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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

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ANNUAL REPORT OF

ACTIVITIES FOR 2000

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PRESENTATION OF THE VENICE COMMISSIONS

REPORT OF ACTIVITIES FOR 2000

Statement by Mr Antonio La Pergola, President of the Venice Commission, to the Committee of Ministers (6 June 2001)

Mr Chairman, Ambassadors, Ladies and Gentlemen,

Last year I had the pleasure to address most of you twice: the first time when presenting the Annual Report for 1999, the second time on the occasion of the 10th Anniversary of our Commission when I welcomed many members of this committee in Venice. On this occasion we were also honoured by the presence of representatives of the highest Italian authorities, a country which continues to provide generous support for our work. But not only Italy, and some other member countries like yours, Mr Chairman, and your neighbours in Switzerland, generously supported our work through voluntary contributions. Before outlining our salient activities of last year and of the first months of 2001, let me say that their increased scope has been made possible only thanks to the generous contribution of the European Commission. Through its joint programme with us the European Commission covers a significant part of our operational expenses. I trust we can rely on its continued support.

From our written annual report you may get an impression of our wide-ranging and varied activities. Geographically, for us as, I think, for you, the Balkans and the Caucasus remain the focus of attention.

Let me start with the **Caucasus** since the admission of Armenia and Azerbaijan to the Council of Europe early this year marks a decisive development for the integration of this region into the European framework. This accession was prepared last year by you and we have tried, and are still trying, to accompany this process by assisting these countries in the building up of democratic institutions. You entrusted to the Venice Commission an important role in ensuring that the conditions for accession are fulfilled. We are doing our best to justify your confidence.

In the case of **Armenia**, quite independently from the accession procedure, the Armenian authorities had already asked us to assist their country in reforming its constitution. The intentions of the Armenian authorities were from the beginning to have a profound revision and our co-operation with them has confirmed that there is willingness to move forward. This reform has become more urgent due to the various commitments Armenia assumed when joining the Council of Europe. Although constitutional reform is not one of the commitments, such reform would logically precede some of the legislative reforms required in Armenia. Our expert team has had several exchanges of views with the Armenian experts, including one that is occurring this very week in Strasbourg, and we expect a successful conclusion of the constitutional reform this year or at the latest at the beginning of next year. You are following our work on Armenia through the group chaired by Ambassador Ago and I dont have to go into further details.

The same applies to **Azerbaijan**. We had already started co-operation on a reform of the electoral law at the request of the Azeri authorities and this process is ongoing. Another part of our co-operation is the question of relations between legislature and executive as well as direct access of the citizen to the Constitutional Court and the Ombudsperson.

With respect to the third country in the Caucasus, **Georgia**, the situation is quite different. Here, following an initiative of Commissioner Gil Robles, we are trying to assist the United Nations and the government of the Republic of Georgia to re-establish a dialogue with the separatist authorities in Sukhumi in the hope of contributing to a solution of the Abkhaz conflict. You have been extensively briefed on the first seminar we have held on this topic and I do not think I have to go into it more deeply. I would only like to recall that this activity is also a follow-up to the visit of the Italian chair of the Committee of Ministers to the Caucasus last year and to the study we prepared at the request of the Italian Chair on a *General Legal Reference Framework to Facilitate the Settlement of Ethno-Political Conflicts*. I have great pleasure also in informing you that the United Nations as well as the Georgian authorities have requested that we take up this dialogue again in the very near future.

Let me now turn towards the traditional core of my presentation, the **Balkans**. The year 2000 has been without doubt a period of renewed hope for peace and stability in the region although there remain numerous pitfalls. This renewed impetus will probably be more clearly reflected in our activities this year than was the case last year.

To start with the country on everybodys mind, the **Federal Republic of Yugoslavia,** you yourselves have admitted it as associate member of the Venice Commission and we have started with co-operation in the field of minority rights. We are ready to provide our expertise as constitutional lawyers on other issues if the authorities so wish.

Otherwise we have continued to follow the situation in Kosovo and to provide our advice to UNMIK on the drafting of the municipal regulation and on possible rules for the self-government institutions during the interim period. The latter activity has come to its conclusion only recently when the Special Representative of the Secretary General of the United Nations, Mr Haekkerup, proclaimed the Regulation on the Constitutional Framework for Provisional Self-Government. This text was prepared during negotiations between UNMIK and local experts. Venice Commission representatives actively participated in these negotiations and provided their input as legal experts on the basis of the political guidelines decided upon by UNMIK. Of course, it is regrettable that representatives of the Kosovo Serbs joined the negotiations only at the final stage.

In **Croatia** we have already been working with the authorities for a number of years on a constitutional law for the protection of minorities. Progress on this law under the old government had been extremely slow and our hope was that the new authorities would have a more constructive attitude. Indeed, work on a new Constitutional Law started in May last year with the active participation of the Venice Commissions Group of Rapporteurs. A draft was prepared that reflects the good will of the new authorities to provide protection for the various minorities in Croatia. However, the draft has neither been finalised nor tabled with the Croatian Parliament. The Venice Commission has witnessed the authorities willingness to address issues of minority protection in Croatia in an effective and positive way. It is now waiting to see this willingness transformed into concrete results.

Bosnia and Herzegovina has always been one of our main areas of activity, all the more so with this country getting closer to accession to the Council of Europe. With respect to Bosnia and Herzegovina there was a positive development in 2000 that is especially worth reporting. In the past, our co-operation was mainly based on requests from the High Representative. While Mr Petritsch continues to avail himself of our services, we have also engaged increasingly in direct, frequent and fruitful contact with the institutions of the State of Bosnia and Herzegovina and the two Entities. This is an encouraging sign of increased maturity within Bosnia and reflects the switch towards local ownership proclaimed by Mr Petritsch.

Progress has been made not only with respect to procedure but also on substantive issues. Both the Entities and the State have in fact adopted laws on the respective Ombudspersons that were prepared in co-operation with the Venice Commission. We are participating in the ongoing work on a possible merger between the Constitutional Court and the Human Rights Chamber. This is a delicate question. The existence of a separate judicial body for the protection of human rights becomes more difficult to justify as Bosnias accession to the European Convention on Human Rights approaches. On the other hand, the important *acquis* of the Human Rights Chamber has to be maintained. Its pure and simple abolition would entail grave risks for the protection of human rights in Bosnia. We are therefore devoting a considerable amount of time and energy, in co-operation with both the local and international actors, to the preparation of conditions that could conceivably surround the merger between the two existing judicial bodies.

The House of Representatives of the Federation of Bosnia and Herzegovina asked the Venice Commission to assist it in a reform of the Federation Constitution. The reforms envisaged in the Federation are partly based on earlier Venice Commission opinions and a large degree of consensus on many issues was reached. We look forward to continuing and finalising this co-operation with the Federation. The proposed reform of the Federation Constitution contains in the main procedural arrangements but at the moment it seems to have been superseded by a more politically sensitive issue. The Constitutional Court of Bosnia and Herzegovina decided last year that the provisions in the Entity constitutions making only Bosniacs and Croats constituent peoples in the Federation and only Serbs a constituent people in the Republika Srpska were not consistent with the Constitution of Bosnia and Herzegovina. This decision has wide-ranging consequences for the institutional set-up in particular within the Federation and we took part in the Task Force of the international community that presented proposals for its implementation in both Entities. We hope that, following the implementation of the decision, we will be able to resume our co-operation on all other aspects of constitutional reform with the Federation.

To come to another European region, the Commission also had an intense co-operation with **Moldova**. On the one hand, we took part at the request of OSCE in a working table on the issue of Transnistria in Kyiv in March 2000. At this meeting international experts prepared, in co-operation with experts from the Moldovan and Transnistrian side, elements for a possible settlement of the Transnistrian conflict.

We were also involved in the process of constitutional reform in Moldova. A member of our Commission, Professor Malinverni from Switzerland, chaired a joint commission with representatives appointed by the President and by Parliament that prepared a compromise text for constitutional reform in this country.

The aim of our activities in the Balkans is to contribute to stability in this area. We have therefore set up, in the framework of the **Stability Pact** and with the support of the Italian authorities at the national, regional and local level, a UniDem campus for the legal training of civil servants from the Stability Pact beneficiary countries in Trieste. While 2000 was devoted to the preparation of this project, this year courses have actually started and the first seminars have been a success.

With respect to **Ukraine**, at the request of the Parliamentary Assembly we provided opinions both on the constitutional referendum which took place on 16 April 2000 and on its implementation.

Of course, these are not the only instances of our co-operation with Council of Europe member States. I could also cite Albania, Bulgaria, Latvia, Slovenia and Switzerland. Our written report, however, contains details of our activities with respect to these countries.

As you well know, activities focusing on individual countries are only one part of our work. We undertake studies on legal questions of general interest, such as the preparation of guidelines for constitutional referendums, undertaken at the initiative of the Liechtenstein Chair of the Committee of Ministers and to be adopted by the Commission at its next plenary meeting in July. We also run our **UniDem** seminars, one of which was organised last year in co-operation with the Irish Chair of the Committee of Ministers on *The Protection of Human Rights in the 21st Century: towards a Greater Complementarity within and between European Regional Organisations*. I might add that the Venice Commission is proud that its contribution has been requested by several recent Chairs of the Committee of Ministers, such as Greece, Ireland, Italy and Liechtenstein.

Another significant part of our activities, even if it is not perhaps the most visible one to you, is our co-operation with **constitutional courts**, the editing of the *Bulletin on Constitutional Case Law* and the development of the CODICES database. In 2000 we have intensified our co-operation with the Conference of European Constitutional Courts and with the association of the francophone constitutional courts. Thanks to generous support from Norway and Switzerland, we are also assisting in the setting-up of an association of constitutional and supreme courts from southern Africa. Contacts have also been established with Constitutional courts from Ibero-America, a region which is close to the European constitutional heritage.

With respect to the database, a more recent development is a request from France to integrate a database set up at the initiative of the former Minister of Justice and President of the Constitutional Council, Robert Badinter, the *Encyclopdie universelle des droits de*

Ihomme. France is willing to continue to provide financial support for this project but would wish us to assume responsibility for its content. At present we are having talks with the French authorities on reorienting the *Encyclopdie* with a view to making it complementary to the web-sites of the Council and our CODICES database through an increased emphasis in the *Encyclopdie* on fundamental and constitutionally guaranteed rights. You will be invited in due course to decide on the terms of this possible co-operation and I hope that other governments will be keen to participate in this initiative of the French authorities. Moreover, our intention of promoting the exchange of views and experiences of constitutional justice could be further enhanced by creating a common room for past and present constitutional judges.

Another recent initiative, which may well entail an important development in our work, is a proposal approved by the Political Affairs Committee of the Parliamentary Assembly that the Venice Commission should set up, together with the Assembly and the Congress, a working group on **electoral matters** with the task of, inter alia, working out a code of practice in such matters and establishing a database. The Assembly takes the view that the Council of Europes interest in electoral matters should be enhanced and it wants to give the Venice Commission a major role in this context. The proposal seems topical; in a different context you will examine a proposal by the Secretary General for an integrated project covering amongst other things the electoral field. Co-operation with other bodies such as ODIHR will be essential but electoral law is certainly a field close to the core function of the Council of Europe as the guardian of democracy in Europe and it is one in which we have a good deal of experience.

If you consider some of the activities outlined above, it is apparent that the Venice Commission is increasingly becoming a tool for spreading Council of Europe values even beyond European borders, among lawyers who share our principles, ideals and working methods and are dedicated to the development of constitutionalism and democracy as we understand them in our continent. We would like to see these developments in our work reflected in the **Statute** of the Commission.

This brings me to the final part of my report, the need to revise our Statute. The Commission still works according to its initial Statute, adopted in 1990, at a time when the future development of its activities was not foreseeable. It is time now, after eleven years of existence, that we reflect on future directions that may be taken by the Commission. It will also be necessary to adapt our Statute to reflect the successful practice developed over the past years, the needs of European countries at the start of the new millennium and the fact that our membership is constantly increasing and interest in our work widening. Indeed last year for the first time we were able to profit from the excellent contributions of a British member, Professor Jowell, and I have some reason to hope that next year there will be a Russian member.

Bearing these various developments in mind, we intend to submit proposals to you for appropriate revisions of our Statute in the near future, which we would hope that you will be able to adopt in time to allow these reforms to come into effect from the beginning of next year. In our proposals we shall place particular emphasis on the independence of our members. Independence of judgment is the working principle of our Commission. We view it as the key to our success. It must be preserved and where necessary strengthened by appropriate guarantees. With your help we will succeed in maintaining the quality of our work as an advisory body for the legal engineering of democracy and for the promotion of constitutionalism and the rule of law in Europe and beyond.

MEMBERSHIP

At the end of 2000, the Commission totalled 40 full members, 4 associate members and 10 observers.

Members

During 2000 Andorra acceded to the Partial Agreement and nominated as its member Mr Franois Luchaire, Honorary President of the University of Paris I, Former member of the French Constitutional Council, former President of the Constitutional Tribunal of Andorra.

Mr Jeffrey Jowell, Professor of Public Law, University College London was nominated member in respect of the United Kingdom. Mr Peeter Roosma, Adviser, Supreme Court was nominated member in respect of Estonia replacing Mr Heiki Loot whose mandate had expired. Mr Alexandre Djerov, Advocate, Member of the National Assembly was nominated member and Mr Vassil Gotzev, Judge, Constitutional Court, nominated substitute member in respect of Bulgaria replacing Ms Ana Milenkova whose mandate had expired.

In addition, Ms Ingrid Siess-Scherz, Head of Division Federal Chancellery was nominated substitute member in respect of Austria replacing Mr Klaus Berchtold who resigned. In addition, Ms Lydie Err, member of parliament and Mr Georg Nolte, Professor of Public Law, University of Goettingen were nominated substitute members in respect of Luxembourg and Germany respectively.

Associate members

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A representative from the Federal Republic of Yugoslavia attended the Commissions 45th Plenary Meeting (15-16 December 2000). A request for Associate member status was received following this meeting and a positive decision was taken by the Committee of Ministers early 2001.

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Observers

Israel obtained observer status and nominated Mr Amnon Rubinstein, Chairman, Constitution, law and Justice Committee of the Knesset, as its observer on the Commission.

Mr Jed Rubenfeld, Professor Yale Law School was nominated observer for the United States of America replacing Mr Paul Gewirtz.

The full list of members, associate members and observers by order of seniority is set out in Appendix I to this report.

Sub-Commissions

A Sub-Commission on South-East Europe was set up to deal with Stability pact issues.

The composition of the Sub-Commissions is set out in Appendix II to this report.

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The 43rd Plenary Meeting of the Commission was followed, on 17 June 2000, by a ceremony to commemorate the 10th anniversary of the Commission. This ceremony was attended by representatives of the member States of the Council of Europe as well as States represented on or working with the Commission, representatives of the town of Venice and of the Veneto region, Italian and foreign personalities, representatives of organisations working with the Commission and the members of the Commission.

The following personalities spoke during the ceremony:

Mr Paolo Costa, Mayor of Venice;

Mr Enrico Cavaliere, President of the Regional Council of Veneto;

Mr Lamberto Dini, President of the Committee of Ministers, Minister for Foreign Affairs of Italy;

Lord Russell-Johnston, President of the Parliamentary Assembly;

Mr Walter Schwimmer, Secretary General of the Council of Europe;

Mr Antonio La Pergola, President of the European Commission for Democracy through Law (Venice Commission).

ACTIVITIES

I. Activities of the European Commission for Democracy through Law in the field of democratic reform

During 2000 the Venice Commission continued its work on constitutional reform and the effective functioning of democratic institutions. The Commission was active on the whole continent but the consolidation of peace in South-East Europe and co-operation with the authorities in the Caucasus were a major part of its work.

As the process of drafting new constitutions moves towards completion across Europe, the Commission has naturally concentrated increasingly on the more technical aspects of the implementation of such texts.

Constitutional reform and constitutional justice remained essential components of the Commissions work in 2000; in addition, the Commission focused on fundamental elements such as elections and institution-building, and in particular the role of institution-building as a means of conflict resolution, notably in its work in Bosnia and Herzegovina, Kosovo and the Caucasus. The central place of democracy in the wider process of European integration heightens the importance of all these aspects of the Commission's activities.

The Commission continued its fruitful co-operation with both the Committee of Ministers and the Parliamentary Assembly of the Council of Europe, as well as with the Congress of Local and Regional Authorities of Europe. While maintaining its absolute independence, the Commission also welcomed the opportunity to co-operate further with other authorities of the Council of Europe, in particular the Directorates General of Legal Affairs and Human Rights.

Much of the Commissions work in 2000 was conducted in the framework of its Joint Programme with the European Commission on strengthening democracy and constitutional development in central and eastern Europe and CIS countries. This programme has enabled the Commission to increase significantly the number of activities carried out in its priority areas. The resultant heavier workload has demanded an unfailing commitment from both the members of the Commission and the Secretariat. The success of the Commission in responding to this call bears witness to the high level of commitment of all concerned.

Finally, a new aspect of the Commissions plenary meetings was the inclusion of regular exchanges of views with members from countries experiencing constitutional developments which had not formed the object of the Commissions work. The Commission welcomed the opportunity to enrich its debates in this manner. A brief summary of the issues discussed is included under point 17 below.

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A short description of the Commissions work in this area is followed by the list of some opinions which the Commission has decided to make public.

Description of the Commissions activities

CO-OPERATION WITH ALBANIA

Following the Commissions opinion on the compatibility of the death penalty with the Albanian Constitution, adopted at its 38th Plenary Meeting, and the decision of 10 December 1999 of the Constitutional Court of Albania that the death penalty was unconstitutional, the Commission welcomed the news that Albania had signed and ratified Protocol No. 6 to the European Convention on Human Rights in the course of the year 2000.

Law on the Supreme Court

The Commission concluded its examination of the Law on the Supreme Court of Albania, which had been initiated at the request of the Albanian authorities. Messrs Russell and Torfason had been appointed as rapporteurs in mid-1999 and their work culminated in a meeting with the Albanian authorities in Tirana on 2-3 March 2000. At the 42nd Plenary Meeting, Mr Torfason reported that numerous points had been addressed at this meeting, concerning the professional fields from which judges could be recruited, the relations between the President and the other judges of the Court and the number of judges on the Court. As a result of the meeting, these concerns had largely been resolved, and the Venice Commissions suggestions had largely been followed in the Law, which had since been adopted.

Electoral Code

During 2000 work towards the revision of the legislation governing elections continued. The questions involved were sensitive, however, and progress was slow. Mr Omari reported at the Commissions 43rd Plenary Meeting that the Electoral Code, prepared with the assistance of the OSCE and the Commission, had now entered into force. However, it was contested by the opposition Democratic Party. At the 45th Plenary Meeting, Mr Newbury, from the Congress of Local and Regional Authorities in Europe, informed the Commission that the possibility of revising the Code had once again been raised, in particular with regard to the question of the withdrawal of candidates for election.

Law on the Organisation and Functioning of the Council of Ministers

At the request of the Albanian authorities, the Commission examined the draft Law on the Organisation and Functioning of the Council of Ministers. Messrs Bartole and Nolte and Ms Suchocka were appointed as rapporteurs and presented written comments on the draft. They highlighted several points within the draft that should be revised. In particular, there should be a clear definition of the nature and hierarchy of acts by the Council of Ministers; the conditions for becoming a minister should not be stricter than those listed in the Constitution; a provision allowing the President to repeat ministerial nominations three times should be revised; and the appointment of high ranking officials should depend on the Council of Ministers rather than on the Prime Minister alone. The rapporteurs further suggested that detailed procedural issues might be left to sub-statutory texts. A revised draft is now awaited so that work on this question can continue.

CO-OPERATION WITH ARMENIA

The Commission co-operated with Armenia on a number of issues in 2000. This co-operation, which had initially focused on the process of revising the Constitution of Armenia, intensified during the year with the prospect of Armenias accession to the Council of Europe, to include the examination of laws and draft laws on political parties, local autonomy, the civil service, the media and the ombudsman. Work on these questions is continuing in 2001.

Revision of the Constitution

At the request of the Armenian authorities, the Commission set up a Working Group on the revision of the Constitution of Armenia. The Group, composed of Messrs Bartole, Batliner, Economides, Endzin, Steinberger and Tuori, held its first meeting in Strasbourg on 25-26 April with a delegation of the Armenian authorities, in order to clarify the basic issues involved in the constitutional revision. These included human rights matters, the separation of powers and efficiency of the legislature, constitutional guarantees for the judiciary (including the Constitutional Court) and local self-government. A second meeting was held in Yerevan on 16-17 November. Following these meetings, which had been highly constructive, the Armenian authorities decided that the final draft would be submitted for opinion to the Commission during 2001. They planned to hold a referendum on the constitutional amendments at the end of 2001.

Co-operation related to Armenias accession to the Council of Europe

Following a request from the Committee of Ministers for the Commission to co-operate with Armenia in view of its accession to the Council of Europe, a delegation of the Commission travelled to Yerevan on 15-18 November 2000. The Secretariat reported at the 45th Plenary Meeting that the Armenian authorities had shown their great willingness to work with the Commission. In addition to the on-going co-operation concerning the constitutional revision described above, laws and draft laws on political parties, local autonomy, the civil service, the media and the ombudsman would be submitted to the Commission. Work on these matters will continue in 2001 according to the co-operation programme adopted by the Commission at its 45th Plenary Meeting.

Electoral Law

In the context of the Commissions co-operation with Armenia in view of its accession to the Council of Europe, Mr Owen prepared comments on the Armenian Electoral Law. He noted that the law of 1999 had eliminated many weaknesses of the earlier law; however, certain sections in the current version should be amended in order to simplify procedures, for example the way in which the voting took place, or to explain clearly procedures that were complex and difficult to follow, for example the adjudication/appeals system. The size of Parliament did not need to be reduced and the relationship of proportional to majoritarian seats should be kept constant. On the other hand, certain innovations in the law, such as the provisions allowing parties to revoke candidates from their party lists, the method of calculating the votes, the system of verification of signatures and the possibility of voting against a candidate, which was in effect a white vote, did not create any difficulties. At its 45th Plenary Meeting, the Commission approved Mr Owens comments on the Armenian Electoral Law and decided to forward them to the Armenian authorities.

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In addition, a seminar on the efficiency of constitutional justice in a society in transition was held in Erevan on 6-7 October 2000. This seminar was part of a series that has been held in Armenia since 1996. It included participants from Armenia, Slovakia, Moldova, Russia, Kazakhstan and Belarus and dealt with the functional, institutional and procedural aspects of the topic in question. Reports from the seminar are to be published by the Constitutional Court of Armenia, in particular on its web-site.

CO-OPERATION WITH AZERBAIJAN

The Commissions co-operation with Azerbaijan in 2000 centred initially around the law on parliamentary elections and the question of reforming access to the Constitutional Court. With the prospect of Azerbaijans accession to the Council of Europe, this co-operation expanded to include general constitutional reform and the revision of media laws and the drafting of laws on the ombudsman and minorities. Work on these questions is continuing in 2001.

Law on Parliamentary Elections

At the request of the Azerbaijani authorities, the Commission examined the law on parliamentary elections in Azerbaijan. Mr Nolte presented his comments, which were approved by the Commission at its 44th Plenary Meeting. The law in question was long and detailed, and contained many questions that were not necessarily present in other countries electoral laws. Certain provisions had been the object of recommendations in the opinion, in particular as to their interpretation: these included provisions on the nomination and registration of candidates, the participation of foreign and other observers, the appeals system, the sanctions that may be imposed for violations of the electoral law, the composition of lower election commissions, the role of NGOs and the registration of political parties. The Central Electoral Commission had stated that it would follow the Venice Commissions recommendations. With respect to the registration of political parties, the Commission referred to the recent decision of the Constitutional Court of Azerbaijan, which had ruled that the provisions concerning conditions for registration of parties must be read as having no retrospective effect, as is expressly prohibited by the Constitution.

At its 45th Plenary Meeting, the Venice Commission again examined the electoral legislation and considered it necessary to revise several points in the light of the November elections. A major issue was to provide a credible procedure for the examination of electoral complaints. The possibility of making parallel complaints to the electoral commissions and the ordinary courts was a particular problem. A provision which barred electoral observers financed from abroad by more than 30% should be abolished, and the 6% threshold required for political parties to enter Parliament might be too high given that only one-sixth of parliamentary seats were allocated through the proportional system. In order to prevent electoral fraud stricter regulations were required. A boundary commission composed of neutral technical staff should make proposals to the CEC for the delimitation of electoral districts. A positive aspect during the elections had been the public medias allocation of air-time to the opposition.

The Commission continues to follow developments in this area keenly.

Co-operation related to Azerbaijans accession to the Council of Europe

Following a request from the Committee of Ministers to co-operate with Azerbaijan in view of its accession to the Council of Europe, a delegation of the Venice Commission travelled to Baku on 30 November-1 December 2000. The authorities of Azerbaijan were very open to co-operation with the Venice Commission. In addition to the on-going work to provide individuals with a direct access to the Constitutional Court, the following elements are to be the subject of an opinion by the Venice Commission: a general constitutional reform, the electoral laws, the media laws and future laws on the ombudsman and on minorities. The Commission will continue its work on these matters in 2001 in accordance with the programme adopted at its 45th Plenary Meeting.

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In addition, a seminar on Human rights protection in the activity of the Constitutional Court of Azerbaijan was held in Baku on 17-18 April 2000.

CO-OPERATION WITH BELARUS

At the 42nd Plenary Meeting, the Secretariat informed the Commission that two opinions of the Commission's experts on the draft electoral code had been sent to the Belarussian authorities. Despite the fact that the Commission had been ready to participate in an exchange of views on the subject, most of the experts observations had not been taken into account and the draft had since been adopted without further consultation. The Secretariat had communicated the experts comments to the OSCE, in order that the issue may be raised with the Belarussian authorities.

CO-OPERATION WITH BOSNIA AND HERZEGOVINA

The year 2000 saw Bosnia and Herzegovina move significantly closer towards accession to the Council of Europe. Throughout the year, the Commission continued its intense and fruitful co-operation with the authorities of Bosnia and Herzegovina as well as with the international actors present in the country. The Commissions priority remained the consolidation of democratic institutions and State structures, and its areas of activity ranged from involvement in the process of constitutional revision in the Federation of Bosnia and Herzegovina to the drafting of laws on various institutions in Bosnia and Herzegovina, as well as the drafting of opinions on more technical aspects of the implementation of the constitutions and laws in force in Bosnia and Herzegovina.

- Ombudsman Institutions in Bosnia and Herzegovina

Within this framework, the Commission adopted at its 42nd Plenary Meeting its opinion on *some aspects of the functioning of Ombudsman institutions in Bosnia and Herzegovina*, at the request of the Human Rights Ombudsperson for Bosnia and Herzegovina. Ms Haller thanked the Commission for this opinion and for the help it had provided over the years to the institution of the Human Rights Ombudsperson for Bosnia and Herzegovina.

In addition, the Commission was pleased to note at its 42nd and 45th Plenary Meetings respectively that the *Lawon the Ombudsman of the Republika Srpska* as well as the *Lawon the Ombudsman of Bosnia and Herzegovina* had been adopted.

Again in the context of its work on the Ombudsman institutions of Bosnia and Herzegovina, at its 43rd Plenary Meeting the Commission adopted its opinion on the *locus standi of the Ombudsman of the Federation of Bosnia and Herzegovina before the Constitutional Court of the Federation of Bosnia and Herzegovina*. The Commission reached the conclusion that according to the current state of the law, the Ombudsman did not have standing before the Constitutional Court. However, there was no reason in principle why the Ombusdman should not be able to introduce cases before the Constitutional Court.

At its 44th Plenary Meeting the Commission was informed that the *Lawon the Ombudsman of the Federation of Bosnia and Herzegovina* prepared by the Working Group of the Venice Commission and the Directorate General of Human Rights of the Council of Europe had been adopted by the House of Representatives. However, some amendments made to the draft were of concern to the Ombudsmen of the Federation and to the OSCE. Following a request from the Ombudsmen of the Federation, the Commission decided to set up a working group on the question. Work is continuing in 2001.

Reform of Human Rights protection mechanisms

A major priority of the Commissions work in Bosnia and Herzegovina over the last few years has been the streamlining of human rights protection mechanisms in the country. In 2000 the Commission focused in this respect on examining in more detail the implications involved in the *merger of the Human Rights Chamber with the Constitutional Court of Bosnia and Herzegovina*. The question which was at the centre of the Venice Commissions work concerns the way in which this merger, or the transfer of competences from the Chamber to the Constitutional Court, could be achieved without reducing the level of human rights protection.

At their meeting in Paris on 24 March 2000 the rapporteurs on this question reached a series of conclusions as to the modalities of the merger, based on the conclusions made by the Working Group. The rapporteurs conclusions dealt in particular with individuals access to remedies after the merger; they concluded that the latter should not take place before the ratification by Bosnia and Herzegovina of the European Convention on Human Rights and should be accomplished through a law and by strengthening the Constitutional Courts competence in the Human Rights field.

Work on the merger is continuing during 2001.

Another of the Commissions priorities in 2000 was its work on the *Lawon the Court of Bosnia and Herzegovina* . The need for the creation of such a body had been identified by the Commission in its opinion, adopted at its 38th Plenary Meeting on 6-7 March 1998, on the need for a judicial institution at the level of the state of Bosnia and Herzegovina (CDL-INF (98) 17). A joint working group of the Commission and the Directorate General of Legal Affairs, with the co-operation of the Office of the High Representative, was established to draft the relevant law, which was presented to the Commission and endorsed by it at its 43rd Plenary Meeting. The Court of Bosnia and Herzegovina was established by decision of the High Representative on 12 November 2000.

- Revision of the Constitution of the Federation of Bosnia and Herzegovina

In the course of the year the Commission received a request from the authorities of the Federation of Bosnia and Herzegovina for assistance in the *revision of the Constitution of the Federation of Bosnia and Herzegovina*. This work had been underway for some time but the recent decisions of the Constitutional Court of Bosnia and Herzegovina in case U 5-98 had made the revision of the Constitution all the more necessary. The chief aim of the revision was to harmonise the Federation Constitution with the Constitution of Bosnia and Herzegovina. The Working Group held its first meeting in Strasbourg on 10-11 July and a second in Venice on 11-12 October with the participation of members of the House of Representatives and of the Constitutional Committee. The basis of the proposed amendments were generally sound and consensus was reached on a number of points. However, a certain number of questions needed further discussion in the Federation of Bosnia and Herzegovina. The Commission will continue its assistance in this process and a further meeting of the Working Group with the representatives of the Federation of Bosnia and Herzegovina is planned for early 2001.

- Constitutional guarantees of freedom of information in Bosnia and Herzegovina

At the proposal of the OSCE Mission in Bosnia and Herzegovina the Commission prepared an opinion on *constitutional guarantees of freedom of information in Bosnia and Herzegovina*. This dealt with two specific questions: first, whether the freedom of information and expression included freedom of access to information, and second, what positive obligations on the state were implied in the right of access to information. It concluded that freedom of expression as mentioned in the enumeration of rights in the Constitution of Bosnia and Herzegovina included freedom of access to information. Furthermore, there was an obligation on the state authorities to facilitate access to information, although there was no clear obligation to provide information on their own motion. This opinion was adopted at the 44th Plenary Meeting and forwarded to the OSCE Mission in Bosnia and Herzegovina.

Finally, following the 45th Plenary Meeting, the Commission received a further request from the Assemblys Committee on Legal Affairs and Human Rights, regarding the implementation of the Partial Decision of the Constitutional Court of Bosnia and Herzegovina on constituent peoples. Work on this matter is continuing in 2001.

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In addition, a Forum on Federalism in Bosnia and Herzegovina was held in Banja Luka, Sarajevo and Mostar on 26-28 July 2000 in collaboration with the German Embassy in Sarajevo.

CO-OPERATION WITH BULGARIA

At the request of the Bulgarian delegation to the Parliamentary Assembly of the Council of Europe, the Commission examined the draft Code of Penal Procedure of Bulgaria. Mr Hamilton pointed out, at the Commissions 42nd Plenary Meeting, that due to the length of the Code the rapporteurs had concentrated on the specific questions raised by the Bulgarian delegation and had not examined whether the Code as a whole complied with the Constitution.

The rapporteurs had concluded that there was no interference with the independence of the judiciary under the draft; the question was simply one of the attribution of competences between the judiciary and the executive. Nor was it contrary to the European Convention

on Human Rights to attribute certain investigative competences to the executive rather than to the judiciary, and indeed this practice existed in many states; in any event, according to the revised texts received by the rapporteurs, the investigative bodies operated under the guidance of the prosecutor, who is a part of the judicial branch of power in the Bulgarian system. Finally, there was no breach of the principle of equality, since all people in similar circumstances would be treated alike.

The Commission was informed that constitutional principles would be respected in the implementation of the Code.

At its 42nd Plenary Meeting, the Commission adopted the opinion on constitutional aspects of certain amendments to the Code of Penal Procedure of Bulgaria, based on comments by Messrs Hamilton and Matscher, and decided to forward it to the Bulgarian delegation to the Parliamentary Assembly of the Council of Europe.

CO-OPERATION WITH CROATIA

At its 42nd Plenary Meeting the Commission held an exchange of views with Mr Jakovcic, Minister for European Integration of Croatia, who described the work of the newly elected Croatian government towards a market economy, democratisation, the consolidation of the state, improved relations with its neighbours and the respect of its international commitments, in the context of its aim to join the European Union and of the commitments made by the Republic of Croatia when it joined the Council of Europe. Mr Jakovcic thanked the Commission for its continued assistance towards the creation of a modern society based on the principles of democracy, tolerance and the rule of law.

Rights of Minorities

At its 43rd Plenary Meeting the Commission adopted the opinion on the Croatian Constitutional Law amending the Constitutional Law of 1991, on the basis of the report prepared by Messrs Matscher and van Dijk and Ms Suchocka. This opinion concluded that the legislation in question lacked rules at the constitutional level to regulate or set out the framework of an effective participation of minorities in public life and rules pertaining to the establishment, functioning and competences of bodies representing minorities at the local and national level. The Commission reiterated its availability to co-operate with the competent Croatian authorities with a view to preparing a new text of the Constitutional Law on the Rights of Minorities as requested by the Parliament of the Republic of Croatia.

The Government of the Republic of Croatia subsequently sought the Commissions opinion on the Draft Constitutional Law on the Rights of Minorities in Croatia. At its 44th Plenary Meeting the Commission adopted the consolidated opinion on the said draft law, based on comments by Messrs Matscher, van Dijk and Delcamp and Ms Suchocka. The Commission found that the new draft law constituted a significant step forward in the protection of national minorities in Croatia. It provided a comprehensive framework for further legislative and regulatory action in the field of protection of minorities. However, several aspects of the draft law needed to be clarified and the Commission stressed, in this respect, that preparatory work on the draft law might take more time than initially expected.

At its 45th Plenary Meeting the Commission held an exchange of views Mr Tonino Picula, Minister of Foreign Affairs of Croatia, on co-operation with this country particularly in the field of national minorities. Mr Picula highlighted the importance of the Council of Europe for Croatia and thanked the Commission for the assistance provided.

Constitutional Law on the Constitutional Court

Finally, at its 45th Plenary Meeting the Commission adopted the consolidated opinion on the Constitutional Law on the Constitutional Court of the Republic of Croatia, based on comments by Ms Janu and Mr Vandernoot. Although noting that some amendments to clarify certain provisions might be recommended, the Rapporteurs nevertheless considered that the text as a whole did not present any major problems in the light of the generally accepted principles and rules in European democratic states that aim to safeguard the supremacy of the Constitution, and the independence and impartiality of the Constitutional Court.

CO-OPERATION WITH GEORGIA

The Commission was informed, at its 44th Plenary Meeting, that Messrs Tuori and Buquicchio had travelled to the Caucasus in June and had met a number of important public figures. Various authorities had requested the assistance of the Commission in finding a solution to the problem of Abkhazia. A preliminary meeting on this topic was planned for 12-13 February 2001, in Sukhumi, with the participation of the OSCE and the United Nations, which were already working on the topic, the Commissioner for Human Rights, Mr Gil-Robles, and several experts of the Commission. It was emphasised that the Commissions role in this context was not political but rather to propose technical solutions to the problems before it. A working group on this topic was set up, composed of Messrs Coppieters, Lopez Guerra, Malinverni and Vogel.

CO-OPERATION WITH KOREA

At its 43rd Plenary Meeting, the Commission held an exchange of views with Mr Kim, Chairman of the Constitutional Court of Korea on future co-operation with the Republic of Korea. This would be of particular interest in the context of Korean unification. Mr Kim informed the Commission that the Korean Constitutional Court had been set up in 1988 since the previous system of administering constitutional justice had not functioned properly. The Court was now able to ensure the effective protection of human rights.

CO-OPERATION WITH LATVIA

Mr Slyom reported, at the 42nd Plenary Meeting, on the results of the seminar that had been held in Riga on 25-26 February 2000 on the draft amendments to the Law on the Constitutional Court, including the introduction of the possibility for individual applications to the Court and a shift from oral to written proceedings. Messrs Lavin, Pinelli, Schwartz and Slyom had participated in the seminar as experts of the Commission.

Many of the Commission's proposals had been followed in the revised version of the draft amendments that had been presented to the rapporteurs at the seminar, for example that decisions should become effective when they were published, and in relation to the time-limits within which the Court had to reach a decision. Although some points of concern remained, the seminar had been very successful overall and the rapporteurs remained ready to co-operate further with the Court in the drafting process should it so request.

Mr Endzin informed the Commission that the Secretariat's memorandum on the results of the seminar had been translated into Latvian and sent together with the draft amendments to the parliament. He expressed the hope that the Commission would continue to provide its support on this issue if needed.

