrusted the (juridical) competence to reform the Constitution to two constituted powers: on the one hand, as the subject holder of the competition, the Congress of the Republic, who may carry it out on its own as long as the reform is approved in two successive ordinary legislatures with a favourable vote, in each case, exceeding two-thirds of the legal number of members of Congress; and, on the other, the people, who express themselves by means of a referendum".

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[11] Articles 95 of the Constitution.
[12] Article 206, last paragraph.
[13] Judgment of the Constitutional Court of January 21, 2002 in Expedient 0014-2002-AI/TC.

> "99. Ultimately, the Constitutional Court considers that an interpretation that respects the principle of unity of the Constitution, requires the interpreter to necessarily understand that the authority to reform partially the Constitution, as a constituted power, is not only subject to formal limits or procedural (Article 206 of the Constitution), but also to material limits, among which are the rights of the person and, in general, to the supreme principles of the constitutional order."

It is not convenient in any democracy to make this type of reforms, which do not respond to the true urgency of adapting our fundamental law to the needs that arise in every society, as a consequence of the dynamics of modern life, the advancement of technology and progress of social rights. In different circumstances, politics must adhere to the Constitution and not *vice versa*.

We should note that the constitutional framework in general and especially the fundamental rights and freedoms, the government periods, the economic model, the legislative function, the administration of justice, among others, are factors that have a direct impact in the decisions of all types of people and companies, especially in the economic order, so sensitive to changes that may arise from unforeseen political reforms.

The stability of the democratic system, the respect for the institutions enshrined in the Constitution, without neglecting its timely and well thought out adaptation to the need of society, is a concern that every Statesman must keep alive in his decision to serve the country.

In none of the two options, approval or disapproval, or approval with modifications, it is possible for the President of the Republic to observe what the Congress approves or disapproves.

The question of trust and the refusal factual

The proposed constitutional reform failed, the relations between the two powers of the State further deteriorated, contributing thereby the opinion of the Venice Commission,[14] which in its report of October 14 marked an adverse position to the stubborn attitude of the Executive Power of linking a matter of trust to the proposals for constitutional reform, as a weapon of pressure to obtain approval, under the terms, conditions and time that this Power of the State signals.

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[14] European Commission for Democracy for the Law.

The Venice Commission in its report[15] arrived at the following conclusions:

"43. The Peruvian Constitution does not set forth any explicit limitations with respect to the issues which may be linked to a question of confidence. It will be up to the Constitutional Tribunal to decide whether proposals for constitutional amendments may be linked to a question of confidence. In comparative law, linking constitutional amendments to a question of confidence is unusual.

44. Any constitutional amendment process should preserve the principle of the separation of powers and the requirement of checks and balances between the President and the Congress. The power of the President to link a question of confidence to constitutional amendments may create a risk of being used to alter this balance. The threat of dissolution after a second vote on a question of confidence may make it difficult for Congress to resist attempts to alter it in favour of the President. In Peru some substantive limitations to constitutional amendments seem to exist, such as the principle of separation of powers or the republican form of government, which might provide a safeguard, but their scope is not clearly defined.

45. The Venice Commission's report on constitutional amendments suggests that constitutional reforms should be based on a wide consensus and undertaken with due care and deliberation in Parliament, in keeping with modern ideas of democracy, as they alter the supreme and fundamental law of the land. For this reason, a Constitution is normally designed to be difficult to amend to ensure its relative permanency, stability, foreseeability, and continuity, and amendment procedures tend to be lengthy. This is in contrast with motions of confidence, which have to be voted upon quickly.

46. The Commission hopes that the President and the Congress of Peru will find a compromise and adequate constitutional solutions which will bring institutional stability and help the authorities to address the challenges faced by the Peruvian society.

47. The Venice Commission remains at the disposal of the Peruvian authorities for any further assistance."

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[15] Venice Commission, CDL-AD(2019)022, Peru – Opinion on the Linking of Constitutional Reforms to the Question of Trust.

The Constitutional Court in the judgment prescribed in the Expedient 006-2018-PI/TC, which declared the demand for unconstitutionality interposed against Legislative Resolution 007-2017-2018-CR, which amended literal e) of Article 86 of the Regulation of the Congress of the Republic, has established that if a question of trust linked to a legislative initiative can be presented, when the amendment of subsection e) of Article 86 above is expelled from the legal system, which established: *"it is not appropriate the interposition of a matter of trust when it is intended to promote, interrupt or prevent the approval of a rule or a legislative procedure or political control."*[16]

The highest interpreter of the Constitution considered that the opposed modification was unconstitutional because it contradicted the principle of balance of powers, because it unduly restricts the faculty of the ministers to be able to present before the Congress of the Republic matters of trust subjects in which the handling of the Executive demand, distorting the purpose of the referred institution, altering the separation of Powers and violating Articles 43, 94, 105, 122 and 132 to 134 of the Constitution.

In the pronouncement of the Constitutional Court, mentioned above, we must make an important precision: although, it is true that with this judgment it is clear that a question of trust, by its own nature, refers to State policies that required concretisation in government actions, for which it is needed the legal devices allowed its effective application, it is also true that these initiatives are limited to the ordinary legislative function of the Congress of the Republic, which are linked to the management needs of the government, but not to the special function and excluded of the same Congress, when exercises the authority as a derivative Constituent Power to approve the total or partial reform of the Constitution, especially by express mandate of the same Magnum Chart and in a systematic interpretation of the same Chart, the President of the Republic cannot even observe it.[17]

Consequently, the President of the Council of Ministers cannot make a matter of trust regarding the approval of the draft constitutional reform, as it is an exclusive attribution of the Congress of the Republic.

Exhausting the possibility of raising a question of trust linked to a constitutional reform, especially by the authorised and timely opinion of the Venice Commission, the Executive found the opportunity to achieve the goal, highly desired by the government of Martin Vizcarra, to dissolve the Congress of the Republic, for which he had the popular support from over 80% of

[16] Foundation 76.
[17] Article 206, second paragraph, of the Constitution.

the population and the discredit of this institution, which reached levels never seen before, in part because of the quality of its members and largely linked to acts of corruption and crimes committed, scenario in which, in sudden and unused enthusiasm, the Special Committee of Congress were encouraged to update the process of election of the Magistrates of the Constitutional Court, which had been paralysed for more than six months, citing a Plenary Session for September 30, with the agenda of voting for the election of six candidates for Magistrates of the Constitutional Court , chosen under the invitation system.

That opportunity materialised when the President of the Council of Ministers Salvador del Solar Labarthe, requested the President of the Congress, Pedro Olaechea Alvarez Calderon, by a communication dated September 27, to be received and heard in the Plenary to propose a matter of trust, which was not revealed and was known only in the Plenary session, after its rugged incursion into the Hemicycle, when he exposed the need and importance for the operation of the democratic system, the election of the judges of the Constitutional Court, which made it a matter of confidence the approval, as a matter of urgency, of a project that modified the Organic Law of the Constitutional Court, as regards the process of election of the Magistrates, conditioning the paralysis of the process already initiated and that led to the election of one of the applicants who reached the qualified vote[18] required by the Constitution, in the midst of a series of incidents, previous matters and reconsiderations.

The matter of confidence was then put to a vote, having been approved, notwithstanding which, that evening, without raising the session, Martin Vizcarra Cornejo, who exercised the Constitutional Presidence until then, decided to interpret that the Congress had denied the trust in a "factual" way[19] by continuing with the election of one of the judges.

Here it is appropriate to ask a question: is it possible that in public law the expression of will of a collegiate body, such as the Congress of the Republic, subject to compliance of a series of formalities for the exercise of its own competences and functions, expressed in the Constitution and its Regulations – which is its Organic Law – for approval or disapproval of an act, can it produce the factual manner, without any limitation, nor criterion of reasonableness, which is not exposed to arbitrariness?

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[18] Two thirds of the legal number of its members. Article 201, last paragraph, of the Constitution.

[19] According to the Royal Academy of the Spanish Language: "factual, ca": based on facts, or limited to them".

The answer to this question is no, since, as is true for all collegiate bodies, especially in the Republic Congress, which is composed of members who have received a popular mandate and represent the interests of the Nation, its decisions are not of a personal interest, they are subject to compliance with the procedures that are of public order, which cannot be avoided, under penalty of nullity, such as the submission to a citation, an agenda, concurrence of the members with the quorum of law, debate and voting,[20] with the majority, which can be: simple, absolute or qualified, depending on the subject.

The hit and the challenge of the Constitutional Court

Nothing that does not comply with the aforementioned formalities may be understood as approved or disapproved in the Congress of the Republic, which is why the "factual refusal" wielded by Mr Martín Vizcarra Cornejo, is not only the expression of an act of arbitrariness, but one of the more serious violations that has been committed in the last 30 years of our democratic life, it has been used to make the decision to dissolve Congress,[21] that even with its bad image, the bad conduct of many of its members and popular discontent, no longer an institution of democracy, which must be respected, without which, sooner or later, it will have to answer to the country.

Outside the arbitrary interpretation of the "factual refusal" of the question of trust and the unconstitutional dissolution of Congress – without even entering into the serious questions about the way in which the supreme decree of dissolution was issued – the question of trust raised by the President of the Council of Ministers, linked to the paralysis of the selection process of the judges of the Constitutional Court, at the voting stage and the modification of their Organic Law, through a bill that just entered into force that same morning, with a request for processing with urgency, entails something that cannot be overlooked, such as the serious impairment of the powers of Congress, this time no longer linked to a constitutional reform, but to the exercise of a competence that the Constitution has granted exclusively, notably the election and appointment of the judges of the Constitutional Court.[22]

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[20] According to Article 86, subsection c), last part, of the Regulations of the Congress, the Question of Confidence will be debated in the same session that is raised or in the following one.

[21] Supreme Decree No. 165-2019-PC, published in the Official Gazette El Peruano, extraordinary edition of September 30, at 9:30 p.m.

[22] Article 201 of the Constitution.

It is evident that, by wanting to paralyse, due to its mere presence and presentation of the issue of trust, a process initiated 10 months earlier, as well as trying to apply, retroactively, a bill, which even with emergency treatment had to submit in the Legislative procedure, the Executive, in the attitude of the President of the Council of Ministers, was invading and undermining the powers of the Legislative Power.

This attitude, which constitutes a conflict of constitutional competence, enables the Congress of the Republic to interpose the claim for a Conflict of Competence before the Constitutional Court, covered by Article 202, paragraph 3 of the Constitution and Articles 109 and the following of the Constitutional Procedural Code.

About this, the Constitutional Court has established jurisprudence that interprets the scope of Article 110 of the Constitutional Procedural Code, specifying the different types of conflict of jurisdiction, which is consider the **"constitutional conflict by undermining competition in the strict sense"** noting on the basis 3 of the judgment handed down in Expediente 001-2010-CC / TC ,[23] the following:

> "3. Likewise, this Court has developed in its jurisprudence the so-called constitutional conflict for impairment of constitutional powers, which has classified in: a) constitutional conflict for impairment in the strict sense, which occurs when, without a conflict in relation to the ownership of a competence or attribution, a constitutional body exercises its competence in a way that affects the proper exercise of the powers reserved to another constitutional body ; ……. " [Cfr. STC 0006-2006-CC, basis 19 to 23]." (Bold emphasis ours).

With the competence claim presented by the President of the Congress, on October 10 of this year and admitted for processing by order of the Constitutional Court, unanimously approved on the 29th of the same month, it is intended:

1. "Declare that when the Executive Power, through the Presidence of the Council of Ministers, made a request for a matter of trust, this can only be granted by the Congress of the Republic in an express form, through a full vote of the Plenary and not by a tacitly or factually way....."
2. "That it be declared that the question of trust must be raised, debated and put to vote respecting the processes established in the Regulations of the Congress….."

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[23] Judgment issued in the conflict of jurisdiction between the Executive Branch and the Judicial Branch.

3. "Declare the consequent nullity of the act of dissolution of the Congress contained in Supreme Decree No. 165-2019-PCM"

In this scenario and with the competence claim in the hands of the Constitutional Court, the highest interpreter of the Constitution has the obligation and the great responsibility, before the country, the history and the International Community, to pronounce on the arbitrary interpretation of the "refusal factual" of the question of trust and its consequence in the unconstitutional decision to dissolve the Congress of the Republic.

The rejection – by most[24] – of the precautionary measure, which was intended to suspend the effects of the supreme decree of dissolution of the Congress of the Republic and the call for elections of a new Congress, make us presage that these are completed facts, but that do not stop being violations of the Constitution, that have altered the democratic system, that cannot be ignored and that constitute a bad presumption for the future, in the task of building a true Constitutional, Democratic and Social State of Law.

The Constitutional Court is obligated to qualify and interpret, from the Constitution, these serious events so that the responsibilities are set and apply the sanctions foreseen in our constitutional order, and specify the scope and limits of the issue of trust and the form in which it should be understood its approval or disapproval, to avoid arbitrary and unconstitutional interpretations in the future.

[24] With the votes of magistrates Miranda Canales, Ramos Núñez, Ledesma Narvaes, Espinoza Saldaña and Ferrero Costa, and the votes in favour of Blume Fortini and Sardón de Taboada.

Pieter van Dijk[1]

Ben Vermeulen[2]

Thirty years of Constitutional Cooperation: The synergy between the European Court of Human Rights and the Venice Commission

1. The constitutional source and cause of the Venice Commission

The Venice Commission was established in 1990. The initiative came from the then Italian Minister for coordinating Community Policies and well-known comparative constitutional law expert, Antonio La Pergola. La Pergola proposed to create within the Council of Europe an advisory body of constitutional lawyers to promote the development of democracy and the Rule of Law. That would become the European Commission for Democracy through Law, better known as the Venice Commission, named after the beautiful city where the Commission since thirty years holds its quarterly plenary sessions.

This project originally 'appeared intellectually appealing but politically suspicious', while 'constitutional law was – and still is – regarded as a state's reserved domain *par excellence*. Giving an international expert body the task, and hence the legitimate authority, to criticise and perhaps influence domestic constitutional choices must have seemed, from a national perspective, rather dangerous.'[3]

La Pergola's proposal however got momentum when, in 1989, the Berlin Wall fell and the communist empire collapsed. Most states that formerly had belonged to the Soviet Union, and other states that had struggled themselves out of the communist regime, wished to join the 'Free Europe' and wanted to qualify as soon as possible as a constitutional democratic state, abiding by the Rule of Law. Membership of the Council of Europe was seen as a certificate of such fundamental change. However, admission to the Council

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[2] Member of the Venice Commission in respect of the Netherlands.

[3] Gianni Buquicchio & Simona Granata-Menghini, 'The Venice Commission Twenty Years on, Challenges met, but Challenges Ahead', in: Marjolein van Roosmalen, Ben Vermeulen *et al.* (eds.), *Fundamental Rights and Principles, Liber Amicorum Pieter van Dijk,* Cambridge: Intersentia, 2013, pp. 241.

of Europe required considerable efforts on their part, in particular in drafting new constitutions and other fundamental legislation. This had to be done, to guarantee the existence and functioning of democracy and an independent judiciary, adherence to the principles of the Rule of Law and protection of human rights. On the other hand, most of these states had a shortage of expertise in precisely these core values of the Council of Europe and how to transfer these values into legislation, and therefore were looking for assistance from elsewhere.