CO-OPERATION WITH MOLDOVA

Constitutional reform

Following the adoption, at the 41st Plenary Meeting of the Commission, of its interim report on constitutional reform in the Republic of Moldova, and the decision of the Moldovan authorities to create a Joint Committee on Constitutional Reform made up of three members of the Constitutional Commission set up by the President and three members of the parliament, the Commission continued to be actively involved in the process of constitutional reform in Moldova in 2000.

The Joint Committee, which had officially invited Mr Malinverni to chair its meetings, held its first meeting in Chisinau on 10-11 March 2000. During this meeting it tackled a number of issues and specifically questions related to the nomination of the Government, its responsibility, referendum and delegation of legislative powers. The meeting resulted in a first draft of a single project of constitutional reform. Two further meetings were held, in Strasbourg on 7-8 April and in Chisinau on 27 May 2000. The result was a concrete proposal for amending the Constitution, which strengthened the role of the executive, in particular the Prime Minister, but not the powers of the President. However, the Commission was informed at its 43rd Plenary Meeting that in addition to this proposal, texts submitted by two groups of 39 and 38 deputies were still pending before the Moldovan Parliament and the President had submitted a further draft which claimed to be inspired by the work of the Joint Committee but was very different in important respects. It was therefore not sure that the text proposed by the Joint Committee would be adopted. In the meantime, a new request had been received from the Monitoring Committee of the Parliamentary Assembly to provide opinions on all the drafts which are currently under consideration by the Moldovan authorities.

At the 44th Plenary Meeting, Mr Solonari informed the Commission that the Parliament had adopted a Constitutional Law introducing reforms having three main pillars: the method of electing the President of Moldova had been changed from a system of universal suffrage to one of election by a special majority of the parliament; the powers of the President had been reduced (although less than the parliaments initial draft law had proposed); and the powers of the government had been increased. The result was greater emphasis in the Constitution on parliamentary democracy. Mr Solonari thanked the Commission for its assistance in the Joint Committee and said that the fact that Moldova had overcome this constitutional crisis without unconstitutional developments was largely thanks to the contribution of the Council of Europe.

The Commissions rapporteurs on this issue, Mr Jowell, Ms Suchocka and Mr Tuori, informed the Commission at its 45th Plenary Meeting that they had, as a consequence of this development, decided to examine the text adopted by the Parliament rather than the Presidents proposal, which the Parliament was now unlikely to adopt. The decision of the Constitutional Court on the proposal of the Joint Committee was still awaited. The assessment of the text adopted by the Parliament was positive in general, although certain points needed clarification. Its main tendency was to reduce the powers of the President. The Prime Minister became head of the executive, leaving the President as Head of State.

The Commission adopted its opinion on constitutional revision in the Republic of Moldova at its 45th Plenary Meeting and decided to forward it to the Parliamentary Assembly.

Transnistria

Mr Tuori informed the Commission at its 42nd Plenary Meeting on the Working Table on the Transnistrian settlement organised by the OSCE in Kyiv on 20-24 March 2000. The participants of the Working Table had split into two groups a Russian-speaking one and an English-speaking one. Because of the lack of time two separate documents were prepared by these groups which reflected a high degree of agreement on the possible features of a common state.

CO-OPERATION WITH SLOVENIA

At the request of the Slovenian authorities, the Commission examined the constitutional amendments concerning parliamentary elections in Slovenia. The Commission was requested to give an opinion on the following question: a referendum had been held, the results of which showed the peoples preference for a majority ballot. However, the parliament subsequently amended the constitutional provisions on parliamentary elections, introducing, at the level of the Constitution, a proportional electoral system. The Commissions task was not to advise as to the best option, but rather to examine the compatibility of the parliaments attitude with European democratic standards and the requirements of the rule of law. The rapporteurs, Messrs Bartole, La Pergola and van Dijk, reported to the Commission at its 44th Plenary Meeting that they considered that no standard or European principle of democracy or of the rule of law had been violated by the parliaments amendment of the Constitution. It was emphasised that the referendum was not an demonstration of sovereign power by the people but rather an expression of the will of people through a means regulated by the Constitution.

The Commission adopted the opinion on the constitutional amendments concerning parliamentary elections in Slovenia based on the considerations of the Rapporteurs at its 44th Plenary Meeting and decided to forward it to the Slovenian authorities.

CO-OPERATION WITH SOUTH AFRICA

Mr Helgesen informed the Commission at its 42nd Plenary Meeting that the Norwegian government had made a contribution of 680,000 FF towards the establishment of a commission of independent experts from the countries of the Southern African Development Community (SADC) to enhance democracy, human rights and good governance in the region.

A conference for judges of constitutional and supreme courts of Southern Africa was organised at Siavonga, Lake Kariba, in Zambia on 12-13 February within the framework of the programme Democracy, from the law book to real life. The theme of the conference was Enhancing constitutionalism and networking among jurisdictions in the SADC region and the topics dealt with were the separation of powers, judicial ethics and complaint systems and the right to a fair trial. At the end of the seminar, participants agreed to co-operate in publishing decisions via the Internet, providing access for all courts to the resources of the libraries of other courts, inviting judges from other courts in the region to attend training courses and organising further seminars like the one in Siavonga.

This conference was the last major event to be organised within the framework of the programme Democracy, from the law book to real life. The Commission thanked once again the Swiss Federal Department of Foreign Affairs for its generous support in funding this programme as well as the Department of Provincial and Local Government for its assistance in implementing the activities. The final report of operations (CDL-INF (2001) 4) details the activities carried out within the framework of the programme.

CO-OPERATION WITH SWITZERLAND (TICINO)

Mr Giorgio Battaglioni, Director of the Department of Justice Division, Ticino Canton, attended the Commissions 44th Plenary meeting and presented the electoral system in the canton of Ticino. The Commission had drawn up a preliminary opinion on this question which had identified the points that could be treated in revising the electoral law and a series of more precise questions had been put to the Council of State in order to assist in the preparation of the final opinion.

CO-OPERATION WITH UKRAINE

Both the Parliamentary Assembly and the Secretary General requested the Commission to prepare an opinion on the constitutional referendum in Ukraine. This referendum took place on 16 April 2000 on the basis of a decree of the President of Ukraine following a popular initiative and had as its aim to increase political stability by weakening the role of the Ukrainian parliament. The opinion on behalf of the rapporteurs, indicated that there were grave doubts as to both the constitutionality and the admissibility of the referendum as a whole, as proposed in the presidential decree on the announcement of an All-Ukraine referendum on the peoples initiative. However, the Constitutional Court had declared two of the six referendum questions unconstitutional and had underlined that any constitutional amendments approved by the referendum would still need to be adopted in accordance with the constitutional provisions on amending the Constitution of Ukraine. Some of the rapporteurs major concerns had been met by this decision.

At its 42nd Plenary Meeting, the Commission adopted the opinion on the constitutional referendum in Ukraine, taking into account this decision of the Constitutional Court. The opinion was forwarded to the Parliamentary Assembly and the Secretary General.

Following the holding of the referendum in Ukraine, in which all four questions received an overwhelming majority of yes votes, both the President and a group of 152 deputies submitted proposals to the Parliament for the implementation of the results of the referendum. The Monitoring Committee of the Parliamentary Assembly subsequently requested the Commission to give a draft opinion on both draft laws, in particular with respect to the parliaments freedom to decide, the compatibility of the proposed amendments with Articles 157 and 158 of the Constitution, their conformity with international standards and their consequences for democracy and the rule of law in Ukraine.

The Commission indicated in its opinion that there were certain points of concern: for instance, the nature of the proposed second chamber of parliament was still not clearly defined; further, it was essential that provisions guaranteeing the protection of parliamentarians against arbitrary arrest or detention have their place in the Constitution rather than in an ordinary law; and finally, the proposed ground of dissolution of the parliament was ambiguous and should be redrafted. The Commission proposed certain amendments to the draft presented by the President of Ukraine and underlined that, should it be approved by the Verkhovna Rada without taking them into account, this might raise serious problems as regards democracy, rule of law and the balance of powers.

At its 44th Plenary Meeting, the Commission adopted the opinion on implementation of the constitutional referendum and decided to forward it to the Monitoring Committee of the Parliamentary Assembly.

CO-OPERATION WITH THE FEDERAL REPUBLIC OF YUGOSLAVIA

At the Commissions 45th Plenary Meeting, an exchange of views was held with Mr Dimitrievic, Director of the Human Rights Centre of Belgrade. He noted that the situation in Yugoslavia was still precarious but he hoped that the further developments in his country would lead towards democracy and the protection of human rights. Much assistance would be needed from the Council of Europe, the Venice Commission and OSCE in this respect. Both the 1990 Serb and the 1992 Yugoslav constitutions had been adopted in a non-democratic manner. However, the introduction of direct presidential elections in the Federation had in the end unseated Mr Milosevic. The persistence of these constitutions was tolerated but they needed to be reformed in order to bring them into line with international human rights instruments. He also expressed the hope that Yugoslavia would give up its untenable claim to continuity from the old state. The major open questions were whether the Federation with Montenegro was to continue to exist and whether Kosovo would remain a part of Serbia. One of the most important issues in the new constitution would be the protection of minorities, given that only two-thirds of the Yugoslav population were of Serb or Montenegrin origin. Minorities would have to be brought back into political life. The definition of Serbia as one single constituency in the electoral code to be applied in the elections on 23 December would make it very difficult for minorities to get any seats in Parliament.

The Commission took note of this information and declared itself ready to co-operate with Yugoslavia on all questions which fall within its competence. Sustained co-operation with Yugoslavia should already be foreseen for 2001.

OTHER CONSTITUTIONAL ISSUES

In the year 2000 the Commission held regular exchanges of views with its members on constitutional issues of current interest in their countries, although they had not formed the object of the Commissions work. The Commission welcomed the opportunity to enrich its debates in this manner.

- France

In the year 2000 a number of constitutional questions had received a great deal of attention in France. Mr Robert presented to the Commission at its 44th Plenary Meeting the issues raised in political discussions concerning the reduction of the term of office of the President from seven years to five, the question of the status of Corsica and the question of presidential immunity. The Commission welcomed this presentation of constitutional issues affecting a western European democracy.

- Kyrgyzstan

The Commission held an exchange of views with Mr Kosakov at its 45th Plenary Meeting. Mr. Kosakov informed the Commission on the results of the recent presidential elections, which were the first in which candidates were required to have a certain level of knowledge of the Kyrgyz language. This had prevented the current mayor of Bishkek from running as a candidate because he had refused to take the language examination. Serious cases of fraud during the elections had been reported. President Akaev had acknowledged that the criticism expressed by the electoral observers should be used to improve future elections.

- The former Yugoslav Republic of Macedonia

At the 44th Plenary Meeting of the Commission, Mr Spirovski related the events surrounding the recent local elections in the former Yugoslav Republic of Macedonia. These had been the object of irregularities in some areas and, at some polling stations, incidents of excessive violence. OSCE monitors had suggested that the law on local elections should be amended, and there were indications that initiatives to amend the law would be forthcoming. However, Mr Spirovski recalled the necessity stressed at the Brdo conference in November 1999 not only of having good laws, but also for a certain political culture to exist, in order that elections be not only legal but also fair and democratic.

On a more positive note, a package of important laws on the government, the organisation and functioning of the government and administration and on the public service had recently been adopted. Despite some concerns in relation to the separation of powers, an important improvement to the law on the public service was the fact that a system of merit had now been introduced for recruitment.

- United Kingdom

At its 45th Plenary Meeting, the Commission held an exchange of views with Mr Jowell about the process of devolution in Scotland and to a lesser degree in Wales. The United Kingdom had so far been a very centralised country, and whereas there had been elected local councils, no regional assemblies had existed. The model of devolution was asymmetric: Scotland had been attributed more powers than Wales, while England had remained under direct central rule. Judicial means of resolving conflicts of competence between the centre and the entities existed, but the organisation of the judiciary had remained a central matter. Powers were defined as being reserved to the centre, fully devolved or shared. In the future, even England might seek a devolution of powers. The devolution was a unilateral act that could at least in theory be reversed by the central authorities. No corresponding right to self-rule existed.

- United States of America

Mr Rubenfeld informed the Commission at its 45th Plenary Meeting about the recent presidential elections in the United States. This was the first time that the result of a presidential has been decided by such a small number of votes. Legislation on presidential elections was entirely a state matter. The US Constitution does not require that the Presdient be elected by direct vote, which is the case for the election of members of Congress, but rather by an Electoral College, whose membership is decided by each State. Legislation on how the electors are chosen is entirely a matter for the States to decide. All States had in fact adopted laws based on the prinicpal of democracy and majority voting. Given that the small states were favoured within the Electoral College and that their votes were required for any Constitutional amendment, it was not likely that structural changes to the electoral system would be made. It was, however, probable that technical aspects of vote counting would be addressed.

SITUATION IN KOSOVO

The Commission continued to keep a close eye on developments in Kosovo over the year 2000. Two main areas of activity are of interest to the Commission: these are local and municipal elections, and the possibility that basic texts concering the organisation and structure of Institutions in Kosovo may be drafted.

With regard to local and municipal elections, the Commission along with the Congress of Local and Regional Authorities of Europe maintained close contact with the authorities in Kosovo. In particular, the Working Group on Kosovo held a meeting in Paris in February with members of the Congress of Local and Regional Authorities of Europe as well as representatives of the OSCE Mission in Kosovo and UNMIK to discuss a draft regulation on municipalities. At this meeting the draft was still at a fairly rudimentary stage;

however, Mr Markert travelled to Kosovo with a delegation from the Congress of Local and Regional Authorities of Europe in early March in order to work further on the drafting of the regulation. In July 2000, UNMIK issued its regulation on municipal elections in Kosovo and in August its regulation on self-government of municipalities in Kosovo.

In addition the Commission welcomed the news that in June, UNMIK had also issued a regulation on the establishment of the Ombudsman institution in Kosovo, based on the draft prepared in the joint working group of the Commission, the Directorate General of Human Rights and the OSCE Mission in Kosovo.

As concerned wider institutional issues, especially the question of the drafting of an interim constitution or series of basic regulations, Mr Markert informed the Commission at its 43rd Plenary Meeting that he had taken part in a seminar on 16 April 2000 in Prizren on a contract for community protection and self-government. During this seminar the UNMIK leadership had for the first time discussed the constitutional problems of Kosovo during the interim period with the participation of outside experts who had been involved in the Rambouillet conference. In July, Mr Markert and Mr Russell travelled to Pristina at the invitation of UNMIK to discuss with Mr Kouchner possible ways forward for Kosovo. Mr Kouchner was keen to allow the local population to participate in directing the future of Kosovo as far as UN Security Council Resolution 1244 would allow, and to this end proposed drawing up a Pact with the people of Kosovo designing Kosovo-wide institutions. The Secretariat continued to follow developments closely in the wake of events in the Federal Republic of Yugoslavia in the latter half of the year, as these would no doubt affect the future of Kosovo.

STABILITY PACT FOR SOUTH-EASTERN EUROPE

The proposal for a UniDem campus in Trieste on legal training for the civil service was proposed during 2000 within the framework of the Stability Pact for South-Eastern Europe. This campus will apply to legal civil servants from South Eastern European States. The project has been approved by the Council of Europe, Table I of the Stability Pact and the Conference of Donators. Financial and/or material support has been promised by the Italian Ministry of Foreign Affairs, the Region Friuli-Venezia Giulia, Municipality of Trieste, Trieste University and the Foundation of the Savings Bank of Trieste.

A general launch seminar was organised in Trieste on 11-12 December 2000. The Seminars aim was to identify the needs and interests of beneficiary States. Several seminars are scheduled to take place within the framework of this campus in 2001.

In addition, a Conference on The Ombudsman Institution in Europe and the challenge of consolidating democracy was held in Athens on 12-13 May 2000 within the framework of the Stability Pact.

LIST OF OPINIONS ADOPTED

The text of these opinions appears in Volume II.

AZERBAIJAN

- Comments on the Law on Parliamentary Elections of the Republic of Azerbaijan (CDL-INF (2000) 17), adopted by the Commission at its 44th Plenary Meeting (Venice, 13-14 October 2000)

BOSNIA AND HERZEGOVINA

- Conclusions on the merger of the the Human Rights Chamber and the Constitutional Court of Bosnia and Herzegovina (CDL-INF (2000) 8), adopted by the Commission at its 42nd Plenary Meeting (Venice, 31 March-1 April 2000);

- Opinion on *locus standi* of the Ombudsmen of the Federation of Bosnia and Herzegovina before the Constitutional Court of the Federation of Bosnia and Herzegovina, based on the comments by Mr Franz Matscher (CDL-INF (2000) 9), adopted by the Commission at its 43rd Plenary Meeting (Venice, 16 June 2000);

- Consolidated opinion on freedom of expression and freedom of access to information as guaranteed by the Constitution of Bosnia and Herzegovina (CDL-INF (2000) 15), adopted by the Commission at its 44th Plenary Meeting (Venice, 13-14 October 2000)

BULGARIA

- Opinion on constitutional aspects of certain amendments to the code of penal procedure of Bulgaria, based on comments by Messrs James Hamilton and Franz Matscher, (CDL-INF (2000) 6), adopted by the Commission at its 42nd Plenary Meeting (Venice, 31 March-1 April 2000)

CROATIA

- Opinion on the Croatian Constitutional Law amending the Constitutional Law of 1991, on the basis of the report prepared by Messrs Matscher, van Dijk and Ms Suchocka, (CDL-INF (2000) 10), adopted by the Commission at its 43rd Plenary Meeting (Venice, 16 June 2000);

- Consolidated opinion on the Constitutional Law on the Constitutional Court of the Republic of Croatia, based on comments by Ms Janu and Mr Vandernoot (CDL-INF (2001) 2) adopted by the Commission at its 45th Plenary Meeting (Venice, 15-16 December 2000)

MOLDOVA

- Final report on co-operation between the Venice Commission and the Republic of Moldova on Constitutional Reform (CDL-INF (2001) 3) adopted by the Commission at its 45th Plenary Meeting (Venice, 15-16 December 2000)

SLOVENIA

- Opinion on the Constitutional amendments concerning legislative elections in Slovenia (CDL-INF (2000) 13) based on the comments of Messrs La Pergola, van Dijk and Bartole, adopted by the Commission at its 44th Plenary Meeting (Venice, 13-14 October 2000)

UKRAINE

- Opinion on Constitutional Referendum in Ukraine, based on comments by Messrs Bartole, Batliner, Malinverni, Steinberger and Svoboda, (CDL-INF (2000) 11), adopted by the Commission at its 42nd Plenary Meeting (Venice, 31 March-1 April 2000);

- Opinion on the implementation of Constitutional Referendum in Ukraine, based on comments by Messrs Bartole, Batliner and

II. Co-operation between the Commission and the statutory organs of the Council of Europe, the European Union and other international organisations

- Co-operation with the Committee of Ministers

Representatives from the Committee of Ministers participated in all the Commissions plenary meetings during 2000.

At its 42nd Plenary Meeting the Commission held an exchange of views with Mr Pietro Ercole Ago, Permanent Representative of Italy to the Council of Europe, who confirmed the support of the Committee of Ministers for the work of the Venice Commission, referring to its activities not only within the Council of Europe member States but also further afield.

Mr Ago outlined the Italian governments programme for its forthcoming Presidency of the Committee of Ministers. These included plans to incorporate the protocols to the European Convention on Human Rights into the Convention itself, enhance protection of minorities by establishing a chamber of the European Court of Human Rights to give opinions on minority issues, promote the accession of Armenia, Azerbaijan and Bosnia and Herzegovina to the Council of Europe during the Italian presidency, enlarge the scope of Council of Europe activities somewhat towards Central Asia and introduce institutionalised summits of the Council of Europe every 5 years while at the same time reducing the sessions of the Committee of Ministers to one per year and introducing a new system for the rotating presidency of the Committee of Ministers. He further highlighted the Italian government's keenness to participate actively in the celebration of the tenth anniversary of the Commission as well as its interest in seeing the Commission prepare a model for the solution of ethnic conflicts, and indicated the support of the Italian government for the project of establishing a UniDem campus in Trieste.

The 42nd Plenary Meeting was also attended by Mr Paulo Castilho, Permanent Representative of Portugal to the Council of Europe, who referred to the universal principles of democracy and human rights and stressed the importance of the law as an instrument allowing certainty, stability and security in these values to be achieved. He stated that the European Union, of which Portugal currently held the Presidency, should extend its links with countries not only of central and eastern Europe but also to countries with which it had traditional links, for example in Africa and South America. He emphasised that the Commission had an important role to play in helping the European Union to maintain a dialogue with such regions on matters of law in the work towards ensuring that common values and principles be guaranteed.

At the 43rd Plenary Meeting, Mr Jiří Mucha, Permanent Representative of the Czech Republic to the Council of Europe, presented the proposal to create a general judicial authority of the Council of Europe. This proposal of the Czech authorities was supported by Parliamentary Assembly Recommendation 1458, based on a report by Mr Svoboda, member of both the Parliamentary Assembly and the Venice Commission. This question was also discussed with Mr Pietro Ercole Ago and with Ms Milena Smit, charg daffaires a.i. of Slovenia to the Council of Europe who attended the Commissions 45th Plenary Meeting.

At its 44th Plenary Meeting the Commission held an exchange of views with Mr Hendrik Wagenmakers, Permanent Representative of the Netherlands to the Council of Europe and with Mr Guillermo Kirkpatrick Permanent Representative of Spain to the Council of Europe.

Mr Wagenmakers reaffirmed the Committee of Ministers appreciation of and interest in the Venice Commissions work, referring to its activities not only within the Council of Europe member States but also further afield, as evidenced by its work on the drafting of constitutions and other constitutional questions in newer member States of the Council of Europe and candidate countries and its collaboration with the Republic of South Africa.

Mr Kirkpatrick shared these views and pointed to the ever-widening circle of members, associate members and observers of the Venice Commission as an indication of the high level of interest generated by its work. He referred to a possible programme of co-operation of the Commission with Latin American States in conjunction with certain universities.

At the Commissions 45th Plenary Meeting Mr Pietro Ercole Ago presented the results of the Italian Presidency of the Committee of Ministers which had come to an end in November. One of the main aims had been the growth of the organisations visibility, which had been achieved in particular by visiting member and candidate States, sending experts to Chechnya and, opening an office in Montenegro. In the human rights field, Protocol N 12 had been adopted, a draft Protocol on the rights of detained people had been presented, and the principle of a Europe without the death penalty approved. The process which could lead to the accession of Yugoslavia to the Council of Europe had been started. The Venice Commissions importance was underlined, in particular on the occasion of its 10th anniversary and in the study on a general legal framework to facilitate the solution of ethno-political conflicts in Europe

The reports on the general legal framework facilitating the settlement of ethno-political conflicts in Europe and on the creation of a general judicial authority in the Council of Europe, were drawn up at the request of the Committee of Ministers.

- Co-operation with the Parliamentary Assembly of the Council of Europe

The Commission continued its close co-operation with the Parliamentary Assembly during 2000. Representatives from the Assembly were present at all the Commissions Plenary Meetings.

Through the regular exchanges of views held with these representatives, the Commission was kept informed of the major issues on the Assemblys agenda throughout the year. These included, notably, the work on a 12th Protocol to the European Convention on Human Rights concerning a general prohibition on discrimination, the drafting of the Charter of Fundamental Human Rights of the European Union, the creation of a general judicial authority of the Council of Europe and the execution of judgments of the European Court of Human Rights (matters on which the Committee of Ministers had already sought the Venice Commissions opinion), reports on the accession of the Federal Republic of Yugoslavia to the Council of Europe and on rights of minorities, as well as the situation in Chechnya.

Once again a significant proportion of the Commissions work has been based on requests from the Assembly. These concerned in particular:

the Croatian Constitutional Law amending the Constitutional Law of 1991 (with respect to the rights of minorities);

opinions on all drafts for constitutional reform that were being considered by the Constitutional Court of Moldova;

the constitutional referendum in Ukraine;

- the implementation of the constitutional referendum in Ukraine.

Finally, following the 45th Plenary Meeting, the Commission received a further request from the Assemblys Committee on Legal Affairs and Human Rights, regarding the implementation of the Partial Decision of the Constitutional Court of Bosnia and Herzegovina on

constituent peoples.

- Co-operation with other bodies of the Council of Europe

- Congress of Local and Regional authorities of Europe

The Commission continued its close co-operation with the CLRAE in particular concerning Bosnia and Herzegovina, Croatia, Moldova and the situation in Kosovo, as well as the study on the financing of political parties. A Representative of the Congress participated in all the Commissions Plenary Meetings during 2000.

- Co-operation with the European Union and other International organisations

A Joint Programme between the European Commission and the Venice Commission entitled "Strengthening democracy and constitutional development in central and eastern Europe and CIS countries" came into force on 1 January 2000 for a period of 2 years. The activities provided for in the programme include exchanges of views to provide assistance to states in drafting and implementing constitutional provisions and legislation on democratic institutions, seminars with recently established constitutional courts, UniDem ("Universities for Democracy") seminars on topics of current constitutional importance and the publication of two special editions of the Bulletin on Constitutional Case-Law. The programme also facilitates the participation of experts from central and eastern Europe and CIS countries in exchanges of views on constitutional issues at plenary meetings of the Venice Commission and provides for the participation of a representative of the European Commission to identify activities and priorities jointly with the Venice Commission.

The European Commission took an active part in the work of the Venice Commission and was represented at most of the Plenary Meetings in 2000.

The Commission also co-operated with the OSCE and ODIHR. Representatives of these organisations participated in many meetings, seminars and Conferences organised by the Commission during 2000.

III. Studies of the Venice Commission

1. General Judicial authority

At its 707th meeting (26 April 2000), the Committee of Ministers forwarded Recommendation 1458 (2000) entitled Towards a uniform interpretation of Council of Europe conventions: creation of a general judicial authority to the Venice Commission for opinion. This Recommendation was proposed by the Czech authorities and based on a report by Mr Svoboda, member of both the Parliamentary Assembly and the Venice Commission.

Already at the Commissions 42nd Plenary Meeting Mr Svoboda had commented that the Parliamentary Assembly would be debating at its next part-session the possibility of creating a body that would deliver legally binding opinions on the interpretation of Council of Europe conventions and indicated that the intention at this stage was to extend the jurisdiction of the European Court of Human Rights to include this competence.

At the Commissions 43rd Plenary Meeting Mr Jiří Mucha, Permanent Representative of the Czech Republic to the Council of Europe, presented the proposal to create a general judicial authority of the Council of Europe.

A number of arguments showed the need for such a body:

- the legal dimension was fundamental for the work of the Council of Europe as opposed to that of other organisations. Without a judicial body to deal with the legal texts of the Council, they were in danger of being reduced to mere international policy.

- the Council of Europe of today was very different from the club of Western prosperous democracies setting up the organisation in 1949. It was now more heterogeneous and due to the membership of many new democracies the need for a judicial body was felt much more strongly.

- the vast system of more than 170 treaties and agreements needed a judicial body to ensure transparency and cohesion and to solve problems of interpretation and implementation.

- the structure of the Council of Europe should reflect the principle of division into the legislative, executive and judicial branches.

While the details of such a body were open to discussion, the Parliamentary Assembly envisaged that it should have the power to adopt both binding and non-binding opinions on the interpretation of Council of Europe conventions at the request of a Council of Europe organ or one or more member States and to make preliminary rulings at the request of a court in a member State.

In the ensuing discussion different opinions on the need for such a body were voiced. Some speakers underlined the possibility for the Venice Commission to give non-binding opinions. It seemed premature to adopt an opinion at this meeting.

At the 45th Plenary Meeting the Commission considered a draft report prepared by Messrs Matscher, Svoboda, van Dijk and Ms Suchocka.

Mr Matscher stressed that the idea of the creation of a general judicial authority, which had already been raised in 1951, had been launched again during the second Summit of Council of Europe Heads of State and Government in 1997, then taken up by the Parliamentary Assembly which had drawn up Recommendation 1458 (2000). The Recommendation had been forwarded to the Committee of Ministers, which had given it for opinion to the CAHDI and to the Venice Commission. The CAHDIs opinion is rather negative, in the sense that it does not foresee, for the moment, the creation of a general judicial authority.

The Commission approved the report on the creation of a general judicial authority which concludes as follows :

When discussing a general judicial authority, the prime consideration should be the need to have machinery for interpreting Council of Europe conventions. A choice then has to be made between the judicial and the non-judicial approach. The *judicial* approach makes it possible to adopt binding decisions, but could only be applied after treaties have been adopted or amended. The role of this authority - whether it is the European Court of Human Rights or a new body - will depend on the conventions in respect of which it has jurisdiction and on the bodies empowered to refer cases to it. If a general judicial authority were set up, it would be advisable to assign it the power, at least in the long term, to interpret most of the Council of Europes conventions. The creation of a judicial authority seems to be the best way of achieving in the long term the aim pursued, namely the binding interpretation of conventions.

The use of the Venice Commission as a *non-judicial* interpretative body is possible however within its current remit without having to undertake conventional amendments. A limited group of members appointed by the Commission under conditions yet to be defined could undertake the task of interpretation of conventions.

The Commission forwarded this report to the Committee of Ministers[1].

2. A general legal framework for the settlement of ethno-political conflicts in Europe

At its 44th Plenary Meeting the Commission adopted the report on a general legal framework for the settlement of ethno-political conflicts in Europe.

At the 713th meeting of the Ministers' Deputies (7 June 2000), the Chair indicated his intention of inviting the Venice Commission, at its meeting on 16 June 2000, to consider the possibility of implementing one of the key proposals in the action programme of the Italian Chairmanship, i.e. the drafting of a general legal reference framework to facilitate the settlement of ethno-political conflicts in Europe.

At its 43rd meeting, the Commission approved a document concerning the drafting of a general legal reference framework to facilitate the settlement of ethno-political conflicts in Europe, which was submitted to the Ministers' Deputies at their 718th meeting (19 July 2000). The Deputies took note that the Venice Commission was ready to undertake an indicative study along the lines set out in document CM (2000) 99.

There are a number of ethno-political conflicts in Europe in which a settlement has yet to be reached. A legal reference framework, such as that defined in the report, aims to identify the issues that may come to the fore in the search for solutions to such conflicts. As can be seen from its title, the report sets out to define a general legal reference framework, not to propose solutions to be adopted in particular cases. It therefore deals with the general issues that arise not only in connection with specific ethno-political conflicts, such as those mentioned in document CM (2000) 99, but also in the far broader context of relations between different levels of public authority. Specific studies of particular cases may be carried out as part of other work.

In the context of a general approach it is indeed not possible to draw a distinction between "conflictual" and "non-conflictual" situations, since the term conflict can be understood in different ways, involving greater or lesser degrees of violence. It is moreover also difficult to distinguish ethno-political conflicts from other kinds of conflicts.

The first part of the document presents the general context of the study. Reference is first made to the principles of the permanence of states and territorial integrity. The main forms of distribution of powers between various tiers of authority and the principles relating to the settlement of disputes under international law are briefly recalled.

The second part of the document broaches the issues common to all systems involving a number of tiers of authority: distribution of powers, decision-making processes and settlement of disputes between the central state and its entities. The scope for international guarantees is also discussed.

This study examines the solutions as provided by internal constitutional law. Reference is, however, briefly made to the principles of international law applicable to conflict resolution.

The report concludes :

The detailed solutions to the various questions which arise when powers are distributed among different tiers of state authority are specific to each individual case. The questions, however, are virtually the same. The report has shown that statutes of autonomy, regionalism, federalism, and even confederation systems, not forgetting rules on the protection of minorities, can be reconciled with respect for territorial integrity. Where a number of tiers of authority co-exist it is necessary to determine the distribution of powers - to decide, firstly, the basis for that distribution and where residual power will lie and, secondly, the different types of powers (exclusive, concurrent, power to pass framework laws, etc.), or again whether distribution of powers will be symmetrical. Another question is whether the entities should participate - directly or indirectly (for instance through a second chamber of parliament) - in the decision-making process of the central state. Here too, should a symmetrical or asymmetrical approach be taken? Yet another important point is the means of settling disputes between the central state and the entities (in principle judicial or arbitral in nature). Lastly, among the solutions to situations of conflict there is room for international guarantees.

3. Constitutional issues raised by the ratification of the Rome statute of the international criminal court

At its 43rd Plenary meeting the Venice Commission had decided to study the constitutional issues raised by the ratification of the Rome Statute of the International Criminal Court. A working group composed of Messrrs Robert, zbudun, Hamilton, Van Dijk, Luchaire, Ms Livada, Err and Mr Vogel prepared a draft report at a meeting held in Paris on 1 December 2000.

At its 45th Plenary Meeting Mr Robert presented the study on Constitutional issues raised by the ratification of the Rome Statute of the International Criminal Court. The main areas of possible constitutional conflict were the immunity of the head of state, extradition of nationals, sentencing and pardon and the powers of the Court's prosecutor. It was pointed out that this study was not to be seen as a recommendation by the Venice Commission on how constitutional problems could be avoided but rather as a compilation of different ideas advanced on the subject. The study was intended to serve rather as a practical tool outlining different options for states which were faced with problems in ratifying the Statute. In order to overcome constitutional problems two major avenues were available. The solution France and Luxembourg had chosen was to adopt a single constitutional amendment allowing for the ratification of the Statute. Another way was to identify each issue of conflict and to amend all constitutional provisions which were in contradiction with the Statute.

At its 45th Plenary Meeting the Commission adopted the report on constitutional issues raised by the ratification of the Rome statute of the international criminal court.

4. Financing of political parties

At the 43rd Plenary Meeting Mr Robert presented his report on the financing of political parties The report, which was drawn up on the basis of replies to a questionnaire, takes into account replies from over thirty countries. The study is divided into two parts. The first part, devoted to general observations, shows that the financing of political parties is a relatively recent phenomenon and that in the majority of states, there is an absence of in-depth legislation on the subject. The second part contains guiding principles, based on a number of questions : should parties be aided solely during election periods, or on a more regular basis? What is the nature of funds which may be granted to parties or that they may raise themselves? What are the limits on financing by private funds? How are the financing and its use controlled?

The report clearly cannot set out to describe in full all the solutions found to the complex problems posed by the highly sensitive issue of party funding, which has numerous political ramifications. It gives therefore a synopsis of the national report in an attempt to explain the major general principles - if any - adopted by the different countries, to highlight the implications of applying those principles, and to bring to the fore the similarities, or conversely the main differences, between solutions, with the aim of possibly suggesting improvements that might be made, here or there, to ensure that the functioning of political parties, which are absolutely essential to all democracies, give rise to fewer difficulties, and possibly even fewer abuses, in future.

The report concludes :

It can be seen from an examination of the various systems established by individual states to organise political party financing in the best possible way that, although the chosen techniques often differ considerably, the underlying concerns are the same everywhere and the objectives are fairly similar.

The constant aim is to meet the requirements inherent in the inevitable cost of democracy. If the democratic process is to function well, it is necessary both to limit, as far as possible, and reduce expenditure by political parties and at the same time to safeguard the principle of equality between parties. This principle often appears to be jeopardised, as mainstream parties, which obtain the highest scores and the largest number of seats, are therefore allocated considerable public subsidies.

It is also necessary to ensure greater transparency in the reporting requirements imposed on parties and a more thorough supervision of the uses made of the funds that they receive.

In the case of funds from private sources there is doubtless also a need for stricter regulation in terms of the fixing of limits and more severe penalties for those who break the law.

On the basis of this report the Commission decided to draw up guidelines for the financing of political parties. A Working Group composed of Ms Err, Messrs Luchaire, Robert, Vogel and zbudun, examined the guidelines on the financing of political parties at a meeting held in Paris on 30 November 2000. The guidelines deal with both public and private financing and electoral campaigns, controls and sanctions.

Work on this question is continuing in 2001 and the guidelines on the financing of political parties should be adopted by the Commission at its Plenary Meeting in March 2001.

5. Execution of decisions of constitutional courts and of the European court of Human Rights

At its meeting in December 1999 the Commission had decided to carry out a study on the execution of constitutional court decisions. A draft questionnaire concentrating on the practices that facilitated or obstructed the execution of constitutional court decisions was drawn up.

With regard to the execution of judgments of the European Court of Human Rights, Mr Van Dijk had, at the Assembly's request, prepared comments on the preliminary opinion of Mr Jurgens, the rapporteur of the Parliamentary Assembly. Mr Jurgens had examined the roles of each of the organs of the Council of Europe and the ways in which they might be better used to ensure the effective implementation of judgments of the Court and of the European Convention on Human Rights itself, and had emphasised the part that might be played by individual members of the Parliamentary Assembly within their own national parliaments. Mr Van Dijk suggested that a comparative study be undertaken of the legislation and legal practice of the member states of the Council of Europe in the areas where obstacles occurred in order to assist domestic authorities in finding solutions. The Commission's expertise could be useful in this respect.

At its 42nd Plenary Meeting the Commission adopted the comments on the preliminary report of the Parliamentary Assembly on the execution of judgments of the Court and monitoring of the case-law of the European Court and Commission of Human Rights, forwarded them to the Parliamentary Assembly and decided to include its further work on the issue in its study on the execution of constitutional court decisions.

The Commissions work on this question continued throughout 2000; a summary report on Judgments of constitutional courts and the execution thereof was drawn up based on the replies to the questionnaire as was a synoptic table of these replies.

The main points of the report are as follows :

At the dawn of the twenty-first century, constitutional courts have become one of the pillars of the primacy of law and, more generally, of constitutional law. Even though their role and jurisdiction differ from State to State, since they were instituted in very different historical and political circumstances, it is essential that their decisions should be carried out effectively. Accordingly, the main aim of the study is to consider the effects of judgments of constitutional courts and their execution. These questions, however, cannot be divorced from an examination of the type and purpose of the review of constitutionality, which is also considered.

Consequently, the study is not confined to issues relating to the execution of constitutional decisions, but sets out to provide a general description of the functioning of constitutional courts of States taking part in the proceedings of the Venice Commission.

The report concludes that as might have been expected, the diversity of forms of constitutional court results in a diversity in the effects of their decisions and in the manner of executing them.

For example, preventive or even abstract review will give rise to fewer difficulties of execution than review carried out in individual cases where such review nevertheless results in judgments of general scope. The sanction whereby the law does not enter into force or is invalidated is easier to execute than a sanction requiring an institution to revise the measures which it has adopted or, worse, requiring the administration to alter a long-established practice. Political or financial considerations may also constitute major impediments to the execution of judgments.

Obviously, this does not signify that only judgments which are easy to execute should be given, as such reasoning could have the perverse effect of reducing the compass of the review of constitutionality. Neither does this mean that courts should not take subtle decisions, leaving a degree of leeway to the legislator, rather than unrealistically imposing substantial expenditure or creating a legislative vacuum. On the other hand, procedural rules must be framed with sufficient precision so as to avoid leaving the way open to non-execution or to doubts as to the effects of a judgment; legislation must provide for institutions empowered to execute judgments and, where necessary, to act in the event of non-execution. It is fortunate in this regard that, despite their imperfections, the systems currently applied give rise to only a limited number of cases of non-execution.

Work on this question is continuing in 2001 and the summary report should be adopted by the Commission at its Plenary Meeting in March 2001.

LIST OF REPORTS AND STUDIES ADOPTED

The text of these reports and studies appears in Volume II.

- A general legal reference framework to facilitate the settlement of ethno-political conflicts in Europe (CDL-INF (2000) 16) adopted by the Commission at its 44th Plenary Meeting (Venice, 13-14 October 2000);

- Report on constitutional issues raised by the ratification of the Rome Statute of the International Criminal Court (CDL-INF (2001) 1) adopted by the Commission at its 45th Plenary Meeting (15-16 December 2000);

- Report on the creation of a general judicial authority the Council of Europe (CDL-INF (2001) 5) adopted by the Commission at its 45th Plenary Meeting (Venice, 15-16 December 2000)

IV. Centre on Constitutional Justice

The most striking development in the field of constitutional justice during the year 2000, was the strong demand for co-operation from regional bodies of constitutional courts and equivalent bodies. Requests came in particular from the Conference of the European Constitutional Courts, the Association of Constitutional Courts using the French Language and constitutional and supreme courts in the Southern African region. It is hoped that regional co-operation will relieve the pressure by individual courts on the Commission for direct co-operation, which could overstretch the resources of the Secretariat.

In addition to the programme of seminars in co-operation with constitutional courts, mainly with more recently established constitutional courts, the Commission continued the regular publication of the *Bulletin on Constitutional Case-Law* and the database CODICES. During the year 2000 the latter grew considerably in size and even more importantly concerning its functionalities.

Co-operation with the Conference of the European Constitutional Courts

The Belgian Presidency of the Conference of the European Constitutional Courts requested the Commission to assist it in the organisation of the 12th Conference with providing secretarial services and with the compilation of resources from the Centre on Constitutional Justice on constitutional courts applying for membership with the Conference. Furthermore, the Presidency asked the Commission to prepare a special issue of the Bulletin on Constitutional Case-Law on the topic of the next Conference: "The relations between the constitutional courts and the other national courts, including the interference in this area of the action of the European courts", decided upon at a preparatory meeting in Brussels in October 2000.

Co-operation with the Association of Constitutional Courts using the French Language

During the year 2000, the Association of Constitutional Courts using the French Language (ACCPUF) requested assistance from the Secretariat for the organisation of sub-regional seminars for the training of the liaison officers of the Association. The goal of these seminars was to acquaint the liaison officers in the use of the Systematic Thesaurus to which ACCPUF is entitled in accordance with the co-operation agreement between the Commission and ACCPUF signed in Vaduz on 30 April 1999. The exchange of publications of both bodies in favour of participating courts started as provided for by this agreement.

In addition, ACCPUF presented a request to the Commission to include the case-law of the courts of the association into the database CODICES in order to enable research in a wider geographical area. The joint database is to enrich the resources available for all participating courts. Preliminary feasibility studies have yielded positive results. For the establishment of such a co-operation an amendment to the co-operation agreement would be required.

Co-operation with constitutional courts and equivalent bodies in the Southern African Region

Within the framework of the programme Democracy, from the law book to real life, funded by Switzerland, the Venice Commission and the Supreme Court of Zambia organised a conference on the separation of powers for constitutional/supreme court judges in Southern Africa. During this conference the courts constituted themselves as the "Southern African Judge's Commission" and requested advice and, possibly later, assistance from the Venice Commission for the exchange of case-law following the model of the *Bulletin on Constitutional Case Law* and the database CODICES of the Venice Commission. Such co-operation will necessarily depend on the availability of sufficient specific funding for this purpose.

Bulletin on Constitutional Case-Law

During the year 2000 three regular issues of the *Bulletin on Constitutional Case-Law* were published in which about 50 constitutional courts and equivalent bodies participated. Two volumes of the Russian edition of the Special Bulletin on the Leading Cases of the European Court of Human Rights was published.

CODICES

At the end of the year 2000, the database CODICES contained about 2700 summaries and 3000 full texts of decisions from constitutional courts and equivalent bodies, together with the laws on the courts, their descriptions and constitutions. Three up-dated versions of CODICES were published via the Internet and on CD-ROM. All regular and special *Bulletins* have been integrated into CODICES. The number of constitutions indexed article by article according to the Systematic Thesaurus of the Commission doubled, thus making them fully searchable by topic.

A new search function allows the user of CODICES to find the case-law of the participating courts concerning a particular article of a constitution or of the ECHR. Furthermore, a search tool has been added to CODICES, enabling the posterior case-law referring to a given decision to be found.

Seminars in co-operation with constitutional courts

In order to promote the rule of law, the Venice Commission has established a series of seminars in co-operation with constitutional courts (CoCoSem) geared towards an exchange of experience between practitioners (judges and staff of the courts) from 'older' and more recently established constitutional courts. At these seminars, it was acknowledged that even though constitutions may differ, similar questions may have to be dealt with by several courts at the time. Both the Bulletin and the seminars are intended to allow comparison of the application of the principles which govern the decisions to be taken.

In 2000, such seminars were organised in co-operation with the constitutional courts of Armenia, Azerbaijan, Estonia and Poland. The issues dealt with during these seminars included the protection of human rights by constitutional courts, constitutional justice in a society in transition, the direct access of the citizen to the constitutional court and the implication of efforts to join European structures on constitutional courts.

V. The UniDem (Universities for Democracy) Programme

The Commission organised three seminars within the framework of this programme during 2000:

1. Conference on The protection of human rights in the 21st Century : towards a greater complementarity within and between European Regional organisations in co-operation with the Irish Presidency of the Committee of Ministers (Dublin, 3-4 March 2000)

A Conference on The protection of Human Rights in the 21st Century: towards greater complementarity within and between European Regional Organisations was organised by the Irish Presidency of the Committee of Ministers, the Venice Commission and the General Directorate of Human Rights of the Council of Europe, in Dublin, on 3-4 March 2000.

The Conference was opened by Mr Brian Cowen, T.D., Minister of Foreign Affairs of Ireland. Introductory speeches were made by Mr Walter Schwimmer, Secretary General of the Council of Europe, Mr Antonio La Pergola, President of the Venice Commission and Mr Michael McDowell S.C., Attorney General of Ireland. Mr Alvaro Gil-Robles y Gil Delgado, Commissioner for Human Rights of the Council of Europe, then opened the debates with a keynote speech concerning his first few months in office.

The ensuing discussion raised different aspects of complementarity. A presentation on the concept of complementarity explored by Professor Conor Gearty, London was followed by reports on complementarity within the Council of Europe by several speakers from Council of Europe bodies.

The participants then dealt with complementarity within international organisations as well at the European level, the question of more effective inter institutional co-ordination in Europe and the implications of the European Union draft charter of Fundamental rights.

The summary report was presented by the General Rapporteur, Mr Gerard Quinn University of Galway.

2. Seminar on Democracy in a Society in Transition in co-operation with the University of Lund (Lund, 19-20 May 2000)

The Commission organised in co-operation with the University of Lund a UniDem Seminar entitled Democracy in a Society in Transition in Lund on 19-20 May 2000.

The purpose of the seminar was to take stock of the progress achieved on the road towards democracy and the rule of law in Central and Eastern Europe in the ten years following the fall of the iron curtain. Seminars such as this one should help us all to become more aware of the situation and of the true problems and enable us to provide the right advice and to take the right measures to assist the countries which have to complete the difficult process of transition.

The Seminar was opened by Mr Per Ole Trskman, Dean, Faculty of Law, University of Lund. In the first session, Lord Russell Johnston, President of the Parliamentary Assembly of the Council of Europe spoke on the role of the Council of Europe in promoting the rule of law in Central and Eastern Europe. Thereafter, speeches were heard on the perspective of the political scientist and the rule of law in the European CIS States.

The second and third sessions were devoted to case studies from Central and Eastern European countries; Armenia, Bulgaria, Estonia, Poland, Russia and Ukraine.

The general report was presented by Mr Otto Luchterhandt, Professor, Institute for Eastern Law, University of Hamburg.

3. Seminar on Constitutional Law and European Integration in co-operation with the Office of the Attorney General of Cyprus (Cyprus, 29-30 September 2000)

The Commission organised, in co-operation with the Attorney General of Cyprus, a UniDem Seminar entitled European Integration and Constitutional Law in Nicosia on 29-30 September 2000.

At the moment when accession negotiations are taking place between the European Union and twelve States, this is one of the most important questions currently under consideration by constitutionalists.

The Seminars aim was to examine the constitutional implications of accession to the European Union.

An introductory report on the situation in member States, which brought up-to-date the work which the Venice Commission has already carried out on this subject, was presented by Mr Armando Toledano Laredo, Honorary Director General, European Commission.

The main purpose of the work was to examine the situation in candidate states to the European Union. The question of constitutional modifications, which would imply a participation in European integration, was treated on a regional basis. Reports were heard from representatives of the Mediterranean regions, South East Europe, the Baltic States and Central Europe.

The reports emphasised, in particular, institutional questions but also addressed the subject of material law.

The concluding report was presented by Mr Luis Lopez Guerra, Vice President, General Council of the Judiciary, Spain.

The Seminars proceedings will be published in the Series Science and Technique of Democracy.

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All three seminars were organised within the framework of the Joint Programme between the European Commission and the Venice Commission of the Council of Europe for strengthening democracy and constitutional development in central and Eastern Europe and the CIS.

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4. Preparation of forthcoming seminars

It is envisaged to hold the following UniDem seminars in 2001 :

a seminar on democracy, rule of law and foreign policy to be organised in the former Yugoslav Republic of Macedonia in October 2001, in co-operation with the Constitutional Court;

a seminar on the constitutional implications of the accession of Turkey to the European Union to be organised in Turkey in November 2001, in co-operation with the University of Ankara.

VOLUME II

TEXTS OF OPINIONS

i. Comments on the Law on Parliamentary Elections of the Republic of Azerbaijan (CDL-INF (2000) 17), adopted by the Commission at its 44th Plenary Meeting (Venice, 13-14 October 2000)

Introductory remarks

These comments are based on the text of the law only, not taking account of its implementation. Reference may be made on this point to point iii.a of opinion no. 222 (2000) of the Parliamentary Assembly, which recommends not only "to revise legislation on elections", but also that "the next general elections in autumn 2000 can confirm definitively the progress made and their results can be accepted by the majority of the political parties that will participate in the elections, and can be considered as free and fair by international observers". Reference can be made also to the following documents : CG/BUR (6) 154 Bureau of the Congress (of local and regional authorities of Europe) - provisional report by the CLRAE observation delegation of the partial local elections in Azerbaijan held on 26 March 2000; doc. 8256 of the Parliamentary Assembly, observation of presidential elections in Azerbaijan (11 October 1998); doc. 7430 Addendum III - Addendum III to the progress report of the Bureau of the Assembly and the Standing Committee, Information report on the parliamentary election in Azerbaijan (9-13 November 1995).

The request by the authorities of Azerbaijan asks only for comments on the law on elections to the Milli Majlis (not including the annexes mentioned e.g. by Articles 39.3, 40.4 and 42.3) and not on the law on the central election commission. This opinion will not deal with this law, but it should be recalled that a fair composition of the central election commission is an important element of free and fair elections (cf. remarks below on the inferior election commissions). This opinion will also not deal with the legislation concerning political parties.

These comments are based on the English translation of the law on elections to the Milli Majlis as well as of the Constitution. The authorities of Azerbaijan provided information on the points the drafters of the opinion had some difficulty in understanding. Most of these points will not be mentioned in the present opinion.

This opinion will deal with several points on which the law could be improved, in particular through careful implementation. The various election commissions, the courts and other authorities are invited to implement the law in conformity with international standards. This should make it possible to avoid a large number of the risks of irregularities mentioned below, even if it will be preferable to clarify the law in the long run.

1. Election campaign/media/freedom of expression

It is understood that the CEC interprets the provisions on election campaigns and the media. In general, the CEC should interpret the provisions on election campaigns and the media in particular according to the following principles and remarks.

Freedom of expression and in particular freedom of the press (Article 10 of the European Convention on Human Rights (ECHR), Article 47 of the Constitution of Azerbaijan) are of the utmost importance during an election campaign. Chapter VIII must be interpreted in conformity with these freedoms, and restrictions to these freedoms must be prescribed by law, be motivated by the public interest and respect the principle of proportionality.

In particular, the provisions of Articles 56 and 57 must be interpreted in conformity with freedom of expression. Following provisions have to be mentioned:

Article 56.1: The expression "rules defined by the legislation" is very general and should preferably be replaced by "the law on the mass media and the criminal code". For the time being, it is understood that the expression used refers only to these laws, which are not the object of the present opinion.

Article 56.3-5: It is hardly conceivable that such provisions, which restrict freedom of expression, can ever be "necessary in a democratic society" in order to preserve one of the public interests mentioned in Article 10.2 ECHR. It is legitimate, however, that the name of a person or organisation that is responsible for the publication be indicated in the material. See also comments on Article 56.9.

Article 56.9: This provision relates to false material. A reference to criminal law and tort law would be suitable. According to international standards, prior prohibition is in conformity with freedom of expression only in exceptional cases. In any case, a prior prohibition must be decided by a court. Electoral propaganda by its very essence lacks objectivity. That is why only the courts should be able to prohibit such material, and only when a criminal offence or a tort is about to be committed. In general, the limits placed on political speech should be less strict than for ordinary speech.

Article 57.1: Here again, prohibition should not go further than what is forbidden by ordinary criminal legislation and tort law. The incitement to change the constitutional basis of government may be forbidden, according to international standards, only when it is proposed to introduce such a change by force. Proposing changes in the constitution is part of the normal political debate. Incitement to violate the territorial integrity of the country should also be understood as referring to violent action or to similarly aggressive methods which pose comparably grave dangers and contradict the law. In general, the specific nature of political speech during an election campaign has to be taken into account and the authorities have to be rather tolerant, in particular the general prosecutor when

applying Article 46.5.

Article 57.3: Like all provisions on limitations to fundamental freedoms, this provision has to be interpreted restrictively; that means that the only advertisements subject to this provision are advertisements that let a link with a candidate or a party appear clearly.

Article 57.4: The provision should be reformulated, or, at least, interpreted so that it is made clear, first, that the primary obligation of TV companies is to create conditions for candidates to defend their dignity and honor and second, that only when clear violations of penal law or tort law occur and no conditions to defend the honor and dignity exist do sanctions apply. In any case, this provision must not be misused and must not go further than what is forbidden by ordinary penal legislation or tort law. If equal conditions are provided for the lists/the candidates according to law, they will have the possibility of defending their prestige, dignity and honour and of disproving misinformation. Electoral propaganda will very often impugn at least the prestige of the opponents. Prior prohibition is in general contrary to international standards (cf. comments on Article 56.9).

Article 57.5: The cancellation of the registration of a candidate or a political party is a very severe sanction and sufficient grounds to provide for it are not given. Criminal sanctions for violation of the law should be sufficient. The courts should take these principles into account when applying the law.

2. Nomination and registration of candidates

Article 22.6.2., 34.6, 37.4, 39.3, 40.5, see also Article 67.3 2nd paragraph: The rules on candidates who have been sentenced apply to people who have been sentenced for a certain period before or after their sentence has been served. They look rather complicated. The provisions on persons with dual citizenship could be in contradiction with international standards: see below, section 6 Ineligibility/Incompatibility, comments on Article 4.4.

Article 38.2.4: The exceptions provided for by the legislation of the Azerbaijan Republic "On State Service" should not leave the door open to inequalities between candidates.

Article 41.2: According to the explanations given by the authorities of Azerbaijan, this provision applies to people whose unsoundness of the mind has been authoritatively confirmed by a court upon proper medical advice.

Article 41.11: This provision has to be interpreted in such a way that, if there is a sufficient number of valid signatures, it is no longer necessary to check the other signatures.

Article 43: the scope of this rule is to know whether the required number of valid signatures has been reached. The only ways to give a correct answer to this question are either to check all signatures on the sheet or to count the valid signatures until the necessary number has been obtained, even if this process is lengthy. What is important is the number of valid signatures and not the number of invalid signatures. See also comments on Article 43.14.

Article 43.10: The rule of Article 43.7 has to be applied in that case too, that means that the signature by the person for him/herself must be considered valid.

Article 43.14: The invalidity of 15 % of signatures can result from the action of political opponents who introduce invalid signatures in order to eliminate a candidate or a list. That is why all signatures should be checked or a minimum number of valid signatures be determined in order to know how many valid signatures have been collected. Article 43.14 should therefore be deleted and replaced by a rule which proceeds from the basis of valid signatures.

Article 43.15: if only 10 or 20 % of signatures are checked, it will be rare that the number of invalid signatures is so high that the total number of signatures is insufficient. On the contrary, if all signatures are checked, such a situation will be more frequent.

In sum, the check of only a part of the signatures according to the present rules could lead to the non-registration of a list when the necessary number of valid signatures has been reached (see comments on Article 43.14) as well as to the registration of a list when the necessary number has not been reached (see comments on Article 43.15). The only way to avoid such a situation is to check all signatures and to declare the list of signatures valid when and only when the required number has been reached. However, for practical reasons, the checking of all signatures could be stopped when it seems that a sufficient number of signatures has been reached after checking 10 % of signatures; it is less serious to register a list with an insufficient number of signatures than not to register a list with a sufficient number of signatures.

Articles 44.4, 84.2: the CEC should comply with following guidelines: the list of cases of refusal must be considered as exhaustive. The rejection of a candidate or a list of candidates should take place only in rare cases, in conformity with the principle of proportionality. In particular, in the case mentioned in Article 44.1, only serious violations should lead to such a sanction (that is, in the cases in which there is clear evidence to indicate that an insufficient number of signatures would probably have been reached if these rules had been respected). In the case of Article 44.4.2 and 44.4.4, a time limit should be given in order to correct the erroneous data. It is necessary to bear in mind that it is much more serious, from the point of view of democracy, to prevent someone from standing as a candidate, than to allow someone who has violated some technical provisions of the law to stand as a candidate. In the latter case, the last word will belong to the voters. The second part of Article 44.4.3 should be dropped (cf. comments on Article 43.14-15). Concerning Article 44.4.5, only serious violations should lead to such a sanction; in the other cases, restitutio in integrum should be ordered, and non-registration could be a sanction of the violation of such a rule. In Article 44.4.6 again, minor violations should not be taken into account.

3. Election commissions

A provision should be included in the law which obliges the members of election commissions to conduct their office impartially and not to divulge improperly information which they obtained in the course of their activity. Since, it would be preferable that the members of election commissions have no political activity.

Article 19: it must be recalled that the composition of the Central Election Commission will not be dealt with in this document.

Concerning the composition of lower election commissions, Article 19.2 provides for the appointment of three members of the Territorial Election Commission (TEC) by the CEC members representing the majority party (even if it only has a relative majority), three members by the CEC members representing the minority parties, and three members by CEC members representing non-partisan deputies. One of the members of the TEC designated by the last group has to be agreed by the first group and one by the second group. Furthermore, majority and minority are defined according to the results of the vote at the level of the single multi-member constituency, and not according to the total number of deputies of each party in Parliament. Such an intricate system is perhaps most suitable in the present situation, but could become unsuitable in case of changes in the composition of the Milli Majlis (for example, if there are very few independent deputies, or if the majority is composed of several parties). It would be preferable to enact rules in the future which are likely to function notwithstanding a particular composition of the Milli Majlis.

Article 20: similar remarks to those made with respect to Article 19 apply.

Article 22.6.3: the term "disability" should be interpreted restrictively and be applied only to conditions which are of comparable gravity to mental incapacity.

Article 22.7: during the election period, a period of ten days for replacing a member of an election commission appears to be too long. For example, according to the new Albanian law, the time-limit is 48 hours.

Article 27.2: The practice regarding the participation of observers should be as liberal as possible. Relevant authorities should

normally take into account proposals by organisations mentioned in Article 27.3 and send invitations in accordance with these proposals.

Article 27.12: this provision must be applied in conformity with the principle of proportionality.

Article 28.9: the election commissions should preferably sit only when all their members have been appointed, unless nomination of some members did not take place within the normal time-limits due to non-cooperation of the appointing or proposing body.

4. Data protection

Articles 7.4, 15.9, 63.4, 63.6, 79: The law deals on several occasions with the use of state automated information systems. According to the information given by the authorities of Azerbaijan, for the time being, a state automated information system has not yet been created. Computer systems are used only for calculation purposes. As soon as such an information system exists, these provisions should be made more precise in order to be in conformity with Article 32.3 of the Constitution.

The following indications can already be given on how to deal with the question of data protection after the creation of a state automated information system.

The constitutional provision (Article 32.3) does not allow the use of information relating to a person's life without consent. If exceptions are admitted, they should at least be based on a clear legislative provision. Such provisions exist in the election law, but in order to safeguard individual rights with regard to the automatic processing of personal data, the law itself should make clear a certain number of points.

In particular, it is necessary to define in the law:

the exact purposes of the collection of the data;

the sources and the catalogue of the data which can be consulted by the election commissions; in particular, sensitive data like data revealing religious beliefs, ethnic origin, political opinions, criminal convictions, health or sexual orientation and which are of no interest for electoral purposes should be excluded from consultation (see Article 6 of Convention ETS N 108); only data which are necessary should be open to consultation if provided for by the law and according to appropriate safeguards. An indication on data which can be collected appears for example in Article 41.7;

the time period during which the data are kept; personal data should not be kept longer than is necessary for fulfilling the original purposes of the collection;

the individuals rights of access to and rectification of the data concerning them;.

the appeals and sanctions available in cases where the data were collected or used for a purpose other than the purpose of the law.

Data protection concerns principally physical persons. However, it might be useful, therefore it could be envisaged to extend it to legal entities (as mentioned in the law) (this may depend on the interpretation of Article 32.3 of the Constitution).

5. Appeals

The law does not provide for a clear and straightforward appeals system. It should be revised in order to be more coherent.

The question of judicial appeals is mainly dealt with by the law "on courts and judges" which was not at the disposal of the drafters of the present opinion; at any rate, in order to make the reading of the law easier, it would be preferable to mention all the appeals available, judicial and non-judicial, in a special section of the electoral law. For example, the expression "the relevant court" (Articles 44.7, 85.3, 85.4) could be avoided and replaced by the indication of the competent court. The authorities of Azerbaijan have confirmed that appeals are always open against a decision of an election commission to the superior election commission - up to the central election commission -, and that appeals are also possible against a decision of an inferior court to a superior court, up to the supreme court. Furthemore, the deadlines for appeals are not shorter than in other fields. Electoral legislation is actually one of the fields in which appeals must be dealt with as quickly as possible: this principle is given concrete expression by Article 83.12, for example.

Article 17.3, 18.6, 44.7: there is a choice for the voter between appealing to a superior election commission or to a court. This could lead to contradictory decisions of election commissions and courts. According to the interpretation given by the authorities of Azerbaijan to Article 129 of the Constitution, the decisions of the courts would prevail in that case (cf. Article 83.11 of the law). If simultaneous appeals to an election commission and to a court are admitted, the appeal to the election commission may be useless and may overload this authority.

Article 83.10 does not seem to be consistent with Article 83.3, on the one hand and Articles 17.3 and 44.7, on the other hand. According to the authorities of Azerbaijan, there is a choice between appealing to a court or to a superior election commission.

According to the explanations given by the authorities of Azerbaijan, the Constitutional court, when acting under Articles 85 of the Constitution and 75 of the election law, deals only with the formal validity of the documents submitted to it by the central election commission. Ordinary courts have the competence to deal with appeals on other points.

Article 85 allows ordinary courts to cancel the results of the elections without any deadline if irregularities are found. The authorities of Azerbaijan informed us that such a rule applies only when new facts appear, so that a ground for retrial arises. It would be preferable to provide for a deadline after discovering the new facts for asking for such a retrial.

6. Ineligibility/incompatibility

Article 4.4 makes a reference to Article 85 of the Constitution. However, this provision does not make a clear distinction between the cases of ineligibility and of incompatibility. This shortcoming could be partially corrected if the law were more precise on this point.

Article 85 of the Constitution can reasonably be understood as follows (cf. also Article 56 of the Constitution): Ineligibility applies to persons whose incapacity has been confirmed by a court and persons who serve their sentences in places of confinement by a court's verdict.

The other cases mentioned in Article 85 of the Constitution are cases of incompatibility. Persons who are in State service in other countries, work in executive or judicial bodies, persons engaged in a different paid activity, ministers of religion have to give up these functions if elected. Persons with dual citizenship have to give up their foreign citizenship if elected.

Such an interpretation has been confirmed by the authorities of Azerbaijan.

The provision of Article 85 of the Constitution compelling persons with dual citizenship to give up their foreign citizenship if they are elected is linked, according to the authorities of Azerbaijan, to the transitional period following the dissolution of the USSR. However,

at least in the long run, such a provision could conflict with international standards, and in particular with Article 17 of the European Convention on Nationality, which provides that "nationals of a State Party in possession of another nationality shall have, in the territory of that State Party in which they reside, the same rights and duties as other nationals of that State Party". Discrimination against persons belonging to national minorities has to be avoided. The same problem arises with Article 81.2 of the law and Article 89.2.2 of the Constitution.

7. Voting procedures

Article 68.4, 68.6, 70.8, 71.7.3, 71.8.3, 72.2.2, 78.4 last indent: the vote "against all single lists of candidates" is completely out of the ordinary in established democracies. It is strongly advised to abolish this possibility, at least in the long run, since it may lead to challenges of the legitimacy of the elections and may thereby undermine the democratically elected regime. The authorities of Azerbaijan informed us that such a provision is linked to the threshold provided for by Article 72.2.1. It would be preferable to give up both rules.

Article 68.13: changes, or at least changes made in handwriting, should be avoided. They will easily lead to violation of the secrecy of voting. The deadline for withdrawing lists/candidates should expire early enough before the elections to allow printing of ballot papers after it has expired. Another possibility is to publish the list of candidates who have withdrawn.

Article 68.14: the condition according to which such a solution is applied "only in exceptional cases" has to be strictly respected.

Article 70.3 and 70.10: these provisions were understood as meaning that the possibility of voting up to 10 days before election day is limited to the cases mentioned in the second sentence of Article 70.3, whereas in the other cases it is possible only on election day. The fact of staying in a "remote place" without further incapacity should not be a ground for using a mobile ballot box. The central election commission should provide for the cases in which the use of a mobile ballot box is allowed in "remote places".

Article 70.6: freedom of vote has to be respected. The way in which a ballot paper has been cut can allow it to be recognised. The authorities of Azerbaijan explained that the ballot includes a part which can be easily removed, so this problem would not arise if the ballots do not include numbers. The simple fact that the ballot paper has been touched by people other than the voter (including members of the electoral commission) could lead to violation of the secrecy of vote (for example, a ballot paper could be slightly torn up, creased, stained). It would be preferable to allow the voter to take the ballot paper him/herself and to give him an envelop in which he/she has to put the ballot or a stamp to be affixed to a particular part of the ballot paper.

Article 71.10, 72.7, 73.9: it should be clear that, if a member of the Election Commission was offered the possibility of signing, but refused to sign, the protocol is nonetheless valid.

Article 72.2.1: the need for such a provision could be reconsidered, because turnout tends to decrease when elections are repeated. At any rate, repeated elections should be valid whatever the turnout.

Article 72.2.3: in order to avoid to repeat elections, the question of tied votes could be settled by declaring elected the oldest candidate or by drawing lots.

Articles 72.3.1, 73.8.1, 85.2: here it is necessary that violations could have affected the result. It would be better to state this expressly.

Article 73.3: since only 25 seats are allocated by (proportional) voting in the multi-seat constitutency it appears that a 6% quota is unnecessarily high. The purpose of the quota can only be to ensure that Parliament is able to form coherent governing majorities. This purpose is already enhanced by the fact that three quarters of all seats are allocated through elections in single-seat constituencies, a rule qhich favours bigger parties. Under the current system it is necessary to receive at least 4% of the votes in order to obtain one seat in Parliament. If the law aimed to prevent sengle member representations of parties in Parliament it would therefore have to set an 8% threshold. Such a threshold would clearly be too high. It is therefore suggested to lower the threshold to 5%.

Article 73.4: the case in which the remainder for the last seat is the same for two or more lists should be settled, e.g. by allocating the last seat to the list with the highest number of votes.

Article 76: this rule applies also to the case in which a candidate refuses his/her election.

Article 76.1: the time limit provided for by the last sentence should be reconsidered: it appears very long and might be cut by half. The same question arises in Article 82.4.

8. Prohibition of foreigners, persons without citizenship or foreign legal entities from participating in the elections

Article 11: This rule should contain a clause that the prohibitions apply notwithstanding the freedom of expression and freedom of information. Such a clause would, in particular, be important for those foreigners who reside in Azerbaijan and who wish to participate in political debates and election campaigns. As to dual citizens, see comments with respect to section 6 : Ineligibility/Incompatibility.

However, according to the authorities of Azerbaijan, this rule applies only to financial questions (see chapter IX). It would be preferable to state this expressly.

9. Sanctions

Articles 7.2, 11.2, 22.8, 86: the sanctions for violation of the law are not all dealt with in the law. This would be suitable from a point of view of clarity and legislative technique. Another possibility would be to make a reference to the criminal code and the code for administrative offences. The sanctions must in any case be proportionate to the gravity of the infraction.

Article 84: Article 44 already provides for the refusal to register candidates and single lists of candidates, Articles 72.3 and 73.7 deal with invalidity of elections.

Article 84.1: Information through the mass media about violations of the law should be limited to a short publication, if it is really considered necessary. Otherwise, the election commission could appear to be biased. The comprehensive information of the public should be left to the electoral propaganda of the political opponent.

The principle of proportionality has to be respected. For example, refusal to register based on a very small excess in expenditure (Article 84.2.5-8) is clearly contrary to this principle. Such a small excess could even be due to a calculation mistake. The principle of proportionality has to be respected also in the application of Articles 84.2.11, 84.3 and 84.5. For example, the mere fact that an agent of a political party violates Article 56.3-4 should not lead to cancellation of registration (see Article 84.3.3). Art. 84.5. contains the () vague expression abuse of the mass media, a term which should be exchanged or must be restrictively interpreted as encompassing only violations of penal law and tort law (see, in addition, comments with respect to no. 3, Articles 56 and 57). The authorities of Azerbaijan declared that Article 84.5 refers only to violation of the law.

Article 85.1-2: do these provisions refer to Article 84 or Article 86 of the law? The last solution would be more logical.

Article 86: it would be preferable to deal with criminal prosecutions and sanctions in the same law, either in the election law or in the legislation on criminal or administrative sanctions (cf. Article 86.2). The act of voting or attempting to vote twice could be mentioned.

Article 86.1.6: the term "misinformation" must be understood in conformity with freedom of expression. This means that the misinformation must have been brought about intentionally. Cf. comments on Article 57.4.

See also comments on Article 57.5.

10. Other points

Article 12.1: This is an important point: it would be be more appropriate to give a boundary commission the task of drawing the limits of the electoral districts. See e.g. Article 68 of the new Albanian electoral code: there, the boundary commission consists of the secretary of the CEC, the director of the institute of statistics, the head registrar of immovable property and the director of the centre of geographic studies of the academy of sciences. The inclusion of a judge could also be contemplated. The boundary commission would report for final decision to the CEC.

Article 12.2: The distribution of voters residing abroad among the constituencies should be dealt with in an abstract and more precise manner in the law itself. According to the authorities of Azerbaijan, voters residing abroad are distributed equally and proportionally among the constituencies. It would be preferable to state this expressly and, in that case, to state that the distribution is done by lot.

Article 14.5: Here too, the "exceptional cases" should be very few.

Article 20.7, 26.8: It would be suitable to allow neutral (non partisan) national observers too (e.g. from non-governmental organisations).

Articles 26.11, 72: observers should have access to the protocols of the territorial election commission. According to the authorities of Azerbaijan, this results from Article 26.1 3rd indent, which has to be interpreted in such a manner that transparency is guaranteed at this level, since it is very important to provide for transparency at all levels. It would be suitable to set the deadline for the delivery of the TEC protocols to the CEC in the law; if not, the CEC should fix a short deadline.

Article 29.1: according to the authorities of Azerbaijan, this provision has no retroactive effect (see Article 149 of the Constitution). That means that parties created before the entry into force of the law, and e.g. in the month following its entry into force, should be delivered the certificate.

Article 48.11, 84.4: these rules appear very drastic; apparently, the withdrawal of only one candidate can prevent registration of a whole list. According to the authorities of Azerbaijan however, only the withdrawal of all of the three first candidates of the list (and not of one of these three candidates) can prevent registration. It is true that the significance of the list for the voter changes significantly when one of the leading candidates drops out but it seems that this fact will be brought to the attention of the voters by the election propaganda of the political opponents. This should be a sufficient check against abuse.

Article 59.4-5: the limits on funds for parties and blocks of parties appear rather low in comparison with the limits for individual candidates (Article 59.2-3). However, they could be justified by the rather limited financial means of most parties.

ii. Conclusions on the merger of the Chamber of the Human Rights Chamber and the Constitutional Court of Bosnia and Herzegovina, (CDL-INF (2000) 8), adopted by the Commission at its 42nd Plenary Meeting (Venice, 31 March-1 April 2000)

At its 39th Plenary meeting (Venice, 18-19 June 1999), the European Commission for Democracy through Law (Venice Commission) adopted a **Preliminary Proposal for the re-structuring of Human Rights protection Mechanisms in Bosnia and Herzegovina (CDL-INF (99) 12). This document, drawn up at the request of the Office of the High Representative, includes the proposal for a merger of the Human Rights Chamber (hereafter the Chamber) and the Constitutional Court (hereafter the Court), at the level of the State of Bosnia and Herzegovina. Two main reasons are put forward for this proposal:**

First, the partial overlapping between the competence of the Chamber and the Court as regards human rights issues is likely, in the Venice Commissions view, to become an important factor leading to the dysfunctioning of human rights adjudication in the country.

Second, in the Commissions view, the Chamber is a transitional *sui generis* (quasi-international) institution, whose establishment under Annex 6 to the Dayton Peace Agreement was necessary pending the accession of Bosnia and Herzegovina to the Council of Europe and ratification of the European Convention on Human Rights (ECHR). The Chamber should thus cease its operation after the ratification of the ECHR, when Bosnia and Herzegovina will be subject to the control mechanisms of this instrument, namely, the European Court of Human Rights.

The Venice Commission concluded that it is both logical and desirable to opt for the transfer of all competences of the Chamber to the Court in order to entrust all final appeals in human rights cases to a single jurisdictional body at the level of the State. This transfer should take the form of a merger of the Human Rights Chamber with the Constitutional Court, ensuring not only the transfer of competence but also an effective transfer of expertise, experience, procedural and other capacities and resources.

As suggested in the above-mentioned proposal, the Venice Commission entrusted a Working Group to examine the modalities of the merger and the possible problems it may raise and draw up a report. Mr Christos Giakoumopoulos, Head of the Constitutional Justice Division of the Venice Commission, and Mr Peter Kempees, member of the Registry of the European Court of Human rights and former Registrar of the Human Rights Chamber of Bosnia and Herzegovina, drew up a report considering the legal and practical issues involved in the proposed merger with the assistance of Mr Anders Mnsson, Registrar of the Human Rights Chamber, Mr Nicolas Maziau, Adviser to the President of the Constitutional Court, Mrs Therese Nelson, Executive Officer of the Human Rights Chamber and Mrs Biljana Potparic, Acting Secretary General of the Constitutional Court.

The Working Group concluded that the suggested transfer of competences of the Human Rights Chamber to the Constitutional Court of Bosnia and Herzegovina can in principle be achieved without any diminishing of the protection granted by the Dayton Peace Agreement. Provided that the Constitutional Court follows an evolutive interpretation of its appellate jurisdiction, the transfer of competences need not require any amendment to the Constitution in force. However, the enactment of a law on the Constitutional Court and several amendments to the Courts Rules of procedure would be advisable. The Working Group considered these to be substantial undertakings that must be accomplished prior to the suggested merger.

Moreover, the Working Group found that that the present human and financial resources of the Court are manifestly insufficient to ensure the effective handling of the case load of human rights cases which may be expected after the suggested transfer of competences. What is needed is therefore a merger of both human and financial resources of the institutions together with changes in working methods and training of local legal staff.