Though the Commission originally was received with some hesitation[4], it immediately found a large sphere of activities, especially - and the first years almost exclusively - in Central and Eastern Europe. The need for advice and assistance, particularly in international and domestic constitutional law, as well as the expertise of the Commission and the trust in its independence and impartiality, soon made its role undisputed and well-received. However, its longer-term survival was not obvious[5] and would depend on its ability to prove a long-lasting stature of independence, reliability and usefulness. In this the Commission has succeeded to a large extent. Remarkably, even in the situation of newly obtained sovereignty by the Central and Eastern European states, the role of this Commission with its international composition was accepted from the very start, and its advisory opinions were followed for the larger part, especially in the first years of its existence. It operated, and still operates, in close cooperation with the governments and parliaments of the states concerned, as well as with the organs of the Council of Europe, especially the Parliamentary Assembly. It has delivered important building blocks and proposed numerous amendments for draft constitutions and legislation, especially in the core area of constitutional law: the division of powers, parliamentary democracy and guaranties for general and free elections, as well as safeguards for the legal position of national minorities, fundamental rights and the independence of the judiciary.

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[4] See G. Buquicchio, 'Vingt ans avec Antonio La Pergola pour le développement de la démocratie', in: P. van Dijk, S. Granata-Menghini (eds.), *Liber Amicorum Antonio La Pergola*, Juristförlager i Lund, 2009.

[5] The Commission was set up for an initial transitional period of two years: see *Resolution adopted by the Conference for the constitution of the Commission for Democracy through Law*, Venice, 19-20 January 1990, and Resolution(90)6 *On a Partial Agreement Establishing the European Commission for Democracy through Law*, adopted by the Committee of Ministers, 10 May 1990.

2. The task of the Commission: constitutional engineering[6]

The role of 'initial emergency constitutional engineering' that gave the Commission its main thrust in the first years of its existence, has gradually been broadened towards structural 'constitutional engineering' for the whole membership of the Council of Europe, since more and more of its opinions and reports also became relevant for the 'old democracies' of Europe. Later on, the Commission became involved in comparable constitutional and legislative processes outside Europe, in particular in countries in North and South Africa and in Latin-America.

Although by far the largest part of the advisory opinions of the Commission still relates to legislative drafts of Central and Eastern European states, at various occasions the Commission received and receives requests from Western European states, for instance in relation to the new constitutions of Finland and Luxembourg. Furthermore, the Parliamentary Assembly, more and more often, asks for an opinion on certain legal developments in Western Europe (for instance on the media law in Italy and the new constitutions of Liechtenstein and Monaco). The Commission also has been active for participating states outside the framework of the Council of Europe, like Morocco and Tunisia.[7]

The Commission's main function is to give advice on draft constitutions, constitutional amendments and other (draft) organic legislation of participating states, particularly in the sphere of election law and fundamental rights. In general, opinions are asked by the state concerned, or by the Parliamentary Assembly in the framework of its supervisory and monitoring role. If a state asks for an opinion on a matter regarding another state, the latter will be informed by the Commission. If these two states are not in agreement about the request, the Commission submits the issue to the Committee of Ministers.[8]

Although the opinions of the Commission are of an advisory character, they are often followed by the state concerned, even if that state did not ask for the opinion itself.[9] In some cases this requires a follow-up opinion or

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[6] Buiquicchio & Granata-Menghini 2013, pp. 243-252; Ben Vermeulen and Anna Jasiak, 'De constitutionele advisering door de Venice Commission' [*The constitutional advices by the Venice Commission*], *RegelMaat* 2018, pp. 207-215.

[7] For instance, the Venice Commission played a vital role in supporting the process of drafting and amending the Constitution of Tunisia of 2014. See Venice Commission, CDL-AD(2013)032, Opinion on the final Draft Constitution of the Republic of Tunisia.

[8] Venice Commission, CDL(2002)027, Revised Statute of the Commission, Resolution (2002)3 of the Committee of Ministers of 21 February 2002, Article 3, para. 2.

[9] However, there has been an ostentatious - but not unexpected - rejection of the *Opinion on the Amendments to the Constitution of proposed by the Princely House of Liechtenstein*; CDL-AD (2002) 32. Moreover, in the past ten years Hungary and Poland often have disregarded

a recommendation by the Parliamentary Assembly. However, even if the opinion of the Commission is implemented in the legislation concerned, that does not in itself guarantee that in fact legal practice develops along the lines set out by the Commission. If that does not seem to be the case, the Parliamentary Assembly may ask for a follow-up opinion on how that actual practice relates to the European standards indicated by the Commission. The Commission itself also examines the follow-up given to its opinions, although it may express itself about its findings publicly only if a new opinion is asked for.

The Venice Commission also plays a role as *amicus curiae* in proceedings before the European Court of Human Rights[10] as well as national highest courts, in particular constitutional courts. In the latter case, it usually only gives an assessment *in abstracto* of the legal questions which the national court has to address in the light of European standards, and does not attempt to provide an interpretation of domestic constitutional or organic law.

The Venice Commission co-operates in a broader area with constitutional courts and courts of equivalent jurisdiction within the framework of the Joint Council on Constitutional Justice. Furthermore, it has established and supports the World Conference on Constitutional Justice, acting as its secretariat. Today, 117 constitutional courts and other supreme jurisdictions are members of the Conference. The Conference meets once every three years in a city in which a national constitutional court has its seat, to discuss topical issues of constitutional law and human rights. These activities are instrumental in creating opportunities for a 'dialogue' between the European Court of Human Rights and domestic judiciaries.[11]

The Venice Commission not only gives advice on draft constitutions and draft legislation. The Parliamentary Assembly in particular often requests opinions about general legal issues under its mandate. Thus, the Commission gave an opinion on the execution of judgments of the European Court of Human Rights[12] and an opinion on the possible implications of the entry

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the Venice Commission opinions.

[10] Venice Commission, CDL-AD(2008)027, *Amicus Curiae* Brief in the cases of *Sejdiç and Finci v. Bosnia and Herzegovina*. The European Court of Human Rights extensively referred to the *amicus curiae* brief: ECtHR (GC), 22.12.2009, *Sedjiç and Finci v. Bosnia and Herzegovina*, nos. 27996/6 and 34836/06, paras. 4 and 17-22. We will elaborate on the *amicus curiae* role of the Commission in para. 4.2.

[11] See *Dialogue between judges*, European Court of Human Rights, Council of Europe, Strasbourg 2008.

[12] Venice Commission, CDL-AD (2002)034, Opinion on the Implementation of the Judgments of the European Court of Human Rights.

into force of the Charter of Fundamental Rights of the European Union for human rights protection in Europe.[13]

Most of these examples demonstrate the close link of the work of the Commission with that of the European Court of Human Rights, in a spirit of cooperation. In paragraph 4 we will take a closer look at the synergy between the Court and the Commission.

3. Legal bases and sources of the Commission's constitutional work[14]

According to Article 1 of its Statute, the Commission's specific field of action concerns the guarantees offered by law in the service of democracy. In that field, it is expected to give priority to work concerning:

a. the constitutional, legislative and administrative principles and techniques which serve the efficiency of democratic institutions and their strengthening, as well as the principle of the Rule of Law;
b. fundamental rights and freedoms, notably those that involve the participation of citizens in public life;
c. the contribution of local and regional self-government to the enhancement of democracy.

No restrictions are set as to the legal sources to be applied in these activities. However, since the Commission was set up in the framework of the Council of Europe, it is self-evident that the legal instruments adopted by that organisation, in particular the European Convention on Human Rights, are its main terms of reference, together with the jurisprudence developed in relation to them, especially in the case law of the European Court of Human Rights.

The 'European standards' applied by the Venice Commission of course includes binding legal instruments such as the European Convention on Human Rights (hereinafter, 'ECHR' or 'the Convention'). This European 'hard law' sets the rigorous minimum standards, the baseline. But the Commission also refers to 'soft law' such as resolutions of the Committee of Ministers, the Parliamentary Assembly and Council of Europe monitoring bodies as well as the OSCE/ODIHR. 'Soft law' may be defined as 'norms that are legally non-binding, or binding to only a very limited extent, and lack sovereign enforceability/sanctionability, but nevertheless provide other *stimuli* for compliance and thus for enabling effectiveness. Soft

[13] Venice Commission, CDL-AD(2003)092, Opinion on the Implications of a Legally-binding EU Charter of Fundamental Rights on Human Rights Protection in Europe.
[14] Buquicchio & Granata-Menghini 2013, pp. 243-246; Vermeulen & Jasiak 2018, pp. 215-217.

instruments can implement soft law – as well as hard law – and/or add to its efficacy.'[15] Gradually, its own 'legisprudence' is also used by the Commission as a source of soft law standards: to that extent the Commission is not only applying soft law, but also produces soft law.

Since the Commission operates not only within the Council of Europe, not all states that may come under review are bound by 'European standards'. That does not imply that these standards are not applied at all. In fact, to a large extent they are taken into account, albeit implicitly.[16] In general, the Commission will specifically refer to the International Covenant on Civil and Political Rights, the UN treaty containing essentially similar provisions on fundamental rights as the European Convention on Human Rights. But the Commission then applies a more restrained assessment, taking into account the different political, religious and cultural background.[17]

Thus, the Commission also considers relevant international standards developed outside the Council of Europe, such as the human rights treaties of the United Nations and the jurisprudence based thereupon, as well as international agreements and resolutions created within other organisations and conferences. In addition, the Commission sometimes refers to domestic law, jurisprudence and legal practice, as indications of evolving common European law. It may also review a domestic draft law or legal practice submitted to it, for its conformity with the relevant state's own constitution. It will use and interpret domestic law, especially constitutional law, but only if that forms part of the review asked for.[18] This does not amount to a 'competition' with the constitutional court of the

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[15] See Wolfgang Hoffmann-Riem, 'The Venice Commission of the European Council – Standards and Impact', *European Journal of International Law* 2014, pp. 580-581. Cf. Buquicchio & Granata-Menghini 2013, pp. 243-244.

[16] However, here the *caveat* is even more at place that 'the broader the VC's scope of action and its membership become the more generous it will have to be in acknowledging the features unique to the respective cultures in the relevant societies (…). It is by no means appropriate to apply specifically Western European (i.e., also Christian) standards, which have formed the bulk of the VC's work up to now, as a matter of course and without any modification whatsoever. For example, the idea of individual self-determination and the concepts of social justice, as have long informed (Western) European thinking, may need to be redefined', Hoffmann-Riem 2014, pp. 583-584

[17] Venice Commission, CDL-AD(2013)032, Opinion on the final Draft Constitution of the Republic of Tunisia.

[18] Venice Commission, CDL-AD(2012)010, Opinion on the Revision of the Constitution of Belgium, with respect to the question whether a temporary change of the review clause in the Constitution was itself compatible with the Constitution; and with respect to the constitutional independence of the judiciary in Poland: CDL-AD(2017)031, Opinion on the draft act amending the Act on the National Council of the Judiciary, on the draft act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts.

state concerned, in particular not if that court has not been addressed with the issue[19] or has itself put the constitutional issue before the Commission through a request for an opinion or an *amicus curiae* brief in a pending case. [20]

The Commission until now has been hesitant to refer to the Charter of Fundamental Human Rights of the European Union and other EU documents. In cases where the state under review is a member of the EU and given the close cooperation between the EU and the Commission, and because of the advisory status of the Commission's opinions, this hesitance may be somewhat misplaced, especially because these European standards are often more specific and give clearer guidance.

Finally, the Commission applies and develops standards with lesser normative character, based upon its own previous opinions and on state practice, as it does for example in various guidelines prepared in cooperation with OSCE/ODIHR on freedom of religion, freedom of assembly and regulation of political parties.[21] However, it must be careful not to impose a practice developed in one state to another state; where several options are equally in line with applicable European standards, it is not the Commission's role to express a preference. It will only indicate which option, in its opinion, might be presented as ' best practice' or would fit well in the situation in the country concerned, and may function there satisfactorily in view of the promotion of the Rule of Law, human rights and democracy.[22]

As a body embedded in the Council of Europe, the Commission takes careful account of the judgments of the European Court of Human Rights, that provides it with its most important hard law sources (see para. 4.1). The Commission will also pay close attention, as the issue arises, to the judgments of the Court of Justice of the EU, and the views of the Human Rights Committee of the UN and other international quasi-judicial bodies.

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[19] However, in that case, the Commission will often abstain from giving its interpretation of the constitutional provisions at stake, in particular when that issue is pending before the constitutional court, see for instance Venice Commission, CDL-AD(2019)033, Opinion on the Law on the Use of Languages (North Macedonia), para. 27

[20] Venice Commission, CDL-AD(2010)002, *Amicus Curiae* Brief for the Constitutional Court of Moldova on the interpretation of Articles 78.5 and 85.3 of the Constitution of Moldova; CDL-AD(2013)008, *Amicus Curiae* Brief on the Immunity of Judges for the Constitutional Court of Moldova.

[21] Venice Commission, CDL-AD(2010)024, Guidelines on Political Party Regulation, *e.g.* the references to best practices in the OSCE/ODIHR and Venice Commission.

[22] Buquicchio & Granata-Menghini 2013, p. 244.

In principle, the Commission may be supposed to take the same attitude in relation to judgments of the domestic constitutional courts and highest jurisdictions, where the interpretation of the domestic law of the respective state is concerned. However, the Commission has shown that it attributes to itself some autonomous role in interpreting domestic constitutional law if it comes to very crucial issues of the Rule of Law, human rights and democracy, although in principle it will refer to the domestic constitutional court.[23] Although the Commission, so far, has not indicated when it feels justified to not follow the judgment of the constitutional court, it seems probable that this will be the case only when it is convinced that that court itself evidently is not constituted or composed according to its own constitutional law or for some other reason does not provide the required guarantees of independence and impartiality. That was the case in an opinion on Venezuela, where the Commission found that the creation of a *Constituante*, on the basis of elections determined by arbitrary criteria defined by President Maduro, violated constitutional requirements, which demanded a referendum held according to rules established by Parliament. The Venezuelan Constitutional Court had ruled earlier that the creation of the Constituante was not unconstitutional.[24]

4. The interaction between the European Court of Human Rights and the Venice Commission[25]

4.1 The Commission as an interpreter of the Court's case-law

It is not possible to grasp the functioning of the Venice Commission without taking into account the essential role of the European Court of Human Rights for the work of the Commission. Of course, there is a

[23] Venice Commission, CDL-AD(2017)001, Slovakia. Opinion on Questions relating to the Appointment of Judges of the Constitutional Court, para. 73: 'According to the Constitution of the Slovak Republic, the Slovak Constitutional Court is the final arbiter in constitutional matters. It is not the task of the Venice Commission to review decisions of Constitutional Courts in interpreting "their" Constitution in the same way a higher Court does.'

[24] Venice Commission, CDL-AD(2017)024, Venezuela – Opinion on the Legal Issues raised by Decree No. 2878 of 23 May 2017 of the President of the Republic on calling Elections to a National Constituent Assembly.