At a meeting held in Paris on 24 March 2000, the Venice Commission Rapporteurs, Messrs Jambrek, Malinverni and Matscher, considered the above conclusions of the Working Groups report in the presence of Mrs Michle Picard, President of the Human Rights Chamber and Prof. Louis Favoreu, judge of the Constitutional Court of Bosnia and Herzegovina, and of representatives of the Chambers and the Courts Registries, the Office of the High Representative and the OSCE Mission in Bosnia and Herzegovina. Mr William Spencer attended the meeting in his capacity as Observer to the Venice Commission for the United States. The European Commission (DG I) submitted a note commenting on the Working Groups report and conclusions.

The Rapporteurs have considered the conclusions and proposals of the Working Group in the light of the discussions at the meeting in Paris and the other information submitted.

The Rapporteurs find that the Constitution of Bosnia and Herzegovina entrusts the Constitutional Court with tasks which go beyond those usually assigned to such courts. The Constitutional Court is competent to review the constitutionality of laws, has appellate jurisdiction on issues of constitutionality arising out of court judgments, decides upon referral by other courts on the compatibility of norms with the Constitution, with the ECHR or with the laws of Bosnia and Herzegovina. The Constitution thus gives the Constitutional Court the means for being an decisive actor in the shaping of the legal system of Bosnia and Herzegovina as a whole. In the Rapporteurs view, the Constitutional Court has the power and even the duty to assume alone in due course the responsibility for the judicial protection of human rights and that this implies the termination of the Chambers operation. The Rapporteurs find it of utmost importance that the termination of the Chambers operation be very carefully prepared in order to avoid any *lacunae* or diminishing in the judicial protection of individual rights in Bosnia and Herzegovina. This will require a legal framework for the merger operations aiming *inter alia* at securing legal certainty as to the judicial avenues available to potential victims of human rights violations and the prerequisites for their use. It also implies an intensive co-operation between the Court and the Chamber with a view to transferring the Chambers competences and docket to the Court. Finally, it will require the active participation of the Constitutional Court and the Chamber in the preparation of the necessary legislative measures to be taken by the Parliamentary Assembly of Bosnia and Herzegovina.

The Rapporteurs concluded the following:

The Commissions position that it is highly desirable to entrust **all final appeals in human rights cases to a single jurisdictional body** at the level of the State and that this can be achieved by a merger of the Human Rights Chamber with the Constitutional Court should be confirmed.

The proposed merger shall consist of the **termination of the Chambers operation** and transfer of its competences (and possibly of its docket), together with its human and financial resources, to the Constitutional Court.

The proposed merger should not take place before the **ratification by Bosnia and Herzegovina of the ECHR,** after which Bosnia and Herzegovina will be subject to the control mechanisms of this instrument, namely the European Court of Human Rights.

In order to achieve **access to the Constitutional court** under the same conditions as to the Chamber in cases of a lack of effective remedies, the Courts appellate jurisdiction (Article VI, 3 (b) of the Constitution) could be construed in such a way as to enable the Court to deal not only with human rights issues arising out of a judgment but also with similar issues arising out of the lack of judgment, such as denial of justice. However, as the case-law of the Court does not so far contain any indication of a development in this sense, it is difficult to conclude, at this stage, that the competence of the Chamber to deal with allegations of human rights violations under Article II para 2 of Annex 6 coincides with the appellate jurisdiction of the Court. Consequently, if the Courts jurisprudence does not evolve in the above-mentioned direction in the near future, the Rapporteurs would consider it necessary that Article VI, 3 (b) of the Constitution be amended or preferably authoritatively interpreted by an **interpretative constitutional law** indicating that the Constitutional Courts appellate jurisdiction comprises appeals against judgements as well as appeals challenging the lack of judgements. Such an interpretative law should be adopted before the termination of the Chambers jurisdiction and preferably not later than 18 months after the end of the transitional period provided for by the Dayton Agreement, i.e. not later than June 2002.

A **constitutional law (on the Constitutional Court) to be adopted by the Parliamentary Assembly of Bosnia and Herzegovina** should regulate the termination of the Chambers operation, the appointment of foreign judges (as required by Article VI para 1 (d) of the Constitution) and possibly some aspects of admissibility of appeals to the Constitutional Court (exhaustion of other effective remedies and time-limits for appeals) as well as aspects of the Courts relations with other State and entity institutions, such as

the obligation to abide by the Constitutional Courts orders on provisional measures;

individual (criminal or disciplinary) liability for non compliance with the Courts orders and judgements;

co-operation with other national authorities, including the Prosecutor of the Court of Bosnia and Herzegovina and the Ombudsman of Bosnia and Herzegovina;

the responsibility of Bosnia and Herzegovina to ensure the Courts adequate funding independence.

The **Constitutional Courts Rules of Procedure** should provide for the possibility of dealing with some of the cases in panels rather than in plenary in order to speed up proceedings; the possibility of a panel referring the case to the plenary where important issues are raised should be provided for. The possibility of appealing a panel judgement to the Plenary should be excluded. Moreover the institution of one or more committees, composed of 3 or 4 members empowered to dismiss (by unanimous decision) cases that are clearly inadmissible or do not have any prospect of success should be provided for. The committees decisions should not be subject to appeal. It would be desirable that the Courts Rules of Procedure include rules for dealing with some cases in priority and rules on *amicus curiae* submissions.

The law on the termination of the Chambers operation shall also provide for the **transfer of human, financial and other resources from the Chamber to the Court**. The idea (in the Working Groups report) that some members of the Chamber should be appointed as members of the Constitutional Court shall be maintained as this will ensure continuity in working methods and case-law.

Until ratification of ECHR and adoption of necessary law and rules as indicated above the two jurisdictions should continue their **parallel operation** despite the forum shopping problem.

iii. Opinion on locus standi of the Ombudsmen of the Federation of Bosnia and Herzegovina before the Constitutional Court of the Federation of Bosnia and Herzegovina, based on the comments by Mr Franz Matscher, (CDL-INF (2000) 9), adopted by the Commission at its 43rd Plenary Meeting (Venice, 16 June 2000)

By letter dated 29 March 2000, the Ombudsman Institution of the Federation of Bosnia and Herzegovina requested the Venice Commission to drawup a report on the possibility for the Ombudsmen of the Federation of Bosnia and Herzegovina to introduce a claim before the Constitutional Court of the Federation of Bosnia and Herzegovina for abstract constitutional reviewof laws or legal provisions. The Commission designated Prof. Matscher as its Rapporteur on the question.

At its 43rd Plenary Meeting (Venice, 16-17 June 2000) the Commission, on the basis of the Rapporteur's report, adopted the present opinion.

I Introduction

In their work the Ombudsmen of the Federation of Bosnia and Herzegovina are sometimes confronted with the possibility that certain provisions of laws or whole laws, the consequence of which is violations of human rights and fundamental freedoms guaranteed by the Constitution and the various human rights instruments listed in the Annex to the Constitution, may be unconstitutional. The question put to the Commission is whether the Ombudsmen can in such cases introduce a claim before the Constitutional Court of the Federation of Bosnia and Herzegovina for abstract constitutional review of the law or provisions at issue.

II Applicable legal provisions

The Ombudsman institution and the Constitutional Court now functioning in the Federation of Bosnia and Herzegovina were established by the Washington Peace Agreements of March 1994. The Constitutional Court is also subject to the provisions of the Law on the Procedure before the Constitutional Court of the Federation of Bosnia and Herzegovina and has adopted its own Rules of Procedure (published in the Official Gazette of the Federation of Bosnia and Herzegovina No. 2/1996) as well as a Decision on the Organisation and Functioning of the Constitutional Court of the Federation of Bosnia and Herzegovina passed at its session on 10 January 1996. A draft law on the Federation Ombudsman, prepared by the working group of the Venice Commission and the Directorate of Human Rights on Ombudsman institutions in Bosnia and Herzegovina, is currently before the legislative bodies of the Federation of Bosnia and Herzegovina. As yet no law has been adopted, however, and the institution remains subject only to the provisions of the Constitution and to its own internal rules.

The constitutional provisions governing the Ombudsman institution state, in relevant part:

Article II.B.5

The Ombudsman may examine the activities of any institution of the Federation, Canton or Municipality, as well as any instruction or persons by whom human dignity, rights or liberties may be negated, including by accomplishing ethnic cleansing or preserving its effects.

Article II.B.6

An Ombudsman is entitled to initiate proceedings in competent courts and to intervene in pending proceedings, including any in the Human Rights Court.

The competence of the Constitutional Court is governed principally by Articles IV.C.10 and 11 of the Federation Constitution.[2] Abstract review of the constitutionality of legal provisions is possible in accordance with the constitutional provisions reproduced below:

Article IV.C.10

The Constitutional Court shall:

(a) At the request of the President, of the Vice-President, of the Prime Minister, of the Deputy Prime Minister, or of one-third of the members of either House of the Legislature, determine whether any proposed law that has been adopted by either House of the Legislature, or any law or proposed law that has been adopted by each House of the Legislature, is in accord with this Constitution;

(b) At the request of the Prime Minister, of the Deputy Prime Minister, of the Cantonal President concerned, or of one-third of the members of the Legislature of a Canton, determine whether any law or proposed law that has been adopted by that Legislature (including the Cantonal Constitution and any amendments thereto), is in accord with this Constitution.

(c) At the request of the President, of the Vice-President, of the Prime Minister, of the Deputy Prime Minister, determine whether any regulation enacted or proposed regulation to be enacted by any organ of the Federation Government is in accord with this Constitution.

(d) At the request of the Prime Minister, the Deputy Prime Minister, or of the Cantonal President concerned, determine whether any regulation enacted or proposed regulation to be enacted by any organ of the Cantonal or Municipal government is in accord with this Constitution.

(3) The Constitutional Court shall also decide constitutional questions presented by the Supreme Court or the Human Rights Court or a Cantonal court that arise in the course of a proceeding currently pending before that Court.

Article 9 of the Law on the Procedure before the Constitutional Court of the Federation of Bosnia and Herzegovina provides further that :

The party to the procedure, in the sense of this Law, shall be considered the authorised applicant of a request for dispute resolution, constitutionality evaluation, establishment of the existence of the vital interest of a constitutional nation, replacement of the President of the Federation and Vice-President of the Federation, and the authorised complainant against the decision of the highest Cantonal Court on the existence of the vital interest of a constitutional nation in a Canton with a special regime, on one hand and the body, or the person in respect to which the request has been submitted, on the other hand.

The term "authorised applicant" is never explicitly defined in the Law. However, the various chapters of the Law dealing with the different types of applications that may be lodged with the Constitutional Court in accordance with Article IV.C.10 of the Constitution refer to specific persons or institutions by whom the type of application in question is to be introduced (Articles 31, 35 and 42). In particular, Article 35 of the Law, in the part of the Law dealing with the evaluation of constitutionality, states that :

The procedure for [e]valuation of constitutionality referred to in Article IV.C.10(2) and decision-making on constitutional issues referred to in Article IV.C.10(3) of the Constitution shall be initiated on the basis of a request submitted by the authorised applicant.

Article 39, paragraph 1 of the Law goes on to provide that :

Parties to the procedure of assessment of the constitutionality shall be the authorised applicants as per Article IV.C.10(2) and (3) of the Constitution and the Federal, Cantonal and Municipal body which proposed or passed the Cantonal Constitution, law or other regulation.

Article IV.C.10(2) of the Constitution refers, according to the provision of which the constitutionality is at issue, to requests made by the President, the Vice-President, the Prime Minister, the Deputy Prime Minister, one third of the members of either House of the Legislature, a Cantonal President or one third of the members of the Legislature of a Canton. Article IV.C.10(3) refers to requests made by the Supreme Court or the Human Rights Court or a Cantonal court that arise in the course of proceedings pending before that Court. No reference, however, is made to the possibility for the Ombudsmen to request that the Constitutional Court undertake the abstract review of the constitutionality of a provision.

Under Article 26 of the Law on the Procedure before the Constitutional Court of the Federation of Bosnia and Herzegovina, "The Constitutional Courtshall decide on the rejection of the request whenthe applicant is not authorised to initiate the procedure". Should there be any doubt as to the precise meaning of the expression "decide on the rejection of the request", the other cases listed in this provision - for example, when the Court is not competent to decide on the request and when the request is submitted out of time - make it apparent that the intention is not that the Court may decide *whether or not* to reject the request but rather that it *must* decide to reject a request when the request is not submitted by an authorised applicant.

It appears from the above that, should the Ombudsmen of the Federation of Bosnia and Herzegovina introduce a request before the Constitutional Court of the Federation of Bosnia and Herzegovina for abstract constitutional review of a law or legal provisions, the Court would be obliged to reject it, even when the consequence of such provisions is the violation of human rights and fundamental freedoms guaranteed by the Constitution and the international instruments listed in the Annex to the Constitution.

Given the above considerations, it is clear that the Constitutional Court cannot be considered to be a "competent court" before which the Ombudsmen can initiate proceedings under the terms of Article II.B.6(1) of the Constitution. As the Commission has previously

indicated in its Opinion on the Reform of Judicial Protection of Human Rights in the Federation of Bosnia and Herzegovina (documentCDL(99)78), the Constitutional Court unquestionably has jurisdiction over questions of abstract constitutional review involving human rights issues, but its competence to undertake such review is limited to situations where such requests are initiated by the persons or institutions provided for in Articles IV.C.10(2) and (3) of the Constitution of the Federation of Bosnia and Herzegovina.

The Commission recalls, however, that the Ombudsmen may participate in proceedings before the Constitutional Court on the basis of their competence to intervene in pending proceedings under Article II.B.6(1) of the Constitution as well as on the basis of Article 12, para. 3 of the Law on the Procedure before the Constitutional Court of the Federation of Bosnia and Herzegovina, which allows the Court to call other persons to participate in proceedings in order to contribute their expertise. Likewise, the Ombudsmen may continue their current practice of recommending to authorised applicants that they apply to the Constitutional Court for abstract review of the constitutionality of relevant provisions, although the effectiveness of this practice depends on the willingness of the party concerned to lodge such an application. Finally, where matters of concrete review of human rights arise and even in the absence of the creation of the Human Rights Court, the Ombudsmen may intervene in or initiate proceedings before other competent courts including the Supreme Court, in accordance with the Constitution.

Provision for the possibility for the Ombudsmen to initiate abstract constitutional review proceedings may nonetheless be envisaged in the future. As discussed below, this possibility does exist in the Greater European context. However, as the above examination reveals, the introduction of such a possibility would require constitutional amendments in the context of the Federation of Bosnia and Herzegovina.

III Greater European context

The question as to whether it is advisable for Ombudsmen to have standing to bring cases for abstract review of constitutionality where they are confronted with the problem of the possible unconstitutionality of laws or provisions thereof has already been dealt with in the legal systems of a number of other European countries. One significant element of consideration may be the fact that Ombudsmen whose competence includes a marked emphasis on human rights are particularly well placed to become aware of legal provisions that are at the root of frequent or systematic violations of human rights.

A number of countries in the Greater Europe grant their Ombudsmen or equivalent institutions *locus standi* before the Constitutional Court to initiate cases for abstract review of the constitutionality of legal provisions. This is the case, for example, in Slovenia, where the Human Rights Ombudsman is entitled to bring such an action only in association with individual cases he or she is dealing with, but the effect of the judgment is generally binding and the Constitutional Court may completely or partially abrogate a statute which does not conform with the Constitution (see in particular Articles 22, 23 and 43 of the Law on the Constitutional Court of Slovenia). By contrast, in Spain, the capacity of the *Defensor del Pueblo* to initiate proceedings for abstract constitutional review is not limited to bringing actions in association with individual cases; there is, indeed, a time-limit of three months after the publication of the challenged provisions within which such proceedings must be initiated, which would seem to preclude the possibility of basing such a case on an individual complaint (Articles 32 and 33 of Organic Law No. 2/1979 on the Constitutional Court).

Other countries in which Ombudsmen have standing to apply for abstract constitutional review of legal provisions, such as Croatia, Georgia and Portugal, may be cited. Furthermore, in Austria the Ombudsman may currently request the Constitutional Court to review the legality of regulations and a constitutional amendment that would enable the Ombudsman to apply for abstract constitutional review is being examined. However, it is not the Commission's intention to conduct a comprehensive survey in the present context. It is sufficient to note that there is no reason in principle why such a competence should not be attributed to an Ombudsman institution, should the relevant authorities so wish. In the present context an amendment to the Constitution of the Federation of Bosnia and Herzegovina would be required in order to attribute such a competence to the Ombudsmen.

IV Conclusions

The Commission finds that:

only the persons and institutions listed in Article IV.C.10(2) and (3) of the Constitution of the Federation of Bosnia and Herzegovina have standing to lodge applications with the Constitutional Court of the Federation of Bosnia and Herzegovina for abstract review of constitutionality;

Article II.B.6(1) of the Constitution is not sufficient to extend the competence of the Constitutional Court to the examination of applications for abstract constitutional review of legal provisions lodged by the Ombudsmen of the Federation of Bosnia and Herzegovina;

the Ombudsmen of the Federation of Bosnia and Herzegovina therefore do not have standing to request the Constitutional Court to undertake the abstract review of the constitutionality of legal provisions identified by the Ombudsmen as being likely to be unconstitutional;

there is, however, no reason in principle why the Ombudsmen should not be granted such standing, should the relevant authorities choose to make the necessary constitutional and legal amendments.

The Commission remains at the disposal of all parties to collaborate in the drafting and implementation of such amendments, should the parties so request.

iv. Consolidated opinion on freedom of expression and freedom of access to information as guaranteed by the Constitution of Bosnia and Herzegovina (CDL-INF (2000) 15), adopted by the Commission at its 44th Plenary Meeting (Venice, 13-14 October 2000)

I. Introduction

1. On 30 July 1999 the High Representative invited the State of Bosnia and Herzegovina and Entity governments and parliaments to start the preparation of the legislation on freedom of information[3]. This law would purport to guarantee and enforce human rights, and therefore falls under the competence of both the State of Bosnia and Herzegovina and its Entities. In April 2000, the OSCE mission to Bosnia and Herzegovina suggested that the Venice Commission consider the relation between the freedom of expression and the freedom of access to information in the context of the constitutional regime of Bosnia and Herzegovina.

2. The first question put to the Commission in this respect is whether the freedom of expression as mentioned in the enumeration of rights in Article II.3.h of Annex 4 of the General Framework Agreement for Peace (hereafter, GFAP) includes freedom of access to information.

3. The second issue raised is whether a national law establishing a right of any natural or legal person to access to information in the control of a public authority and a corresponding obligation to disclose such information is an element of the obligation to "ensure the highest level of internationally recognized human rights and fundamental freedoms" as established in Article II. 1 of Annex 4 GFAP.

4. At its 42nd plenary meeting (Venice, 9 June 2000), the Commission designated Messrs Helgesen, Lavin and Van Dijk as rapporteurs on this issue.

II. Relevant provisions in the Dayton Agreement.

Article II Human Rights and Fundamental Freedoms of the Constitution of Bosnia and Herzegovina provides in paragraphs 1 and 2 that:

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1. Human Rights. *Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms [].*

International Standards. *The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law[].*

Article II, para. 3 provides that *All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and freedoms referred to in paragraph 2; these include: h) freedom of expression.*

6. Furthermore, the Annex to the Constitution of Bosnia and Herzegovina sets out a list of Additional Human Rights Agreements To Be Applied In Bosnia And Herzegovina which includes *inter alia* the International Covenant on Civil and Political Rights and the 1966 and 1989 Optional Protocols thereto.

7. It follows from the above that the basic rights and freedoms as enshrined in international human rights instruments are directly applicable in the legal order of Bosnia and Herzegovina and both Entities with priority over domestic law and that their scope must correspond to that given by international bodies entrusted with their authoritative interpretation. As regards freedom of expression, the instruments directly applicable in the legal order of Bosnia and Herzegovina are the European Convention on Human Rights (Article II para. 2 of the Constitution of Bosnia and Herzegovina) and the 1966 International Covenant on Civil and Political Rights.

8. Considering the above-mentioned provisions of the Constitution of Bosnia and Herzegovina, this report will examine the interpretation given to freedom of expression by the European Court of Human Rights and by competent bodies of the United Nations concentrating on:

whether the freedom of expression as a basic human right recognised by international law includes the right of access to information;

whether there are direct obligations of public authorities in the scope of freedom of access to information.

9. The first issue concerns the right to have access to information without any interference by the authorities other than under those restrictions are provided by law and necessary in a democratic society for the protection of certain public interests and the reputation and interests of orders. This right serves to promote free flow of information and to prevent monopolies of certain information streams.

10. As far as access to information held by the authorities is concerned, this report will deal with *public access*, i.e. the entitlement of all members of the public at large to government information in order to promote transparent administration and citizen participation within the democratic process. This is to be distinguished from both *private access*, in other words, the entitlement of a person to access to his or her personal information and that of *official access* meaning the entitlement of public authorities, including Parliament and courts, to government information.

III. The interpretation of freedom of expression in international law

A. The European Convention on Human Rights. The European Court on Human Rights

- Freedom of expression and freedom of access to information

11. As already mentioned in paragraph 5 of this report, the rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols are directly applicable in Bosnia and Herzegovina according to its Constitution with priority over domestic law. Freedom of expression is protected under Article 10 of the European Convention for the Protection of Human Rights, which reads:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by lawand are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

12. From the second sentence of para. 1 of the Article 10 it is evident that the right to *receive and impart* information is considered as an integral part of freedom of expression.

- Obligation of a public body to disclose information

13. The European Commission of Human Rights has held that the right of freedom of public access to government information was connected with the right of freedom of expression under Article 10 of the Convention in so far as the information concerned was generally accessible under domestic law. At the same time the Commission took the stand that the right to access information concerns mainly the access to general sources of information and aims at prohibiting a Government to prevent anyone from receiving information that others wished or might have been willing to impart to him[4].

14. The European Court of Human Rights has considered the question of interpretation of Article 10 in the context of protecting access to information in several occasions.

15. In the cases of *Observer and Guardian v. United Kingdom* and *Autronic v. Switzerland*[5] the Court clearly held that under Article 10 of the European Convention on Human Rights, freedom of expression indeed includes a right to impart and receive information.

16. The judgement of the European Court of Human Rights in the case of *Guerra and others v. Italy* reveals the Courts current position in relation to the right to seek information. In this case the Court reiterated *that the freedom to receive information, referred to in Article 10.2 of the European Convention, basically prohibited a Government from preventing a person from receiving information that others wished or might have been willing to impart to him*. In making specific reference to *Guerra and others v. Italy* case[6], it was held that freedom to receive information could not, however, be construed as imposing on a State positive obligations to collect and disseminate information of its own motion. Thus, as indicated in this judgement, the Court:

considered that Article 10 primarily contains for the authorities the obligation to refrain from restricting access to information, which others wish to impart.

recognised that Article 10 may also imply certain positive obligations to make effective the right to receive information.

did not accept as a general rule that there is a positive obligation for the State to collect and disseminate information of its own motion (although Judge Palm and six other judges delivered a concurring judgement[7] in which they held that a State might have such an obligation under certain circumstances).

17. It follows from the above that the case-law of the European Court of Human Rights has not yet given a clear answer as to whether Article 10 entails a general obligation for the authorities to disseminate information of their own motion. It would seem to imply, however, an obligation to provide information on request, subject, of course, to the limitations set forth in Article 10 para. 2 of the Convention.

18. The Parliamentary Assembly of the Council of Europe in its Recommendation of 23 January 1973 on Mass Communication Media and Human Rights[8] proposed to extend Article 10 of the European Convention by expressly securing freedom to seek information with a corresponding duty of the authorities to make information available on matters of public interest subject to appropriate limitations. The recommendation did not however, result in an amendment to Article 10.

19. The Committee of Ministers of the Council of Europe in a Declaration of 29 April 1982 on the Freedom of Expression and Information expressed the intention of member States to pursue an open information policy in the public sector, including the access to information, in order to enhance the individuals understanding of, and his ability to discuss freely political, social, economic and cultural matters. Access to information is not however referred to as a right included in Article 10 of the European Convention on Human Rights.

20. It can be concluded from the above that although no binding rules on this matter may be drawn from the Convention or the case law of the European Court of Human Rights, there is a certain tendency to accept that the right to receive information as element of the right of freedom of expression implies in principle the right of access to information of the administration - information which must be made public at a specific request and subject to the usual grounds of limitation.

* * *

21. It should be noted that a number of democratic States have in the recent past moved from the traditional system of official secrecy to a regime of freedom of official information. Certain countries such as Sweden or Belgium adopted a number of legal instruments[9] granting the right to freedom of information that go far beyond the requirements of the European Convention on Human Rights (a regime of open government provides that a document is public if it is kept by a public authority and if it has been received, prepared or drawn up by an authority)[10].

22. The European Convention on Human Rights encourages its signatories to further promote human rights through the adoption of specific national legislation that gives additional protection to certain rights or by signing other international agreements. Article 53 provides that *Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under in laws of any High Contracting Party or under any agreements to which it is a Party*. By the virtue of this provision the Convention can by no means be interpreted as restricting the adoption of national legislation, granting additional protection to the right of access to information or implementation of any other international treaties where they apply.

B. United Nations. Committee on Human Rights. Economic and Social Council. The Commission on Human Rights

Freedom of expression and freedom of access to information

23. The Human Rights Committee of the United Nations adopted at its nineteenth session in 1983 a General Comment on freedom of expression (Article 19 of the International Covenant on Civil and Political Rights). As for the protection of the right to freedom of expression, it pointed out in para. 2 that this concept included *not only freedom to impart information and ideas of all kinds, but also freedom to seek and receive them regardless of frontiers and in whatever medium, either orally, in writing or in print, in the form of art, or through any other media of his choice*.

24. More recently the United Nations Commission on Human Rights treated the issue of the right to freedom of opinion and expression and its connection to freedom of information in its Resolutions 1996/39, 1998/42 and 2000/38. The report of the Special Rapporteur on the protection and promotion of the right to freedom of opinion and expression, Mr. Abid Hussain (E/CN.4/2000/63) also dealt with the same issue. Resolutions of the Commission on Human Rights do not refer to the freedom of access to information but use a more narrow approach promoting the right to seek, receive and impart information. The notion of access to information appears in recommendations contained in the report of the Special Rapporteur. These sources, although, cannot be considered as binding norms, they do have a value of interpretation of international instruments for the protection of the right to freedom of expression and freedom to seek, receive and impart information.

25. Resolutions 1996/39 and 1998/42 both take note of the Johannesburg Principles on National Security, Freedom of Expression and Access to Information adopted by a group of experts after convening in South Africa on 1 October 1995[11][12]. The Johannesburg principles make a clear link between the freedom of expression and the freedom of access to information in Principle 1 (b):

*(b) Everyone has the right to **freedom of expression, which includes the freedom to seek, receive and impart information and ideas of all kinds**, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his or her choice.*

26. Resolution 1998/42 also establishes a clear link between the freedom of expression and the freedom of information also in the field of modern technologies as it emphasises the need to *raise awareness about all aspects of the interrelationship between the use and the availability of newmedia of communication, including modern telecommunications technology, and the right of freedom of expression and information []*,

27. In Resolution 2000/38 the right to freedom of expression appears in connection with the freedom to seek, receive and impart information. States are urged not to impose restrictions on this right although they have a margin of appreciation under certain circumstances as defined by law.

28. From the above it can be concluded that the freedom to seek, receive and impart information is an integral part of the freedom of expression. Considering the content of Article II.1 of the GFAP, which refers to the *highest level of internationally recognised standards*, the freedom of expression mentioned in Article II.3.h must include the freedom to seek, receive and impart information as it directly refers to Article 19 of the International Covenant on civil and political rights and to its scope as defined in Resolutions of the Human Rights Commission.

Obligation of a public body to disclose information

29. As it appears from the Covenant and the General comment to Article 19, under that provision States do not have an obligation to disclose information to natural or legal persons. Nevertheless, the jurisprudence of the Human Rights Committee shows that a limitation of access to information may amount under certain circumstances to an infringement of Article 19 of the Covenant.

30. In Communication N 633/ 1995[13] the Committee considered the issue whether the restriction of access to press facilities in Parliament amounts to a violation of the right protected under Article 19 of the Covenant, to seek, receive and impart information. The Committee referred to the right to take part in the conduct of public affairs, as laid in Article 25 of the Covenant and in particular to General Comment N25 (57)[14]. According to the Committee Article 25 *read together with Article 19, implies that citizens, in particular through the media, should have wide access to information and the opportunity to disseminate information and opinions about the activities of elected bodies and their members*[15]. However, neither the above mentioned case nor any other case-law of the Committee allow to draw the conclusion that Article 19 enshrines an obligation for States to disclose information to natural and legal persons.

31. In his report, Mr. Abid Hussain, Special Rapporteur on the protection and promotion of the right to freedom of opinion and expression (E/CN.4/2000/63), finds the following : *The right to seek, receive and impart information is not merely a corollary of freedom of opinion and expression; it is a right in and of itself. As such, it is one of the rights upon which free and democratic societies depend. It is also a right that gives meaning to the right to participate which has been acknowledged as fundamental to, for example, the realization of the right to development[16].* The Special Rapporteur expressed concern: *about the tendency of Governments, and the institutions of Government, to withhold from the people information that is rightly theirs in that the decisions of Governments, and the implementation of policies by public institutions, have a direct and often immediate impact on their lives and may not be undertaken without their informed consent[17]* . Finally, he *directed the attention of Governments to a number of areas and urged them either to reviewexisting legislation or adopt newlegislation on access to information and ensure its conformity with these general principles[18].*

32. It follows from the above that although United Nations treaties do not contain any provision expressly guaranteeing freedom of access to information in the control of a public authority, there is a clear tendency in the practice of UN and its specialised bodies to encourage national authorities to grant their citizens the right of free access to public information through national legislation.

IV. Conclusion.

The Venice Commission is of the opinion that:

a. Freedom of expression as mentioned in the enumeration of rights in Article II.3.h of Annex 4 of the General Framework Agreement for Peace includes freedom of access to information.

b. The United Nations Human Rights instruments as well as the European Convention on Human Rights do not impose on Member States an obligation to grant any natural or legal person a right of access to information in the control of a public authority, nor do they impose on public authorities a corresponding obligation to disclose information, at least not on their own motion. Therefore it cannot be concluded that the freedom of expression as mentioned in Article II.3.h of the annex 4 GFAP gives automaticaly such protection. Nevertheless, national legislators increasingly do grant and regulate a right to access to information in the control of public administration and impose on public authorities a corresponding obligation to disclose information under certain conditions and with certain exceptions. This evolution is to a certain extent reflected in international and European law as both United Nations and Council of Europe bodies recommendations promote and encourage such legislative measures.

v. Opinion on constitutional aspects of certain amendments to the code of penal procedure of Bulgaria, based on comments by Messrs James Hamilton and Franz Matscher, (CDL-INF (2000) 6), adopted by the Commission at its 42nd Plenary Meeting (Venice, 31 March-1 April 2000)

A. INTRODUCTION

1. The Bulgarian delegation to the Parliamentary Assembly of the Council of Europe requested the Venice Commission to give an opinion on constitutional aspects concerning certain amendments to the Code of Penal Procedure of Bulgaria, which were subject of disagreement between the members of the delegation. The Commission appointed Messrs. Hamilton and Matscher as rapporteurs who prepared written comments (CDL (2000) 13 and 18).

2. The Code of Penal Procedure was promulgated in the State Gazette, No. 89 of 1974, and the amendments in question are contained in the Law amending the Code of Penal Procedure promulgated in the State Gazette No. 70 of 6 August 1999. The amending Law is a substantial document containing 255 sections. The Code of Penal Procedure itself runs to some 466 articles many of which have been amended by the 1999 amending law (copies can be obtained from the Secretariat upon request). The Venice Commission therefore sought clarification from the Bulgarian delegation as to the precise constitutional issue which arises and which is in dispute. It was made clear that the Commission could not examine the Code as a whole.

The Delegation informed the Commission that the issue, which was in dispute, was whether the amending law infringed upon the independence of the judiciary by giving to the police powers to investigate a large part of criminal cases. Subsequently, Ms. Milenkova clarified that there were three objections to the amendments (CDL (2000) 12):

that an inequality was created between citizens in the stage before the intervention of the Court in various penal cases

that investigation during the period of police instruction is carried out by the executive who has an interest in the result

(3) that the rights of the suspect are limited in comparison to those of the accused

B. THE AMENDMENTS TO THE LAW

3. Under the Code of Penal Procedure in operation prior to the amendments the procedure regarding investigations was as follows:

Preliminary investigation was to be carried out by examining magistrates and assistant examining magistrates, in co-operation with the respective bodies of the Ministry of Interior (Article 48 (1)).

These enquiries were under the guidance and supervision of the prosecutor (Article 48 (3)).

In exercising guidance and supervision the prosecutor had extensive powers, including power to give instructions, to request, study and verify all materials collected, to demand the case file, to take part in the preliminary inquiry, to remove the persons conducting the inquiry, to transfer the case file to another body of inquiry, and to revoke unlawful and unjustified decisions (Article 176). His instructions to the magistrate were mandatory (Article 178), subject to an appeal to the superior prosecutor.

Separate investigations could also be carried out by the prosecutor after completion of proceedings by the examining magistrate (Articles 48 (2) and 177).

In Bulgaria the prosecutors are an integral part of the judicial branch of government (Article 117 of the Constitution of Bulgaria).

4. The Amendments to the Code of Penal Procedure include the following changes:

In cases where preliminary proceedings are to be carried out, the examining magistrates continue to act as the investigating bodies (Article 48 (1)), and remain under the guidance and supervision of the prosecutor (Article 48 (3)). The prosecutors powers over the activities of the examining magistrate are undiminished (Articles 176 and 178).

The prosecutor may now conduct a separate enquiry at the preliminary proceedings, not merely after their completion (Article 177).

The cases in which preliminary proceedings are mandatory are set out in Article 171 of the Code.

In addition, preliminary proceedings shall be instituted where there is a legal occasion and sufficient information about a perpetrated crime. Legal occasion include information to the prosecutor or examining magistrate about a crime, press articles, the making a confession or direct discovery of signs. Anonymous complaints are not admissible (Articles 186, 187 and 188).

Preliminary proceedings may also be instituted where it is necessary to carry out urgent investigative actions. (Article 186(2)).

Under the amended Code, where no preliminary proceedings are carried out, the investigating bodies are to be the inquest officers in the Ministry of Interior (Article 48 (1)). Inquest officers are employees of the Ministry of Interior designated by order of the Minister and, for crimes under Articles 242 and 251 of the Penal Code, may be the customs employees designated by common order of the Minister of the Interior and the Minister of Finance.

Under Article 48 (3), the investigating bodies continue to be under the guidance and supervision of the prosecutor.

Notwithstanding their appointment by the Minister and their status as his employees, Article 9 of the amended Code provides that the investigating bodies shall be independent in implementing their functions and shall obey only the law.

Article 191 deals with the situation where there are no sufficient data for institution of preliminary proceedings and no urgent investigative actions are necessary. In such cases

the examining magistrates, the respective bodies of the Ministry of Interior and other administrative bodies, as provided by law, shall conduct preliminary inspection and shall notify the prosecutor thereof. Preliminary inspection may be carried out as well by order of the prosecutor. In all cases the respective bodies shall perform the inspection under the supervision and guidance of the prosecutor and they shall be obliged to notify him of its results within a time limit set by him.

Furthermore:

In the course of preliminary inspection no investigative actions, provided in the Code, shall be allowed, except inspection on the site of the incident and the relevant search and appropriation and interrogation of eye-witnesses, where the immediate conduct of such actions is the only way to collect and preserve evidence. The examining magistrate shall notify forthwith the prosecutor about any such actions.

The respective bodies of the Ministry of the Interior are conferred with functions where preliminary proceedings against unknown perpetrators are instituted. The prosecutor or examining magistrate is to assign to them the search for the perpetrator (Article 192a). They are to deliver the materials collected to the magistrate where they consider they have collected sufficient data incriminating a certain person.

The examining magistrate, under Article 201, independently decides what investigative actions must be carried out. He may require the bodies of the Ministry of Interior to assist him in carrying out separate investigative actions (Article 201a).

C. CONCLUSIONS

The following conclusions refer to the issues of the independence of the judiciary, the compatibility with the European Convention of Human Rights and equality but do not provide an opinion on the compatibility of the amendments with the Constitution in general.

1. The independence of the judiciary

The complaint made by certain members of the Bulgarian Delegation to the Parliamentary Assembly of the Council of Europe is that the amendment to the Code of Penal Procedure infringes upon the independence of the judiciary by giving to the police powers to investigate a large part of criminal cases.

Even if, following the concept of Bulgarian law, both the public prosecutor and the examining magistrate are part of the judiciary, the question raised seems to be misleading. While it is true that the amendments provide that for a considerable number of cases the investigation should be carried out by the police rather than by the judiciary, this may have an impact on the competencies of the judiciary regarding the investigation of crimes but this does not infringe upon the independence of the latter. The question of the independence of a body can be at stake only regarding matters, which, in accordance with the law, are within its competence and further, if there are possibilities of interference by other authorities.

It is, therefore, difficult to conclude that the text of the proposed amendments provides a factual basis for the complaint. In the first instance, as can be seen from the analysis of the new provisions in paragraph 4 above, the transfer of investigative functions relates solely to the cases in which preliminary proceedings are not to be carried out; that is to say, to less serious cases or to cases in which a perpetrator has not yet been identified, as well as to cases in which the examining magistrate requests assistance. Secondly, the powers of the relevant bodies are in all cases to be exercised under the supervision and guidance of the prosecutor who has the status of a judicial officer.

Moreover, it should be noted that there is no legal principle according to which preliminary investigative functions must be carried out by or subject to the control of a prosecutor or judicial officer. Neither the rule of law nor the European Convention of Human Rights provide for a certain distribution of competencies among the different bodies, which are investigating crimes. Hence, this distribution of competencies is a question of legal policy left to the discretion of the states. A comparative review of legislation in this field shows that states indeed follow various approaches. In many countries the function of investigating crime is considered as an executive act.

In the Guidelines on the Role of Prosecutors adopted by the Eighth United Nations congress on the Prevention of Crime and the Treatment of Offenders adopted at Havana, Cuba, in 1990 (the Havana Guidelines) it is provided as follows

10. The office of prosecutors shall be strictly separated from judicial functions.

11. Prosecutors shall perform an active role in criminal proceedings, including institution of prosecution and, *where authorised by law or consistent with local practice,* in the investigation of crime, supervision over the legality of these investigations, supervision of the execution of court decisions and the exercise of other functions as representatives of the public interest.

(emphasis added).

The Prosecution Standards of the International Association of Prosecutors adopted on 23 April 1999 also make reference to this variety in practice between jurisdictions. The preamble contains the following recital:

WHEREAS the degree of involvement, if any, of prosecutors at the investigative stage varies from one jurisdiction to another

In paragraph 4 it is stated as follows:

prosecutors shall perform an active role in criminal proceedings as follows:

where authorised by law or practice to participate in the investigation of crime, or to exercise authority over the police or other investigators, they will do so objectively, impartially and professionally.

10. There are two possible abuses, which should be avoided in relation to investigatory powers. The first is that the powers will be used to prevent the institution of investigations, which ought to be carried out; the second is that the powers will be used to carry out investigations for the purpose of harassment or intimidation where there is no justification for an investigation. Under Article 192 of the revised Bulgarian Code of Penal Procedure the prosecutor and examining magistrate retain the power to institute preliminary proceedings. The bodies of the Ministry of Interior have no power to prevent them doing so. Where those bodies carry out investigation outside the scope of preliminary proceedings they do so under the supervision and guidance of the prosecutor (Articles 48 (3) and 191). The text of the code, therefore, contains guarantees against such abuses, which could not take place solely on the initiative of the investigating bodies designated by the Ministry of Interior.

11. It can, therefore, be concluded that the amendments to the Code of Penal Procedure of Bulgaria, which give powers to investigate crimes to officers of the Ministry of Interior do not infringe upon the independence of the judiciary.

2. Compatibility with the European Convention of Human Rights

12. Whatever investigative system is applied, from the viewpoint if the European Convention of Human Rights, it is important that the rights of the accused person are guaranteed.

13. According to the case-law of the European Court of Human Rights, a criminal accusation within the meaning of Article 6 of the Convention starts at the very moment when the first investigative steps are undertaken and the investigating authorities for the first time contact the accused. This is the moment, which triggers the applicability of the procedural guarantees of Article 6 of the Convention (and of Article 5 for persons, who have been arrested).

14. When examined in the light of these guarantees, the amendments to the Code of Penal Procedure of Bulgaria do not seem to be incompatible with the Convention.

3. Equality

15. Concerning the issue of equality, this principle requires equality between persons, that is, that two persons similarly placed should not be differently treated. It does not, however, prevent different procedures being applied to different types of cases. The adoption of procedures relating to the investigation of certain categories of crime, which differ from those applied in the case of other categories is not an infringement of the principle of equality. Nor is it an infringement of the principle of equality that the options open to an accused person are different at different stages of the penal procedure provided that the rights of the accused person are guaranteed.

vi. Opinion on the Croatian Constitutional Law amending the Constitutional Law of 1991, on the basis of the report prepared by Messrs Matscher, van Dijk and Ms Suchocka, (CDL-INF (2000) 10), adopted by the Commission at its 43rd Plenary Meeting (Venice, 16 June 2000)

On 28 April 2000, the Parliament of the Republic of Croatia considered at first reading a Draft Proposal of the Constitutional Law on Amendments to the Constitutional Law on Human Rights and Rights of Ethnic or National Communities or Minorities. Having been asked by the Parliamentary Assembly to follow the developments in the revision of the said Constitutional Law of 1991 and its implementation, the Venice Commission considered the same draft in order to submit to the Croatian authorities its comments and observations. On 3 May 2000 the Croatian Government forwarded the draft Constitutional Law (together with two other draft laws on the use of minority languages and on education in minority languages) to the Venice Commission requesting its comments.

It is recalled in this respect that, in the framework of the procedure for the accession of Croatia to the Council of Europe, the Venice Commission recommended that the suspended provisions of the 1991 Constitutional Law on Human Rights and Rights of Minorities be revised as soon as possible in order to ensure that persons belonging to minorities are guaranteed rights in the field of local autonomy in accordance with the European Charter of Local Self-Government and Recommendation 1201 (1993).

On its accession to the Council of Europe, Croatia undertook to carry these recommendations into effect (see Assembly Opinion No. 195 (1996) on Croatia's request for membership of the Council of Europe, para. 9.vii). Furthermore, under Committee of Ministers Resolution (96) 31, such membership is subject to the requirement to co-operate with the Council of Europe, *inter alia* in applying the Constitutional Law on Human Rights and Freedoms and the Rights of National and Ethnic Communities or Minorities.

The Venice Commissions Rapporteurs examined the draft constitutional law as a matter of urgency. On 10 May they submitted to the Government of Croatia and to the Parliamentary Assembly of the Council of Europe a preliminary report (CDL (2000) 31). They found that the draft constitutional law, as such, did not seem to offer an adequate response to the political needs of minorities in Croatia. In addition, they regretted that despite the commitment of the Croat authorities and the Commissions reiterated availability no consultation had taken place at an earlier stage of the Constitutional Laws drafting.

However, on 11 May 2000, the Parliament of the Republic of Croatia adopted the draft without substantial changes (CDL (2000) 35). It is however to be noted that in a Conclusion adopted at the same meeting, the Parliament instructed the Government to prepare a new draft of the Constitutional Law on the Rights of National Minorities so that it can be introduced before the Parliament in the next six months.

Finally it should be noted that on 22 May 2000, fourteen representatives of the House of Counties requested the Government to initiate proceedings before the Constitutional Court to challenge the conformity of adoption of the new Constitutional Law with the Constitution of Croatia. They claim that the House of Counties was not consulted prior to the adoption of the new Constitutional Law as it ought to be pursuant to Articles 127 and 137 of the Constitution.

Two other laws (on use of and on education in minority languages,CDL(2000)32 and 36) where adopted on the same date, thus constituting a package of minority legislation. The Commission understands that for reasons of rationalisation of legislative work these laws were introduced and considered together by the legislator. However it finds no objective reason why the new Constitutional Law should be regarded as connected to or as a prerequisite for the adoption of the two other laws. It recalls in this respect that the constitutional basis for these two laws is to be found in Articles 5 to 12 of the Constitutional Law of 1991 which were not suspended in 1995 and were consequently already in force when the laws were discussed and adopted.

The Constitutional Law of 1991, its suspension and its revision

The 1991 Constitutional Law conferred *inter alia* specific rights of representation and participation in public institutions (parliament, government and supreme judicial bodies) to all minorities representing more than 8% of the population; these provisions were designed mainly to protect the largest minorities in Croatia by granting them effective representation at different levels of the legislative, executive and judicial institutions. Although there are 16 minorities present in Croatia, only the Serb minority was concerned by these provisions. Minorities representing less than 8% of the population were granted five seats to the Parliament of the Republic of Croatia.

By Constitutional Law adopted on 20 September 1995 all provisions relating to the special rights of minorities amounting to at least 8% of the population have been suspended. This also applied to provisions granting special status to districts with a majority of Serbs. The reason put forward for this suspension is that, following population movements, there are no longer units where the Serb minority would be a majority and that, consequently, the prerequisite for the implementation of the provisions at stake was not met.

The Venice Commission expressed the view that the relevant provisions of the Constitutional Law of 1991 should be revised with a view to ensuring an effective participation of minorities in public life (CDL(96)26).

In October 1996, the Government of the Republic of Croatia established a commission entrusted with the task to examine and to propose the revision of the Constitutional Law and the Venice Commission appointed some of its members to participate in the work of the above-mentioned commission. The members of the Venice Commission met the Croatian Commission for the Revision of the Constitutional Law in Zagreb in March and May 1997. Following these meetings

- a consultative body (now called Council of National Minorities) was set up, where representatives of minorities sit and discuss with Government representatives and officials questions concerning minority protection policy. Mrs Zoricic Tabakovic, chair of the Council participated in the 36th Plenary meeting of the Venice Commission (Venice, 11-12 December 1998)

- the Venice Commission addressed to the Croatian authorities, in June 1997, a memorandum containing the orientations and conclusions concerning the revision of the Constitutional Law (see Venice Commission 2nd Report on its co-operation with Croatia (CDL-INF (98) 7)).

- the Croatian authorities agreed to elaborate a draft Law on the Revision of the Constitutional Law which would be the basis for the further work on revision.

On 12 December 1997 the Parliament of the Republic of Croatia adopted amendments to the Constitution whereby, among others, the list of minorities expressly mentioned in the preamble of the Constitution was amended in such a way as to delete the mention of "Muslims" and "Slovenes" and to include "the Germans, Austrians, Ukrainians and Ruthenians". The Commission had not been able to assess the possible effects of this amendment on the work of the Croatian commission for the revision of the Constitutional Law and on the composition and the activities of the Council of National Minorities. However, it became clear later, when the electoral law was adopted, that this amendment had negative effects on the representation of the minority groups whose mention in the Preamble was deleted (see below).

On 29 April 1999, the Parliamentary Assembly, by its Resolution 1185 (1999) on the honouring of obligations and commitments by Croatia regrett(ed) that little progress (had) been made by Croatia in honouring commitments and obligations related to the fundamental principles of the Council of Europe (democracy, rule of law and human rights) and called on the Croatian authorities, *inter alia*, to adopt a constitutional law revising the suspended provisions of the 1991 constitutional law in compliance with the recommendations of the Venice Commission and taking into account new realities, by the end of October 1999 at the latest .

Following an invitation by Mrs ZoricicTabakovic, Messrs G. Maas Geesteranus and F. Matscher participated in a meeting of the Council of national minorities in Zagreb, on 5 May 1999 (see DocumentCDL(99)34). During the meeting the urgency of the revision was underlined and reference was made to the Memorandum addressed by the Venice Commission to the Croatian Parliament in 1997 indicating the main topics to be dealt with in the framework of the revision. These include the status of the Council of National Minorities and other minority institutions, the representation of minorities in the legislative bodies and the Government and guarantees for educational and cultural autonomy. It was generally accepted that the points set out in the Commissions Memorandum could form the basis for the revision. It was stressed further that early involvement of the Commission in the preparation of the revision would make co-operation easier and more effective. In this respect, the need was underlined to submit to the Commission as soon as possible any draft amendments to the Constitutional law of 1991, including provisions on the electoral rights of persons belonging to minorities. The Director of the Governmental Office for Minorities indicated that work on the revision was going on, but no draft had been finalised so far. As soon as finalised, the draft would be sent to the Venice Commission and to the Council of National Minorities for consideration. However, no draft material has been forwarded to the Commission until April 2000.

Moreover, some of the suspended provisions concerning electoral rights of minorities, including the Serb minority, were in fact reviewed by the adoption, on 29 October 1999 of the new Croatian electoral legislation. The draft election law provides for the representation in the House of Representatives of indigenous (autocthonous) national minorities. Minorities have the right to elect five representatives in a national minority constituency in accordance with the following scheme: Italians, Hungarians and Serbs shall elect one representative each; Czechs and Slovaks shall also elect one representative; Ukrainians, Ruthenians, Jews, Germans and Austrians shall elect one representative. In order to achieve that all above mentioned minorities be represented, the representatives of Czechs and Slovaks, as well as the representatives of Ukrainians, Ruthenians, Jews, Germans and Austrians shall rotate. As a result of the above enactment the guaranteed representation of Serbs in Parliament was reduced from three to one. The amendment to the Preamble of the Constitution had also the effect of guaranteeing a representation by rotation to Germans, Austrians, Ukrainians and Ruthenians, whereas no representation whatsoever was guaranteed for Slovenes and Bosniacs (Muslims).

The Constitutional Law on Amendments to the Constitutional Law of 1991

The Constitutional Law makes the following substantial proposals:

First, it provides that all previously suspended provisions concerning special status districts are abolished.

Moreover, the Constitutional Law provides that other specific rights of minorities representing more than 8% of the population, i.e. rights to be proportionally represented in the Parliament and in the Government and in high judicial bodies are re-introduced. However their effective implementation shall only start after the proclamation of the results of a census to be held in the Republic of Croatia (The date of the census is not specified in the law but according to information received by the Commission at its Plenary meeting the end of 2001 would be the time envisaged).

Rights of minorities who do not represent more than 8% of the population are not affected.

Pursuant to the Constitutional Law, a new list of national minorities is included in Article 3 of the Constitutional Law of 1991 including again the Slovene and the Bosniac minority, as well as several other minorities, i.e. Albanian, Bulgarian, Montenegrin, Macedonian, Polish, Roma, Romanian, Russian, Turkish and Vlach minorities.

Assessment of the Constitutional Law

Article 1 of the new Constitutional Law amends Article 3 of the Constitutional Law on Human Rights and Rights of Minorities. This provision no longer guarantees equality of national and ethnic groups or minorities but equality of the members of ethnic and national communities or minorities.

This shows the will of the Croat constitution maker to depart from the concept of protecting minority rights as group rights and focus on protection of individual rights of persons belonging to minorities. However, Articles 4 and 5 of the Constitutional Law guaranteeing to minorities the right to self-organisation, to develop their relations with their parent countries in order to promote their national cultural development and the right to cultural autonomy remain unchanged.

The wording equality of the members of the minorities shows that the Law does no longer make any distinction between minorities on the ground of their numerical importance or on their autochthonous nature (cf. Preamble to the Constitution). Also the list of minorities is now given in a strict alphabetical order. To the contrary, in the Constitution Serbs appear in the beginning of the list.

The discrepancies between the list in the Constitution and the list in the Constitutional Law should not in principle raise any difficulty as both are regarded as indicative. However, the conclusion the legislator has drawn from the list of autochthonous minorities in the Constitution, namely that only these minorities have the right to be represented in the Parliament, may no longer be justified under the proposed amendment to Article 3 of the Constitutional Law.

Articles 2, 3 and 5-8 of the new Constitutional Law abolish all provisions concerning special status of districts where minority members represent the majority of the population (Articles 13, and 21 to 58 of the Constitutional Law of 1991), namely the districts of Glina and Knin with Serb majority according to the 1981 census. The explanatory report states that the special status districts are abolished since in the present conditions in the Republic of Croatia a need for such a form of minority protection no longer exists.

This abolition conflicts with the proposals made by the Venice Commission at various stages of its work on the implementation and the revision of the Constitutional Law of 1991. In its report on the implementation of the Constitutional Law (CDL (96) 26), adopted at the Commissions 27th Plenary Meeting, Venice 17-18 May 1996) the Commission had already considered the argument that the special status would be inadequate because of the change in the demographic conditions of the region. The Commission had expressed concern about the discouraging psychological effect that the suspension would have on minorities and displaced populations who would like to remain in or return to Croatia. The Commission had stated then that the Constitutional Law of 1991 without its special status provisions could not be said to constitute an adequate response to the situation after 1995. In the Commissions view a revision of these provisions was required but this should not amount to an abolition of any special status.

The Constitutional Law does not make any proposal for revision of the constitutional law.

The Commission had proposed in its Memorandum addressed to the Croatian authorities that the existence and functioning of the "Council of National Minorities, a consultative body comprising representatives of minorities and advising the authorities in the field of minority policies, should be provided by the Revised Constitutional Law.

As to the special status provisions the Commission made proposals in this respect on two occasions:

First, in its above-mentioned report on the implementation of the Constitutional Law of 1991, the Commission found the following:

Although recent events are capable of justifying a revision of certain provisions of the Constitutional Law of 1991 () this revision should not lead to the abolition of any special status but should rather institute a regime of local self-government adapted to the new situation. In this respect, it is of course for the national legislature to determine the principal characteristics of that regime. However the new provisions should, in line with Recommendation 1201 (1993) and with the European Charter of Local Autonomy, guarantee that concentrated minorities will enjoy the right to regulate and manage an important part of public affairs..

As regards in particular the situation of the Serb minority, the Commission indicated in its Memorandum on the revision addressed to the Croatian authorities in June 1997:

The authorities of the Republic of Croatia should consider including in the Revised Constitutional Law the guarantees of political representation and educational and cultural autonomy which are included in the "Letter of intent" (Letter of the Government of the Republic of Croatia dated 13 January 1997 on the completion of peaceful reintegration of the region under transitional administration (Danube region) in the Republic of Croatia)

The Commission indicated in the said Memorandum that the Revised Constitutional Law should set out the principle of representation of the Serb ethnic community notably from the Danube region in State bodies and bodies of local self Government acting in the region. It should also set out the framework for the functioning and competence of the "Joint Council of Municipalities" in accordance with the principles enshrined in the European Charter of local Self-Government, the Framework Convention for the protection of national minorities and Recommendation 1201 (1993) of the Parliamentary Assembly of the Council of Europe. Finally, the Revised Law should enshrine the principle of representation of the Serb ethnic community in the Parliament;

By virtue of Article 12 of the new Constitutional Law, Article 18 of the Constitutional Law is reactivated. This would allow minorities representing more than 8% of the population to be proportionally represented in the Parliament and in Government and High judicial bodies. However, in practice, this s re-activation is again suspended by virtue of Article 11 until the proclamation of the results of the (future) census.

The Commission does not overlook the importance of the reactivation of Article 18. As it stands, it guarantees a clear participation in political life to minorities provided that they are numerically important and this may have an encouraging effect to the return process of refugees. However, the practical effects of this provision will mostly depend on the general return policy of the Croat Government, including fair and speedy procedures concerning citizenship.

Moreover, it has to be recalled that the Commission was of the opinion that some rights should be granted to concentrated minorities making up a substantial number of the population irrespective of the total percentage that such a minority represents at national level (CDL (96) 26, para 22).

The new laws on use and education of minority languages

In addition to the new Constitutional Law, the Croatian Parliament adopted on the same date (11 May 2000) two laws : The law on the use of law on the use of language and script of national minorities in the Republic of Croatia (CDL (2000) 32)and the law on the education in the language and script of national minorities (CDL (2000) 36).

The **law on the use of minority languages** provides for the official use of languages and script of national minorities by local administrative authorities in their official work and all their documents, in the relations between these authorities and the individual citizens, as well as before first instance State authorities and before courts of first instance. It further provides for equal use of minority languages and scripts in the display of topographic indications. The law provides for the equal official use of national minority language and script" in the following cases:

when the members of a particular national minority constitute the majority of inhabitants of a town or municipality;

when this is envisaged by international agreements to which Croatia is a party;

when municipalities and towns have so decided in their Statute, in accordance with the provisions of the Constitutional Law on Human Rights and Rights of Minorities and the Framework Convention for the Protection of National Minorities;

when the county, in the area of which the minority language and script is in equal official use in particular municipalities and towns, has stipulated in its Statute that the minority language will be used in the work of its bodies.

The law contains several references to the Framework Convention for the Protection of National Minorities and this should in principle be welcome. Although the condition set for a mandatory equal official use, i.e. that the minority constitutes the majority in a town or municipality is rather strict[19], it leaves an important margin to local authorities to decide that a minority language or script will be in official use even when this condition is not fulfilled. Generally, it can be said that the law provides for a relatively large application of the equal official use of the minority language.

The **law on education in minority languages** provides that there will be education in minority language in pre-school institutions, primary and secondary schools and other school institutions. It provides extensive possibilities for education in a minority language and sets out the obligation of the State to fund minority language educational institutions. It is to be noted that the law stipulates that the minority culture curricula are adopted by the Ministry of education after opinion of the associations of the national minority concerned. School institutions with minority classes can use textbooks from the parent country subject to approval of the Ministry of education. Furthermore, provisions that required a declaration of belonging to an ethnic and national community or minority upon enrolment in a minority language educational unit (educational institution, class, tuition group) contained in a previous draft were removed from the law. To the contrary, the law provides that teachers in minority language units shall in principle belong to the respective ethnic and national community or minority themselves[20].

Undoubtedly, it would be desirable to clearly state in the law some procedural details as to the negotiation of curricula and the approval of textbooks. For instance, the law does not contain regulations on the principles by which the Ministry shall be bound when passing the curricula according to Art.6 (2) or as to the representativity of the minority association consulted by the Ministry in this respect. There are also no rules as to the reasons for and the conditions under which the Ministry may refuse to approve textbooks from the parent country. Such provisions would contribute to legal security and prevent arbitrary decisions. Be that as it may, the Commission is of the opinion that in general the Education Law regulates successfully an area having key position in the protection of minorities and sets an appropriate framework to guarantee education in the minority language.

General assessment of the laws on use of minority language and on education in minority language

Although there are some critical points in both laws that may raise delicate issues in their implementation, in general it can be said that they grant a relatively high level of protection of cultural rights for national minorities, concerning the use of and education in their languages. This fact and the positive intention standing behind these laws are certainly very welcome.

However, these laws are not likely to fill the vacuum left by the abolition of the special status provisions.

It is to be stressed that no rules are adopted at the constitutional level to regulate or to set out the frame of an effective participation of minorities in public life nor are there any rules as to the establishment and competencies of bodies representing minorities at the local and national level.

Future steps

The Commission notes that in accordance with the Conclusion of the Sabor, the Government will have to present a new draft for the revision of the Constitutional Law on Rights of Minorities within six months from the Conclusion, i.e. by mid of November 2000. Whatever the legal value and the legal effect of this conclusion could be in Croatian domestic law, the Commission understands this as being a political commitment to reconsider the question of the revision of the Constitutional Law on Rights of Minorities and welcomes the fact that a committee, under the authority of Mr Ivanisević, Minister of Justice, has already started working on the revision. Recalling Croatias commitments when acceding to the Council of Europe, the Commission reiterates formally its availability to co-operate with the competent Croatian authorities in this respect.

Conclusion

In the Commissions opinion:

The new Constitutional Law does not revise the suspended provisions but clearly abolishes all special regime for important minorities in Croatia. Admittedly, it re-activates provisions concerning proportional representation of minorities making more than 8% of the population but this is again suspended until the results of a census to be held in the future.

The laws on use of minority language and on education in minority language grant a relatively high level of protection of cultural rights for national minorities, concerning the use of and education in their languages, but are not likely to fill the vacuum left by the abolition of the special status provisions.

The legislation considered still lacks as a whole rules at the constitutional level to regulate or to set out the frame of an effective participation of minorities in public life and rules as to the establishment, functioning and competencies of bodies representing minorities at the local and national level.

Finally, the Commission recalls that it expressed repeatedly its availability to co-operate with the competent Croatian authorities. It regrets that despite the commitment of the Croat authorities consultation did not take place at an earlier stage and reiterates again formally its availability to co-operate with the competent Croatian authorities in this respect in the coming months with a view to prepare a proposal to amendment the Constitutional Law on Human Rights and Rights of Minorities as requested by the Parliament of the Republic of Croatia.

vii. Consolidated opinion on the Constitutional Law on the Constitutional Court of the Republic of Croatia, based on comments by Ms Janu and Mr Vandernoot (CDL-INF (2001) 2) adopted by the Commission at its 45th Plenary Meeting (Venice, 15-16 December 2000)

I. Introduction

Upon the request of the President of the Constitutional Court of Croatia, Mr S. Sokol, the Venice Commission was asked to prepare a legal opinion on the Constitutional Law on the Constitutional Court of the Republic of Croatia (Doc.CDL(2000)51).

Mrs Janu and Mr Vandernoot were designated as rapporteurs on this issue. The following consolidated opinion is based on their comments that have already been transmitted to the Croatian authorities.

The Venice Commission discussed and adopted the opinion at its 45th Plenary Meeting in the presence of Mr Sokol. It was underlined that the Constitutional Law on the Constitutional Court of the Republic of Croatia in conformity with democratic standards applied by most European States.

The following report summarises the observations made by rapporteurs in their separate opinion and the discussions held during the Plenary Meeting.

II. General comments

The Constitutional Law on the Constitutional Court aims to define the position of this institution in the Croatian legal system and the status of judges, to institute procedures for the review of the constitutionality and legality, to describe the legal effects of decisions, the protection of human rights and fundamental freedoms and to settle a number of other issues.

The very first comment that one could make is that the text is very detailed for a Constitutional Law: together with really fundamental issues it describes in detail different procedures. This approach leads to a number of omissions, which could be problematic for the efficient work of the Court. Although this legal approach does not seem to create difficulties in current practice, the Law could enable the Constitutional Court to have more freedom to regulate certain aspects of its own procedure in conformity with the principles defined by the law.

In spite of the very detailed description of certain types of proceedings, the distinction between different competences of the Court could be better defined. Article 125 of the Constitution of Croatia gives the description of different fields of competence of the Court. The Law on the Constitutional Court of Croatia is aims to give the details of how these competences are carried out by the Court. Nevertheless, there are still certain issues that are not clear in the text (see below).

The Constitutional Court does not only deal with constitutional issues but appears to be the guarantor of the hierarchy of all norms. This may in the long run overburden the Constitutional Court. In this light the extension of the competence of the Constitutional Court in issues of control of constitutionality of norms could be reconsidered. It might be wise to entrust it with the power to control the constitutionality of laws and leave the control of administrative acts and decisions to other jurisdictions (courts of justice as they appear in the text of the Law). This proposal is supported by **Article 35** Para 2 of the law, which gives the right to courts of justice to *determine that the regulation other than the law, which is to be applied, is not in accordance with the Constitution or the law*, and, on

the basis of this determination, not to apply that regulation and to inform the Supreme Court thereupon. The Supreme Court in accordance with **Article 34** of the law can refer this issue to the Constitutional Court. There could be, for example, a system where competences of the Constitutional Court and other high jurisdictions are distributed in such a way that the Court would be a last-instance jurisdiction on issues of conformity of different acts to the Constitution. Other courts would refer to the Constitutional Court only in cases when they consider that the provision of a certain act clearly breaches the Constitution and the intervention of the Constitutional Court is absolutely necessary.

The text could be amended with provisions aimed at implementation of the decisions of international jurisdictions, especially in the field of human rights. The role of the Court in the field of implementation in Croatia of different norms of international instruments on human rights, minorities etc., to which Croatia adhered ,could also be clearly stated. The Law could even provide for a specific procedure in this respect.

Considering the importance of the role of the Constitutional Court in the protection of minorities the Council of National Minorities, whatever its status, should have the right to refer this issue to the Constitutional Court.

Another general issue of importance is the protection of minorities by the Constitutional Court. The Constitutional Law of the Republic of Croatia of 4 December 1991 on human rights and fundamental freedoms and on national or ethnic minorities establishes that minorities that represent more than 8 % of the population must be represented in high jurisdictions[21]. The latter should include, in principle, the Constitutional Court. This provision is not reflected in the Law on the Constitutional Court.

As for the structure of the text, certain articles are not clear from the point of view of terminology. This is the case, for example, of Articles **10 and 12, 16 and 41 42, 17 and 32**. These terms should be better defined in order to avoid any possible confusion.

III Some comments on concrete articles of the Law[22].

A. *Composition of the Constitutional Court and status of judges (Articles 4 15).*

The definition of a necessary professional background for being elected judge at the Constitutional Court defined by **Article 5 Para 1** is too vague. It could include more specific reference to the professional experience of a candidate such as work as a professor of law at a university or as a judge in other jurisdictions. Para 3 of the same article refers to such experience but in very general terms.

Article 6 Para 2 states that *The judge of the Constitutional Court who has been elected in place of the judge relieved of his/her office before the expiry of his/her term of office shall enter his office at the time determined by the House of Representatives of the Croatian National Parliament.* This provision might be problematic because it gives an opportunity to the Parliament to postpone indefinitely the nomination of a new judge.

Article 10, while determining the reasons for the termination of office of the judge in its first paragraph, gives additional reasons for removal of the judge in the second one. It would be more logical if the first paragraph would set out the cases when a judge can be removed and the second one the internal discipline of the Court. Sanctions other than revocation could also be included in this paragraph.

Article 11 at **Paras 3 and 4** on the Courts power to determine the *permanent incapacity of a judge of the Constitutional Court* or of its President to carry on their duties could be more detailed. It should be considered whether the quorum for the removal of a judge should be the same as for the removal of the President by the virtue of the principle *par inter pares*.

The procedure to follow when the term of office of a judge expires is not sufficiently clear from the wording of **Article 13 Para 1**. This article should be more explicit on the consequences of the expiry of the term of office of the judge on the pending cases or issues she/he is examining. Another issue of great importance, as has already been mentioned in paragraph 10 of this report, is the procedure of election of a new judge by the Parliament. There should be either a procedure allowing the incumbent judge to pursue his/her work until the formal nomination of his/her successor or a provision specifying that a procedure of nomination of a new judge could start some time before the expiration of the mandate of the incumbent one[23].

B. *Review of the constitutionality of laws and the constitutionality and legality of other regulations (Articles 34 58).*

Articles 47 and **48 Para 3** do not allow a clear distinction to be made between a public hearing and a consultative session. A public hearing should take place whenever the case before the Constitutional Court is determinant for an individuals civil rights and obligations, within the meaning of Article 6 of the European Convention on Human Rights.

Article 52 allows the Court to *review the constitutionality of the law* or *the constitutionality and legality of other regulations even in the case when the same law or regulation has already been reviewed by the Constitutional Court.* This procedure allows the Court to examine several different cases, complaints or arguments concerning the same law or regulation. However, this provision could be problematic in the light of the principle *res judicata*.

Article 43 authorising the Court to suspend the execution of acts adopted on the basis of law or regulation contested before the Court could be completed and include:

as a motive for such suspension, the existence of sufficiently justified reason;

as another motive - the adoption of an act identical to the contested one;

an authorisation to suspend the law or regulation and not only acts based on them.

Article 55 concerning an incidence of abrogation or amendment of the law or regulation challenged before the Court should be interpreted in a way that allows the Court to take into account when deciding whether to pursue or end the proceedings, the existence of a genuine interest of any injured party in having the case decided by the Court.

Articles 53 56 are not clear about the effect of the decisions of the Court. It is not clear when the Court abrogates, repeals or annuls unconstitutional norms. Therefore, it is not clear if the effects of its decisions are *ex tunc* or *ex nunc*. A possible solution could be to fix the effects of decisions of the Constitutional Court as *ex tunc* and to foresee a possible exception allowing under certain specific circumstances to maintain temporarily the effects of the annulled act[24].

C. *Protection of Constitutional freedoms and human rights (Articles 59 76).*

It has been already mentioned in Chapter II paragraph 7 of this report that the text of the Law could be more explicit on the role of the Constitutional Court in implementing the international norms of protection of human rights.

Another important point can be mentioned in respect of **Article 75** establishing that *the proceedings instituted by the constitutional complaint shall end when the applicant dies*. This provision is too strict. In certain cases, especially civil ones, third persons could have a legitimate interest in pursuing the case for example successors.

IV Conclusions

The Constitutional law on the Constitutional Court of the Republic of Croatia as a whole does not present any major problems in the light of generally accepted principles and rules in European democratic States that aim to safeguard the supremacy of the Constitution, and the independence and impartiality of the Constitutional Court. Nevertheless, some amendments could be made to the text in order to clarify some of its provisions, which can be summarised as follows:

there should be a better description of the competences of the Constitutional Court and the role of other jurisdictions in the process of control of constitutionality;

the effects of decisions of the Court should be defined in a more precise way;

a reference to the role of the Constitutional Courts role in controlling the respect of international instruments of protection of human rights by Croatia should be explicit in the text;

the nomination of judges and internal organisation of the Court should be clarified; it would be advisable if the Law includes some provisions for internal discipline.

some provisions concerning national minorities could be introduced, giving them a possibility to be represented in the Court, enabling the Council of National Minorities to refer the issue to the Constitutional Court and by integrating different international instruments of protection of minorities as norms of reference for the Court.

viii. Second interim report on constitutional reform in Moldova (CDL-INF (2001) 3) adopted by the Commission at its 43rd Plenary Meeting (Venice, 16 June 2000)

I. Introduction

1. In April 1999, following the consultative referendum on the possible amendment of the Constitution of Moldova organised by President Lucinschi, the Committee on the Honouring of Obligations and Commitments by Member States of the Parliamentary Assembly of the Council of Europe, decided to ask the Venice Commission to follow constitutional developments in the Republic of Moldova. The Venice Commission was informed of this decision by letter of 3 May 1999. Furthermore, on 25 May 1999, the Commission was also asked to look at the question of constitutional reform by the Parliament of Moldova. The Parliament submitted to the Venice Commission a draft for a revision of the Commission prepared by 39 deputies.

2. On 13 June 2000, the Parliamentary Assembly of the Council of Europe asked the Venice Commission to examine all projects for constitutional reform currently examined by the Constitutional Court and by the Parliament. The Commission has appointed rapporteurs on these drafts and will adopt its opinion at its next Plenary meeting on 13 to 14 October 2000. The individual opinions will be forwarded to the Assembly as soon as they are available.

II. Cooperation between the Venice Commission and the Moldovan authorities in 1999

3. On 1 July 1999, following the consultative referendum on the possible modification of the Constitution, the President of the Republic of Moldova, Mr P. Lucinschi, signed a decree setting up a National Committee to draft a law amending the Constitution of the Republic of Moldova (Constitutional Committee). Its aim was to propose changes which would reinforce the role of the executive. In the space of two months, the Constitutional Committee presented the Venice Commission with 4 versions of draft constitutional modifications, all of which aim to establish a presidential rgime in Moldova.

4. At its 41st plenary meeting in December 1999, the Venice Commission adopted an interim report on constitutional reform in the Republic of Moldova and transmitted it to the Parliamentary Assembly of the Council of Europe (See Chapter I). The Venice Commission expressed the desire that all parties concerned continue to seek a consensus on constitutional reform.

5. As explained above, the Venice Commission was asked to examine the proposal of the 39 deputies. In its Interim Report it stated that the text was in conformity with democratic standards.

6. On the other hand, the Venice Commission considered that the Constitutional Committees draft contained a number of elements which did not allow confirmation that it was in conformity with European democratic standards [25]. At the same time, the draft in its entirety was unacceptable to the Parliament. The observations by the Venice Commission appear in the Interim Report presented to the Parliamentary Assembly in December 1999.

7. A further draft, aimed at setting up a parliamentary rgime in Moldova, was presented by 38 deputies in the Moldovan parliament. The Commission has not yet examined this draft.

III. The work of the Joint Committee

8. During his official visit to Moldova from 6 to 7 December, the President of the Parliamentary Assembly of the Council of Europe, Lord Russel-Johnston made an urgent appeal to the President of Moldova and to the Parliament, urging them to reach a compromise on the subject of constitutional conflict which opposes both sides on the manner of reinforcing the executive. Furthermore, he suggested that a committee of wise persons, comprising members of the Moldovan parliament and personalities nominated by the President of the Republic, could, with the help of the Venice Commission of the Council of Europe, draw up such a compromise[26].

9. Following this appeal, the President and the Parliament of the Republic of Moldova decided to create, in February 2000, a Joint Committee who would elaborate a single draft of constitutional amendments. This Committee would comprise three representatives of the President and three of the Parliament. The two sides asked that this Committee be chaired by Mr G. Malinverni, member of the Venice Commission, who accepted this proposal.

10. The Joint Committee met three times, on 9 and 10 March and on 26 and 27 May in Chisinau and on 7 and 8 April in Strasbourg. The Joint Committee prepared a draft proposal for the revision of the Constitution accepted by all its members (the text appears in Section 4 of this report). The final text was signed by the members of the Joint Committee.[27]

11. As stated above, the draft constitutes a compromise between the Parliament and the Constitutional Committee. Nevertheless, the participants were unable to agree on the two following important points: the right of the President to dismiss the Prime Minister and on the electoral system. On the first question the parliament categorically refused to concede this right to the Head of State. As for the electoral system, the parliamentarians considered that this reform should be made at a later date by way of changes to be made to the Electoral Code.

12. In this connection it should be mentioned that, at a time when the work of the Joint Committee was still in progress, the President of the Republic submitted a new draft text for examination to the Constitutional Court. The authors of the draft indicated that they had based themselves on the results of the work of the Joint Committee working under the aegis of the Venice Commission. When examining this text, it is apparent that there are important differences between the text proposed by the Joint Committee and the text submitted by the President. Following a request from the President of the Joint Committee and the Secretary of the Venice Commission, the President of the Republic of Moldova accepted to respect a moratorium on all the work in the field of constitutional reform until the Joint Committee had finished its work. The Parliament did likewise for the proposals made by 39 and 38 Deputies already presented to the Parliament.

13. In accordance with the provisions of the Moldovan Constitution, all draft proposals for constitutional reform must first be examined by the Constitutional Court. It is now up to the President or to the Moldovan Parliament to submit the draft prepared by the Joint Committee to the Constitutional Court. Moreover, the drafts of the 39 and 38 members of the Parliament, already examined by the Constitutional Court, are with the Parliament, whilst the Presidential draft is still subject to examination by the Constitutional Court. None of the texts have been formally withdrawn. It is therefore uncertain that the text established by the Joint Committee will be accepted.