[25] See P. van Dijk, 'Europees Hof voor de Rechten van de Mens en Venetië Commissie. En praktijk van wederzijdse bevruchting' [*European Court of Human Rights and Venice Commission. A practice of mutual fertilization*], *NTM/NJCM-Bulletin* 2010, p. 884-896; Hoffmann-Riem 2014, pp. 581-582; Gianni Buquicchio & Simona Granata-Menghini, The Interaction between the Venice Commission and the European Court of Human Rights: Anticipation, Consolidation, Coordination of Human Rights Protection in Europa', in: Roberto Chenal *et al.* (eds.), *Intersecting Views on National and International Human Rights Protection*, Nijmegen: Wolf Legal Publishers 2019, pp. 35-50.

fundamental difference in status and function between these two institutions. The European Court of Human Rights is (of course) a court, a tribunal established by the European Convention on Human Rights and delivering binding judgments and decisions in concrete individual cases on the basis of the Convention. The Venice Commission is not a court and is not constituted by a treaty; its opinions, reports, guidelines etc. are not legally binding, and primarily concern (draft) constitutions and laws *in abstracto*. In its advisory function the Venice Commission, to a large extent, relies on the Convention, as interpreted and applied by the Court.[26] There is hardly any opinion or other document of the Venice Commission in which it does not rely on the Court's case-law. Hoffmann-Riemann is right in that there is not an equal 'two-way street' communication: the Venice Commission has to rely on the Court's jurisprudence, but the Court is not dependent on the opinions of the Venice Commission.[27]

On the other hand, it would be wrong to regard the relationship between the Court and the Commission as a simple 'one-way street' communication, from Court to Commission. Indeed, there is a kind of cross-fertilization.[28]

Firstly, the Venice Commission fulfils an important and helpful role in actively enriching, and spreading knowledge of, the Convention and the Strasbourg case-law as an important part of the growing *Ius commune Europaeum*. This is often done in more or less concrete cases, resulting in an opinion about the compatibility of (draft) legislation of a specific state with the Convention and the Court's case-law. Furthermore, sometimes an opinion deals with draft legislation that aims at implementing a Court judgment that found a breach of the Convention.[29] But giving more concrete guidance on the application of the Convention is also done by way of general reports, guidelines and compilations, in which the Court's case-law is interpreted, summarised and transformed in generalised rules and criteria.

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[26] Venice Commission, CDL-AD(2009)006, Opinion on the Constitutional and Legal Provisions relevant to the Prohibition of Political Parties in Turkey. See for instance the advice of the Venice Commission to the Monitoring Committee of the Parliamentary Assembly:

[27] Hoffmann-Riem 2014, p. 587.

[28] P. van Dijk, 'The Venice Commission on Certain Aspects of the European Convention of Human Rights Ratione Personae', in S. Breitenmoser *et al.* (eds.), *Human Rights, Democracy and the Rule of Law: Liber Amicorum Luzius Wildhaber*, Baden-Baden: Nomos Verlagsgesellschaft 2007, p. 183.

[29] See, for instance, Venice Commission, CDL-AD(2011)051, Opinion on the Draft Law on Amendments and Additions to the Law on Alternative Service of Armenia, drafted in the light of ECtHR (GC), *Bayatyan v. Armenia*, no. 23459/03, 07.07.2011.

4.2 The Commission as an amicus curiae of the Court

Not only is the Venice Commission an important interpreter of the Court's case-law: it also is a source of information and inspiration influencing that case-law. There is a direct influence when the Commission is asked by the President of the Court or a Chamber to submit written comments in the form of a third party intervention 'in the interest of the proper administration of justice' (Article 36(2) of the Convention) - that is as *amicus curiae*. Until now the Venice Commission has delivered seven *amicus curiae* briefs for the Court.

For instance, the Commission was requested by the Court to intervene in the case of *Parti Nationaliste Basque – Organisation Régionale d'Iparralde v. France*. Questions were raised by the Court with regard to the legitimacy of a prohibition for a political party to receive funds from a foreign political party. Based on extensive comparative research the Commission concluded that such a prohibition may be regarded necessary in a democratic society if:

i. such funding is used to pursue aims incompatible with the Constitution and legislation of the country;
ii. it undermines the fairness or integrity of political competition or leads to distortion of the electoral process or poses a threat to national territorial integrity; if it inhibits responsive democratic development; or
iii. the prohibition is part of the international obligations of the state.[30]

In its judgment, the Court noted that the Commission's guidelines considered that the prohibition of foreign funding by states was necessary to protect national sovereignty (and agreed with that conclusion). As to the question of financing from other foreign sources (including sister parties in other countries), the conclusion of the Commission was less outspoken, though it accepted that limitations on that kind of funding could be compatible with Article 11 ECHR, depending on the concrete context of the case. As the impact of the prohibition for the applicant political party to receive funds from its sister party, the Spanish Basque party, was not such as to impede the exercise of its political activities, the Court concluded that the interference could be regarded as necessary in a democratic society for the protection of order.[31]

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[30] Venice Commission, CDL-AD(2006)014, Opinion on the Prohibition of Financial Contributions to Political Parties from Foreign Sources.
[31] ECtHR, *Parti nationaliste Basque – Organisation Regionale d'Iparralde v. France*, no. 71251/01, 07.06.007, paras. 45-52.

The Court has furthermore requested three opinions concerning complicated issues in the Balkan countries, fields in which the Commission has provided legal assistance for many years. One of the requests concerned the aforementioned case of *Sejdic and Finci v. Bosnia and Herzegovina*, raising the issue of discriminatory exclusion of persons not belonging to one of the three constituent peoples (Bosniaks, Serbs, Croats) from elections to parliament and the presidency.[32] The Venice Commission in its intervention concluded that the exclusion clauses indeed were discriminatory – incompatible with Article 14 in conjunction with Article 3 Protocol 1 and Protocol 12 ECHR. The Court followed the *amicus curiae* brief, also referring to earlier opinions of the Commission on the situation of Bosnia and Herzegovina.

Another *amicus curiae* brief concerned the guarantees in the Polish procedure before parliamentary committees of inquiry and the compatibility with the presumption of innocence and right to an independent and impartial tribunal, as enshrined in Article 6 ECHR. The Commission[33], and later on the Court[34], did not find a breach of these rights.

In a recent case, *Berlusconi v. Italy*, the Commission identified and analysed in a comparative research the minimum procedural guarantees applicable in procedures of disqualification from an elective office. It concluded that a system of disqualification based on exhaustive legal criteria with regard to the nature and seriousness of the offence and the conduct of the person, in which parliament only had to confirm the disqualification *ex lege* on the basis of these criteria, does not require a full-fledged judicial procedure.[35] The Court did not pass judgment: it struck the application off the list after request by the applicant who had been rehabilitated.

The most recent *amicus curiae* brief, so far, has been requested by the Court in the case of *Mugemangango v. Belgium*, concerning the adequate procedural safeguards a state must ensure in procedures challenging the result of an election or the distribution of seats. The request in particular concerned the necessary characteristics of the body responsible for examining appeals regarding the result of elections and the ratification of the powers of elected

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[32] The two other 'Balcan' opinions concern the cases of ECtHR, *Bjelic v. Serbia and Montenegro*, no. 11890/05, 06.11.2009 and *Ruza Jelicic v. Bosnia and Herzegovina,* no. 41183/02, 15.11.2005. See on these opinions Buquicchio & Granata-Menghini 2019, pp. 43-45.

[33] Venice Commission, CDL-AD(2014)013, *Amicus Curiae* Brief in the Case of *Rywin v. Poland* pending before the European Court of Human Rights.

[34] ECtHR, *Rywin v. Poland*, nos. 6091/06, 4047/07 and 4070/07, 18.02.2016,.

[35] Venice Commission, CDL-AD(2017)025, *Amicus Curiae* Brief for the European Court of Human Rights in the case of *Berlusconi v. Italy*.

representatives.[36] In Belgium the ratification competence belongs to the federal or regional parliament, depending on the type of election; no appeal of the decision of that parliament is possible. So in essence parliament is both judge and party in examining complaints about the ratification process.

The Venice Commission earlier had expressed its doubts about such a system, in particular in the Code of Good Practice in Electoral matters.[37] The *amicus curiae* brief notes that verification of credentials in the ratification process amounts to verification of the election results, and that (the new) parliament therefore is judge in its own election. Although such a system of parliamentary self-control still exists in countries like Belgium (and the Netherlands), most European states have adopted a *judicial* procedure of appeal against election results. Indeed, according to the Code of Good Conduct in Electoral Matters and Commission opinions, there must be an effective remedy in electoral issues. The appeal body must be impartial and sufficiently independent of the legislative and executive branches, which precludes parliament from being the final instance. Guarantees equivalent to those in Article 6 ECHR should apply. The Commission's reasoning implies that the Belgian – and possibly also the Dutch – system of (purely) parliamentary control is insufficient and will have to be supplemented with an independent remedy against the decisions of parliament in electoral matters.

Not surprisingly, in the Grand Chamber judgment on 10 July 2020, the Court, referring extensively to the Venice Commission's third-party observations and other Commission documents[38], ruled that the complaint by Mugemangango had been examined by a body (parliament itself) which had not been provided with the requisite guarantees of impartiality and whose discretion had not been circumscribed with provisions of domestic law. The grievances had not been dealt with in a procedure offering adequate and sufficient safeguards to prevent arbitrariness and to ensure their effective examination. The Court concluded that there had been a violation of Article 3 of Protocol No. 1, as well as of Article 13 ECHR.

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[36] Venice Commission, CDL-AD(2019)021, *Amicus Curiae* brief in the case of *Mugemangango v. Belgium* on the procedural Safeguards which a State must ensure in Procedures challenging the Result of an Election or the Distribution of Seats.

[37] Venice Commission, CDL-AD(2002)023, Code of Good Practice in Electoral Matters, para. 3.3. See also ECtHR, *Grosaru v. Romania*, no. 78039/01, 02.03.2010, paras. 22-28, referring to the Code and other Venice Commission documents.

[38] ECtHR (GC) *Mugemangango v. Belgium*, no. 310/15, 10.07.2020, paras. 6, 32-34, 40, 52, 61-64, 99-107..

4.3 The Commission as a source of inspiration and information for the Court

The most fruitful way in which the Commission may be relevant for the work of the Court is that its opinions, reports, studies and guidelines may function as important sources of inspiration and information. Over the past 20 years the Court has referred to Venice Commission documents in more than 200 judgments and decisions. The first reference was to a report of the Commission on the treatment of national minorities by their kin-states in the decision in *Bankovic and Others v. Belgium and others* (2001). In the *Bankovic* decision, the Grand Chamber had to answer the complex question whether NATO-members could be held responsible for actions of NATO-forces outside their territories - bombardments of Yugoslavia. In the technical terminology of Article 1 ECHR: were the complainants and the deceased family members they represented to be regarded as 'persons within their jurisdiction'? The Grand Chamber, referring in para. 60 to the Venice Commission's *Report on the Preferential Treatment of National Minorities by their Kin-State,*[39] decided as follows:

> 'As to the "ordinary meaning" of the relevant term of Article 1 of the Convention, the Court is satisfied that, from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial. While international law does not exclude a State's exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction […] are, as a general rule, defined and limited by the sovereign territorial jurisdiction rights of the other relevant States […] Accordingly, for example, a State's competence to exercise jurisdiction over its own nationals abroad is subordinate to that State's and other States' territorial competence.'[40]

Since the *Bankovic* decision, referring by the Court to Venice Commission documents has become a systematic practice. These references may be divided in three categories.[41]

i. References by the Court to Venice Commission documents are often made because they may be regarded as 'codifications' of common standards of a general nature, e.g. in electoral law,[42] political party

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[39] Venice Commission, CDL-AD(2001)19, Report on the Preferential Treatment of National Minorities by their Kin-State.
[40] ECtHR (GC), *Bankovic and others v. Belgium and others*, no. 52297/99, 12.12.2001, paras. 59-60.
[41] Hoffmann-Riem 2014, pp. 585-586; Buiquicchio & Granata-Menghini 2019, pp. 47-49.
[42] See for instance ECtHR (GC), *Hirst v. United Kingdom* (No. 2), no. 74025/01, 06.10.2005, paras. 32 and 71, referring to Venice Commission, CDL-AD(2002)023, Code of Good

regulation[43] or fundamental rights. For instance, the Court has relied on the Commission's report on the democratic control of intelligence agencies to conclude that prior judicial authorisation in this field, though possibly a best practice, is neither necessary nor sufficient to ensure compliance with Article 8 ECHR.[44]

ii. Furthermore, the Court may refer to country-specific Venice Commission opinions analysing the constitutional and legal situation in a particular state. So, in the *Baka* case the Court, concluding *inter alia* that the premature termination of office of the President of the Supreme Court resulting from the transitional measures of the new Fundamental Law, was a form of *ad hominem* legislation, which is not subject to any form of judicial review and therefore violated Article 6 ECHR, in numerous places mentioned various Commission opinions on Hungary.[45]

iii. Finally, references sometimes are used for developing conceptual distinctions, in which the Commission - followed by the Court - differentiates between different types or models of regulation or organisation. For instance, in the *Yabloko* case the Court accepted the dichotomy the Venice Commission made in one of its reports between the principles of party autonomy and that of internal democracy, the first based on a political free market model and the other on an egalitarian-democratic model. Both models are acceptable under the Convention, and allow for a margin of appreciation of the state, leading to various ways to regulate (or abstain from regulating) the issue of internal party democracy.[46]

Practice in Electoral Matters; ECtHR (GC) *Tanase v. Moldova*, no. 7/08, 27.04.2010, referring *inter alia* to the Code in para. 168.

[43] See the aforementioned ECtHR, *Parti nationaliste Basque – Organisation Regionale d'Iparralde v. France*, no. 71251/01, 07.07.2007, paras. 45-47, referring to the Venice Commission, CDL-INF(2001)008, Guidelines on the Financing of Political Parties.

[44] ECtHR, *Centrum för Rättvisa v. Sweden,* no. 35252/08, 19.06.2018, paras. 69-74 and 179, and ECtHR, *Big Brother Watch and Others v. United Kingdom,* nos. 58170/13, 62322/14, 24960/15, 13.09.2018, paras. 211-216 and 318, referring to Venice Commission, CDL-AD(2015)011, Report on the Democratic Oversight of Signals Intelligence Agencies.

[45] ECtHR, *Baka v. Hungary* (GC), no. 20261/12, 23.06.2016, referring in several paragraphs (paras. 57-63, 68, 82-83, 117, 127, 146-148) to: Venice Commission, CDL-AD(2011)016, Opinion on the Fundamental Law of Hungary; CDL-AD(2012)001, Opinion on the Legal Status and Remuneration of Judges Act and Act on the Organisation and Administration of the Courts in Hungary; and CDL-AD(2012)020, Opinion on the Cardinal Acts on the Judiciary.

[46] ECtHR, *Yabloko Russian United Democratic Party and Others v. Russia*, no. 18860/07, 08.11.2016, paras. 74-88, referring to the CDL-AD(2015)020, Report on the Method of Nomination of Candidates within Political Parties.

5. Concluding remarks

The effectiveness of the Venice Commission depends on a circular process. The authority of its opinions, reports, guidelines etc. to a large extent rests on the ability and capacity of the Commission to adequately formulate and apply core European values within the context of the Council of Europe (and the EU), thereby assisting the states within the Council of Europe area and, if appropriate, beyond. This achievement is mainly due to its expertise and working methods, which make it rather unique and well suited to assist states who may lack expertise or need advice in an internal controversy.

The authority of the Venice Commission has gradually been enhanced by the fact that its opinions, reports, etc. are to a large extent accepted, implemented, applied in courts and incorporated in legislation. By complying, states hope to strengthen their position within the community of states which are committed to the Rule of Law, human rights and democracy,[47] for European states often connected to their desire to become members of the European Union.

In the thirty years of its existence, the Venice Commission has been active and effective in the area of democracy, the Rule of Law and human rights, in close cooperation with the other institutions of the Council of Europe. The case law of the European Court of Human Rights in particular has served as an important – binding – frame of reference. In turn, on certain issues the Commission has inspired judicial and quasi-judicial bodies, not in the least the Strasbourg Court, on certain legal and interpretative issues. Thus, the Commission has firmly established its specific place in the international institutional structure for the promotion and protection of democracy, Rule of Law and human rights.