IV. Conclusions

The Venice Commission welcomes that the members of the Joint Committee were able to agree on a compromise text for constitutional reform. The amendments proposed take into account the experience of different European States and the needs of Moldova, and at the same time considerably reinforce the Executive without undermining the principle of separation of powers. The Venice Commission is hopeful that the text, which is the result of joint work by the representatives of the Parliament and the Constitutional Commission, will have the support of the authorities and of the different political forces represented in Parliament.

ix. Opinion on constitutional reform in Moldova (CDL-INF (2001) 3) adopted by the Commission at its 45th Plenary Meeting (Venice, 15-16 December 2000)

I. Introduction

1. In April 1999, following the consultative referendum on the possible amendment of the Constitution of Moldova organised by President Lucinschi, the Committee on the Honouring of Obligations and Commitments by Member States of the Parliamentary Assembly of the Council of Europe, decided to ask the Venice Commission to follow constitutional developments in the Republic of Moldova. The Venice Commission was informed of this decision by letter of 3 May 1999. Furthermore, on 25 May 1999, the Commission was also asked to look at the question of constitutional reform by the Parliament of Moldova.

2. In 1999 the Commission examined draft proposals for constitutional reform prepared by a Constitutional Commission set up by the President of the Republic and a draft law proposed by 39 parliamentarians. These two projects had a different vision of the nature of the reform to be carried out the first wanted to reinforce the executive by giving additional powers to the President whereas the second proposed to give new powers to the Government. At its 41st plenary Meeting in June 1999 the Commission adopted a first interim report and forwarded it to the Parliamentary Assembly (doc.CDL(99)88). In this report the Commission expressed the concern that the presidential draft would concentrate too much power in the hands of the President and gave a generally favourable assesment of the draft of the 39 parliamentarians.

3. Following the proposal of the President of the Parliamentary Assembly, Lord Russel-Johnston in December 1999[28], the President and the Parliament of the Republic of Moldova decided to create, in February 2000, a Joint Committee, which would elaborate a single draft of constitutional amendments. This Committee comprised three representatives of the President and three of the Parliament. The two sides had asked Mr G. Malinverni, member of the Venice Commission, to chair this committee.

4 . The Joint Committee met three times in 2000, on 9-10 March, on 26-27 May in Chisinau and on 7-8 April in Strasbourg. The Joint Committee had prepared a draft proposal of the revision accepted by all its members (CDL (2000) 37). In June 2000 this draft was submitted to the Constitutional Court, which has to decide if it is in conformity with the Constitution of Moldova. To date, the Court has not taken a decision on this question.

5. The draft prepared by the Joint Committee constituted a compromise between the Parliament and the Constitutional Committee. Nevertheless, the participants were unable to agree on the following two important points: the right of the President to dismiss the Prime Minister and the organisation of the electoral system. On the first question the Parliament categorically refused to concede this right to the Head of State. As for the electoral system, the parliamentarians considered that this reform should be made at a later date by way of changes to be made to the Electoral code.

6. At its 43rd plenary meetings in June 2000, the Venice Commission adopted its second interim report on constitutional reform in the Republic of Moldova and forwarded it to the Parliamentary Assembly of the Council of Europe (CDL (2000) 53). The Venice Commission expressed the wish that all parties concerned continue to seek a consensus on the methods of constitutional reform.

7. On 13 June 2000, the Parliamentary Assembly of the Council of Europe asked the Venice Commission to study all projects currently examined by the Constitutional Court and by the Parliament. On 5 July 2000 the Parliament voted a Law on constitutional reform based on proposals of 39 (see above) and 38 members of the Parliament (a proposal for a purely parliamentary system with a President elected by the Parliament) and sent it for promulgation to the President of the Republic. The President vetoed the Bill. On 21 July the Parliament overcame the veto by an overwhelming majority of its members and the Law came into force (with minor amendments to the initial text). The text adopted appears in documentCDL(2000)55 rev.

8. The Venice Commission decided to examine this text and not to work on the presidential text, which the legislators would not adopt. At its 43rd plenary meeting the Venice Commission asked Ms H. Suchocka, Mr K. Tuori and Mr J. Jowell to give their opinion on this Law. The text that follows is a consolidated opinion of the rapporteurs. The final paragraphs pay special attention to the relation of the adopted amendments to the proposal made by the Joint Committee (CDL(2000) 37).

II. The Law on Constitutional reform adopted by the Parliament of Moldova.

A. General observations.

9. The Constitution of the Republic of Moldova adopted on 29 July 1994 established a system of governance that is a compromise between a presidential and parliamentary system. It would seem inevitable that such a hybrid system would reveal tensions and uncertainties with regard to the respective roles and powers of the President, Prime Minister, Government and Parliament. The principle of separation of powers did not help to ease tensions on the contrary, it deepened them when each branch started to give extensive interpretation of the scope of its prerogatives.

10. The amendments adopted by the Parliament aim at strengthening the parliamentary traits of the Constitution. This means reinforcing the position of the Government and the Parliament at the expense of that of the President. The model of government shifts away from that of a semi-presidential system towards a parliamentary one. The role of the President is effectively moved from the head of the executive towards that of the head of state. The Prime Minister elected by the Parliament assumes the role of head of the executive.

11. The amendments strive for the effective functioning of the political system through increasing the powers of the Government. The basic solution, which underlies the individual amendments, is in itself fully legitimate. The main issue to be examined is, whether this solution has consequently been adhered to.

B. Particular amendments.

- The newrole of the President

12. The weakening of the position of the President is manifested already in the change in the procedures for his/her election and dismissal. According to Art. 78, the President will be elected by the Parliament. Given the fact that the Presidents powers are to be largely devoid of governmental power, retaining only largely ceremonial and some residual powers, especially in foreign affairs (as a Head of State), these amendment accords with democratic standards. One should positively assess the amendment that one may fill the office of President only for two terms of office (Art. 80, new paragraph 4).

13. Correspondingly, the dismissal of the President from his office will no more require a referendum but can be decided on by a qualified majority of the Parliament (Art. 89). An amendment of 21 July 2000 permits the President to submit to the Constitutional Court as well as the Parliament, his defence of a charge of impeachment. This additional judicial safeguard rightly accords with the requirements of rule of law.

14. As regards the powers of the President, Art. 83, according to which the President can take part in Government meetings and preside over them, will be abrogated. This corresponds to the general aims of the amendments adopted. There seems no need, however, to strip the President of power to consult the Government (Art. 83 (2) in the text of the Constitution of 1994). Consultations might be particularly necessary in cases where the President exercises some residual powers (such as the power in foreign affairs set out in Art. 86, see below). Similarly, there is no reason why the Prime Minister should not be required to keep the President informed on matters of special importance (the second sentence of Art. 101 (1) that establishes this procedure is abrogated). The Head of State should not be deprived of the right to obtain information from the Prime Minister, especially in the light of Art. 77, which defines the Presidents role in the state as the person representing the state and the guarantor of national sovereignty, independence, unity as well as the nations territorial integrity.

15. The President will also lose his right to initiate the revision of the constitution (Art. 141.1). By contrast according to the text of the law as finally adopted on 21 July 2000 he will retain the right to propose legislation. The text initially approved on 5 July 2000 had taken away this right from him. This initial text would have seemed more in line with the general tendency of the constitutional reform.

16. The President, however, will retain some important powers. On the other hand, these powers include the dissolution of the Parliament in cases defined in Art. 85 and in Art. 78(6). The Presidents right to dissolve the Parliament does not in itself contradict the basic line chosen in the amendments. Even in a predominantly parliamentary system, there is a need to provide for a way to solve situations of political deadlock, related to, e.g. the formation of the Government. As the Constitutional Court has, according to Art. 135, paragraph 1 f), to ascertain the circumstances justifying the dissolution of the Parliament, the scope for the Presidents independent political discretion is quite limited. This covers the situation, where new legislation has been deadlocked for three consecutive months and which also constitutes a reason for the dissolution of the Parliament.

17. The President will retain the right to take part in the negotiation of international treaties. In most countries with a parliamentary form of government this is essentially a governmental task and therefore it does not seem to fit into the role of the President as revised by the Law in question. There can be no objection to the President concluding treaties in the name of the Republic of Moldova, or submitting the treaties to Parliament for ratification (provided he has no discretion in the matter). Similarly, there can be no objection to the President accrediting diplomatic representatives.

18. The President will also in the future be the Commander-in-Chief of the armed forces (Art. 87). This role can be justified, at least so long as it is a formal power only and does not carry with it executive responsibility.

19. In the formation of the Government, the President designates the candidate for the office of the Prime Minister only after having consulted the groups represented in the Parliament (Art. 98(1)). This will, most certainly, strengthen the government by providing support of the parliamentary majority. At the same time, the President will lose to the Government the right to appoint two judges to the Constitutional Court (Art. 136(2)).

20. On the whole, the powers, which the President will have in the future, do not seem to cause problems for the basic line adopted in the amendments and aiming at the strengthening of the parliamentary traits of the constitutional system. The President will mainly figure as a *pouvoir neutre*, to be resorted to in situations of political and/or constitutional deadlock. However, there remains one right, which - perhaps in addition to the Presidents role in foreign and defence policy - can give the President the possibility to act as an independent political actor, namely the right to call a referendum on matters of national interest (Art. 88, paragraph f).

- Provisions strengthening the executive and defining its relations with the Parliament.

21. The purpose of enhancing the possibilities of the executive power for effective political leadership is, first of all, reflected in the new provisions concerning the use of legislative power. Thus, the Government can establish an order of priority for the examination of bills in the Parliament and also require an urgent procedure (Art. 74(3)). It is difficult to deduce from the constitutional wording how one should understand *le mode etablie par le Gouvernement* (the course established by the Government). However, it is manifest that the Parliament has the autonomous right to establish its procedures in a system of the division of powers. The power held by the Government cannot therefore overrule this right of the Parliament.

22. Article 106(1) that establishes the procedure for engaging the responsibility of the Government, which is inspired by the French model, conforms to democratic standards. It also corresponds to the proposal made in the draft of the Joint Committee.

23. According to Art. 106(2) the Parliament can also, on the proposal of the Government, adopt a law delegating legislative powers for the purpose of implementing the programme of the Government. The draft of the Joint Committee gives a more detailed procedure for delegation of powers than the adopted Law. It establishes a mechanism where the Parliament keeps control over the legislative procedure and can intervene at any time during the duration of the powers of the Government to issue by-laws and therefore gives additional guarantees against the misuse of this power by the executive. This control by the Parliament is of great importance as many democratic institutions and customs are in the process of their establishment in post communist countries. It is clear that the basic principle underlying this provision does not elicit any doubts from the legal point of view or represent a threat in most democracies. However, for any society in transition risks of abuse of power should be carefully considered and where possible additional guarantees should be provided in order to prevent them. It should therefore be considered that Article 106 can be revised to correspond to the proposals of the Joint Committee.

24. According to the adopted law legislative initiatives or amendments entailing budgetary consequences can be adopted by the Parliament only after the Government has approved these consequences (Art. 131(4)). This is a very important provision. The Government is accountable for the states economic policy. The introduction of amendment to the budget by members of Parliament without the Governments acceptance might lead to the collapse of the states economic policy.

25. According to the new Art. 136 (2), the Government has the right to appoint two judges of the Constitutional Court. Under the system established by the Constitution of 1994, the Presidents right to appoint two judges was of a different nature because his legitimacy as Head of State was based on his election through direct universal elections. Under the current system the appointment of two judges by the Government risks compromising the principle of judicial independence.

III. Conclusions.

26. In general, the adopted law on constitutional amendments raises no major problems in the light of modern democratic constitutional standards. The balance of powers is preserved and the aim of strengthening the Government initially set forth by Moldovan authorities is achieved. However, the Venice Commission hopes that these changes will provide a certain constitutional stability. Powers cannot be shifted from one power to another and the Constitution amended in conjunction with every change in the political situation in the country or after a constitution of a new parliamentary majority. The established system has great potential to contribute to the reinforcement of a genuine and efficient democracy in the country. While some fine tuning seems still necessary, the basic principles underlying the constitutional reform should no longer be questioned.

27. The constitutional amendments adopted by the Parliament include some of the proposals of the Joint Committee, relating to e.g., the strengthening of the role of the Government in the use of legislative power and the committal of responsibility by the Government before the Parliament. However, there are also differences, which cannot in all cases be explained by the basic line underlying the amendments. Thus, the proposals of the Joint Committee on the nomination of the Government (Art. 82) and on the constructive vote of no-confidence (Art. 106) could have been included in the amendments without contradicting their general aims. As set out above, the Joint Committee proposals in the delegating of legislative powers to the government are more precise. Complementing provisions on referendums, which the Joint Committee included in its proposal for Art 75, are needed even after the adoption of the examined Law of 5 July. The proposals of the Joint Committee concerning the limits of constitutional revision (Art. 142), the law on constitutional revision (Art. 143) and the promulgation of the laws amending the Constitution (Art. 93(3)) have also retained their pertinence.

28. The Venice Commission is of the opinion that if the Constitutional Court of Moldova gives a positive opinion on the draft of the Joint Committee, the Parliament could consider some of the proposals made in this text. As has been already mentioned earlier their

content is not only compatible with the logic of the established parliamentary system of government, but can also render co-operation between different powers more efficient.

x. Proposals for the Joint Committee responsible for a draft revised Constitution for the Republic of Moldova adopted in Chisinau on 27 May 2000

DRAFT LAW ON CONSTITUTIONAL REFORM

CHAPTER IV

PARLIAMENT

1. The Joint Committee has examined two proposals for reforming the electoral system, one from the Constitutional Committee which would entail electing 70 members of Parliament on a single-seat majority basis and 31 by proportional representation, and another which would entail electing all the members of Parliament by proportional representation in the constituencies. The Joint Committee has not been able to agree on either of these systems.

2. Letter "b" of Article 66 will read as follows:

"b) To call referendums within the meaning of Article 75."

3. The Third Section will be headed as follows: "Legislative procedure and referendums".

4. Article 72 is maintained in its 1994 version.

5. Article 74 will read as follows:

Article 74

The passing of laws and resolutions

1.) Constitutional laws shall be passed in accordance with the procedure provided for under Title VI of the Constitution.

2) Organic laws shall be passed by majority vote of majority of elected deputies based on at least two ballots.

3) Ordinary laws and resolutions shall be passed by the majority of the votes cast by the members present in session except where otherwise provided for in the Constitution. However, for such acts to be passed at least half of the members must be present.

4) Parliament shall examine bills introduced by the Government, as well as bills accepted by the latter in accordance with the order and priorities established by the Government. The Government may decide to ask that its bills be examined under urgent procedure.

5) The rules of procedure of Parliament shall set forth the procedures for passing organic laws, ordinary laws and resolutions, including urgent procedure.

6) The laws shall be submitted to the President of the Republic of Moldova for promulgation.

6. Article 75 will read as follows:

Article 75

Referendums

1) Problems of utmost gravity or urgency confronting the Moldovan society or State may be resolved by a Republic-wide consultative referendum. A consultative referendum on matters of national interest may be called by the President or by Parliament following mutual consultation in accordance with the legislation in force.

2) Constitutional referendums shall be organised and run in compliance with Articles 142 and 143 of the Constitution and with the legislation in force.

3) Problems of major importance for a given locality may be submitted to a local referendum in accordance with the legislation in force.

CHAPTER V

THE PRESIDENT OF THE REPUBLIC

7. Article 77 will be supplemented by a paragraph 3 reading as follows:

"The President of the Republic shall ensure respect for the Constitution and the proper functioning of the institutions. For this purpose, he shall act as a mediator between the state authorities and between the State and society."

8. Article 82 will read as follows:

Article 82

Nomination of Government

1) Within no less than fifteen days and no more than thirty days of the convening of Parliament and following consultation with the parliamentary groups, the President shall propose to Parliament a candidate for the office of Prime Minister. The candidate must be elected by an absolute majority of elected members within ten days. The person thus elected must be appointed by the President of the Republic of Moldova.

2) If the proposed candidate is not elected within ten days, Parliament may elect a Prime Minister by a majority of its elected members within fourteen days of the ballot provided for in paragraph 1 above.

3) If no candidate is elected within this time limit, a new ballot shall be held immediately, following which the person obtaining the highest number of votes shall be deemed elected. If the person elected obtains a majority of votes of the elected members of Parliament, the President must appoint him within ten days of the election. If the person elected fails to obtain that majority, the President shall either appoint him within ten days or dissolve Parliament.

4) Ministers shall be appointed and dismissed by the President at the proposal of the Prime Minister[29].

9. Article 85 will read as follows:

Article 85

Dissolution of Parliament

1) In cases where it is impossible to elect the Prime Minister in accordance with Article 82 paragraph 3 and where a motion of no confidence within the meaning of Article 106(1) has been passed, the President of the Republic, following consultation with the parliamentary groups, may dissolve Parliament.

2) Parliament may not be dissolved during a state of emergency, martial law or war.

10. Article 88f) will read as follows:

"f) call referendums within the meaning of Article 75."

11. Article 93 will be supplemented by a paragraph 3 reading as follows:

"Laws amending the Constitution shall be promulgated by the President of the Republic of Moldova within 15 days following their approval by referendum or 100 days after the passing of the law if no constitutional referendum has been initiated within that period."

CHAPTER VI

GOVERNMENT

12. The title of Article 96 will change to "The role of the Government and the responsibility of its members". The present paragraph 2 will be replaced by the following text:

"2) The members of the Government shall bear political responsibility for the management of their ministries within the terms established by the Constitution and the legislation in force."

13. Article 98 will be entitled "Taking up of office". The first three paragraphs will be deleted.

14. In Article 102 of the Constitution, "Acts of Government", the following amendments and additions will be made:

a) In paragraph (1), incorporate the word *"ordinances"* after the word "*issues*".

b) After paragraph (1), a new paragraph (2) will be inserted, reading as follows:

"(2) The ordinances shall be issued in accordance with Article 106(2)."

c) Previous paragraphs (2) and (3) become paragraphs (3) and (4) respectively.

15. Article 104 will read as follows:

"The Government shall supply Parliament with all the information and documents that it and its committees and individual members may request."

CHAPTER VIII

RELATIONS BETWEEN

PARLIAMENT AND GOVERNMENT

16. Article 106 will read as follows:

Article 106

Positive motion of no confidence

1) Parliament may carry a motion of no confidence in the Prime Minister if initiated by at least one-quarter of the members.

2) Parliament may express its opposition to the Prime Minister only by electing a successor by the majority of the members and by asking the President of the Republic to dismiss him. The President must accede to this request and appoint the person elected.

3) The motion of no confidence shall not be examined until at least 3 days have elapsed from the date when it was brought before Parliament.

17. An new Article 106(1) will read as follows:

Article 106(1)

Committal of responsibility by the Government

1) The Government may engage its own responsibility before Parliament for a programme, a general policy declaration or a bill.

2) The Government shall be dismissed if a motion of no confidence tabled by at least one-quarter of the members within three days following the tabling of the programme, general policy declaration or bill, is passed by the majority of the elected members.

3) If the Government is not dismissed in accordance with paragraph (2), the bill tabled shall be deemed passed, and the Government shall be under obligation to implement the programme or general policy declaration.

4) If the motion of no confidence is passed, the President may dissolve Parliament within 21 days. The right of dissolution shall expire as soon as Parliament has elected a new Prime Minister by the majority of the elected members.

18. A new Article 106(2) will read as follows:

Article 106(2)

Delegation of legislative power

1) The Government may ask Parliament, with a view to implementing its programme of activities, to authorise it to adopt ordinances in a given sphere, for a certain period of time.

2) Parliament grants the Government the authorisation provided for in paragraph (1) above by passing an organic law of authorisation, which must state the sphere and time limit in which such ordinances are to be issued.

3) Ordinances shall enter into force at the time of their publication. They are not to be promulgated. The bill approving the ordinance or ordinances shall be submitted to Parliament under the terms established by the law of authorisation. Any failure to comply with the time limit shall result in the ceasing of the effects of the ordinance. If Parliament does not reject the bill approving the ordinances, the latter shall remain in force. Following the expiry of the time limit mentioned in paragraph (2) above, the ordinances may be repealed, suspended or modified only by law."

TITLE IV

NATIONAL ECONOMY AND PUBLIC FINANCE

19. Article 131 "**National public budget**" of the Constitution will be supplemented by a new paragraph 4, reading as follows:

"4) Any legislative initiative or amendment resulting in an increase or a reduction in budgetary income or borrowing, or an increase or reduction in budget expenditure, may be adopted only after such increases or reductions have been agreed to by the Government."

Paragraphs 4 and 5 will become paragraphs 5 and 6 respectively.

TITLE V

CONSTITUTIONAL COURT

20. Article 135 a) and f) will read as follows:

"a) enforces on notification constitutional review of laws and orders of Parliament, Presidential decrees, ordinances and decisions of Government, as well as international treaties endorsed by the Republic of Moldova.

[]

f) ascertains the circumstances justifying the suspension from office of the President of the Republic of Moldova or the interim office of the President of the Republic of Moldova."

TITLE VI

REVISING THE CONSTITUTION[30]

21. Articles 142 and 143 will be supplemented as follows:

Article 142

Limits of revision

1) The provisions regarding the sovereignty, independence and unity of the State, the provisions set forth in Articles 1 to 6 above, as well as those regarding the permanent neutrality of the State may be revised only by constitutional referendum by a majority vote of registered voting citizens.

2) No revision shall be allowed if it results in the suppression of the fundamental rights and freedoms of citizens or of the guarantees of those rights and freedoms.

3) The Constitution may not be revised in a state of national emergency, martial law or war.

Article 143

The Law on Constitutional revision

1) Parliament must vote on any revision of the Constitution within[31] no more than eighteen months following the date on which the draft was submitted. The law must be passed by a two-thirds majority of the members.

2) The law on constitutional revision shall enter into force 100 days after the passing of the law by Parliament and the publication of the draft in the *Monitorul officiel*, unless a constitutional referendum is initiated by 200,000 citizens or by the President of the Republic within the aforementioned period. If such a step is taken, Parliament, having first obtained the opinion of the Constitutional Court, shall organise the constitutional referendum in accordance with the law.

3) If the constitutional referendum provided for in Article 142 (1) yields a negative result, the law submitted to the referendum shall be deemed null and void.

4) If the constitutional referendum provided for in paragraph 2 above yields a negative result, the law submitted for approval shall be deemed passed.

* * *

Done in Chisinau on 27 May 2000 in triplicate in the presence of:

Giorgio MALINVERNI

Chairman of the Joint Committee

Mihai PETRACHE (signature)

Anatol PLUGARU (signature)

Maria POSTOIKO

Eugen RUSU (signature)

Vladimir SOLONARI (signature)

xi. Opinion on the Constitutional amendments concerning legislative elections in Slovenia (CDL-INF (2000) 13) based on the comments of Messrs La Pergola, van Dijk and Bartole, adopted by the Commission at its 44th Plenary Meeting (Venice, 13-14 October 2000)

By letters of 21 July and 7 September 2000, the Prime Minister of the Republic of Slovenia, Dr Andrej Bajuk, addressed to the European Commission for Democracy through Law the question whether amendments introduced to the Constitution of Slovenia concerning provisions on Parliamentary elections, by which a proportional electoral system with a threshold of 4% for access to the distribution of seats in the National Assembly is established, is compatible with European democratic traditions and standards. The request indicated in this respect that these amendments conflict with the decision of the people as expressed in a referendum and decisions of the Constitutional Court.

The Commission examined the factual and legal background of the request for an opinion (see the summary of facts in DocCDL(2000)61 and the Prime Ministers letter of 7 September 2000) on the basis of the report by Messrs Antonio La Pergola, Pieter van Dijk, Sergio Bartole, Rapporteurs at its 44th Plenary Meeting, 13-14 October 2000, in the presence of: Mrs Barbara Brezigar, Minister of Justice, Mr Jelko Kacin, Chairman of the Foreign Affairs Committee of the National Assembly, Mrs Tina Bitenc Pengov, Deputy Director and Acting Head of the Secretariat of Legislation and Legal Affairs of the National Assembly, Mr Miro Cerar, Constitutional Adviser to the National Assembly and Mr Klemen Jaklic, Legal Councillor to the Prime Minister.

The Commission notes that the question raised by the Prime Minister concerns the relationship between the peoples power, exercised in accordance with the Constitution (Article 90), and the National Assemblys power to amend the Constitution.

By its decision of 8 October 1998 the Constitutional Court found that the proposal for a majoritarian electoral system submitted to referendum on 8 December 1996 had been approved. Its also concluded that the National Assembly was bound to adopt, within a reasonable time, a law regulating the electoral system in accordance with the results of the referendum. The Constitutional Court further stated that this obligation is not only political and ethical but also legal. In this respect the Constitutional Court clearly recalled that despite its character as preliminary (because no specific norms were adopted but only a legislative concept), the referendum was clearly binding. The National Assembly should not therefore either adopt a law whose contents would be incompatible with the said concept or unduly delay the adoption of a law. Otherwise, the citizens constitutional right as enshrined in Article 90 of the Constitution would be theoretical or illusory.

Despite the clear indication to the legislator by the Constitutional Court, the National Assembly did not pass the electoral law.

Undoubtedly, the situation as described above amounts to a constitutional impasse that may hinder the effective operation of democratic institutions. On 25 July 2000, in reaction to this situation, the National Assembly passed a constitutional amendment establishing a proportional electoral system with a threshold of 4% for access to the distribution of seats in the National Assembly.

The Commission finds that it is the duty of both the legislator, representing the sovereign people, and the Constitutional Court, the guardian of the Constitution, to ensure that constitutional institutions of the State are able to perform their duties and are not exposed to a risk of paralysis. It understands, on the basis of the second letter by the Prime Minister of Slovenia, that it is not required to suggest alternative solutions, if there were any, to the impasse described above, but rather to consider whether the amendments to the Constitution adopted on 25 July 2000 represent a solution compatible with European democratic standards.

In this respect the Commission recalls that adopting a proportional electoral system even with a threshold is certainly not in conflict with European democratic standards. Moreover, the constitutionalisation of the choice of the electoral system, although not very frequent, is followed in several European countries (e.g. Austria) and cannot be said to be incompatible with these standards either.

The Commission further observes that the National Assembly enacted the Constitutional Act amending Article 80 of the Constitution pursuant to Article 169 of the Constitution. In doing so, the National Assembly acted as a constitution making power (*constituant*), in accordance with the procedure provided by the Constitution of the Republic of Slovenia for its own amendment, and not as common legislator. From this perspective, there is no conflict between the decision adopted by referendum and the constitutional amendments of 25 July, as the latter, being of constitutional value, obviously prevails and takes precedence over the decision of preliminary legislative character adopted by the referendum.

It can of course be argued that the referendum is the manifestation of popular sovereignty and that, therefore, the validity of decisions taken by referendum can never be challenged in a democratic society. However this approach is nowadays hardly tenable. Most European Constitutions, including the Constitution of Slovenia, lay down the procedure for the referendum and define its possible scope. Moreover, there is a clear tendency in Europe today to make more frequent use of referendum as an instrument of direct democracy for legislative purposes and in this respect the referendum is subject to a control as to its compatibility with the Constitution. Consequently, both the procedural and substantive aspects of the peoples action designed to introduce new law or remove existing law are clearly subjected to constitutional scrutiny[32]. Definitely, and notwithstanding their undisputed political value, decisions taken by legislative referendum are not beyond the reach of the Constitution.

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. This is true also for constitutional systems that establish a co-habitation of popular and parliamentary sovereignty, as is the case of Slovenia where the people are not excluded from the process of constitutional revision (Article 170 of the Constitution of the Republic of Slovenia). The Commission finds that there is no common European standard according to which the results of any referendum of whatever nature are binding upon the constituent power even in the absence of a constitutional provision. Consequently, the results of the referendum of 8 December 1996 should not prevent the National Assembly from exercising its constitution making powers under the Constitution.

The Commission finally notes that the National Assembly is politically responsible to the people for deciding to amend the Constitution and constitutionalise the choice of the proportional electoral system. In this respect the fact that legislative elections are to be held in the near future and the sovereign people will have the opportunity to manifest its approval or disapproval of the National Assemblys stand is in itself a guarantee for democracy.

In view of the fact

- that there was a need to react urgently, in view of the forthcoming elections, to the risk of paralysis of the democratic functioning of

the State,

- that the National Assembly acted as a constitution making body whereas the referendum of 8 December 1996 was of preliminary legislative character,

- that the Constitutional amendment was enacted in compliance with the Constitution, and

- that the National Assemblys responsibility is engaged at the forthcoming legislative elections,

The Commission finds that the National Assemblys reaction to the risk of a constitutional impasse, i.e. the adoption of amendments to the Constitution adopted on 25 July 2000, in strict compliance with the latters relevant provisions, is not in conflict with European democratic standards.

The Commission would further suggest that the National Assembly considers in the near future which legislative and possibly constitutional amendments are required to avoid the risk that similar situations arise again in Slovenia. They recall in this respect that on several occasions constitutional bodies in other European countries have been confronted with a similar risk. In a judgment given on 18 January 1995 *(Gazetta Ufficiale, Prima Serie n 3; Bulletin of Constitutional Case-lawITA-95-1-001*), the Constitutional Court of Italy, seized with the question of admissibility of a referendum to abrogate a set of electoral provisions, laid down some principles that should be followed when it comes to deciding by referendum issues affecting the functioning of constitutional institutions. The Italian Constitutional Court observed that it might be acknowledged that the Parliament has a constitutional duty to co-operate, in that if the outcome of the referendum is in favour of repealing the existing legislation, the Parliament has to introduce (on its own initiative) legislation to comply where necessary with the wish of the people as expressed in the referendum. However, if after the referendum the legislator fails to introduce new legislation to fill the legal vacuum or amend the electoral provisions, there would be no effective remedy to oblige the Parliament to enact a law and the situation amounts to a crisis in the functioning of representative democracy. To avoid this, a referendum affecting the rules of functioning of constitutional bodies should only be admitted if the rules that remain in force after the referendum allow the constitutional body concerned to function without any further legislative action being required.

xii. Opinion on Constitutional Referendum in Ukraine, based on comments by Messrs Bartole, Batliner, Malinverni, Steinberger and Svoboda, (CDL-INF (2000) 11), adopted by the Commission at its 42nd Plenary Meeting (Venice, 31 March-1 April 2000)

I. Introduction

On 15 January 2000 the President of Ukraine adopted a decree on announcement of an All-Ukraine referendum on the Peoples Initiative. This decree provides for the holding of a referendum on 16 April 2000. Six questions will be put to the people at this referendum, aiming at amendments to the Ukrainian Constitution. The text of the decree appears in documentCDL(2000)4 rev.

By letters dated 28 January 2000 and 31 January 2000 the President of the Parliamentary Assembly, Lord Russell-Johnston, asked the Venice Commission to give an opinion on the constitutionality of the referendum and on the proposed constitutional changes. On 31 January 2000, the Secretary General of the Council of Europe, Mr Walter Schwimmer, also asked the Commission to give an opinion on the legal aspects of the referendum.

The present opinion was adopted by the European Commission for Democracy through Law at its 42nd Plenary Meeting, 31 March 2000, on the basis of contributions by Messrs Bartole, Batliner, Malinverni, Steinberger and Svoboda.

On 27 March 2000 the Constitutional Court of Ukraine adopted its decision on the constitutionality of the referendum. This decision was made public on 29 March 2000. On the same day the President adopted a decree implementing the decision of the Court. For time reasons, the Commission could only take this decision into account in the conclusions of its opinion.

II. Legal background of the referendum

The main rules on referendums are contained in Chapter III of the Ukrainian Constitution on elections and referendums:

Article 69

The expression of the will of the people is exercised through elections, referendum and other forms of direct democracy.

Article 72

An All-Ukrainian referendum is designated by the Verkhovna Rada of Ukraine or by the President of Ukraine, in accordance with their authority established by this Constitution.

An All-Ukrainian referendum is called on popular initiative on the request of no less than three million citizens of Ukraine who have the right to vote, on the condition that the signatures in favour of designating the referendum have been collected in no less than two-thirds of the oblasts, with no less than 100 000 signatures in each oblast.

Article 73

Issues of altering the territory of Ukraine are resolved exclusively by an All-Ukrainian referendum.

Article 74

A referendum shall not be permitted in regard to draft laws on issues of taxes, the budget and amnesty.

Of particular importance are also Articles 92.20 and 106.6:

Article 92

The following are determined exclusively by the laws of Ukraine:

the organisation and procedure for conducting elections and referendums;

Article 106

The President of Ukraine:

designates an All-Ukrainian referendum regarding amendments to the Constitution of Ukraine in accordance with Article 156 of this Constitution, proclaims an All-Ukrainian referendum on popular initiative;

The most pertinent provisions of Chapter XIII of the Constitution on Introducing Amendments to the Constitution are the following:

Article 154

A draft law on introducing amendments to the Constitution of Ukraine may be submitted to the Verkhovna Rada of Ukraine by the President of Ukraine, or by no fewer National Deputies of Ukraine than one-third of the constitutional composition of the Verkhovna Rada of Ukraine.

Article 155

A draft law on introducing amendments to the Constitution of Ukraine, with the exception of Chapter I General Principles, Chapter III Elections. Referendum, and Chapter XIII Introducing Amendments to the Constitution of Ukraine, previously adopted by the majority of the constitutional composition of the Verkhovna Rada of Ukraine, is deemed to be adopted, if at the next regular session of the Verkhovna Rada of Ukraine, no less than two-thirds of the constitutional composition of the Verkhovna Rada of Ukraine have voted in favour thereof.

Article 156

A draft law on introducing amendments to Chapter I General Principles, Chapter III Elections. Referendum, and Chapter XIII Introducing Amendments to the Constitution of Ukraine, is submitted to the Verkhovna Rada of Ukraine by the President , or by no less than two-thirds of the constitutional composition of the Verkhovna Rada of Ukraine, and on the condition that it is adopted by no less than two-thirds of the constitutional composition of the Verkhovna Rada of Ukraine, and is approved by an All-Ukrainian referendum designated by the President of Ukraine.

The repeat submission of a draft law on introducing amendments to Chapters I, III and XIII of this Constitution on one and the same issue is possible only to the Verkhovna Rada of Ukraine of the next convocation.

Article 157

The Constitution of Ukraine shall not be amended, if the amendments foresee the abolition or restriction of human and citizens rights and freedoms, or if they are oriented toward the liquidation of the independence or violation of the territorial indivisibility of Ukraine.

The Constitution of Ukraine shall not be amended in conditions of martial law or a state of emergency.

Law N^{o} 1286-XII on All-Ukraine and Local Referendums of 3 July 1991 was adopted before Ukraine became an independent state. This law was amended in 1992 in order to change the terminology and to modify certain provisions on local referendums in the Republic of Crimea. The law was never brought into conformity with the Constitution of Ukraine adopted on 28 June 1996. Its applicability is therefore governed by the transitional provisions of the Ukrainian Constitution:

Chapter XV

Transitional Provisions

Laws and other normative acts, adopted prior to this Constitution entering into force, are in force in the part that does not contradict the Constitution of Ukraine.

On 11 January 2000 the Parliament of Ukraine adopted a law (Law no. 1356-XIV) introducing a ban on all referendums due to the fact that there "was a difficult socio-economic situation in the country and no sufficient legislative basis for organising a referendum". The President refused to sign this law and returned it to the Parliament on 26 January 2000. In his reply to the Parliament the Head of State said that referendum is a sovereign right of the people of Ukraine that cannot be restricted.

III. The developments in Ukraine leading to the referendum

The proposed referendum is a referendum at the peoples initiative for which more than three million signatures have been collected. Article 72.2 of the Constitution provides for a referendum on popular initiative on the request of no less than three million citizens and the law on All-Ukraine and Local Referendums provides a procedure for collecting signatures. The regularity of the procedure of collecting signatures in this case has been challenged by opponents of the referendum. It is obviously not up to the Commission to take a position in this respect.

The proposed referendum can only be understood in the context of the current political conflicts in Ukraine. The Parliament (the Verkhovna Rada) has been perceived by many as not being able or willing to adopt the legislation necessary to implement reforms in the country. It has recently split into two parts, a majority broadly favourable to the President and the government and a minority headed by the previously elected speaker. Both parts of the parliament have even held separate sessions and the question whether the election of a new speaker by the new majority is valid or not is contested between both sides.

IV. The legal nature of the referendum

In general, two main types of referendums can be distinguished: consultative or binding. The binding referendum can relate to the Constitution or to legislation. With respect to the referendum on popular initiative, the Ukrainian Constitution unfortunately is silent as to its legal nature, although the Commission, in its Opinion on the Draft Constitution of Ukraine (CDL-INF (96) 6) had recommended that the possible subject matters of peoples initiatives be clearly defined.

The present referendum relates to the Constitution and not to legislation. It is less clear whether it is binding or not. During contacts with the Secretariat of the Commission the Minister of Justice of Ukraine, Ms Stanik, has clearly stated that the result of the referendum would have to be confirmed by a decision of the Verkhovna Rada. By contrast, the President of Ukraine indicated to the rapporteurs of the Parliamentary Assembly that the results of the referendum would be directly binding.

The text of the presidential decree is not absolutely clear in this respect. In the introductory paragraph mention is made both of consulting the opinion of Ukrainian citizens on a range of important questions that could influence the future of the country and of introducing the corresponding changes to the Constitution of Ukraine. With respect to the various questions, it is clear that question 5 on the introduction of a bicameral parliament cannot be directly binding since no detail is given as to the composition and powers of such a second chamber. By contrast, other questions contain the precise text of an amendment to the constitution and therefore could theoretically be considered as binding. The wording of the questions (Are you in favour, Do you support) leaves however the possibility of a consultative character open.

Having regard to the fact that it would seem highly unusual to combine directly binding and purely consultative questions in the same referendum without a clear distinction between both types of questions, it would seem more appropriate to assume that the referendum is conceived as having a consultative character. Nevertheless, the fact that even for (admittedly foreign) constitutional scholars it is not very obvious which legal consequences the referendum is supposed to have is worrying and one wonders whether the citizens of Ukraine will know exactly what they are voting on.

Since the purely consultative character of the referendum is not uncontested, it is important to examine whether there would be a constitutional basis in Ukraine for a directly binding character of the referendum. As stated above, Article 72.2 does not clarify the legal nature of referendums on popular initiative. Read in isolation, it might therefore be interpreted as providing a basis also for a referendum directly amending the constitution.

Nevertheless, other provisions of the Constitution clearly show that Article 72.2 cannot be used as the basis for a constitutional referendum.

Chapter XIII on introducing amendments to the Constitution of Ukraine contains detailed provisions on the procedures required for

amending the Constitution. These procedures clearly reflect the conviction of the authors of the Constitution that the Ukrainian Constitution should be a rigid constitution which cannot be amended very easily but only on the basis of procedures implying sufficient guarantees. Article 156 mentions the possibility of constitutional referendums, but only with respect to certain chapters of the Constitution and only to confirm a decision already taken by the Verkhovna Rada by a two-thirds majority in favour of a constitutional change.

With the exception of question 6, the proposed changes relate to Chapter IV of the Constitution, which is not mentioned in Article 156, and no decision has been taken by the Verkhovna Rada in favour of a constitutional change. Article 156 therefore cannot be used as the basis for the present referendum. No other article of the Constitution refers to the possibility of amending the Constitution by a referendum. Having regard to the detailed rules on amending the Constitution and the clear tendency to make constitutional amendments difficult and subject to guarantees, the possibility of amending the Constitution directly by a binding constitutional referendum would have to be provided for expressly in the text of the Constitution.

Under the Constitution of Ukraine, it is therefore not possible to give the present referendum a legally binding character. The referendum does not have, and may not have, the character of a binding constitutional referendum.

Therefore, only the possibility of a consultative referendum remains in the present case. Nevertheless, even this possibility is not at all certain. A consultative referendum is not legally irrelevant. By giving the people the possibility to express their opinion, pressure is put on the elected bodies to abide by the will of the people. Therefore the possibility to have recourse to a consultative referendum has an important influence on the balance of powers between the State organs.

Both in its opinions on the draft Constitution of Ukraine (CDL-INF (96) 6) and on the Constitution of Ukraine (CDL-INF (97) 2) the Commission has interpreted Article 72.2, although without detailed analysis for which there was no reason at the time, as relating to the legislative referendum. This would seem to be the most logical interpretation of this provision. A consultative referendum makes sense if the State organ, be it the President, the government or the Parliament, asks the population to give its opinion on a specific issue. Here the referendum was not initiated by a State organ but by the population itself. It would appear highly unusual and would probably be without precedent elsewhere if the result of an initiative by the people would only be that the people have to be consulted and cannot decide directly.

The Commission would therefore tend to stick to its previous interpretation, that Article 72.2 refers to the legislative referendum. Nevertheless, it would be desirable for the Ukrainian Constitutional Court to give an interpretation of this article. The issue whether the individual questions put to referendum may be submitted *ratione materiae* to a consultative referendum will be examined below.

It is irrelevant whether the Law on all-Ukraine and local referendums gives a wider scope to the possibility of holding referendums. The Constitution prevails over ordinary laws (see Article 8.2 of the Constitution) and is moreover even the more recent law.

To sum up, the Commission is of the opinion that the present referendum does not have, and may not have, the effect of directly introducing amendments to the Ukrainian Constitution and that it appears highly questionable whether the referendum is admissible as a consultative referendum.

V. The regularity of the referendum

It is quite obvious, and this is confirmed by Article 92.20 of the Constitution, that in addition to the constitutional rules, rules on the organisation and procedure for the referendum are required. The Law on All-Ukraine and Local Referendums of 1991/1992 contains such rules. Certain articles are however obviously in contradiction with the Ukrainian Constitution and therefore no longer applicable (cf. Transitional Provision 1 of the Constitution). Until now, no decision of the Constitutional Court has been taken to decide which provisions of this Law are still applicable. It may well be that so many of its provisions are based on an entirely different constitutional order that it appears problematic or even impossible to conduct a referendum on its basis. Legal certainty as a main element of the rule of law, enshrined in particular in Articles 1 and 8.1 of the Ukrainian Constitution, requires that all major issues pertaining to referendums are clearly defined by Law.

It is not up to the Venice Commission but only to the Constitutional Court of Ukraine to decide to which extent this Law is still applicable and whether under these circumstances the holding of the referendum appears possible. One of the elements the Constitutional Court might take into account is the fact that the Verkhovna Rada which, according to Article 92.20, has to adopt the law setting out the rules on the organisation and procedure of referendums, is of the opinion that such a legal basis does not exist at the moment. It should however be underlined that the Verkhovna Rada is then under an obligation to adopt such a law as soon as possible.

With respect to the text of the presidential decree, it is striking that the President has added a preamble to the text of the question which strongly suggests that a positive reply should be given to those questions. This would be inadmissible in other countries.

Constitutionality of the proposals submitted to referendum and their compatibility with international standards

The present opinion examines the various proposals submitted to referendum both from the point of view of the Ukrainian Constitution and of international standards. To the extent that amendments to the present Constitution are proposed, there may be questions of compatibility of the proposals with other non-amended parts of the Constitution but the question of constitutionality becomes moot once the proposals are adopted. Nevertheless, the issue remains whether such proposals are compatible with international standards, in particular whether a sufficient balance of powers would remain if the proposals were adopted.

Question 1

The first question contains in reality two questions. Citizens are asked to pronounce themselves at the same time

on the question whether the present Verkhovna Rada enjoys their confidence;

on a proposal to amend the Constitution introducing the possibility for the President of Ukraine to dissolve the Verkhovna Rada in the case of such a vote of no confidence.

To combine two questions in this way is in contradiction with a principle of referendum law known for example in Switzerland or Italy as the unity of subject matter. It may well be that a citizen of Ukraine wishes to have in general the right to express his lack of confidence in parliament without at the same time doing so with respect to the Verkhovna Rada presently in office. The present wording of the question deprives him of this possibility to give different replies to the two questions.

The first part of the question is clearly unconstitutional. The Constitution of Ukraine contains no legal basis for a vote of no confidence by the people in the Verkhovna Rada. While earlier drafts of the Constitution of Ukraine (see documentCDL(95)28) contained the possibility of referendums of no confidence in the Verkhovna Rada (and also the President), these provisions were deleted following *inter alia* strong criticism from the Venice Commission (see opinion of Mrs A. Milenkova,CDL(95)63). The possibility of a vote of no confidence by the people in Parliament is alien to the Western concept of representative democracy and can in no way be presumed in the absence of an express constitutional authorisation.

On the contrary, the Ukrainian Constitution is clear in excluding such a possibility. It sets down the period of office of the Verkhovna Rada and Article 90 provides for an early termination of the authority of the Verkhovna Rada only if it fails to meet within 30 days of a regular session. Article 5 of the Law on All-Ukraine and Local Referendums also seems to exclude the possibility of a dismissal by referendum. Finally, the fact that the authors of the proposal propose at the same time a constitutional amendment seems to indicate that they were conscious of the absence of a legal basis. This is a violation of the fundamental principle that any action by a State organ requires prior legal authorisation.

The first part of the question is therefore incompatible with the Constitution of Ukraine and, in the absence of the possibility to answer

both parts of the question separately, the whole question falls.

As regards the second part of the question, the Commission has taken a position against this type of referendums already during the process of adoption of the Constitution of Ukraine. The possibility to hold such referendums would be a permanent source of instability. To provide it with respect to one of the State organs, the Verkhovna Rada elected by the people, would seriously undermine the balance of powers between Parliament and President by giving the President the possibility to appeal to the people in the case of conflict between him and Parliament without giving a similar possibility to Parliament.

Question 1 is therefore both unconstitutional and at variance with international democratic standards.

Question 2

Since this question aims at amending the Constitution, the question of the constitutionality of the question as such does not arise. By contrast, the compatibility of the proposed constitutional amendment with international standards seems questionable.

First of all, the wording of the proposal seems seriously flawed. It is proposed to give to the President of Ukraine the power to terminate the powers of the Verkhovna Rada and to dissolve the Verkhovna Rada. The drafting of the proposal is unclear and confusing. It is proposed to amend at the same time Article 90 and Article 106 of the Constitution and both proposals are mixed up in the proposed wording.

Moreover, the conditions for this step are ill-defined. What precisely is the meaning of failing to form a stable and operational majority? This gives too much discretion to the President and the period of one month for forming such a majority appears short.

In conclusion, the drafting of this question is so unclear that its admissibility appears questionable and the adoption of the proposal would appear highly undesirable.

Question 3

By limiting parliamentary immunity, the proposed constitutional amendment intends to curtail an important safeguard for the independence of Parliament. Parliamentary immunity is an achievement of the 19th century, and the independence it is designed to safeguard still is pertinent, particularly in a new democracy.

Question 4

Whether it is advisable to reduce the number of deputies from 450 to 300 is a political question, it being understood that such a change could only be applied to a future Verkhovna Rada.

Question 5

This question cannot be directly binding. It would require amendments to the Constitution which are however not spelt out. Even as a consultative question it thus appears highly problematic since the elements provided in the question do not enable the voters to make an informed judgment on the advisability of the proposed reform. Nothing is said with respect to the powers of the suggested second chamber and information on its composition is limited to the statement that it would represent interests of the Ukrainian regions.

In general, it is obviously up to Ukraine to decide on whether the country wishes to have a monocameral or bicameral system. In a unitary State such as Ukraine there is no obvious need for a second chamber. Nevertheless, a second chamber may contribute to the quality of legislation. It has however to be taken into account that the existence of a second chamber will slow down the legislative process. The present problems given as reasons for the introduction of the reform are therefore likely only to be aggravated under such a system.

With respect to any such second chamber it would, of course, have to be ensured that its members are elected freely and do not in any way depend on the heads of the local State administration, who are appointed by the President of Ukraine (Article 106.10 and 118.4 of the Constitution).

Question 6

The wording of this question appears again seriously flawed. Taken literally it would seem to undermine the whole constitutional order by giving to the people of Ukraine the possibility to replace the present Constitution of Ukraine by an entirely new Constitution. For such a new Constitution it would no longer be necessary to respect the important safeguards applicable to constitutional amendments under the present Constitution. Reference is made in particular to Article 157 outlawing the abolition or restriction of human rights and freedoms and to the need for a two-thirds majority in the Verkhovna Rada. If this question is interpreted as referring to amendments to the Constitution only, it remains completely unclear which parts of the present Articles 154 et seq. would remain or be amended.

The introduction of the possibility to amend the Constitution by referendum seems inadvisable. In its opinion on the Draft Constitution of Ukraine (CDL (96) 6), the Commission has already stated:

"It is in particular recommended to avoid the possibility of amending the Constitution through a referendum, since this apparently democratic procedure may easily be abused for populist purposes."

Developments in other CIS countries such as Belarus or Kazakhstan have confirmed that this possibility is likely to be abused to excessively strengthen presidential powers.

The admissibility of the question therefore seems highly questionable due to **its** lack of clarity and the proposal submitted to referendum in any case undesirable.

General assessment of the questions taken together

The analysis of the questions one by one has shown that there is a large number of ambiguities and incoherences. Even for constitutional lawyers it is extremely difficult to grasp the content of some of the questions and one wonders whether the Ukrainian voters will be able to make an informed judgment. These flaws are certainly due to the fact that the questions were formulated by citizens' initiatives without any subsequent control by the organs of the State and show that amending a Constitution in this way is undesirable.

The first question is clearly unconstitutional and other questions are extremely problematic. The combined flaws undermine the validity of the whole referendum.

In addition, the political consequences of the various proposals would always be the same: to weaken the Verkhovna Rada and directly or indirectly to strengthen the President. Taken together the proposals will, if implemented, disrupt the balance of powers between the President and Parliament.

Conclusions

53. With respect to the referendum as originally proposed in the decree of 15 January 2000 the conclusions of the Commission can be summarised as follows:

the present referendum cannot directly amend the Constitution;

it seems highly questionable whether a consultative referendum on the people's initiative is admissible;

it is up to the Constitutional Court of Ukraine to decide whether at the present stage of the implementation of the Ukrainian Constitution there is in general a legal basis for the holding of referendums in Ukraine;

one of the questions submitted to referendum is clearly unconstitutional, the other questions are extremely problematic and/or unclear;

taken together, the adoption of the proposals contained in the referendum would disrupt the balance of powers between the President and the Parliament.

These elements taken together cast grave doubts on both the constitutionality and the admissibility of the referendum as a whole.

54. Following the decision of the Constitutional Court, the factual situation taken into consideration by the Commission has changed. In this very important decision the Court has declared questions 1 and 6 unconstitutional and decided that, if the other questions are approved during the referendum, this is not equivalent to a direct amendment of the Constitution but that the State organs are obliged to consider these proposals and to take a decision on them in accordance with Chapter XIII of the Constitution on introducing amendments to the Constitution of Ukraine.

The Commission notes that this decision opens the door for a possible solution on the basis of consensus between the various branches of State power. If the questions are approved by the people, their consideration by the Verkhovna Rada and the other bodies of State power will make it possible to ensure that the amendments finally adopted will not contain any provisions incompatible with European standards and that they reflect a solution acceptable to the various State organs. The Commission is at the disposal of the Ukrainian authorities to provide its assistance in this respect.

xiii. Opinion on the implementation of Constitutional Referendum in Ukraine, based on comments by Messrs Bartole, Batliner and Malinverni, (CDL-INF (2000) 14), adopted by the Commission at its 44th Plenary Meeting (Venice, 13-14 October 2000)

I. Introduction

By letter dated 13 June 2000 the Chairperson of the Monitoring Committee of the Parliamentary Assembly asked the Venice Commission to prepare an opinion

concerning Ukraine, the two draft laws on the constitutional reform presented by President Kuchma and by members of Parliament, following the referendum of April this year, in particular, as regards freedom of decision of Parliament, compatibility with Articles 157 and 158 of the Constitution, compliance with international standards and consequences for democracy and the rule of law in Ukraine.

It is recalled that the President of Ukraine signed on 15 January 2000 a decree announcing an all-Ukraine referendum on the peoples initiative for 16 April 2000. The aim of the referendum was to amend the Ukrainian Constitution mainly with a view to weakening the position of the Verkhovna Rada (the Ukrainian parliament). The referendum was hotly contested, in particular by members of the Verkhovna Rada, it was examined by the Venice Commission (see below) and the Constitutional Court declared two of the initial six questions submitted to referendum unconstitutional.

The Venice Commission adopted on 31 March 2000 at the request of the Parliamentary Assembly and the Secretary General of the Council of Europe an opinion on the referendum (documentCDL-INF(2000)11). Its conclusions were as follows:

53. With respect to the referendum as originally proposed in the decree of 15 January 2000 the conclusions of the Commission can be summarised as follows:

the present referendum cannot directly amend the Constitution;

it seems highly questionable whether a consultative referendum on the people's initiative is admissible;

it is up to the Constitutional Court of Ukraine to decide whether at the present stage of the implementation of the Ukrainian Constitution there is in general a legal basis for the holding of referendums in Ukraine;

one of the questions submitted to referendum is clearly unconstitutional, the other questions are extremely problematic and/or unclear;

taken together, the adoption of the proposals contained in the referendum would disrupt the balance of powers between the President and the Parliament.

These elements taken together cast grave doubts on both the constitutionality and the admissibility of the referendum as a whole.

54. Following the decision of the Constitutional Court, the factual situation taken into consideration by the Commission has changed. In this very important decision the Court has declared questions 1 and 6 unconstitutional and decided that, if the other questions are approved during the referendum, this is not equivalent to a direct amendment of the Constitution but that the State organs are obliged to consider these proposals and to take a decision on them in accordance with Chapter XIII of the Constitution on introducing amendments to the Constitution of Ukraine.

55. The Commission notes that this decision opens the door for a possible solution on the basis of consensus between the various branches of State power. If the questions are approved by the people, their consideration by the Verkhovna Rada and the other bodies of State power will make it possible to ensure that the amendments finally adopted will not contain any provisions incompatible with European standards and that they reflect a solution acceptable to the various State organs. The Commission is at the disposal of the Ukrainian authorities to provide its assistance in this respect.

The referendum took place on 16 April 2000 (in accordance with Ukrainian legislation voting started 10 days earlier). According to the official results, 81.1% of Ukrainian voters took part in the referendum and majorities between 80% and 90% approved the four remaining proposals submitted to referendum.

In order to implement the results of the referendum, two draft laws were submitted to the Verkhovna Rada, one by the President of Ukraine (CDL (2000) 41) and one by 152 Deputies (CDL (2000) 42). These two drafts are the subject of the present opinion. In accordance with the Ukrainian Constitution both drafts were submitted to the Constitutional Court for opinion as to their conformity with Articles 157 and 158 of the Constitution. While the Court had no objections against the draft submitted by the President, it declared the proposal of the Deputies on parliamentary immunity unconstitutional and considered their proposal for a second chamber incomplete and not ripe for consideration (see below).

On 13 to 15 September 2000 a delegation of three members of the Commission (Mr Bartole from Italy, Mr Batliner from Liechtenstein and Mr Malinverni from Switzerland) visited Ukraine and had extensive meetings with representatives of the Presidential Administration, the Verkhovna Rada, the Constitutional Court, the Ministry of Justice, the Ministry for Foreign Affairs and the Central Electoral Commission as well as informal talks with opposition politicians.

II. The procedure for implementing the referendum

As pointed out in the Commissions opinion of 31 March 2000, the Ukrainian Law on all-Ukraine and Local Referendums was adopted in 1991 (with amendments in 1992), well before the Ukrainian Constitution (28 June 1996), and never harmonised with it. All interlocutors of the Commission delegation in Ukraine recognised the need for the adoption of a new law on referendums. There are at present no applicable legislative rules for the calling and the implementation of the referendum. The implementation of the referendum can only be based on the decision of the Constitutional Court on the constitutionality of the referendum of 27 March 2000 in which the Court declares:

If approved by an all-Ukrainian referendum by peoples initiative, the questions formulated in paragraphs 2, 3, 4, 5 of Article 2 of the Decree of the President of Ukraine On calling the all-Ukrainian referendum by peoples initiative are binding for consideration and taking decisions according to the procedure established by the Constitution of Ukraine, in particular, by its Chapter XIII Introducing amendments to the Constitution of Ukraine, and by the laws of Ukraine.

This decision cannot remedy the lack of applicable legal rules. A number of procedural questions remain open. In particular it remains unclear whether following the referendum the results were automatically referred to the Verkhovna Rada or whether somebody (who?) had to submit a proposal to it. In practice this problem was solved by having recourse to the constitutional procedure for amending the Constitution provided for in Article 154 of the Constitution. This provision gives the right of initiative to the President or one third of the Verkhovna Rada.

Also important is the fact that Ukrainian law contains no solution for the conflict arising if the necessary two-thirds majority for amending the Constitution cannot be reached within the Verkhovna Rada. The Constitution cannot be amended without a positive vote by the Verkhovna Rada and the deputies are free to approve the proposals or amend or reject them. In the first reading the presidential draft got 251 votes in the Verkhovna Rada. This falls short of the 300 votes required in the final reading for amending the Constitution. It is therefore possible that the results of the referendum as expressed during the referendum will not be implemented. This would be an unsatisfactory result following a nation-wide referendum.

This confirms the critical assessment of the referendum and the rules applicable to it made in the Commissions opinion of 31 March 2000. Nevertheless, it is certainly a lesser evil than abandoning the principle of the free mandate of the Deputies and disregarding the clear rules on amending the Constitution, which require the consent of two-thirds of the Verkhovna Rada. The Commission therefore welcomes the fact that all the official interlocutors it met during the delegations visit acknowledged that the Verkhovna Rada cannot be forced to vote for the constitutional amendments. Both the representatives of the Presidential Administration and of the Ministry for Foreign Affairs referred to a statement made by President Kuchma in a meeting with the Ukrainian ambassadors to European countries on 26 to 27 August 2000 in which the President stated that he would adhere to the constitutional rules for amending the constitution and not dissolve the Verkhovna Rada if the required majority for the constitutional changes cannot be reached.

In conclusion, the Commission welcomes this commitment and highlights the need for new legislation on referendums in Ukraine.

The draft submitted by the President

General features

The draft presented by the President is a concise text. It only contains the proposals for constitutional amendments approved during the referendum in reply to three of the four questions. With respect to the fourth question, the introduction of a second chamber, the President has not included any proposals in his draft but has set up a commission of experts with representatives of various State bodies with the task of preparing a concrete proposal. This Commission also has the task of preparing the changes in ordinary legislation required as a result of the referendum.

Proposed constitutional amendment to reduce the number of Deputies

The first proposal of the President is to amend, in accordance with the results of the referendum, Art. 76 of the Constitution to reduce the number of members of the Verkhovna Rada from 450 to 300. It is up to the Verkhovna to decide on this amendment, which meets with no objections from the point of view of the Commission, provided it enters into force only following new elections.

Proposal to limit parliamentary immunity

In accordance with the results of the referendum, the President proposes to delete section 3 of Article 80 of the Constitution, which provides: National Deputies of Ukraine shall not be held criminally liable, detained or arrested without the consent of the Verkhovna Rada of Ukraine. The Commission continues to have serious misgivings with respect to this proposal.

It is true that there are Western democracies, in particular within the Common Law tradition, which do not recognise the principle of the absolute immunity of members of parliament from arrest and detention and only recognise immunity for statements made in parliament. However, these are countries with a long democratic tradition where an arbitrary arrest of opposition politicians on spurious grounds seems unthinkable. This contrasts with the situation in Ukraine, where democracy is quite recent and where opposition politicians express the fear of being arrested on a pretext if not protected by this provision. Moreover, according to Transitional Provision 13 of the Constitution, the pre-constitutional procedure for arresting persons remains in force until 28 June 2001 and according to Transitional Rule 9 the procuracy is still governed by the former rules. The members of the Verkhovna Rada, once deprived of their immunity, could therefore be arrested and kept in detention without judicial intervention. This is certainly a situation in which the freedom of opinion and decision of parliamentarians could be impaired.

During the delegations visit to Ukraine, the official interlocutors accepted the need for legal provisions providing a certain degree of protection for the Deputies after the deletion of section 3 of Article 80 of the Constitution. The intention seems to be to provide some protection under ordinary law.

The Commission is of the opinion that the proper place for a basic rule on parliamentary immunity is within the Constitution and points out that parallel rules on immunity for example for judges are contained in the Constitution itself (Art. 126 s. 3). Deleting section 3 of Article 80 of the Constitution now, pending the adoption of a law, would also entail the risk that for some time there would be no protection and this at a time when the constitutional provisions concerning arrest and detention have not yet entered into force. This seems unacceptable. In order to take account of the result of the referendum, it could be envisaged to reduce the immunity of Deputies to the level presently enjoyed by judges under section 3 of Article 126 of the Constitution: A judge shall not be detained or arrested without the consent of the Verkhovna Rada of Ukraine, until a verdict of guilty is rendered by a court. A parallel rule for members of parliament should be part of the Constitution and not of an ordinary law and should enter into force simultaneously with the abrogation of the present rule.

Proposal for facilitating the dissolution of the Verkhovna Rada

The third proposal of the President is to add a new section 3 to Art. 90 of the Constitution with the following text:

The President of Ukraine may also terminate the authority of the Verkhovna Rada of Ukraine prior to the expiration of the term, if within one month the Verkhovna Rada of Ukraine fails to form permanently acting parliamentary majority or in the event that within three months it fails to approve the State Budget of Ukraine elaborated and submitted by the Cabinet of Ministers of Ukraine pursuant to the established procedure.

and to make a corresponding technical amendment to Art. 106 of the Constitution.

Currently the Verkhovna Rada may only be dissolved if within thirty days of a single regular session the plenary meetings fail to commence. This is very restrictive and increased possibilities of dissolution cannot be rejected from the outset.

As regards the first proposed new ground for dissolution, that is the failure to form a permanently acting parliamentary majority within one month, the intention behind the proposal, i.e. to force the Deputies to be consistent and to contribute to stable government is understandable and even welcome. The inability of the Verkhovna Rada to form a clear majority has certainly had negative consequences for Ukraine and contributed to the low pace of reforms in Ukraine. The wording of the proposal seems, however, seriously flawed.

As regards the timeframe of one month, it is in no way defined when this period is supposed to start. The most plausible interpretation would seem to be within one month of the first meeting of the newly elected Verkhovna Rada. Dissolution at this moment, however, risks reproducing the same composition of the Verkhovna Rada and in any case it seems impossible to determine at this early stage whether there is a permanently acting parliamentary majority. Another possible but extremely far-fetched interpretation would be to establish a link with the preceding section and to let the thirty days start at the beginning of each regular session (the Verkhovna Rada under Art. 83 of the Constitution has two regular sessions per year). It seems, however, contradictory to speak of the forming of a permanently acting majority twice a year and the rationale behind the link between regular sessions and forming of a majority is not very obvious. Either way, this provision is unclear.

The other element, the forming of a permanently acting majority is not much clearer. This notion is defined nowhere. The alternative draft submitted by the 152 Deputies tried to define it by providing for a kind of corporation of the majority within the Verkhovna Rada. The latter approach risks entering into conflict with the free mandate of Deputies. It also seems impossible for there to be a legal requirement for such a stable or permanent majority to exist since no member of parliament or party can be prevented from leaving the majority in case of disagreements. To be meaningful, the notion of majority has to be linked to a specific event. Under the Ukrainian Constitution there seem to be two moments of particular significance for the forming of a majority: the consent by the Verkhovna Rada (Art. 87 no. 12) to the person of the Prime Minister and the approval of his or her programme (Art. 87 no. 11). Instead of introducing a vague concept of permanent majority it would be better to link the possibility of dissolution to the repeated refusal of the Verkhovna Rada to consent to the nomination of the Prime Minister (proposed by the President) or to failure to approve his or her programme.

Moreover a systematic aspect should not be overlooked. Under the Ukrainian Constitution the President is free to present any candidate for Prime Minister without any requirement to appoint a candidate acceptable to the majority, and the Cabinet of Ministers is responsible first of all to the President and only in the second place controlled by and accountable to the Verkhovna Rada. This does not encourage the forming of a stable majority around the government. If one wishes to establish a clear majority within the Verkhovna Rada, one should logically also give this majority a decisive say in the appointment of the Prime Minister (as is done in the draft of the 152 Deputies).

As regards the second ground for dissolution, the failure to adopt the budget within three months, this seems clearly defined and the purpose of the rule is understandable. There is no objection of principle against this rule, although in a situation already characterised by a strong executive and fairly weak parliamentary power it tends to further strengthen the executive.

To sum up on this point, the Commission is of the opinion that the first ground for dissolution has to be defined more clearly. Otherwise the freedom of decision of the Verkhovna Rada will be impaired, as parliament will be under a threat of dissolution under conditions not clearly defined by the Constitution.

The draft presented by 152 Deputies

As pointed out above, the draft of the Deputies has been blocked by the Constitutional Court with respect to the parts which differed from the presidential draft and has therefore lost its practical relevance (except with respect to Article 90 and item 8 of part I of Article 106). The Commission will therefore limit itself to a summary consideration of its proposals, in so far as these differ from the presidential proposals, and concentrate on the question of the second chamber with respect to which the President has not submitted a proposal but set up a Commission with the task of preparing a concrete proposal.

Proposal to limit parliamentary immunity

The deputies suggest replacing the requirement of consent by the Verkhovna Rada for arrest or prosecution of Deputies by the requirement of approval by the Supreme Court. The Constitutional Court declared this provision unconstitutional, in particular since the consent by the Supreme Court could be interpreted by the lower courts as prejudging the guilt of the Deputy concerned. The Commission shares the misgivings of the Constitutional Court and prefers the solution outlined above in paragraph 17.

Proposal for a second chamber

In its opinion of 31 March 2000 the Commission criticised the referendum question regarding the creation of a second chamber since it was far too vague to enable Ukrainian citizens to make an informed judgement. The referendum question contained no information as to the powers and composition of the second chamber, apart from a mention that it is supposed to represent the interests of the regions. It is therefore impossible to know what were the popular intentions when approving the question and a wide variety of solutions can be envisaged.

One other aspect was emphasised by the Commission at the time: the setting up of a second chamber risks being in contradiction with the reasons given for the referendum. The referendum was justified by the need to speed up and facilitate the legislative process, whereas the existence of a second chamber necessarily slows it down. This is a circumstance which will have to be born in mind in the design of any proposal for a second chamber.

As regards the content of the proposal of the 152 Deputies, the Constitutional Court of Ukraine discovered some technical flaws in it from the point of view of Ukrainian law. From the point of view of international standards, the proposal does not raise serious issues. A main concern linked to the establishment of a second chamber in Ukraine would be that this may lead to a further weakening of the role of a then divided parliament in a system already characterised by strong executive, in particular presidential, power. The authors of the proposal have sought to counterbalance this risk. They have given to the new Senate not only powers previously reserved to the Verkhovna Rada but also required its consent for many presidential appointments and have replaced the presidential veto on legislation by the requirement of approval by the Senate.

Transitional provisions

At the end of their draft the Deputies suggest amendments to Transitional Provisions 9 and 13 of the Constitution to the effect that the constitutional rules on the reform of the procuracy and on arrest and detention should enter into force on 1 January 2001. While this can scarcely be regarded as implementation of the referendum, there is now, more than four years after the adoption of the Constitution, a paramount need to implement these provisions of essential importance for the protection of human rights. The Commission therefore appeals to Ukraine to take the necessary steps rapidly.

Conclusion

In conclusion, the Commission

notes with satisfaction the commitment by the President of Ukraine to stick to established constitutional procedures for amending the Constitution and not to dissolve the Verkhovna Rada if the latter refuses to consent to the constitutional amendments;

underlines the need for new rules on referendums in Ukraine;

notes that following the decision of the Constitutional Court the draft submitted by 152 Deputies remains relevant only with respect to Article 90 and item 8 of part I of Article 106 of the Constitution;

notes that the proposal of the Deputies for a Senate as a future second chamber is one possible interpretation of the results of the referendum;

notes that the President will submit his proposals for a second chamber at a later stage following the work of the Commission established by him;

considers that the draft presented by the President of Ukraine should not be adopted in its present form with respect to the following two issues:

a) members of parliament have to be protected against arbitrary arrest or detention by a rule in the Constitution requiring consent of the Verkhovna Rada for the arrest or detention of Deputies (see paragraph 17 above);

the unclear proposed ground of dissolution if within one month the Verkhovna Rada fails to form permanently acting parliamentary majority has to be redrafted (see paragraphs 21 and 22 above);

underlines that, should the draft presented by the President of Ukraine be approved by the Verkhovna Rada without taking into account the amendments proposed by the Commission, this might raise serious problems as regards democracy, rule of law and the balance of powers

xiv. A general legal reference framework to facilitate the settlement of ethno-political conflicts in Europe (CDL-INF (2000) 16) adopted by the Commission at its 44th Plenary Meeting (Venice, 13-14 October 2000)

At the 713th meeting of the Ministers' Deputies (7 June 2000), the Chair indicated his intention of inviting the Commission, at its meeting on 16 June 2000, to consider the possibility of implementing one of the key proposals in the action programme of the Italian Chairmanship, i.e. the drafting of a general legal reference framework to facilitate the settlement of ethno-political conflicts in Europe.

At its 43rd meeting, held in Venice on 16 June 2000, the Commission approved a document concerning the drafting of a general legal reference framework to facilitate the settlement of ethno-political conflicts in Europe (CDL (2000) 50), which was submitted to the Ministers' Deputies at their 718th meeting (19 July 2000). The Deputies took note that the Venice Commission was ready to undertake an indicative study along the lines set out in document CM (2000) 99.

Introduction

There are a number of ethno-political conflicts in Europe in which a settlement has yet to be reached. A legal reference framework, such as that defined here, aims to identify the issues that may come to the fore in the search for solutions to such conflicts. As can be seen from its title, this document sets out to define a general legal reference framework, not to propose solutions to be adopted in particular cases. It will therefore deal with the general issues that arise not only in connection with specific ethno-political conflicts, such as those mentioned in document CM (2000) 99, but also in the far broader context of relations between different levels of public authority. Specific studies of particular cases may be carried out as part of other work.

In the context of a general approach it is indeed not possible to draw a distinction between "conflictual" and "non-conflictual" situations, since the term conflict has different acceptations, involving greater or lesser degrees of violence. It is moreover also difficult to distinguish ethno-political conflicts from other kinds of conflicts.

The first part of this document will present the general context of the study. Reference will first be made to the principles of the permanence of states and territorial integrity. The main forms of distribution of powers between various tiers of authority and the principles relating to the settlement of disputes under international law will be briefly recalled.

The second part of the document will broach the issues common to all systems involving a number of tiers of authority: distribution of powers, decision-making processes and settlement of disputes between the central state and its entities. The scope for international guarantees will also be discussed.

This study shall examine the solutions as provided by internal constitutional law. Reference shall, however, be briefly made to the principles of international law applicable to conflict resolution.

Part I: General context

A. States' permanent nature/the principle of territorial integrity

The principle of territorial integrity commands very widespread recognition - whether express or tacit - in constitutional law. On the other hand, constitutional law just as comprehensively rules out secession or the redrawing of borders. This should come as no surprise since that branch of law is the very foundation of the state, which might be deprived of one of its constituent parts if such possibilities were provided for.

In most states this does not preclude changes in borders through constitutional amendments, but, in practice, such reforms are extremely rare. Furthermore, although a number of constitutions guarantee the right to self-determination, the concept excludes secession. What is often being referred to is a state's external self-determination. Where self-determination is envisaged within a state, it is construed in ways compatible with territorial integrity. Hence, although "self-determination of peoples within the *Russian Federation*" is one of the foundations of the federal structure, the same applies to the Federation's integrity as a state[33]. Similarly, the *South African* Constitution provides "the right of the South-African people as a whole to self-determination does not preclude, within the framework of this right, recognition of the notion of the right of self-determination of any community sharing a common cultural and language heritage, within a territorial entity in the Republic or in any other way, determined by national legislation"[34], but, as the country's Constitutional Court has held, such self-determination does not comprise any notion of political independence or of separation[35].

In the case of *Northern Ireland*, on the other hand, the possibility of a future transfer of sovereignty has been envisaged and accepted. In the Belfast Accord of 1998, the British and Irish governments recognised the existence of two different national identities in Northern Ireland: British and Irish. The two governments were in agreement on the fact that should a majority in Northern Ireland wish to retain

their position in the United Kingdom, this would remain the case, but if in the future a majority wished to be part of a united Ireland, the two governments would give effect to such a wish. Furthermore, institutions for the facilitation and promotion of co-operation between the United Kingdom and Ireland have been created. These are the North-South Ministerial Council, which comprises members of the Irish government and the Northern Ireland Executive, and the British-Irish Council, which represents the British and Irish Governments as well as the regional institutions of Northern Ireland, Scotland and Wales.

As already mentioned, it is conceivable that borders may be changed by a constitutional reform. This was acknowledged by the Supreme Court of *Canada* when, while ruling that Quebec had no right to self-determination or to secede, it held that the existing Canadian constitutional order could not be indifferent to a clear indication, in response to a clear question, by a clear majority of Quebeckers that they no longer wished to remain in Canada.[36] [37] But both such reforms and the question of unilateral secession fall outside the ambit of this study, which is concerned with relations between authorities within the same - internal - legal order, to be distinguished from relations between sovereign states within the international legal order.

For the same reason, this document will not broach the right to self-determination recognised in public international law, nor the links with any constitutional provisions apparently in conflict therewith[38].

The idea that a conflict can best be solved through division into a number of separate states is not consistent with the real shape of things at the dawn of the 21st century. Today power is increasingly distributed among various tiers of authority - at state level and the levels below and above states - to the point where it may be a question of shared sovereignty. In these circumstances the dichotomy between full sovereignty and total lack of power - if ever there may have been any basis for it - is in any case no longer relevant. The solutions to conflicts lie far more in co-operation between tiers of authority, which can be organised in as many ways as there are different situations. This report aims to determine the framework for such co-operation.

B. Existing types of solution

Constitutional law, in particular regarding instruments and relations between the central state and subordinate entities, has certain distinctive features in each state. Nevertheless, it is possible to identify the following major forms of organisation of public authorities, ranging from the most decentralised to the most centralised.

a. **Confederation**: This term traditionally refers to the system that prevailed in the *United States*, *Germany* and *Switzerland* before they became federal states. It can therefore be perceived as a historical concept, which subsequently led to the establishment of a more powerful central authority. However, the process of European unification has breathed new life into the idea of a confederation. The *European Union* must be regarded as a modern form of confederation, which is highly unified and includes certain genuinely federal elements[39]. It should nonetheless be noted that, so far, no confederation has come into being as a result of the partitioning of an existing state with a federal, or possibly even unitary, system of government. It is consequently difficult to recommend this as a solution - for lack of experience in applying it - although, in theory, an approach along such lines cannot be ruled out[40].