Compared to judicial and quasi-judicial bodies, the Commission's role is primarily a pro-active one, in advising on draft legislation, infrastructures and procedures. And different from judicial institutions, the Commission's opinions are not binding, and only have an advisory status. Nevertheless, the Commission has established a considerable prestige and authority in the eyes of most governments, parliaments and courts of the participating states as well as of the other organs of the Council of Europe, the Organisation for Security and Cooperation in Europe and the European Union. Moreover, it has become a lifeline for non-governmental organisations and groups, minorities and civil society in general.

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[47] Hoffmann-Riem 2014, p. 596.

There are various reasons for the effectiveness of the Venice Commission. In part it is due to its pluriform composition and broad scale of expertise, and - equally important - its highly qualified and devoted secretariat. Furthermore, the Commission owes its prestige and authority to a large extent to its careful performances and balanced procedures, in which there is ample room for input and dialogue on the part of the authorities and persons involved, and to its deliberately chosen low profile and reticence as far as publicity is concerned. Moreover, as a non-judicial body that does not deliver binding decisions in individual disputes but gives advisory opinions on legislation and legal practice, the Commission often is in a better position to take political reality and socio-economic consequences more into account than a court of law may do.

But it is especially due to the *synergy* between the Venice Commission as a non-judicial body with one specific court of law - the European Court of Human Rights - that the Commission has gained its current impact. We sincerely hope that this synergy, this fruitful and respectful cooperation between Court and Commission, will continue and deepen during the next thirty years – and beyond.

András Zs. Varga[1]

Rule of Law and Constitutional Identities: concurring or complementary European values?

1. Conflict of international and national courts

One of the recent challenges faced by the legislation and jurisprudence of the different European organizations – namely the European Union and of the Council of Europe – are the burgeoning conflicts between international-supranational institutions and some of their member States. The issue of who shall render the final decision in constitutional conflicts, particularly when it comes to conflicts based on or related to human rights or the Rule of Law is inevitable. The question is the following: what can a sovereign state or its Supreme/Constitutional Court do if it finds that a judgement of an international court (the Court of Justice of the European Union (hereinafter, "CJEU") or the European Court of Human Rights (hereinafter, "ECtHR") is contrary to the national constitution?

When a constitutional court finds that a judgement of an international court is contrary to the constitution, finding a solution should start from the primary exigency that the decision itself must be enforced, since the state is bound by international law (e. g. TEU or ECHR).[2] But this primary answer does not assist furthering the general acceptance of, or overcoming the reluctance toward the international decision: harmonization of national case-law with the standpoint of the international court. The question is delicate since the final nature and enforceability of the international judgement does not imply that it is also appropriate and applicable over a longer period of time. Consequently, we cannot be satisfied by simply saying that the scepticism of different states and courts is nothing more than a nationalistic view that should be rejected. Anti-European sentiment in certain states may be reason for concern but it has some considerable foundations.

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[1] Member of the Venice Commission in respect of Hungary.

[2] Venice Commission, CDL-AD(2016)005, Public Interim Opinion on the amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation, para 14, 97.

A first, obvious but not trivial argument is that such a conflict can arise not only between an international and a domestic court but may also be perceived between international courts. The example is, of course, Opinion 2/13 of the CJEU regarding the accession of the European Union to the European Convention on Human Rights. The CJEU found that the agreement presented by the European Commission on the conditions of accession was incompatible with the TEU. The main reasoning of the opinion was that "jurisdiction to carry out a judicial review of acts, actions or omissions on the part of the EU, including in the light of fundamental rights, cannot be conferred exclusively on an international court which is outside the institutional and judicial framework of the EU".[3] The democratically elected governments by their signature and the democratically elected parliaments by their ratification expressed clearly their will that the EU and its institutions should accept the jurisdiction of the ECtHR, but the CJEU has categorically blocked this. What else does it mean if not that democracy is suppressed by the Rule of Law interpreted arbitrary by a too powerful court? Of course, formally the EU is still awaiting accession to the ECHR while member States have already joined. Nevertheless, the arguments presented by the CJEU are the same as the arguments raised by the different member States. One of the reactions of the ECtHR was made public on 23 May 2016 in the Case *Avotiņš v. Latvia*[4] in which the Court sustained the so called Bosphorus presumption[5] member States of the Council of Europe (hereinafter, "CoE") are liable under the ECHR even when fulfilling other international obligations.

Another argument would be the broader interpretation of human rights. All signatory states of the CoE undertook to abide by the final judgment of the ECtHR in any case to which they are parties. Formally, this obligation cannot lose its effect with the passing of time. There is no doubt that all member States observed this obligation not only in relation to the particular cases, but they adjusted their legislation and government practice to the judgments of the ECtHR. At the same time, the legal background did not remain unchanged. Both binding and soft law (recommendations or even the opinions of the Venice Commission) were conquering new fields of law or provided broader interpretations. These changes infiltrated the jurisdiction of the ECtHR, thus member States had to face growing number

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[3] Opinion 2/13 of the Court (Full Court) on 18 December 2014, para 256.

[4] ECtHR, *Avotins v. Latvia*, no. 17502/07, 23.05.2016, see Johansen, Stian Øby: *EU law and the ECHR: the Bosphorus presumption is still alive and kicking – the case of Avotiņš v. Latvia*, http://eulawanalysis.blogspot.hu/2016/05/eu-law-and-echr-bosphorus-presumption.html

[5] Korenica, Fisnic: *The EU Accession to the ECHR*. Springer, 2015, 358-362.

of obligations that were unforeseen before. To give a few examples from my country: the law establishing a monopoly for the trade in tobacco[6] was found to be in violation of Article 1 Protocol 1 of the ECHR, the different levels of cooperation between different religious groupings and the State in social affairs[7] was found to be in violation of Article 11 of the ECHR.

The following argument stems from the tensions between the lack of political reasons (social reality) and legal obligations. Although Article 1 of the Statute of the CoE mentions a set of values and goals considered to be common for the founding member States and those adhering later, the shape of the CoE became dominated by legal aspects. In the case of the ECtHR this is natural: the ECHR is legally binding. But it cannot be left out of consideration that the Convention is "lean" in comparison with the constitutions of the member States or even compared to the Universal Declaration of Human Rights (just one example: the Convention does not mention the dignity of human beings nor any non-individual – collective – rights). Yet at the same time, social reality is permanently changing making it necessary to give new answers to old questions. Not only legal but also political answers must be given which may lead to tensions. One example can be the law on measures for combatting terrorism[8] declared to be in violation of Article 8 of the ECHR. In this case, applicants were considered to be persons potentially subjected to unjustified and disproportionately intrusive measures. Thus, no real abuse but already its mere possibility was declared contrary to the ECHR, giving the ECtHR a role similar to that of the constitutional courts: it carried out an abstract control of legal acts. The situation and need for new rules after a terrorist attack against Paris or Brussels highlights the inconsistency of the judgment with social and legal reality.

2. Dissolution of difference between binding and soft law

An important new phenomenon is the fading difference between binding and soft law. The role of the Venice Commission could be the perfect example. The Venice Commission never misses a chance to stress that its opinions are non-binding, signatory states are free to accept or to reject them. This approach does not fit perfectly with reality. In general, an opinion left out of consideration does not go unnoticed and triggers different responses

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6 ECtHR, *Vékony v. Hungary*, no. 65681/13, 13.01.2015.

7 ECtHR, *Magyar Keresztény Mennonita Egyház and Others v. Hungary*, no. 70945/11 and others, 19.01.2017.

8 ECtHR, *Szabó and Vissy v. Hungary*, no. 37138/14, 12.01.2016.

(monitoring, launching of different proceedings, our follow-up mechanism). For member States that are also members of the EU the situation is even more serious. The last paragraph of item 4 of the *Communication from the Commission to the European Parliament and the Council* COM(2014)158 on *A new EU Framework to strengthen the Rule of Law* states[9] that "The Commission will, as a rule and in appropriate cases, seek the advice of the Council of Europe and/or its Venice Commission, and will coordinate its analysis with them in all cases where the matter is also under their consideration and analysis." Actions based on the Framework may lead to legal proceedings before the CJEU or political proceedings within the European Parliament. Hence, especially if a CJEU action is launched, the soft law opinion of the Venice Commission may be "upgraded" to possess binding force. This is another phenomenon which may trouble the member States. Poland, as the first EU member State, faces the consequences of the new Framework.[10]

The last point goes to the heart of the reluctance of the ECtHR to accept arguments based on constitutional identity. Certain, and by no means irrelevant, groups of people feel that the ECtHR and generally the Rule of Law serves only "others", while general values are gradually forgotten. Just to name some examples regarding Hungary: *Korbely v. Hungary*, no 9174/02 (volley in 1956) or *Vajnai v. Hungary*, no 33629/06 (prohibition of public display of communist symbols, e.g. the red star). This argument leads to one of the most troubling phenomena, marked by the term "sovereignists": expropriation of values such as the Rule of Law or human rights by different political movements. When the Rule of Law or human rights are instrumentalized and used as weapons in political debates, these values are transformed from common ideals to sectarian idols. Thus "Strasbourg" or "Brussels" or "Luxembourg" may become a blasphemy for other political movements. It is no coincidence that in the last years the UK expressed doubts regarding the judgements of the ECtHR in the same or even cruder tone than the Russian Federation, even threatening to leave the ECHR.

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[9] Láncos, Petra Lea: A Bizottság közleménye a jogállamiság erősítésének új, uniós keretéről [Communication from the Commission on a new EU framework for strengthening the Rule of Law]. In: PLWP 2014/5. http://d18wh0wf8v71m4.cloudfront.net/docs/wp/2014/2014-05.Lancos.pdf

[10] Venice Commission, Opinion on the Rule of Law in Poland and the Rule of Law Framework: Questions & Answers. http://europa.eu/rapid/press-release_memo-16-2017_en.htm, its preliminaries will be presented in Chapter II. See also: Polakiewicz, Jörg – Sandvig, Jenny (2016): The Council of Europe and the Rule of Law. In Schroeder, Werner ed.: *Strengthening the Rule of Law in Europe. From a Common Concept to Mechanisms of Implementation.* Portland, Oregon, Hart Publishing.

I think the UK should be considered an old democracy with a certain constitutional identity.[11] It demands attention when such an old democracy feels its identity endangered by the ECtHR.

The conclusion cannot be avoided: the Rule of Law and the primacy of EU and international law requires that judgements of international courts be observed and enforced. But if there is no instrument to correct misguided judgments, if there is no counterbalance to the unlimited power of international courts that expropriate legislation, if constitutional courts are mere servants of international courts, we face arbitrariness. In this case, the old and common European ideal of the Rule of Law becomes a tyrannous idol as it was explained above. Do we think that constitutional courts will silently commit to this fearful process? Do we think that the principle of democracy will become an empty reference?

3. Historical background of identities

During the 19th century the problem of nations and national identities was attached to the fight for national independence, for aspiration to establish or re-establish a national state. Thus, the sociological interpretation was transformed into legal debates as interpretation of sovereignty and citizenship. In this period constitution meant both fact and law. Fact as the political and institutional tradition of a state or of a part of its people and law as the legal image of the political tradition. Hence the written (charter) constitutions were not usual in Europe not a specific legal formulation but a shorter or longer set of laws was meant when the word "constitution" was mentioned – together with the circumstances of their origin and history. This concept of the historical constitution meant the past and had an effect on the present time and mostly on the future as a reference for legitimacy of a certain political aim. Consequently, the nation and national identity played the primary role, and the constitutional tradition, if it existed at all, served only as its legal background. Of course, this interpretation does not mean that constitutional tradition was not important. Just the contrary, we know several states that could re-establish their sovereignty, even repeatedly, based on their strong and emotionally defended constitutional traditions.

During the 20th century the legal aspects of constitutions grew above the idea of national identities. After the First World War the political map of

[11] www.telegraph.co.uk/news/uknews/law-and-order/11911057/David-Cameron-I-will-ignore-Europes-top-court-on-prisoner-voting.html, www.mirror.co.uk/news/uk-news/david-cameron-considers-exit-european-5816205.

Central Europe was completely changed and after the collapse of the former empires a compelling need for new constitutions came up. The national identity and sovereignty of the national states was expressed through the new, written, charter constitutions. This move of emphasis from the sociological to legal interpretations, from national identity to constitutional legality was – at least within the happier half of Europe – completed after the Second World War. In the pursuit to overcome the horrors of the previous years and to keep peace, security and welfare the West had focused on cooperation, on multilateral international or supranational organizations and treaties, on legal safeguards and not on political will based on national identities. In our region the long grizzle of Bolshevik oppression precluded any form of reference to national identity.

Of course, in Central Europe the notion of constitutionalism was forbidden as well. Thus, the transition of the '90s meant for us not the simple turn back to the national and constitutional heritage abandoned unintentionally after the Second World War but it brought the adoption of the approach and wording of the West. We joined the Council of Europe, the Venice Commission, later the European Union and we faced the highly appreciated role of law, above all the esteemed the Rule of Law. And what more, we had to comprehend and to accept the new significance of national and international courts in the protection of the Rule of Law.

4. Reaction of constitutional courts

If the two above-mentioned phenomena, the emphasis on international cooperation instead of national identities and development of the judicial Rule of Law replacing the legislative *Rechtsstaat* are examined together, it will not be surprising that the role of courts was increased and that new legal terms as common European tradition and constitutional identity appeared firstly in judgments.

The starting shot came from the ECJ in I*nternationale Handelsgesellschaft* (Case 11-70). The Court used the new term of "constitutional traditions common to the member States" with focus on the common and homogenous protection of human rights. As the danger of overcoming the constitutional judicature of the member States was quite clear and present, the answer did not delay. The German *Bundesverfassungsgericht* reacted in 1974 with *Solange I* based on the *Grundgesetz*, namely on its eternity clauses stated that community law, consequently the common constitutional traditions protected by the ECJ does not have priority over the protection granted by

the *Grundgesetz* and protected by the German courts. In this way *Solange I* tried to go against the international common traditions by highlighting the role of national constitutions. The quiet battle was going on for decades. *Solange II, Solange III* and many other cases were the nodes of this tug of war. Finally, The Treaty on European Union tried to give a peaceful equilibrium.

On one hand, Article 2 of TEU identifies common values of the member States, as respect for human dignity, freedom, democracy, equality, the Rule of Law and respect for human rights, including the rights of persons belonging to minorities. Article 6 mentions fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the well-known constitutional traditions common to the member States. On the other hand, Article 4 rules that the Union shall respect the equality of member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.[12]

What are the consequences of the TEU regulation? On one hand it means that common traditions as international or supranational values will be protected later on by the ECJ which perhaps will maintain the primacy of the EU law against national constitutions. But on the other hand, just the TEU gives a strong background for the standpoint that the common European constitutional heritage must not be opposed to national constitutional identity and *vice versa*. The two set of values should be equilibrated.

It means that constitutional identity of the different nations cannot be dissolved in an artificially constructed common imperial formula. The common values contain what is common, the national values cover what is not common. But values that are not common are also values and these values also need legal protection. If constitutional identity disappears, the common part also loses its importance, it will be reduced to a mere imperial order.

It means that it must be created a concordant approach of common values, common constitutional heritage and national/constitutional identity. For the Central European states, and no doubt, for Poland and Hungary among them this question of identity is not incidental. During our last 500 years this was THE issue: identity with emphasis on 'constitutional'. Our countries are familiar with multi-national community (included solidarity) but our own constitutional identity is not for bargain. As regards my country,

[12] Trócsányi, László (2016): *The Dilemmas of Drafting the Hungarian Fundamental Law*. Passau, Schenk Verlag.

the reconciliation of 1867 can be debated on political ground, but it cannot be questioned that it was performed on legal basis. And it was performed half a century after Chancellor Metternich suggested to the Emperor of Austria and King of Hungary: "If Your Majesty wants to govern Hungary easily and well, govern it based on its own constitution…"

5. Unsolved constitutional problems of direct applicability

From institutional aspect this means that if the common European heritage is developed and protected by international and supranational courts, the ECJ and the ECtHR, the equilibrium needs a similar court protection. The path was shown by the German *Bundesverfassungsgericht* in the Solange decisions, and many of the constitutional courts made their contribution to it. The Hungarian Constitutional Court tread on this path in 2016 by a decision which strengthens the respect of primacy of EU law and the position of parties to refer to it, but also draws the limits of primacy. Before its presentation a theoretical problem should be pointed out. The problem regards direct applicability by ordinary courts of the Charter of Fundamental Rights as part of the EU law. The question of direct applicability of the Charter cannot be answered without reference to the direct applicability of rights and freedoms regulated in the constitution of a given member State, in our case the Basic Law of Hungary.

Article 28 of the Basic Law prescribes to the ordinary courts interpretation of laws *inter alia* in conformity with the Basic Law. Compulsory interpretation of the rules of the Basic Law is granted by the Constitutional Court. Case law of the Constitutional Court is invariant in the last 30 years that clauses regulating fundamental rights and freedoms do not apply directly in private relations, direct applicability is against the state (no *drittwirkung*). Otherwise all the other laws but the constitution would lose their binding force. Ordinary courts should apply directly the laws regulating the given private relation, the Basic Law gives effect through interpretation of laws in conformity with it, consequently in conformity with rights and freedoms. If ordinary courts have doubts regarding the constitutionality of a law applicable in a particular case, may ask the Constitutional Court to annul that law (or legal regulation). If ordinary courts fail to achieve this coherent and constitutional interpretation of laws, the Constitutional Court acting due to a (full) constitutional complaint, has the power to repeal their decision.

In other words: in the Hungarian legal system only the Constitutional Court is authorized to apply directly the Basic Law, the ordinary courts

may not deviate from laws, may not decide to ignore laws with reference to the Basic Law. This division of competences between the Constitutional Court and ordinary courts comes from the *Kelsen*-type system of courts: a Constitutional Court institutionally separated from the structure of ordinary courts is the guardian of the constitution. Hungary – as practically almost all the European legal systems, except the UK – follows this model since the transition (1990) or its EU membership (2004). Formal or informal (step-by-step) acceptance of direct application of the Constitution (*drittwirkung*) would lead to decentralized constitutional judiciary. In principle this model is not unknown in the world (see: US and others), but it would be absolutely contrary to the Hungarian constitutional establishment.

The Charter of Fundamental Rights has strong similarities to the human rights regulations within a constitution. This requires precautious application. Direct application of the Charter would lead to ignorance of national laws and what more, to ignorance of the national constitution. It would happen not only in cases of conferred competencies but in the cases regulated by national laws as well. This effect would be contrary to Section (1) Article 4 and Article 5 of the TEU and it could be avoided only by annulment by the of such a decision of an ordinary court. The Hungarian Constitutional Court has the requisite powers to protect the primacy of the Basic Law at least in non-conferred competencies. Application of the Charter of Fundamental Rights shall be indirect: interpretation of ordinary (national or EU) laws should be in coherence with the Charter (in a similar manner that was described regarding the Basic Law). It should be added that as direct application of the Charter among private parties did not arise in judicature of ordinary courts the answer to this question is of theoretical nature.

6. The belated but strong reaction of the Hungarian Constitutional Court

Coming back to the identity-issue, it can be underlined that the Constitutional Court have never contested primacy of EU law and judgments of CJEU when these falls within the limits of Articles 4 and 5 TEU (conferred competencies). On the other hand, the Constitutional Court seems to watch carefully the limits between conferred and national competencies.

The first important doctrine was elaborated in Decision 22/2016. (XII. 5.) AB[13] of the Constitutional Court (hereinafter, *Quota-judgment*

[13] Full English translation: hunconcourt.hu/uploads/sites/3/2017/11/en_22_2016.pdf.

or *Quota*). The case answered application by the Deputy Ombudsman for Minority Rights on abstract interpretation of Article E), also called Europa-clause of the Basic Law of Hungary. The Constitutional Court ruled that:

> "The Constitutional Court may examine upon a relevant motion – in the course of exercising its competences – whether the joint exercise of powers under Article E) Section (2) of the Basic Law would violate human dignity, another fundamental right, the sovereignty of Hungary or its identity based on the country's historical constitution."

Reasoning of the *Quota-judgment*, which gives a large overview of the relevant case law of other constitutional courts, gives two important novelties concerning the interpretation (or coexistence) of EU and Hungarian domestic law.

Firstly, it fixes that the Court:

- "interprets the concept of constitutional identity as Hungary's self-identity and it unfolds the content of this concept from case to case, on the basis of the whole Basic Law and certain provisions thereof, in accordance with the National Avowal and the achievements of our historical constitution – as required by Article R) (3) of the Basic Law.
- The constitutional self-identity of Hungary is not a list of static and closed values, nevertheless many of its important components – identical with the constitutional values generally accepted today (…)
- The protection of constitutional self-identity may be raised in the cases having an influence on the living conditions of the individuals, in particular their privacy protected by fundamental rights, on their personal and social security, and on their decision-making responsibility, and when Hungary's linguistic, historical and cultural traditions are affected.

The Constitutional Court establishes that the constitutional self-identity of Hungary is a fundamental value not created by the Basic Law – it is merely acknowledged by the Basic Law. Consequently, constitutional identity cannot be waived by way of an international treaty – Hungary can only be deprived of its constitutional identity through the final termination of its sovereignty, its independent statehood. Therefore, the protection of constitutional identity shall remain the duty of the Constitutional Court as long as Hungary is a sovereign State. Accordingly, sovereignty and constitutional identity have several common points, thus their control should be performed with due regard to each other in specific cases" (Sections [64]-[67] of argumentation).

This doctrine of constitutional self-identity is linked (without a clear reference to Article 4 Section (2) of TEU). The major message is the principle of non-creation: if constitutional self-identity of Hungary is a fundamental value not created, only acknowledged by the Basic Law it is resistant to any international treaty. The Quota does not explicitly highlight, but its context makes incontestable that the doctrine has naturally retrospective effect: constitutional identity as a legal fact is and was resistant to any international treaty – it also applies the Accession Treaty of Hungary to the EU.

The other novelty of *Quota,* as a consequence of doctrine of constitutional self-identity, is the presumption or principle of maintained sovereignty. The Court expressed that:

> "Since by joining the European Union, Hungary has not surrendered its sovereignty, it rather allowed for the joint exercising of certain competences, the maintenance of Hungary's sovereignty should be presumed when judging upon the joint exercising of further competences additional to the rights and obligations provided in the Founding Treaties of the European Union (the principle of maintained sovereignty). Sovereignty has been laid down in the Basic Law as the ultimate source of competences and not as a competence. Therefore the joint exercising of competences shall not result in depriving the people of the possibility of possessing the ultimate chance to control the exercising of public power (realised either in joint or in individual – member State – form)" (Section [60] of argumentation).

Without any direct or hidden reference *Quota-judgment* has certain similarities with argumentation of Opinion 2/13 CJEU on accession of the EU to European Convention of Human Rights. However, it should be stressed that principle of maintained sovereignty elaborated by the Constitutional Court applies only those cases where reasonable doubt is risen regarding the conferral of a competence. If there is no doubt or the doubt is not reasonable, primacy of EU law is beyond dispute.

Principle of maintained sovereignty looks to become a reference-point for the Constitutional Court. It was not only repeated but used as a legal anchor in another case, Decision 2/2019. (III. 5.) AB1 of the Constitutional Court (hereinafter: *Exclusivity-judgment*). The case answered application by the Minister of Justice on abstract interpretation of Articles E, R, 24, XIV of the Basic Law of Hungary.

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[1] Full English translation: hunconcourt.hu/uploads/sites/3/2019/03/2_2019_en_final.pdf.

The Court ruled that as consequence of Article R Section (1) stating that the Basic Law shall be the foundation of the legal system of Hungary, "applicability of the European Union's law in Hungary shall be based on Article E) of the Basic Law". It means that law of the EU law is not connected to the Hungarián legal system through Article Q, as general international law. It is linked by the special Europe-clause of Article E:

1. "Hungary shall contribute to achieve European unity in order to realise the liberty, the well-being and the security of the European peoples.
2. In order to participate in the European Union as a member State, Hungary – to the extent that is necessary to exercise the rights and to perform the obligations arising from the Founding Treaties – may exercise certain competences arising from the Basic Law in conjunction with other member States through the institutions of the European Union based upon international treaty. Exercise of these competences should be in concordance with fundamental rights and liberties guaranteed by the Basic Law and may not restrict the inalienable right of disposal of Hungary regarding its territorial unity, population, form of state and governmental organiation."

In short: the *Exclusivity-judgment* underlines that in Hungary EU law is not binding automatically, by itself but only due to a special clause of the Hungarian Basic Law. This leads to the conclusion that the Basic Law cannot be ignored when EU law is interpreted in order to be applied in Hungary.

The second provision of the Court declares that:

"the genuine interpreter of the Basic Law is the Constitutional Court. The interpretation provided by the Constitutional Court cannot be derogated by any interpretation provided by another organ; the Constitutional Court's interpretation has to be respected by everyone. During the interpretation of the Basic Law, the Constitutional Court takes into account the obligations binding Hungary on the basis of its membership in the European Union and under international treaties".

This declaration of exclusive interpretation, together with the *Quota-judgment,* gives an unavoidable nature to the Constitutional Court: the CJEU is the genuine and final interpreter of the EU law, the Constitutional Court is the genuine and final interpreter of the Basic Law of Hungary. Hence the Basic Law cannot be ignored when EU law is interpreted in order to be applied in Hungary, neither can be the Constitutional Court. It means that the Constitutional Court has the power, even if it was not used in practice

until now, to overrule the application of EU law by the judgments of the ordinary courts. It should be stressed again, that these interpretations are based on principle of maintained sovereignty of *Quota*.

In a third provision the Court stated, as an application of the previous interpretations, that "granting asylum for a non-Hungarian citizen who arrived to the territory of Hungary through a country where he or she was not subject to persecution or imminent risk of persecution, shall not be regarded as a constitutional obligation of the Hungarian State, however the Parliament may also grant asylum to such persons according to the substantive and procedural regulations it specifies".

The importance of *Quota* is highlighted by the fact that the Hungarian Parliament as Puvoir Constituent amended the Basic Law in June 2018. The new pronouncement of the National Avowal proclaims that:

> "...protecting our identity, as it is rooted in our historical Constitution, is a fundamental duty of the State".

Article E regulating the relations to the EU was amended stating that the exercise of powers together with the other member States, through the institutions of the European Union:

> "...must be consistent with the fundamental rights and freedoms set out in the Fundamental Law, and it must not be allowed to restrict Hungary's inalienable right of disposition relating to its territorial integrity, population, political system and form of governance".
>
> The hermeneutical rule of Article R was amended by a new Section 4 prescribing that:
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> "Every institution of the State shall be obliged to protect the constitutional identity and the Christian culture of Hungary".
>
> Article XIV already mentioned was also amended by a prohibition rule:
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> "Settlement of foreign populations in Hungary shall not be allowed".

In this seventh amendment the new clauses introduced into the Basic Law are based on the decision of the Court, that tried to interpret the constitutional identity of Hungary based on our historical Constitution. The decision is also a new attempt to perform the mission emerging from the TEU to create a balance among the common European constitutional heritage and the national identity – between these two European values.

7. The philosophy of balance

The philosophy of the approach of *Quota* is that the Treaty of Lisbon created a reasonable balance among two different set of values. On one

hand Article 2 of TEU identifies common values of the member States, as respect for human dignity, freedom, democracy, equality, the Rule of Law and respect for human rights, including the rights of persons belonging to minorities. Article 6 mentions fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the well-known constitutional traditions common to the member States. On the other hand, Article 4 rules that the Union shall respect the equality of member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.

Consequences of the TEU regulation are on one hand that common traditions as international or supranational values will be protected later on by the CJEU which perhaps will maintain the primacy of the EU law against national constitutions. But on the other hand, just the TEU gives a strong background for the standpoint that the common European constitutional heritage must not be opposed to national constitutional identity and vice versa. The two set of values should be balanced not only at the level of the Treaty but also in individual cases solved by individual judgments.

It means that constitutional identity of the different nations cannot be dissolved in an artificially constructed common formula. The common values contain what is common, the national values cover what is not common. But in the same time national values that are not common are also values and these values also need legal protection. If constitutional identity disappears, the common part also loses its importance, it will be reduced to a mere imperial order. There is no common European identity without national constitutional identities.

The balancing protection is vested in the constitutional courts of the member States of the Council of Europe and of the European Union. Thus, the constitutional courts may have a lot of different tasks but their primary mission is protection of their own constitutional identity. This is not only national but, if we accept the regulation of the TEU, it is also a European mission. This is the way which leads to respect of the Treaty on European Union, respect of Europe and respect of its nations in the same time. The Basic Law of Hungary gives a definite background and the practice of the Hungarian Constitutional Court based on this constitutional background fulfils step by step this double mission: it safeguards constitutional identity of Hungary and through this it contributes to development of the common European identity.

José Luis Vargas Valdez[1]

The Venice Commission and Latin America

I. Introduction

The European Commission for Democracy through Law, better known as the Venice Commission, was created in 1990 as the advisory body on constitutional matters of the Council of Europe. Since then, its role has been to provide legal advice to its member States in line with European standards, best practices and international experience in the fields of democracy, human rights and the rule of law.[2]

In 2013, the Venice Commission established a more focalised co-operation link with Latin American countries through a Sub-Commission on the region. As a result of this relationship, the Commission has, on the one side, strengthened exchanges with regional organisations such as the Organization of American States (OAS) or the Interamerican Court of Human Rights, and on the other, it has adopted and issued several opinions and *amicus curiae* that have helped to consolidate democracy and constitutional culture all over the region.[3]

In the following section, I will briefly present a sample of which I consider, are some of the most relevant documents that the Commission has issued about democratic and legal challenges in the region, to show that some of those guidelines, best practices and recommendations, eventually supported legal reforms or institutional strengthening processes.

Subsequently, in another section, I will review references in the rulings of the High Chamber of the Mexican Electoral Tribunal to any Opinion, Code or Guidelines adopted by the Commission, in order to identify which documents and subjects have had a major presence, and how those references have helped to build criteria through time and, therefore, contributed with the strengthening of democracy through law.

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[1] Substitute Member of the Venice Commission in respect of Mexico.

[2] Venice Commission. *The Venice Commission of the Council of Europe. For democracy through law*. Available at: https://bit.ly/39Ob5Nt

[3] Venice Commission. *Accompanying constitutional and electoral reforms in Latin America*. Available at: https://bit.ly/38MA8iH

II. The Venice Commission in Latin America
A. Institutional Design /Constitutional Engineering

1. Opinion on the draft organic law of the public prosecutor's office of Bolivia – CDL-AD(2011)007

On February 2011, Bolivia requested an Opinion to the Venice Commission on the Draft Organic Law of the Public Prosecutor's Office. The document under scrutiny basically aimed to regulate the organisation and functions of this body.

In response, first of all, the Commission highlighted that the draft Law had highly positive elements such as "the defence of victims' rights, the obligation to state reasons for the decisions made and inform the victim of his or her rights, together with the principles of professionalism and independence of public prosecutors through security of tenure".

Nevertheless, the Opinion also warned about the fact that the Public Prosecutor's Office outlined in the Draft seemed to have very extensive powers and a highly complex organisation, which would imply a considerable expenditure.

These remarks were followed by a set of concrete recommendations. In my view, some of the most relevant were:

1. Trials of the highest judicial bodies should not be instituted by Parliament;
2. the Prosecutor must not coordinate or take an active part in actions of civil society;
3. any instruction to reverse the opinion of a lower-rank prosecutor must be motivated;
4. in disciplinary procedures, the accused prosecutor must have the right to legal representation; and
5. the financial independence of the Public Prosecutor's Office must be ensured without resorting to funds involving the carrying out of certain actions or donations from private or foreign sectors.

These recommendations were not only a reference framework for the preparation of the Draft, but also constituted a set of replicable guidelines for the rest of the countries in the region to establish independent, impartial and strong Public Prosecutor's Offices.

2. Opinion on constitutional reforms relating to the disappearance and murder of a great number of women and girls in Mexico – CDL-AD(2005)006

Since 1993, in the northern Mexican border state of Chihuahua, and more specifically in Ciudad Juárez, hundreds of women and girls were abducted, abused and brutally murdered. Apparently, local authorities had been unable to handle this situation and, according to Mexican laws, the Federal Prosecutor's Office (PGR) could only take over ("attract") those cases where organised crime was involved. Unfortunately, the PGR concluded that most of these crimes had no relation to organised crime.

In this context, the Venice Commission issued an opinion[4] based upon a draft Presidential amendment to Article 73 of the Mexican Constitution and other related laws that intended to give the Federal authorities the power to prosecute "ordinary offences related to human rights violations when they transcend the powers of the States," provided that such offences were committed after the entry into force of the secondary legislation, "derived from a situation of persistent perpetration of the same type of offence," and the intervention of the federal authorities were "necessary for compliance with international obligations."

Essentially, the Venice Commission pointed out that, pursuant to the obligation imposed by the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) to achieve the 'practical realisation' of non-discrimination, Mexico had to "ensure by appropriate means the effective investigation and prosecution of these murders", even if the fulfilment of such obligation required constitutional change and "the transfer of prosecutorial authority from the Mexican states to the Mexican federal power." Also, the Commission considered that the constitutional amendment proposal satisfied "the essential conditions to permit retroactive criminal law" because the change would not disadvantage the accused, the definition of the crime and its penalty remained unchanged, and it was "a purely procedural or administrative" reform proposal.

The importance of this opinion is evident: it highlighted the international obligation of the Mexican State to more effectively "prosecute the perpetrators of horrific and apparently systemic murder of women in Mexico", and clearly defined the conditions for an adequate constitutional

[4] At the time it was issued, Mexico was not a member of the Commission and did not officially request this opinion.

and institutional reform that (theoretically) would allow such prosecution without violating the principle of non-retroactivity in detriment of third parties. Nowadays, the murder of women motivated by gender (called "feminicide") is regulated in Article 325 of the Federal Criminal Code and is thus prosecuted by federal authorities.

3. Opinion on the draft Code of Constitutional Procedure of Bolivia – CDL-AD(2011)038

On September 2011, Bolivia requested an opinion to the Venice Commission on the Draft Code of Constitutional Procedures, prepared in the context of the 2009 constitutional reform initiated by President Evo Morales.

After welcoming some of the provisions included in the Draft, and analysing its different sections –regarding, among other subjects, the effects and execution of the judgments of the Constitutional Court, the regime for actions for unconstitutionality or the conflicts of jurisdiction – the Commission suggested nineteen specific recommendations. In my perspective as a constitutional judge, the following four were among the most relevant, since they are closely related to the safeguard and integrity of constitutional order.

1. Trials of the highest judicial bodies should not be instituted by Parliament;
2. the Prosecutor must not coordinate or take an active part in actions of civil society;
3. any instruction to reverse the opinion of a lower-rank prosecutor must be motivated;
4. in disciplinary procedures, the accused prosecutor must have the right to legal representation; and
5. the financial independence of the Public Prosecutor's Office must be ensured without resorting to funds involving the carrying out of certain actions or donations from private or foreign sectors.

Even if this Opinion did not intend to provide an exhaustive and general set of standards, it results very useful for countries aiming to regulate, reform or strengthen constitutional review systems and courts, since it contains some detailed guidelines on issues regarding the independence of judges, fair trail, equal access to justice, the obligation to reason decisions, separation of powers and the safeguard of constitutional order.

B. Elections and Political Rights

1. Opinion on the Electoral Legislation of Mexico – CDL-AD(2013)021

On December 2011, the President of the Mexican electoral administrative authority, the Federal Electoral Institute (IFE), requested an opinion to the Venice Commission on the electoral legislation of Mexico.[5] Even if the opinion was divided in several topics and subtopics, in the following section I will focus on two of the most relevant ones.

Media coverage of elections

After the elections of 2006, where the media provided differentiated access to the presidential candidates, the need for a reform on that field became evident. Thus, designing an impartial and fair electoral communications model was the main motor behind this reform. After the 2007-2008 reform, the Mexican Constitution recognised the political parties' right to use radio and television by arranging a public scheme, where they get free airtime during the electoral period. While 30% is equally distributed among them, 70% is distributed according to the vote percentage that each one obtained at the previous elections. Besides that, the reform established that no private individual or legal entity could buy airtime on television or radio to influence political preferences or to promote or attack a certain candidate or party.

According to the Opinion, (1) the model is in line with the equality that the *Explanatory Report of the Code of Good Practice on Electoral Matters* mandates, and (2) the prohibition to buy airtime "that mainly affects the media freedom of commerce, meets the requirements set out by international human rights standards", since it is based on the law, benefits the general interest, respects the proportionality principle and has a legitimate goal: to ensure equality without putting at risk the freedom of expression.

Gender Equality

The Commission stated that, in this regard, Mexican legislation seemed progressive, since the Electoral Code established a quota of 40% of candidacies to the Senate and Congress were reserved to the underrepresented gender.

Since then, gender equality in Mexico has improved, to the point that today nearly half of the Mexican Chamber of Deputies and the Senate is

[5] The constitutional and legal framework that the Commission analyzed in its Opinion was the one reformed in 2007-2008 and that was valid then.

composed of women. This was possible due to a constitutional amendment in 2014, which reinforced and mandated gender equality in both local and federal legislative candidacies, but also because of a previous set of rulings issued by the Electoral Tribunal[6] supporting the representation and participation of women in public spaces. In those rulings, the Tribunal mandated, for example, that at least 40% of the formulas (meaning both main and substitute candidates) must be integrated by persons of the same gender;[7] by establishing the rule of alternation or *zipper lists* for proportional representation candidacies; or binding political parties to integrate their internal management bodies respecting gender equality.

2. Report on term-limits Parts I, II and III – Presidents, Members of Parliament, and Representatives and Executive Officials elected at sub-national and local level – STUDY NO. 908/2017

On October 24th, 2017, the Secretary General of the Organization of American States (OAS) invited the Venice Commission to undertake a study on the right to re-election, motivated by a "recently observed bad practice" of modifying presidential terms through decisions by constitutional courts rather than through reform processes. For that purpose, the OAS posed a set of questions regarding the nature, rationale, limits and regulatory aspects of the right to re-election of presidents, members of national and local parliaments (MP), and representatives and executive officials elected at the sub-national and local levels.

In this study, divided in three sections, the Venice Commission argued that "there is no specific and distinct human right to re-election" because "[t]he possibility to stand for office for another period foreseen by the law is a modality of, or a restriction to, the right to political participation and, specifically, to stand for office" (Part I, para. 117).

As to whether term-limits constrain the human and political rights of aspiring candidates or voters, the Venice Commission stated that "[r]estrictions to the human right to political participation and to stand for election are… generally allowed within a constitutional democracy, to the

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[6] SUP-JDC-12624/2011 y acumulados; SUP-JDC-461/2009; SUP-JDC-369/2017, SUP-JDC-399/2017, SUP-JDC-445/2017 Y, SUP-JDC-468/2017, acumulados; SUP-REC-46/2015; SUP-JRC-4/2018 Y SUP- JRC-5/2018 acumulado; SUP-JDC-567/2017 y acumulados; SUP-REC-7/2018 and SUP-REC-16/2014.

[7] This prevented forcing female candidates to resign in favor of male candidates, which was a way of hindering the effectiveness of quotas.

extent that they are justified and necessary" (Parts II and III, para. 67) and "pursue the legitimate aims to protect human rights, democracy and the rule of law" (Part I, para. 120). For that end, such restrictions must be objective, reasonable, non-discriminatory, aim to guarantee "genuine" periodic elections "in the sense of Article 25 ICCPR and Art. 23(1b) ACHR", ensure "that representatives are freely chosen and accountable", and do not allow the premature removal of someone from office (Part I, para. 120 and 123).

However, the Venice Commission has considered that certain term limitations are more desirable than others. For instance, "due to the risks for the balance of powers and even for democracy as such involved in the possibility for the incumbent to be re-elected more than once, the Venice Commission has clearly expressed its critical approach towards constitutional provisions allowing for more than one re-election of the head of state in presidential or semi-presidential systems" (Part I, para. 63). In a similar fashion, "[t]he imposition of term limits on executive officials directly elected at the sub-national and local level could appear more justifiable, as their position may be more comparable to that of a president" (Parts II and III, para. 73).

By contrast, the Commission asserted that "MPs, unlike Presidents, exercise a representative mandate and form part of a collegiate body" and therefore term-limits "are not required in order to prevent the equivalent of an unlimited exercise of power by the Executive" (Parts II and III, para. 69). Nevertheless, the Commission has recognised that it is up to each Constitutional system to decide whether to impose term-limits on MP but recommends that such restrictions be "less strict than those that apply to an executive body" (Parts II and III, para. 70). Likewise, the Commission is of the opinion that imposing term-limits to "executive officials who are indirectly elected by sub-national or municipal councils" is not justified, since their position "is more similar to that of a Prime Minister in a parliamentary system" (Parts II and III, para. 73).

To tackle the OAS' concern in relation to the "recently observed bad practice" of modifying presidential terms through a decision of constitutional courts, the Venice Commission concluded that the best way to modify term limits within a constitutional state is through a constitutional or legal amendment according to the level of the affected positions (i.e. president, MP, local executives), because "[o]nly the people who have lawful sovereign power can modify the scope of authority which they gave to [any elected official]" and "[a]ny adjustment in a political system that affects checks and balances between the executive and the legislative branches and that has an impact on

the citizens' ability to hold representatives accountable should be adopted through the established amendment procedure, according to the Constitution" (Part I, para. 127; parts II and III, para. 62 and 64). Yet, the Commission stressed that a "popular referendum should not be used as a way to override the due constitutional amendment procedure" (Parts II and III, para. 63).

These opinions provide particularly relevant criteria for understanding the nature and limits of the rights to active and passive vote. Re-election is not a right by itself and, consequently, it is reasonable and even desirable to impose limits on it, particularly in relation to executive positions, if they are established at the constitutional level and comply with the objectivity and reasonability criteria. Given the history of Latin American political regimes and re-election issues, the Venice Commission insights turn out to be extremely helpful for legislative and judicial bodies.

C. Separation of Powers

1. Peru. Opinion on linking constitutional amendments to the question of confidence – CDL-AD(2019)022

On 31 July 2019, the President of the Republic of Peru and the President of the Cabinet sent to the Congress an "urgent" proposal of constitutional amendment to advance the next general congressional and presidential elections from 2021 to 2020 and to forbid anyone who has held the presidential office to run for immediate re-election. If approved by the Congress, the proposal would be submitted to a national referendum.

According to Article 134 of the Peruvian Constitution, the President has the possibility of linking this type of proposals to a "question of confidence" and, if censured or rejected twice, he is entitled to dissolve the Congress and call for extraordinary elections. As informed by the President of the Cabinet to the Venice Commission, the Executive "did not intend to propose a question of confidence linked to the constitutional amendments", but he also stated that "the President would have to decide on how to react if Congress did not adopt the amendments".

On August 16th, 2019, the Speaker of the Congress of the Republic of Peru requested an opinion of the Venice Commission on the issue of linking a constitutional reform to a question of confidence and expressed his concern with "the possibility of the Executive branch using, once again, a question of confidence to force a vote in favour of this reform". This Opinion would be based on comments by representatives from Canada,

Chile, Finland, Mexico and Spain.

In this regard, the Venice Commission suggested that such a possibility could represent a threat to the principle of separation of powers and to an adequate process of constitutional amendments. Accordingly, its Opinion stated that "[a]ny constitutional amendment process should preserve the principle of the separation of powers and the requirement of checks and balances between the President and the Congress", but "[t]he power of the President to link a question of confidence to constitutional amendments may create a risk of being used to alter this balance" because of the underlying threat of Congress dissolution. Moreover, according to the Venice Commission's report on constitutional amendments, "constitutional reforms should be based on a wide consensus and undertaken with due care and deliberation in Parliament… in contrast with motions of confidence, which have to be voted upon quickly".

Despite this opinion, later and related to a different issue, the President of Peru did exert his constitutional powers to dissolve the Congress.[8] His actions were later confirmed by the Peruvian Supreme Court of Justice.[9] On January 26th, 2020, early parliamentary elections were held. The Venice Commission was very clear in the Peruvian case that it was "up to the Constitutional Tribunal to decide whether proposals for constitutional amendments may be linked to a question of confidence" but that "[i]n comparative law, linking constitutional amendments to a question of confidence is unusual." The Opinion settled an important precedent regarding the principle of separation of powers and the ideal checks and balances between the Executive and Legislative branches, while highlighting the consultative and non-binding nature of the documents adopted by the Venice Commission.

2. Venezuela opinion on the legal issues raised by Decree No. 2878 of May 2017 of the President of the Republic on calling elections to a National Constituent Assembly – CDL-AD(2017)024

On May 1st, 2017, the President of the Republic of Venezuela issued Decree No. 2830 calling for the election of a National Constituent Assembly (NCA). The following May 23rd, he fixed the rules for such election through

[8] It is important to note that the dissolution of Congress was based on a different issue, not related to the Opinion of the Venice Commission.

[9] BBC News. *Peru's top court says dissolution of parliament was legal*. 15 January 2020. Retrieved on 12 March 2020, from: https://bbc.in/2WfTee6

Decree No. 2878. According to the announcement supplied by the National Electoral Council (CNE), the elections would take place on July 30th, 2017. By letter of June 26th, 2017, the Secretary General of the Organization of American States (OAS) requested an opinion to the Venice Commission on the legal issues raised by this situation.

In response, the Venice Commission prepared an opinion based on the fundamental premises that "constitutional change does not necessarily imply a constitutional break" and that "[i]n a democratic and constitutional State, the fundamental agreement should prevent the constituted ordinary bodies from transforming themselves into the constituent power". These premises imply that "a democratic Constitution must foresee the appropriate mechanisms to implement fundamental changes, including supermajorities, direct approval from the people and other methods of control that ensure constitutional continuity".

Drawing on these premises and on national legislation and international standards, the Commission concluded that, "in light of the wording of the relevant constitutional provisions, against the background of the previous constitutional experience of Venezuela and in the absence of compelling arguments to the contrary," the question of whether the decision on the convocation of a National Constituent Assembly may be taken by the President or by the people of Venezuela through a referendum "may not be considered to have been finally settled".

In relation to the question of whether the Constitution granted enough powers to the President to establish the rules for the election of the National Constituent Assembly, the Commission considered that it belongs exclusively to the National Assembly because, according to the Venezuelan Constitution, the legislative branch is the only competent power to enact laws. The Executive branch "may only legislate on the basis of an explicit constitutional provision, on the basis of a delegation of powers explicitly defined in a legislative act and under the control of parliament and the judiciary" which, in the opinion of the Commission, was not the case. Furthermore, neither the direct election of the President nor his power to initiate the calling of the National Assembly sufficed to change his subordinate position to the Constitution.

Finally, the Venice Commission considered that the rules of the election of the NCA did not comply with basic democratic principles because the rules based on simultaneous territorial and sectorial representation entailed "a flagrant violation of the democratic principle of equal voting rights", among other issues.

Notwithstanding these opinions and recommendations, the election of the National Constituent Assembly took place in the terms proposed by the Venezuelan President. More than 40 countries condemned the process and did not recognise it.[10] The Venice Commission opinion stands as a relevant international precedent for better understanding the principles that must rule a constitutional democracy.

D. Crimes against Humanity

Amicus Curiae brief on the case Santiago Brysón de la Barra et al (on crimes against humanity) for the Constitutional Court of Peru – CDL-AD(2011)041

On June 2011, the Constitutional Court of Peru requested the Venice Commission to submit an *amicus curiae* on the case *Santiago Brysón de la Barra et al.* (case No. 1969-2011-PHC/TC) regarding the punishment for crimes against humanity related to the military intervention that took place, after an uprising, in 1986, in the prison "El Frontón".

The main questions that the Venice Commission answered in this *amicus curiae* were: what case-law has been issued on crimes against humanity by national courts and constitutionally equivalent bodies? How have the crimes against humanity been defined and established? And, based on this case-law, what types of facts have been considered as constituting crimes against humanity?

In summary, after making a historic and conceptual analysis on how the notion of crimes against humanity emerged and evolved at the international and domestic levels, the Venice Commission outlined the following matters:

- **Definition and elements.** A crime against humanity normally consists of the following elements: One or several objective elements (an inhumane act/conduct), a contextual element (widespread or systematic attack against civilian population), and a subjective element (knowledge of both the objective and the contextual elements)".
- **Legal dilemmas.** The Commission pointed out the legal issues derived from the prosecution of crimes against humanity, such as the retroactive application of law or the prescription of crimes, and then enlisted possible solutions in line with international standards.

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[10] Brodzinsky, Sibylla and Boffey, Daniel**.** *40 countries protest Venezuela's new assembly amid fraud accusations*. The Guardian. Wednesday 2 Aug 2017. Retrieved on 3 March 2020, from: https://bit.ly/33bNDqX

- **The issue of the sentencing.** The document mentioned the existing major trends that have been followed to harmonise "the various countervailing factors that play a role in the determination of the severity of sentences to be imposed upon perpetrators of past crimes against humanity".

In conclusion, it can be said that this *amicus curiae* is an exhaustive reference to all the issues that can arise while judging a case related to crimes against humanity, as well as a compendium of solutions and comparative best practices on the subject, which is useful to States in general, and to judges in particular, when approaching this sensitive and transcendent subject.

III. The Venice Commission in Mexico's Electoral Justice

Perhaps the most direct way of showing the importance and influence of the Venice Commission in the Mexican electoral justice, is to look at the numbers: in more than a decade (22 February 2008 – 26 February 2020), the Electoral Tribunal of the Federal Judiciary Branch of Mexico referred to Venice Commission's opinions and studies in 197 resolutions, of which 113 were issued by its High Chamber.

In total, 14 documents of the Commission supported the rulings of the High Chamber. The most quoted, by far, was the *Code of Good Practice on Electoral Matters* (CDL-AD(2002)023rev) with a total of 74 mentions. It was followed by the *Report on the misuse of administrative resources during electoral processes* (CDL-AD(2013)033) with six mentions; the *Guidelines on Legislation on Political Parties* (CDL-PP (2002) 1), with five; the *Parameters on the relationship between the parliamentary majority and the opposition in a democracy: a checklist* (CDL-AD(2019)015) and the *Joint Guidelines for preventing and responding to the misuse of administrative resources during electoral processes* (CDL-AD(2016)004) with three. The other nine were mentioned only once.[11]

[11] Venice Commission, CDL-AD(2007)008, Code of Good Practice on Referendums; CDL(2008)094, Draft joint opinion on the Election Code of Moldova; CDL-AD(2004)007rev, Guidelines and explanatory report on legislation on political parties: some specific issues; CDL-INF (2000)001, Guidelines on prohibition and dissolution of political parties and analogous measures; CDL-AD(2010)043, CDL-AD(2018)10, Report on figure based management of possible election fraud; General Report of the XIVth Congress of the Conference of European Constitutional Courts on Problems of Legislative Omission in Constitutional Jurisprudence; Romania - Opinion on draft amendments to Law No. 303/2004, Law No. 304/2004 and Law No. 317/2004; CDL(2013)053, The misuse of administrative resources during electoral processes; CDL-AD(2016)007, The Rule of Law Checklist.

The contributions of the Venice Commission to these rulings refer to diverse issues such as the requirements for the registration of independent candidates; the scope and limits of referenda; equality in electoral campaigns; gender equality; proportionality principle and reasonable limitations to political rights; the obligations of the State regarding the right of association; political financing principles; among many others. As such, the Venice Commission has clearly contributed, as an international guidance, to a better justice administration in Mexico.

IV. Conclusions

Beyond the value of the Venice Commission's opinions and studies for the Mexican electoral system, it has significantly contributed to the constitutional and democratic development of Latin America.

Regarding issues of **constitutional engineering and institutional design**, it highlighted the unwavering international obligation of the States to protect the rights of women and girls, and provided replicable guidelines to design strong constitutional systems based on the impartiality and efficiency of Public Prosecutor's Offices, the independence of judges, fair trail, equal access to justice, the obligation to reason decisions, separation of powers and the safeguard of constitutional order.

In relation to **elections and political rights**, the Venice Commission has pointed out the importance of protecting the balance between the freedom of commerce of media and the general interest in electoral equality, without putting at risk the freedom of expression. It has also provided relevant criteria for understanding the nature and limits of re-election in the light of the rights to active and passive vote. But most importantly, it has supported Constitutional amendments necessary for equal gender representation – a reality in the current Mexican Congress.

When called to evaluate regional political processes, the Commission stressed out the transcendence of the principle of **separation of powers** and adequate checks and balances between the Executive and Legislative branches in order to protect and strengthen constitutional democracies. And, in cases of **crimes against humanity**, the European organism elaborated on the issues that can arise while judging on such matters and offered a compendium of solutions on the subject.

As can be seen from this brief summary, the work and presence of the Venice Commission in Latin America is highly valuable. In my opinion, the

region must continue and strengthen its collaboration with the Council of Europe. I am sure that the exchange of ideas and good practices certainly benefits constitutional democracies not only in Latin America and Europe, but also in the rest of the world.

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Section II
Key Texts

Final declaration of the Conference Democracy through Law 10 April 1989

The Ministers of Foreign Affairs and of Justice, assembled at the Conference on Democracy through Law held in Venice from 31 March to 1 April 1989 at the invitation of the Italian Government:

- recalling the political and legal value of co-operation already carried out within the Council of Europe as a symbol of mutual trust and of the strengthening of democracy in its member States;
- recognising the need to continue and to reinforce the role hitherto carried out by the Council of Europe which has constantly endeavoured to ensure that attacks on the democratic system of government, its constitutional guarantees and its respect of human rights do not occur in Europe or elsewhere in the world;
- considering the usefulness and the high political and moral value of an initiative aiming to promote reflection and the study of an initiative aiming to promote reflection and the study of democracy through law, so that the organisation of peace and the common enjoyment of freedom and its accompanying social progress may be more securely entrenched in relations between States in Europe;

consider that such an initiative which could be suitable fulfilled by the creation, in the framework of the Council of Europe, of a permanent body entitled "Commission for Democracy through Law", needs to be submitted to the Committee of Ministers for deliberation. The composition of the Commission, its aims and working procedures may draw inspiration from the outline indicated in the draft proposals annexed to the present declaration.

- The Ministers also consider that tat this moment in time the Commission could bring about a notable contribution to the examination of the political development in European non-member States of the Council of Europe as well as in non-European States which share the cultural heritage of European democracy.
- The Ministers note that the Venice regional authorities are prepared to make available appropriate facilities for the Commission's meetings.
- The Ministers consider it to be particularly significant that this initiative coincides with the fortieth anniversary of the founding of the Council of Europe, and invite the Committee of Ministers to examine the proposal for the setting-up of a Commission for Democracy through Law on the solemn occasion of its meeting on 5 May 1989.

COMMISSION FOR DEMOCRACY THROUGH LAW

Proposals

The Commission for Democracy through Law referred to as the "Commission", is established with the Council of Europe.

The Commission shall regard as its own specific field of action the guarantees laid down by law in the service of democracy. It shall fulfil the following objectives:

- the knowledge of the legal systems of the member States,
- the understanding of their legal culture, and
- the examination of the problems raised by the working of democratic institutions and their reinforcement and development.

The Commission shall give priority to research studies, initiatives and proposals with regard to:

a. those fundamental rights that involve the participation of citizens in the life of institutions

b. the constitutional technique which serves the efficiency of democratic institutions and their strengthening;

c. the political and institutional role of local and regional self-government.

The Commission shall supply opinions upon request of the Committee of Ministers, the Consultative Assembly, the Secretariat General and the individual member Sates of the Council of Europe.

Within the framework of its programme of activity the Commission is to carry out studies and research and, where required, may draft normative provisions and international agreements. All the proposals of the Commission can be discussed and adopted by the competent organs of the Council of Europe.

Non-member States of the Council of Europe and international organisations and bodies may benefit from the activities of the Commission by making a request to the Secretary General of the Council of Europe who shall accordingly notify the Committee of Ministers and the Assembly.

In the course of its work, the Commission shall make suitable arrangements for close co-operation with institutes, documentation, research and study centre in the member States.

The Commission shall be composed of personalities who have achieved international fame through their experience in democratic institutions and by their contribution to the enhancement of law and political science.

The members of the Commission shall be selected by the Committee of Ministers on the proposal of the Assembly; they shall hold office for a five year term.

The Commission shall elect a President from among its members to preside over its activities and to direct and represent it.

The Commission shall be convened in plenary session whenever necessary by the President, who shall also decide the venue of the meeting. The travel and subsistence expenses incurred by members of the Commission shall be covered by their respective States.

The Commission is to establish its procedures and working methods. Individual or collective dissenting and concurring opinions shall be published.

Once a year, the Committee of Ministers shall examine the report on the activities of the Commission as well as its general programme for the following year.

The Secretariat shall be provided by the residing personnel at the seat of the Commission in liaison with the Secretariat General (Directorate of Legal Affairs) of the Council of Europe.

The seat of the Commission is to be based at Venice, according to the modalities established in agreement with the Italian Government.

Resolution
adopted by the Conference for the Constitution of the Commission for Democracy through Law
19-20 January 1990

The participants in the Conference for the constitution of the Commission for Democracy through Law, held in Venice at the invitation of the Italian government on 19 and 20 January 1990.

Implementing the Final Declaration of the Conference on Democracy through Law (31 March – 1 April 1989);

Convinced of the urgency to establish the Commission for Democracy through Law, intended to act int eh field of the guarantees laid down by law in the service of democracy;

Considering that the Committee of Ministers of the Council of Europe granted the auspices of the Organisation to the Commission.

I. Decide to create the Commission for Democracy through Law and appoint as its members for a transitional period of two years:

AUSTRIA:	Mr. Franz MATSCHER
BELGIUM:	Mr. Daniel FLORE (*)
CYPRUS:	Mr. Christodoulos CHRYSANTHOU (*)
DENMARK:	Mr. Christian TRØNNING
FINLAND:	Mr. Antti SUVIRANTA
FRANCE:	Mr. Louis JOINET
F. R. GERMANY:	Mr. Helmut STEINBERGER
GREECE:	Mr. Constantin ECONOMIDES
ITALY:	Mr. Antonio LA PERGOLA (President)
LUXEMBOURG:	Mr. Gérard REUTER
MALTA:	Mr. Giovanni BONELLO
PORTUGAL:	Mr. José Menéres PIMENTEL
SAN MARINO:	Mr. Giovanni GUALANDI
SPAIN:	Mr. Fernando SEQUEIRA (*)
SWITZERLAND:	Mr. Giorgio MALINVERNI
TURKEY:	Mr. Ergun ÖZBUDUN (*)

it being understood that those member States of the Council of Europe which have not been able to appoint a personality to sit on the Commission may do so at a later stage by informing the President of the Commission thereof;

II. ask the Commission to draw up its own Statute;

III. invite the competent bodies of the Council of Europe to examine, in consultation with the Commission, proposals aimed at specifying and developing the institutional links between the latter and the Council of Europe;

IV. accept with gratitude the offer of the Region Veneto to put a seat at the disposal of the Commission.

Resolution (90)6

On a Partial Agreement Establishing the European Commission for Democracy through Law

(adopted by the Committee of Ministers on 10 May 1990
at its 86th Session)

The representatives in the Committee of Ministers of Austria, Belgium, Cyprus, Denmark, Finland, France, Greece, Ireland, Italy, Luxembourg, Malta, Norway, Portugal, San Marino, Spain, Sweden, Switzerland and Turkey,

Having regard to the Resolution adopted by the Conference for the constitution of the Commission for Democracy through Law (Venice, 19–20 January 1990) which created the European Commission for Democracy through Law for a transitional period of two years;

Considering that the participants in the Conference invited the competent bodies of the Council of Europe to examine, in consultation with the Commission, proposals aimed at specifying and developing institutional links between the latter and the Council of Europe;

Welcoming the fact that a large number of member States has already expressed the intention to participate in the work of the Commission;

Considering that the Commission will constitute a fundamental instrument for the development of democracy in Europe;

Having regard to the decision of 23 April 1990 whereby the Committee of Ministers unanimously authorised the member States who so wish to pursue these objectives within the Council of Europe by means of a Partial Agreement;

Resolve to establish the European Commission for Democracy through Law, governed by the Statute appended hereto;

Agree to re-examine before 31 December 1992 the institutional links between the Commission and the Council of Europe in the light of the experience acquired, in particular with a view to strengthening them, if appropriate by the incorporation of the activities of the Commission into the intergovernmental programme of activities of the Council of Europe.

Appendix to Resoloution (90)6

Statute of the European Commission for Democracy through Law

Article 1

1. The European Commission for Democracy through Law shall be a consultative body which co-operates with the member States of the Council of Europe and with non-member States, in particular those of Central and Eastern Europe. Its own specific field of action shall be the guarantees offered by law in the service of democracy. It shall fulfil the following objectives:

– the knowledge of their legal systems, notably with a view to bringing these systems closer;

– the understanding of their legal culture;

– the examination of the problems raised by the working of democratic institutions and their reinforcement and development.

2. The Commission shall give priority to work concerning:

a. 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;

b. the public rights and freedoms, notably those that involve the participation of citizens in the life of the institutions;

c. the contribution of local and regional self-government to the development of democracy.

Article 2

1. Without prejudice to the competence of the organs of the Council of Europe, the Commission may carry out research on its own initiative and, where required, may outline laws, recommendations and international agreements. Any proposal of the Commission can be discussed and adopted by the statutory organs of the Council of Europe.

2. The Commission shall supply opinions upon request submitted through the Committee of Ministers in its composition limited to the member States of the Partial Agreement (hereafter referred to as the Committee of Ministers) by the Parliamentary Assembly, by the Secretary General or by any member State of the Council of Europe.

3. Any non-member State as well as any intergovernmental organisation may benefit from the activities of the Commission by making a request to the Committee of Ministers with a view to obtaining its consent.

4. In the course of its work, the Commission shall co-operate with the International Institute for Democracy created under the auspices of the Strasbourg Conference on Parliamentary Democracy.

5. Furthermore, the Commission may establish links with documentation, study and research institutes and centres.

Article 3

1. The Commission shall be composed of independent experts who have achieved international fame through their experience in democratic institutions or by their contribution to the enhancement of law and political science.

2. The experts, members of the Commission, shall be appointed, one in respect of each country, by the member States of the Council of Europe members of the Partial Agreement. They shall hold office for a four year term and may be reappointed. The President of the Parliamentary Assembly and the President of the Giunta of the Region Veneto or their representatives may attend the work of the Commission.

3. The Committee of Ministers may unanimously decide to admit any European non-member State of the Council of Europe to participate in the work of the Commission. After consultations with the Commission, the State concerned may appoint either an associate member or an observer to sit on the Commission.

4. Any other State may be invited under the same modalities to appoint an observer.

5. Any State which appointed a member or an associate member may appoint a substitute. The modalities by which substitutes may participate in the work of the Commission shall be determined in the Rules of Procedure of the Commission.

Article 4

1. The Commission shall elect from among its members a Bureau, composed of the President, three Vice-Presidents and four other members. The term of office of the President, the Vice-Presidents and the other members of the Bureau shall be two years; however, the term of office of one of the Vice-Presidents and two of the other members of the Bureau appointed in the first election, to be chosen by lot, shall expire at the end of one year. The President, the Vice-Presidents and the members of the Bureau may be re-elected.

2. The President shall preside over the work of the Commission and shall represent it externally. The Vice-Presidents shall replace the President whenever he is unable to take the Chair.

3. The Commission shall be convened in plenary session whenever necessary by the President, who shall decide the venue of the meeting. The Commission may also set up restricted chambers in order to deal with specific questions.

4. The Commission shall establish its procedures and working methods in the Rules of Procedure and shall decide on the publicity to give to its activities. The working languages of the Commission shall be English and French.

Article 5

1. Whenever it considers it necessary, the Commission may be assisted by consultants particularly competent in the law or the institutional practice of the country or countries concerned.

2. The Commission may also hold hearings or invite to participate in its work, on a case by case basis, any qualified person or non-governmental organisation active in the fields of competence of the Commission and capable of helping the Commission in the fulfilment of its objectives.

Article 6

1. Expenditure relating to the implementation of the programme of activities and common secretariat expenditure shall be covered by a Partial Agreement budget funded by the member States of the Partial Agreement and governed by the same financial rules as foreseen for the other budgets of the Council of Europe.

2. In addition, the Commission may accept voluntary contributions, which shall be paid into a special account opened under the terms of Article 4.2 of the Financial Regulations of the Council of Europe. Other voluntary contributions can be earmarked for specific research.

3. The Region Veneto shall put a seat at the disposal of the Commission free of charge. Expenditure relating to the local secretariat and the operation of the seat of the Commission shall be borne by the Region Veneto and the Italian Government, under terms to be agreed between these authorities.

4. Travel and subsistence expenses of each member of the Commission shall be borne by the State which appointed him.

Article 7

Once a year, the Commission shall forward to the Committee of Ministers a report on its activities containing also an outline of its future activities.

Article 8

1. The Commission shall be assisted by the Secretariat General of the Council of Europe, which shall also provide a liaison with the staff seconded by the Italian authorities at the seat of the Commission.

2. The staff seconded by the Italian authorities at the seat of the Commission shall not belong to the staff of the Council of Europe.
3. The seat of the Commission shall be based in Venice.

Article 9

1. The Committee of Ministers may adopt amendments to this Statute by the majority foreseen at Article 20.d of the Statute of the Council of Europe, after consulting the Commission.

2. The Commission may propose amendments to this Statute to the Committee of Ministers, which shall decide by the above mentioned majority.

Resolution (2002)3

adopting the revised Statute of the European Commission for Democracy through Law

(adopted by the Committee of Ministers on 21 February 2002
at the 784th meeting of the Ministers' Deputies)

The Representatives on the Committee of Ministers of the states members of the Partial Agreement establishing the European Commission for Democracy through Law ,

Recalling Resolution (90) 6 on a Partial Agreement establishing the European Commission for Democracy through Law;

Having regard to the decision taken at the 484bis meeting of the Ministers Deputies in December 1992 to maintain for the future the structure of the Commission as a Partial Agreement of the Council of Europe;

Having regard to Statutory Resolution (93) 28 on Partial and Enlarged Agreements;

Welcoming the interest expressed by many non member States of the Council of Europe in the work of the Commission and wishing to give to these states the possibility to take part in the work of the Commission on an equal footing;

Convinced that the independent character of the Commission and its flexible working methods are the key to its success and have to be safeguarded;

Desirous to further develop the Statute of the Commission in the light of the experience acquired,

Article 1

1. The European Commission for Democracy through Law shall be an independent consultative body which co-operates with the member States of the Council of Europe, as well as with interested non-member States and interested international organisations and bodies. Its own specific field of action shall be the guarantees offered by law in the service of democracy. It shall fulfil the following objectives:

- strengthening the understanding of the legal systems of the participating states, notably with a view to bringing these systems closer;
- promoting the rule of law and democracy ;
- examining the problems raised by the working of democratic institutions and their reinforcement and development.

2. The Commission shall give priority to work concerning:

a. the constitutional, legislative and administrative principles and techniques which serve the efficiency of democratic institutions and their strengthening, as well as the principle of the rule of law;
b. fundamental rights and freedoms, notably those that involve the participation of citizens in public life;
c. the contribution of local and regional self government to the enhancement of democracy.

3. With a view to spreading the fundamental values of the rule of law, human rights and democracy, the Commission encourages the setting up of similar bodies in other regions of the world and may establish links with them and run joint programmes within its field of activity.

Article 2

1. The Commission shall be composed of independent experts who have achieved eminence through their experience in democratic institutions or by their contribution to the enhancement of law and political science. The members of the Commission shall serve in their individual capacity and shall not receive or accept any instructions.

2. There shall be one member and one substitute in respect of each member State of the Enlarged Agreement. The member and substitute shall be appointed by the member State concerned and shall have the qualifications required by the first paragraph of this article as well as the capacity and availability to serve on the Commission.

3. Members shall hold office for a four-year term and may be reappointed. During their term of office members may only be replaced if they have tendered their resignation or if the Commission notes that the member concerned is no longer able or qualified to exercise his or her functions.

4. Representatives of the Committee of Ministers, the Parliamentary Assembly, the Congress of Local and Regional Authorities of Europe and the Giunta of the Regione Veneto may attend the sessions of the Commission.

5. The Committee of Ministers may by the majority stipulated in Article 20.d of the Statute of the Council of Europe invite any non-member State of the Council of Europe to join the Enlarged Agreement. Members appointed by non-member States of the Council of Europe shall not be entitled to vote on questions raised by the statutory bodies of the Council of Europe.

6. The European Community shall be entitled to participate in the work of the Commission. It may become a member of the Commission according to modalities agreed with the Committee of Ministers.

7. The Committee of Ministers may, by the majority stipulated in Article 20.d of the Statute of the Council of Europe, authorise the Commission to invite international organisations or bodies to participate in its work.

8. Any state authorised in the past to participate in the work of the Commission in the capacity of associate member or observer may continue to do so unless it joins the Commission as a member. Observers are invited to the sessions of the Commission depending on the items on the agenda. The rules governing members shall apply mutatis mutandis to associate members and observers.

Article 3

1. Without prejudice to the competence of the organs of the Council of Europe, the Commission may carry out research on its own initiative and, where appropriate, may prepare studies and draft guidelines, laws and international agreements. Any proposal of the Commission can be discussed and adopted by the statutory organs of the Council of Europe.

2. The Commission may supply, within its mandate, opinions upon request submitted by the Committee of Ministers, the Parliamentary Assembly, the Congress of Local and Regional Authorities of Europe, the Secretary General, or by a state or international organisation or body participating in the work of the Commission.

Where an opinion is requested by a state on a matter regarding another state, the Commission shall inform the state concerned and, unless the two states are in agreement, submit the issue to the Committee of Ministers.

3. Any state which is not a member of the Enlarged Agreement may benefit from the activities of the Commission by making a request to the Committee of Ministers.

4. The Commission co-operates with constitutional courts and courts of equivalent jurisdiction bilaterally and through associations representing these courts. In order to promote this co-operation, the Commission may set up a Joint Council on Constitutional Justice composed of members of the Commission and representatives from co-operating courts and associations.

5. Furthermore, the Commission may establish links with documentation, study and research institutes and centres.

Article 4

1. The Commission shall elect from among its members a Bureau, composed of the President, three Vice Presidents and four other members. The term of office of the President, the Vice Presidents and the other members of the Bureau shall be two years. The President, the Vice Presidents and the members of the Bureau may be re-elected.

2. The President shall preside over the work of the Commission and shall represent it. One of the Vice Presidents shall replace the President whenever he or she is unable to take the Chair.

3. The Commission shall meet in plenary session as a rule four times a year. Its Sub-Commissions may meet whenever necessary.

4. The Commission shall establish its procedures and working methods in the Rules of Procedure and shall decide on the publicity to give to its activities. The working languages of the Commission shall be English and French.

Article 5

1. Whenever it considers it necessary, the Commission may be assisted by consultants.

2. The Commission may also hold hearings or invite to participate in its work, on a case-by-case basis, any qualified person or non governmental organisation active in the fields of competence of the Commission and capable of helping the Commission in the fulfilment of its objectives.

Article 6

1. Expenditure relating to the implementation of the programme of activities and common secretariat expenditure shall be covered by an Enlarged Agreement budget funded by the member States of the Enlarged Agreement and governed by the financial rules as foreseen for Enlarged Agreement budgets of the Council of Europe, subject to the following modifications:

a) the rate of contribution of a non member State of the Council of Europe to the Enlarged Agreement Budget shall be one third of its contribution as calculated in accordance with the rules for Council of Europe member States; however, it shall not be higher than one-third of the contribution by the major contributors;
b) the Commission shall propose, after having consulted the member States of the Enlarged Agreement not members of the Council of Europe, its draft annual budget to the Committee of Ministers for adoption.

2. In addition, the Commission may accept voluntary contributions, which shall be paid into a special account opened under the terms of Article 4.2 of the Financial Regulations of the Council of Europe. Other voluntary contributions can be earmarked for specific research.

3. The Regione Veneto shall put a seat at the disposal of the Commission free of charge. Expenditure relating to the local secretariat and the operation of the seat of the Commission shall be borne by the Regione Veneto and the Italian Government, under terms to be agreed between these authorities.

4. Travel and subsistence expenses of each member of the Commission shall be borne by the State concerned. If the Commission entrusts members with specific missions, the expenses shall be borne by the budget of the Commission.

Article 7

Once a year, the Commission shall present to the Committee of Ministers a report on its activities containing also an outline of its future activities.

Article 8

1. The Commission shall be assisted by the Secretariat General of the Council of Europe, which shall also provide a liaison with the staff seconded by the Italian authorities at the seat of the Commission.

2. The staff seconded by the Italian authorities at the seat of the Commission shall not belong to the staff of the Council of Europe.

3. The seat of the Commission shall be based in Venice.

Article 9

1. The Committee of Ministers may adopt amendments to this Statute by the majority provided for under Article 20.d of the Statute of the Council of Europe, after consulting the Commission.

2. The Commission may propose amendments to this Statute to the Committee of Ministers, which shall decide by the above-mentioned majority.

VENICE COMMISSION OF THE COUNCIL OF EUROPE
KEY FACTS

ESTABLISHMENT

10 MAY 1990

by 18 Council of Europe member States

TO DATE

62 MEMBER STATES
INCLUDING 15 NON Council of Europe MEMBERS
+ 4 observer countries and 1 associate member
+ 2 with special cooperation status
+ 9 countries beneficiaries of cooperation programmes

CLOSE COOPERATION WITH
EU, OSCE/ODIHR and OAS
3 INTERNATIONAL ORGANISATIONS
PARTICIPATING IN THE WORK OF THE COMMISSION

OVER 900 OPINIONS AND REPORTS

OVER 100 MAJOR INTERNATIONAL CONFERENCES

TRAINING IN
- human rights
- rule of law
- good governance
- electoral administration and justice

WORLD CONFERENCE ON CONSTITUTIONAL JUSTICE*

*SINCE 2009

COURTS 116 MEMBERS

NUMBER OF JUDGMENTS IN CODICES DATABASE OVER 10,000

EUROPEAN COURT OF HUMAN RIGHTS

references in 200 JUDGEMENTS AND DECISIONS*
*Since 2001

requests for 7 *amicus curiae* BRIEFS**
**Since 2005

IN 2019

OPINIONS/REPORTS

The Venice Commission ***adopted*** 34 TEXTS

- 6 TEXTS on constitutional isues concerning Albania, Armenia, Luxembourg, Republic of Moldova, Peru
- 18 OPINIONS on (draft) legislative texts
- 9 TEXTS of a general nature
- including 5 AMICUS CURIAE BRIEFS

EVENTS/MEETINGS

It (co)organised 17 MEETINGS

and participated in more than 100 OTHER EVENTS

[including in 5 election observation missions]

CONSTITUTIONAL CASE LAW

published 3 BULLETINS on Constitutional Case-Law

responded to 27 VENICE FORUM REQUESTS by constitutional courts on the VENICE FORUM

NUMBER OF JUDGMENTS ADDED TO CODICES DATABASE 345
WWW.CODICES.COE.INT

www.venice.coe.int

COMMISSION DE VENISE DU CONSEIL DE L'EUROPE
CHIFFRES CLÉS

CRÉATION

10 MAI 1990

par 18 États membres du Conseil de l'Europe

À CE JOUR

62 ÉTATS MEMBRES DONT 15 NON MEMBRES du Conseil de l'Europe + 4 pays observateurs et 1 membre associé

+ 2 pays avec un statut spécial de coopération + 9 pays bénéficiaires de programmes de coopération

COOPÉRATION ÉTROITE AVEC
L'UE, L'OSCE/BIDDH ET OEA
3 ORGANISATIONS INTERNATIONALES
QUI PARTICIPENT AUX TRAVAUX DE LA COMMISSION

PUBLICATION
900 AVIS ET ÉTUDES

ORGANISATION
100 CONFÉRENCES INTERNATIONALES

FORMATION
- droits de l'homme
- État de droit
- bonne gouvernance
- administration et justice électorales

CONFÉRENCE MONDIALE SUR LA JUSTICE CONSTITUTIONNELLE*
COURS 116 MEMBRES
*DEPUIS 2009

NUMERO DE ARRETS DANS LA **BASE DE DONNÉES CODICES** PLUS DE 10,000

COUR EUROPÉENNE DES DROITS DE L'HOMME (CEDH)
références dans 200 ARRÊTS ET DÉCISIONS*
** Depuis 2001*

demandes de 7 MÉMOIRES ***d'amicus curiae*****
***Depuis 2005*

EN 2019

AVIS/ÉTUDES
La Commission de Venise ***a adopté*** 34 **TEXTES**

- 6 TEXTES sur des **réformes et révisions constitutionnelles** concernant
  - Albanie
  - Arménie
  - Luxembourg
  - Republique de Moldova
  - Pérou
- 9 TEXTS **à caractère général**
- 18 AVIS sur des (projets de) **textes législatifs** et autres questions juridiques
- 5 **y compris** MEMOIRES D'AMICUS CURIAE

ÉVÉNEMENTS/ CONFÉRENCES
Elle a organisé / coorganisé 17 ÉVÉNEMENTS

et participé à plus de 100 AUTRES ACTIVITÉS

[**dont 5 missions** d'observation d'élections]

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et répondu à 27 DEMANDES **des cours constitutionnelles sur le** VENICE FORUM

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