In comparison with the other forms of organisation mentioned below, the distinctive characteristic of a confederation is that its component entities are acknowledged to have international legal personality. However, it is a matter of controversy whether a confederation itself has international legal personality. In other words, a confederation differs from all the other structures referred to in this document in that it is not a state, but its component entities are themselves states enjoying international immediacy[41]. This is perhaps why no confederation has so far been established through a partitioning process[42], as both those in favour of preserving a state's territorial integrity and those seeking autonomy are inclined to discard the solution. Yet, it should not be overlooked that in a genuine compromise no party is ever given full satisfaction, and that the concept of shared sovereignty tends to narrow the difference between a confederation and a federal state. Here too, the European Union and, in particular, the Communities offer a good example; they are often considered to be a unique halfway house between a confederation and a federation[43].

b. **Federal state**: The traditional federal state more often than not came into being as the result of a unification movement or the transformation of a confederation into a federation (examples are the *United States*, *Switzerland*, and *Germany*). Other federal states were founded when former colonies were grouped together (*Canada, Australia*). Associative federalism was the rule, as the federal state was not perceived as a means of solving conflicts, except perhaps as part of a gradual unification process leading to ever-closer interdependence, such as that taking place within the European Union. *Belgium*, which between 1970 and 1993 moved from a classic unitary system of government to a regional, and then federal, system, was the first example of dissociative federalism. *Russia* set the seal on this concept following the dissolution of the USSR. Although the USSR, and even the Russian Soviet Federative Socialist Republic, were officially federal in nature, the dominance of the Communist Party, described as "the nucleus of [the] political system"[44], prevented the emergence of any true federalism.

c. **Regional state**: This concept of state is not fundamentally different from the federal state. For that reason this document does not attempt to define the two concepts, but rather uses the terminology specific to national constitutional law. The concept of the regional state has developed above all in *Italy* and *Spain*[45]. In both of those countries, the system of regional government is not the same everywhere for historical reasons, since regions with special statutes were established before a regionalisation policy was applied countrywide. In this respect the process was slower in *Italy*. It is true that the 1947 Constitution made provision, from the outset, for the entire Republic to be divided into regions[46]. However, true regionalisation required the passing of a number of laws, a process which took almost 25 years to complete. The clause of the Constitution providing "Particular forms and conditions of autonomy, as laid down by special statutes adopted by constitutional law, shall be granted to Sicily, Sardinia, Trentino-Alto-Adige, Fruili-Venezia Guilia, and Valle d'Aosta"[47] was nonetheless implemented earlier, and the regions with special statutes enjoy greater autonomy than the others. Heterogeneous regionalisation is also enshrined in the Spanish Constitution. Moreover, upon the adoption of the 1978 Constitution, regionalisation was not the general rule, as the text stipulates that it is solely the territories concerned that may initiate the process towards self-government[48]. To begin with, self-government was primarily intended for the historical communities with specific linguistic characteristics. However, no region constituted an exception, with the result that Spain is now divided into a number of autonomous communities. The system is nonetheless highly asymmetrical. Although there are certain core powers, which, by nature, are the national government's preserve, the autonomous communities may assume jurisdiction in all other matters under their respective statutes[49]. The lack of symmetry consequently results from the diversity of the autonomous communities' statutes, complex legal instruments subject to special drafting procedures, which are ultimately adopted in the form of a national organic law.

As already mentioned, federal states and regional states do not fundamentally differ in nature. A feature common to both systems is the sharing of legislative authority, which is exercised both centrally and by the entities (federated states, regions, autonomous communities). There are therefore legislative, and into the bargain executive, bodies at both levels. This raises the question of the distribution of powers, to which we shall come back later.

The system of devolution applied in the United Kingdom has resulted in a highly advanced notion of decentralisation, which has lead to the creation of a new form of regional state. This system is asymmetrical and allows for different powers for Scotland, Wales and Northern Ireland[50].

d. **Specific statutes of autonomy**: The examples of Italy and, above all, Spain show that special autonomous status for certain territories with specific characteristics can go hand in hand with a country-wide system of regional self-government (a regional state). However, self-governing status may be confined to parts of a state's territory, in particular those with specific ethnic or geographical characteristics.

It is possible to cite the following examples of statutes of autonomy in Europe:

- In *Denmark* the Faroe Islands have their own legislature and executive. These islands are not only geographically distant from the rest of the country but also have their own distinct language and history. It should be noted that, although a 1946 referendum showed that a narrow majority of the population was in favour of secession from Denmark, the local parliament (Lgting) elected shortly after that referendum was not pro-secession, and a Home Rule Act was passed in 1948 following negotiations. Under that Act the Faroe Islands were granted greater powers of self-government than before but were kept within Denmark[51]. Greenland (geographically part of America) also has autonomous status.

- The status of the land Islands in *Finland* offers one of the best examples of peaceful settlement of a dispute at an international level. Although the question whether the inhabitants of the islands are themselves a separate minority has not been answered, it must be said that the majority of the population concerned is Swedish-speaking and that the Swedish-language population is in a minority in Finland. A majority of the inhabitants were in favour of union with Sweden. A dispute over the islands then arose between Finland and Sweden. This territorial dispute was referred to the League of Nations, which decided in favour of Finland. Even before that settlement an Act on Self-Government had been passed, giving the land Islands their own legislative assembly. The final solution agreed upon by Finland and Sweden, and adopted by the League of Nations, confirmed the islands' autonomy. This was subsequently broadened in scope, particularly in linguistic matters; Swedish is the language used in state schools, for instance. The autonomy arrangement is

now sometimes regarded as part of customary international law[52].

- In *Portugal* the archipelagos of the Azores and Madeira are autonomous regions with their own political and administrative statutes, which are prepared by the regional legislative assemblies and approved by the Assembly of the Republic. The same procedure applies to amendments of those statutes[53].

More recently, special statutes of autonomy were introduced in two European unitary states, *Moldova* and *Ukraine*.

- In *Moldova* such a statute was conferred on Gagauzia, making it possible to resolve the crisis triggered by the unilateral proclamation of a "Gagauz Republic" in 1990. The Gagauz community is a national minority of Turkish origin and Christian faith. The region's special status is based on a clause of the Constitution which provides that autonomy may be granted, under an organic law, to places on the left bank of the Dniestr and certain other places in the south of the Republic of Moldova (where Gagauzia is located)[54]. Some geographical limits have therefore been placed on statutes of autonomy (unlike in Spain), but such statutes could be granted to a number of other territories mentioned in the Constitution. A case-by-case approach, resulting in asymmetry between territories, might be envisaged. The statute of Gagauzia was adopted following negotiations between Moldovan and Gagauz representatives. The relevant Act states that Gagauzia is an autonomous territorial unit with special status, constituting the form of self-determination of the Gagauz people and an integral part of the Republic of Moldova[55]. Self-determination is thus construed as leading to autonomy in accordance with the principle of territorial integrity. It should nonetheless be noted that, should Moldova lose the status of an independent state, the Gagauz people would be entitled to external self-determination[56] [57].

- In *Ukraine* it is the Republic of Crimea that enjoys special autonomous status[58]. This territory has a predominantly Russian population and belonged to Russia for part of the Soviet era. Its union with Ukraine was questioned, even officially, and signatures were collected on a petition for Crimea's independence[59]. The situation was in some ways similar to that which led to home rule for the land Islands, although it did not give rise to any international settlement. Crimea is now vested with legislative authority within the unitary state of Ukraine.

e. **Powersharing political arrangements.** In some cases, where a political unit contains a number of distinct communities, solutions to ethno-political conflict have been attempted which are not based on a division of the political unit into different entities but rather on the creation of special political arrangements within a single entity to provide for the representation of the distinct communities. A recent example is provided in the institutional arrangements for executive power sharing in *Northern Ireland*, where the population is divided between a majority British unionist and a substantial minority Irish nationalist community. A legislative Assembly is elected using proportional representation. Members of the Assembly are required to designate their identity as nationalist, unionist or other. Key decisions of the Assembly require either the support of a majority, including a majority of both the unionist and nationalist members voting, or a 60% majority overall which includes at least 40% of the unionist and the nationalist members. Such key decisions include election of key office-holders, including the First Minister and Deputy First Minister in the Executive, standing orders and budget allocations, and other issues where a significant minority of Assembly members express concern. Other Ministries in the Executive are allocated to political parties on the basis of the dHondt system by reference to the number of seats each party has in the Assembly[60].

f. **Protection of minorities** does not necessarily entail special autonomous status for part of a state's territory. Many states have passed legislation affording protection to minorities without adopting statutes of autonomy. At the same time, federalism, regionalism or statutes of autonomy do not necessarily go hand in hand with the presence of minorities. They may even exist independently of minorities, which may be protected by other separate legislation, as is the case with the Danish, Frisian and Sorb minorities in *Germany*. In particular, a **special status** - notably through a system of personal autonomy - may be devised without there being any specific local or self-governing authority[61]. A halfway house solution has been adopted in *Hungary*, where, although there is no system of territorial autonomy, minority councils at local level have a say in all matters of importance to their communities. At national level autonomous bodies representing the minorities are made up of minority spokespersons and of electors designated in places where there is no representative or spokesperson for a given minority[62].

This document will not come back to the above-mentioned methods of protecting minorities - apart from federalism, regionalism or other forms of territorial self-government. That does not mean that attempts to find non-territorial solutions, including the granting of special status to minorities, should be ruled out, particularly in situations of conflict. Where a minority is scattered or its members are not in a majority anywhere, or only in a very small area, this may be the most desirable way of handling the situation. However, the question of protection of minorities in general[63] lies outside the ambit of this study, which focuses on situations in which several tiers of authority are superposed.

C. Principles of international law (overview)

In cases of ethno-political conflict, just as in any other situation, States must respect and enforce in good faith obligations flowing from international law, particularly with respect to disputes with other States. Put more precisely, they must respect the three core principles of the international system as established by the Charter of the United Nations: the principle that international disputes are to be settled by exclusively peaceful means (Article 2, paragraph 3); that of refraining from the threat or use of force in international relations (Article 2, paragraph 4); and finally the obligation to conform to resolutions of the Security Council taken within the context of collective security, by virtue of Chapter VII of the United Nations Charter. In their mutual relations, States must also respect the rules of neighbourly relations[64]. These principles are in particular to be applied when a dispute involves a national minority. It would be beyond the scope of this study, which concerns the settlement of ethno-political conflicts under internal constitutional law, to undertake a more thorough analysis of this question.

Part II: Systems involving a number of tiers of authority: issues to be addressed

The second part of this document will be devoted to a number of general issues relevant to all situations in which there are a number of tiers of authority. The three main themes to be broached are the distribution of powers, decision-making processes and settlement of disputes between the *centre* (confederation, federal state, central government) and the *entities* (states members of a confederation, federated states, regions or autonomous communities). Distribution of powers is a question that arises in all states, but is of particular importance in the cases with which we are concerned here, where legislative, or at least rule-making, powers are shared. On the other hand, participation in the decision-making process primarily concerns confederate or federal systems and is of less relevance to specific statutes of autonomy. Lastly, we shall consider the scope for international guarantees.

All of the systems studied are subject to the fundamental principles of *superposition* and *autonomy*. Firstly, the central state's law takes precedence over that of the entities (the principle of superposition). Secondly, the entities enjoy a certain degree of authority to organise themselves as they see fit (the principle of autonomy). In confederations - as is the case in the *European Union* - the emphasis is on autonomy, whereas as one moves on to federal states, then regional states or states granting certain areas specific statutes of autonomy the scales are tipped further and further towards superposition[65]. For example, states members of a federation adopt their own constitutions within the framework of federal law. Conversely, the statutes of regions or autonomous communities usually take the form of laws passed by the central state, even if they are first adopted by an organ of the entity concerned. For instance, in *Italy* the special statutes are adopted as constitutional laws[66], whereas the other regions without special statutes have no basic law. The statutes of the Spanish autonomous communities are ultimately enacted as an organic law[67]. The statute of the land Islands (*Finland*) is of the nature of a constitutional law (Act of Exception to the Constitution)[68]. The autonomous status of Gagauzia (*Moldova*) has its basis in an organic law[69]. The Autonomous Republic of Crimea adopts its own constitution, but subject to approval by the parliament (Verkhovna Rada) of *Ukraine*[70]. The powers of the autonomous regions of the Faeroe Islands and Greenland (*Denmark*) are guaranteed under Home Rule Acts, approved by the provincial assemblies and then by the national parliament, whereas the statutes of the Azores and Madeira (*Portugal*) are prepared by the regional legislative assemblies and approved by the Assembly of the Republic[71].

A. Distribution of powers[72]

The details of the distribution of powers are peculiar to each state, and we shall consequently not deal with them here. A solution adopted in one state is not transposable elsewhere as it stands. On the other hand, it is possible to identify a number of general practices in this area.

1. The basis and method of distribution of powers

a. Basis of distribution of powers

The first question that arises is the legal basis of the distribution of powers. More often than not it is the *Constitution*.

In *Russia* the Constitution nonetheless empowers the Russian Federation to give extremely broad scope to its activities in areas where the Federation and the subjects of the Federation have joint jurisdiction, since the subjects solely retain responsibility for matters not governed by federal legislation[73]. Certain subjects have therefore negotiated agreements with the Federation defining their respective powers and areas of responsibility. In addition, the federal treaty of 1992 - or the part thereof not at variance with the Constitution - is also applicable in matters of distribution of powers[74].

In *Italy* the Constitution lists those matters coming within the jurisdiction of the ordinary-statute regions, whereas the specific powers of the regions with special statutes are set out in the relevant constitutional laws[75]. In *Spain*, however, it is primarily the statutes of autonomy, ultimately enacted in the form of a national organic law, which determine the powers of the autonomous communities. Again, where special statutes of autonomy exist, the Constitution frequently defines the powers of the autonomous regions, as in *Portugal*[76]and *Ukraine*[77]. The situation is more or less the same in *Finland*, since the Act conferring self-governing status on the province of land ranks as a constitutional law. On the other hand, in *Denmark* the powers of the Faeroe Islands and Greenland are determined in the specific Home Rule Acts. The same applies to the organic law on Gagauzia in *Moldova*.

b. Method of distribution of powers - residual power

In *federal states* the Constitution most often grants the entities *residual power*, in that those powers not expressly allocated to the federal state under the Constitution remain vested in the entities (examples are *Germany*[78], *Russia*,[79] *Switzerland*[80] and the *United States*[81]). In the old confederations the member states also enjoyed residual power, as is the case today in the *European Union*, in particular at Community level[82].

In *Belgium*, the principle of residual power for the communities and regions will come into force only after a further constitutional reform, with the result that it is the central state that currently enjoys residual power[83].

A system based on two lists of powers (of the central state and of the entities) is also conceivable. For instance, in *Canada* the Constitution contains both a list of federal powers and a list of the provinces' powers. However, such a system can function only where there is residual power, as it is not possible for the constitution-makers to foresee every scenario and, given the rigid nature of constitutions, to adapt the text to every new situation. Therefore, under the Canadian system residual power in principle belongs to the central state, but this rule is qualified by the fact that responsibility for local and private matters is conferred on the provinces[84].

Preservation of the central state's residual power in *Belgium* and *Canada* does not alter the fact that in those countries the entities enjoy more extensive powers than, for example, in *Austria*, a state where residual power is in fact vested in the entities. *The method of distribution of powers therefore does not affect their scope*. What is more, the balance of powers between the centre and the entities is affected not only by the number of powers, but also by the nature of those powers and how they are construed. In the *United States*, for instance, an inflexible constitution goes hand in hand with the very broad interpretation given to the clauses conferring various powers on the Union.

Conversely, in *regional states* residual power lies with central government. The *Spanish* system is a particularly complex one. The Constitution may seem to contain two lists of powers - those that may be allocated to the autonomous communities and those reserved for central government[85] - but in actual fact it is the statutes of autonomy, ultimately adopted in the form of an organic law, which determine the scope of each entity's powers. At the very most, it might be said that certain powers are, by nature, the exclusive preserve of central government. The central government retains those powers not conferred on the autonomous community by its statute. In *Italy* the powers of the special-statute regions are laid down in their respective statutes, which take the form of constitutional laws[86]. The Constitution contains an exhaustive list of the powers of the ordinary regions[87].

The system of distribution of powers within the context of devolution in the *United Kingdom* is of an asymmetrical nature. In the case of Scotland, certain subjects are specifically devolved to the Scottish parliament, whilst others are reserved for Westminster, and issues that are not the subject of a specific rule fall to the Scottish parliament; Scotland thus retains residual competence. This is in contrast with Wales, where the Parliament may only adopt subordinate legislation in such areas as have been specifically devolved.

A fortiori, in unitary states, where all powers in principle belong to the central government but certain entities are granted special statutes, the entities only enjoy the powers laid down in those statutes.

2. Symmetry or asymmetry in the distribution of powers

Distribution of powers among several tiers of authority does not mean that each entity enjoys exactly the same powers. This goes without saying in states, which grant special self-governing status to certain of their entities, as the other entities do not enjoy the same autonomy. The regional states of Europe are also based on a degree of asymmetry in the distribution of powers. *Italy* has regions with a special status peculiar to each region concerned[88]. *Spain* has as many specific statutes as it has regions. On the other hand, federal states are usually based on a symmetric system of distribution of powers (examples are *Austria*, *Bosnia and Herzegovina*, *Canada*, *Germany*, *Switzerland* and the *United States*). The *Russian* system differs, however, since, on one hand, specific treaties between the subjects and the federation lead to a degree of asymmetry, and, on the other, there are different categories of subjects of the federation (republics, territories, regions, autonomous districts), some of which are included in others[89].

3. The various types of powers

Each state deals differently with the distribution of powers between central government and the entities. It is nonetheless possible to define a number of general types of powers[90]:

- *Exclusive* powers vested in the central state, with a corresponding lack of power at the level of the entities.

- *Concurrent* powers (of the central state and the entities): the central state may exhaust all aspects of a matter; the entities retain the power to legislate only in so far as the central state has not done so.

- The central state's power to adopt *framework laws*, matched by the entities' power to deal with matters of detail. Framework laws contain general principles, whereas the entities have jurisdiction as regards points of detail and execution.

- *Parallel* powers (of the central state and the entities): a task may be performed simultaneously by the central state and the entities, each in its respective field. The most common example concerns taxation in states such as *Argentina*, *Belgium*, *Canada* and *Switzerland*.

- *Exclusive* powers vested in the entities in fields where the central state has no jurisdiction.

4. Common rules with regard to powers?

Powers are distributed between the central state and the entities as is deemed most fitting under each legal system. Consequently, although some similarities may be observed, diversity is the rule in such matters. However, although there is no binding rule under international law, where a genuine state - and not merely a confederation - exists, a number of spheres (almost) always come within the jurisdiction of the central state:

a. In domestic law

- Defence

- Monetary policy

- Intellectual property

- Bankruptcy

- Weights and measures

- Customs

This is of course without prejudice to the powers of the European Union.

Moreover, private law, criminal law and social security are usually - at least for the most part - matters for the central state. It should nonetheless be noted that some federal states, such as the *United States* and *Canada*, do not have a unified system of private law.

b. International relations

Foreign policy is always, wholly or partly, within the jurisdiction of the central state. The most advantageous situation from the entities' point of view is parallelism of domestic and international powers, where the entities and the central state have substantive jurisdiction to conclude international treaties in the same matters as come within their internal legislative authority, subject to the provisions of special clauses conferring treaty-making powers. This is the practice in *Belgium*, for instance[91]. However, more often than not the entities have fewer powers at an international level than at the domestic level. In addition, even where the entities have treaty-making authority in given matters, treaties are often concluded through the intermediary of central government (*Switzerland*[92]) or subject to its approval (*Germany*, *Austria*[93])[94].

B. Participation by the entities in the decision-making process of the central state

Distribution of powers is not the only criterion whereby the entities' role within a state can be gauged. The entities may be recognised as having the status of *organs of the central state* and thus participate directly in the constitutional or - more rarely - legislative process. They may also participate indirectly in this process via a second chamber, which represents them. Generally speaking, participation by the entities in the decision-making process of the central state is mostly an established principle in federal states, and far less frequent in regional states or unitary states with autonomous entities.

1. Entities as organs of the central state: direct participation

In many federal states it is above all at the *constitutional level* that the entities participate in the decision-making process. For example, in *Russia*, constitutional amendments come into force only after they have been approved by the legislative authorities of at least two-thirds of the subjects of the Federation[95]. In the *United States* the agreement of the legislative authorities of three-quarters of the states is required, and a constitutional reform may be proposed by a convention convened at the request of the legislatures of two-thirds of the states[96]. In *Canada* such amendments require the approval of at least seven of the ten provinces representing at least 50% of the population; the most important rules can even be revised only with the provinces' unanimous consent[97]. In Switzerland federal constitution-making authority is conferred on the federal electorate and the cantons. Revisions of the constitution must therefore be approved by a majority of the federal electorate and a majority of the cantons[98]; however, the system is not absolutely symmetrical as the votes of six cantons only count as half a vote.

In states that do not follow the federal pattern direct participation is far more limited. For example, in *Italy* five regional councils may request a constitutional referendum on a constitutional law passed by parliament without a two-thirds majority[99].

Where specific statutes of autonomy exist, these may have to be approved by the relevant autonomous entity. An autonomous entity may also be empowered to take decisions concerning legislation of direct relevance to it: in *Finland* the province of land participates in any revision of the constitutional law on its self-governing status and of the Act governing the purchase of real property located on the land Islands[100].

At the *legislative* level, a referendum must be called at the request of five regions, in the case of *Italy*[101], or of eight cantons, in that of *Switzerland*[102](where referendums may also relate to certain international treaties). The right of initiative in legislative or constitutional matters exists, for instance, in those two states[103], in *Russia*[104] and in *Spain*[105], but is limited in scope, as the legislature is free to decide whether it wishes to act upon such an initiative.

2. Indirect participation

In a number of federal and regional states the second chamber of parliament may be considered to represent the entities.

However, the closeness of the link between the second chamber and the entities varies. It is particularly close in *Germany*, where the Bundesrat is made up of members of the Lnder governments, which have authority for their appointment and dismissal[106]. It is less so where members of the second chamber are elected by the entities' parliaments, as in the *Austrian* Bundesrat[107]. *Russia* comes halfway between the two, since the Constitution provides "Two deputies from each subject of the Federation shall be members of the Federation Council: one from the representative body and one from the executive body of state authority"[108]. Lastly, the fact that members of the *Swiss* Council of States and the *United States* Senate[109] are elected directly by the people also tends to mean that they are not genuine representatives of the entities. In *Italy*, a regional state, the Senate is also elected on a regional basis[110].

The existence of a second chamber representing the entities does not necessarily entail their *equal* representation. Representation of the entities in the second chamber is equal - two members per federated state - in *Russia*[111], the *United States*[112] and *Switzerland*[113] (except for the six cantons which elect only one member of the Council of States instead of two). In *Austria*[114] a Land's number of representatives in the Bundesrat is in principle proportional to its population. In the *Italian* Senate allocation of seats among the regions is also basically proportional to the population. In *Germany*[115] the population is taken into account when allocating seats, but not on a proportional basis. Where the second chamber does not represent the entities, the number of members originating from each entity is of course not the same and there can be no question of equal representation.

The powers of the second chamber, where it represents the entities, also vary. *Switzerland*, for example, has a perfectly bicameral system in which the two chambers enjoy the same powers[116] (except at joint meetings of the two councils of the Federal Assembly, when the 46 members of the Council of States carry less weight than the 200 members of the National Council). In *Austria*[117], *Germany*[118] and *Russia*[119], however, the second chamber has fewer powers than the first. In the *United States*[120] the Senate is vested with powers in certain fields, such as ratifying treaties and confirming the appointment of certain officials, which the House of Representatives does not possess[121].

In *Belgium* there is no real indirect participation of the entities in the decision-making process of the central state. The emphasis is more on linguistic parity, which therefore concerns the different *linguistic groups* but not the communities or regions. In very many instances where community or regional institutions or powers are affected, the Constitution requires the passing of so-called "special" laws, which must be adopted by a majority in each linguistic group[122]. This is therefore a somewhat different situation, where it is for groups - rather than federated or regional entities - to participate in the decision-making process.

It is conceivable that indirect participation of the entities in the decision-making process might take place not only in the legislature, but also in *the executive and the judiciary*.

As regards the *executive*, there are no real examples of such participation, apart from in the *European Union*. The EU Council, which combines features of both legislative and executive powers, is made up of ministers of the member states[123]. It should be noted that the *European Union* is more of the nature of a confederation than a federation. In *Belgium* linguistic parity is even more strictly applied in the government than in parliament, since "With the possible exception of the Prime Minister, the Council of Ministers includes as many French-speaking members as Dutch-speaking members"[124].

Lastly, with regard to the judiciary, the linguistic parity rule in *Belgium* also applies to membership of the Court of Cassation, the Conseil d'Etat (the highest ordinary courts) and the Court of Arbitration (constitutional court). In *Switzerland*, the various official languages, and therefore the linguistic groups, must be represented within the Federal Court[125], but this is not really linked to the federation's structure, which is not based on any linguistic criterion.

As can be seen from the above paragraphs, the *symmetry* or *asymmetry* question arises not only with regard to the distribution of powers, but also concerning the entities' participation in the decision-making process of the central state, whether directly or - above all - indirectly via their representation on central bodies.

C. Settlement of disputes

In federal or regional states a *judicial* mechanism is established to deal with disputes between the central state and the entities. In this way not only subjective but also objective impartiality is guaranteed. It is indeed necessary to ensure that a political body, moreover one belonging to the central state, does not have the final word in such disputes.

In states that have a constitutional court, that court has jurisdiction to decide such disputes. This is the case, for instance, in *Germany*, where the Federal Constitutional Court gives decisions, inter alia, "in case of disagreement or doubt as to the formal and substantive compatibility of federal or Land legislation with this Basic Law or as to the compatibility of Land legislation with other federal legislation, at the request of the federal government, a Land government " and "in case of disagreement over the rights and obligations of the Federation and the Lnder, particularly concerning the implementation of federal legislation by the Lnder and the exercise of federal supervision"[126]. In *Austria* the Constitutional Court gives decisions in "disputes as to jurisdiction between the Lnder or between a Land and the federation"; "on an application from the federal government or a Land government, the Constitutional Court also determines whether a legislative or executive measure comes within the jurisdiction of the federation or the Lnder."[127] The *Belgian* Constitution provides that the Court of Arbitration has authority, in particular on an application from the federal government or a community or regional government, to repeal legislation passed by the central state or its entities on the ground that it violates "rules laid down in the Constitution or pursuant thereto so as to determine the respective responsibilities of the state, the communities and the regions"[128]. In *Bosnia and Herzegovina* "The Constitutional Court has exclusive jurisdiction to decide any dispute that arises under the Constitution between Bosnia and Herzegovina and an Entity or Entities"[129]. The Constitutional Court of the *Russian Federation* resolves disputes as to jurisdiction between state bodies of the Russian Federation and state bodies of the subjects of the Federation[130].

Similar rules exist in regional states. In *Spain* the Constitutional Court resolves disputes as to jurisdiction between the state and the autonomous communities, and the central government may challenge before that court any decisions taken by autonomous community bodies[131]. In *Italy* the Constitutional Court deals with disputes as to jurisdiction between state authorities and regional authorities[132].

In some federal states where there is no concentrated form of constitutional review it is for the Supreme Court to rule, as sole instance, on legal disputes between the central state and the entities. This applies, for example, to the *United States*[133]. In *Switzerland* the Federal Court deals with disputes between the Confederation and the cantons, but has no jurisdiction to review the constitutionality of federal laws[134].

Conversely, in *Canada* all of the ordinary courts may give decisions concerning questions of constitutionality. The Supreme Court exercises appellate jurisdiction[135], except in cases where an advisory opinion is requested from it by the Governor in Council[136].

Judicial means of settling disputes, by means of a Constitutional Court or another equivalent court, also exist where specific statutes of autonomy have been granted. In *Ukraine* various national bodies may challenge the constitutionality of acts of the Verkhovna Rada of Crimea before the Constitutional Court, and the Verkhovna Rada of Crimea may do likewise in respect of national laws and regulations[137]. In *Portugal* the national authorities may refer legislation passed by the autonomous regions to the Constitutional Court for prior constitutional review[138]; although the same avenue is not open to the autonomous regions in respect of national legislation, substantive constitutional review of such legislation is always possible[139]. A novel solution has been found in the case of Greenland (*Denmark*): disputes over the respective responsibilities of the national and the regional authorities are brought before a body comprising two government-appointed members, two members appointed by the regional authorities and three judges of the Supreme Court appointed by its President. If the four persons appointed by the national and regional authorities reach an agreement, the dispute is settled. Failing this, the matter is decided by the three judges of the Supreme Court[140]. The first stage of this procedure resembles an arbitration arrangement.

The *European Union*, which is halfway between a confederation and a federal state, also has its own mechanisms for settling disputes between the Communities and the member states before the Court of Justice (*e.g.* actions brought by the Community against member states which it deems to have failed to fulfil a treaty obligation[141]; actions brought by member states to challenge acts adopted by the European institutions[142]).

D. International guarantees

Although federalism, regionalism and statutes of autonomy are basically matters for domestic law, they may be covered by international guarantees. Generally speaking, such guarantees may be based on treaties for the protection of minorities. It is true that multilateral treaties do not impose a statute of autonomy, let alone a regional or federal structure. However, federalism, regionalism or statutes of autonomy constitute one means of ensuring that the domestic legal order embodies the obligations resulting from those treaties. This may concern both multilateral treaties such as the Framework Convention for the Protection of National Minorities[143] and bilateral treaties aimed at solving the situation of a specific minority[144].

The most typical example of an international guarantee is that enjoyed by the *land Islands*. Soon after the Finnish declaration of independence in 1917, a majority of the electorate in the islands signed a petition calling for their union with Sweden. Shortly thereafter, a dispute over the islands arose between Finland and Sweden. A further petition-based campaign for union with Sweden followed. The territorial dispute was brought before the League of Nations, which settled it in Finland's favour on condition that guarantees were given, with the aim, inter alia, of ensuring the islanders' prosperity and well-being, and measures were taken to demilitarise and neutralise the islands. The final solution consisted in an agreement between Sweden and Finland, submitted to the Council of the League of Nations, which provided that the Council would supervise application of the guarantees and might refer to the Permanent Court of International Justice any complaint of a legal nature from the Landsting (parliament) of land concerning the guarantees. Under the agreement a number of provisions were to be added to the Act on self-government of the land Islands; these concerned use of Swedish as the language of instruction in schools, the purchase of real property and the introduction of a five-year residence requirement for entitlement to vote in municipal and provincial elections, etc.[145].

In *Italy* the conclusion of the De Gasperi-Gruber agreement with Austria in 1946[146] led to the creation of the autonomous region of Trentino-Alto-Adige and the granting of special rights (including legislative powers) to the province of Bolzano, where the majority of the population is German-speaking.

The Dayton Agreements for peace in Bosnia and Herzegovina, which ended the armed conflict in that country, were concluded between Bosnia and Herzegovina, Croatia and Yugoslavia. They include, as an annex, the Constitution of Bosnia and Herzegovina, which provides for a complex balancing mechanism between the two entities, the Federation of Bosnia and Herzegovina and the Republika Srpska, and the various peoples present in the territory. International organisations are also involved, in particular NATO with regard to the military aspects of the peace settlement[147], and the Office of the High Representative, an ad hoc institution, concerning its civilian aspects[148].

Lastly, although it merely offers a transitional solution, Security Council Resolution 1244 takes an original approach, in that it gives the international community real powers in respect of the territory of Kosovo. Generally speaking, the international community has had a greater conflict-solving role in recent years, which would seem to point towards a long-term trend.

Conclusion

The detailed solutions to the various questions which arise when powers are distributed among different tiers of state authority are specific to each individual case. The questions, however, are virtually the same. This report has shown that statutes of autonomy, regionalism, federalism, and even confederation systems, not forgetting rules on the protection of minorities, can be reconciled with respect for territorial integrity. Where a number of tiers of authority co-exist it is necessary to determine the distribution of powers - to decide, firstly, the basis for that distribution and where residual power will lie and, secondly, the different types of powers (exclusive, concurrent, power to pass framework laws, etc.), or again whether distribution of powers will be symmetrical. Another question is whether the entities will participate - directly or indirectly (for instance through a second chamber of parliament) - in the decision-making process of the central state. Here too, should a symmetrical or asymmetrical approach be taken? Yet another important point is the means of settling disputes between the central state and the entities (in principle judicial or arbitral in nature). Lastly, among the solutions to situations of conflict there is room for international guarantees.

xv. Report on constitutional issues raised by the ratification of the Rome Statute of the International Criminal Court (CDL-INF (2001) 1) adopted by the Commission at its 45th Plenary Meeting (15-16 December 2000)

At its 43rd Plenary meeting the Venice Commission decided to study the constitutional issues raised by the ratification of the Rome Statute of the International Criminal Court. A working group composed of Messrs Robert, zbudun, Hamilton, Van Dijk, Luchaire, Ms Livada, Err and Mr Vogel prepared a draft report in Paris on 1 December 2000. The present report was adopted by the European Commission for Democracy through Law at its 45th Plenary Meeting in *Venice, on 15 to 16 December 2000.*

Following the Second World War, the powers which emerged victorious established the Nuremberg and Tokyo tribunals in order to bring to account the perpetrators of the most abhorrent crimes that had been committed. The ensuing Cold War did not permit to continue this precedent to be followed in the decades thereafter. It was not until the end of the East-West confrontation that the establishment of two *ad hoc* tribunals became possible: one for the crimes committed in the Former Yugoslavia and one for those in Rwanda. Both these tribunals were established by virtue of Security Council resolutions in application of Chapter VII of the UN Charter.

However, although regional conflicts take place in many parts of the world, it would be impossible to continuously establish *ad hoc* tribunals to bring the perpetrators of such crimes in each area to account. It was thus considered that the creation of such *ad-hoc* tribunals through Security Council resolution could not be regarded as an adequate practice in the long run. It was under such circumstances that the idea of establishing a permanent international criminal court to deal with such crimes committed in all areas of the world was revived. It thus became possible for a Diplomatic Conference held in Rome under the auspices of the UN to adopt in July 1998 the Statute of the International Criminal Court.

This new international court will be an important means of countering impunity and respecting humanitarian law and human rights. It will be used to bring to trial all those who commit genocide, crimes against humanity, war crimes and the crime of aggression.[149] However, to enter into force the statute must be ratified by at least sixty states. The members of both the European Parliament[150] and the Parliamentary Assembly of the Council of Europe[151] have called on their countries to ratify the statute as soon as possible. By 1 January 2001, it had been ratified by 27 states, 11 of which are European[152].

Ratifying this type of instrument can pose a number of problems under national law, particularly at a constitutional level. The constitutional problems raised derive first of all from the effect of transfer of sovereignty resulting from the ratification. This question of a general nature, that several European States have already dealt with in the context of the process of European integration (not only in respect of accession to the European Union but also in respect of ratification of some Council of Europe treaties) will not be dealt with in this report, unless where closely connected with specific constitutional problems raised by the ratification of the Statute of Rome. These specific problems relate to: immunity of persons having an official capacity[153]; the obligation for states to surrender their own nationals to the court at its request[154]; the possibility for the court to impose a term of life imprisonment[155]; exercise of the prerogative of pardon; execution of requests made by the court's Prosecutor[156]; amnesties decreed under national law or the existence of a national statute of limitations[157]; and the fact that persons brought before the court will be tried by a panel of three judges rather than a jury[158].

This report sets out to analyse the reasoning and interpretations that may be relied on by governments to solve these problems and enable their countries to ratify the Rome Statute. Obviously, this reasoning and interpretation are not restrictive and are given simply as indications. They represent merely a methodological reflection and do not commit the European Commission for Democracy Through Law, which does not favour any one solution over the others.

States may consider several solutions for the ratification of the Statute of Rome, despite the presence of constitutional problems. These may include, for example:

insertion of a new article in the constitution, which allows all relevant constitutional problems to be settled, and avoids the need to include exceptions for all the relevant articles, this is the measure used in particular by France and Luxembourg.

systematic revision of all constitutional articles that must be changed to comply with the Statute.

introduce and/or apply a special procedure of approval by Parliament, as a consequence of which the Statute may be ratified, despite the fact that some articles are in conflict with the Constitution [159].

interpreting certain provisions of the constitution in a way to avoid conflict with the Statute of Rome

1. Immunity of Heads of State or Government and others persons having an *official capacity*

One of the constitutional problems raised by the ratification of the Rome Statute concerns the immunity which most European countries' constitutions grant to the head of state or government, a member of a government or parliament, an elected representative or a government official[160]. Such immunity may contravene Article 27 (1) of the statute, which provides *This Statute shall apply equally to all persons without any distinction based on official capacity.*. Their official status in no way exempts these persons from criminal responsibility under the statute, nor does it constitute, per se, a ground for reduction of sentence. The second paragraph adds *Immunities which may attach to the official capacity of a person, whether under national or international law shall not bar the Court from exercising its jurisdiction over such a person.*. In other words, where they commit a crime coming within the jurisdiction of the International Criminal Court, political leaders cannot evade their responsibility by pleading immunity before either that court or their country's own courts[161].

A number of solutions to this problem of immunity can be envisaged. Firstly, a state has the possibility of amending its constitution to bring it into line with the statute[162]. This approach has been followed, inter alia, by France and Luxembourg. Both countries added a clause to their constitution providing in the case of France *the French Republic may recognise the jurisdiction of the International Criminal Court under the conditions set out in the treaty signed on 18 July 1998*[163]*/**[164]*/ and in that of Luxembourg *no provision of the Constitution shall constitute an obstacle to approval of the Statute of the International Criminal Court and to fulfilment of the obligations arising therefrom under the conditions set out in that Statute*.[165]. These clauses are worded in such a way as to permit these countries to avoid creating an exception or exceptions to specific articles of their constitution.

The process of constitutional amendments will also be used by the Czech Republic, where the bill amending the constitution contains the following provision Article 112a): *As regards crimes, where a ratified and promulgated international treaty binding the Czech Republic provides for the jurisdiction of an international criminal court; a) neither the special conditions provided for the prosecution of deputy, senator, the President of the Republic, and judge of the Constitution Court, nor the right of deputy, senator, and judge of the Constitutional Court to refuse to give testimony on facts that he gathered in connection with his seat or function shall apply;* .[166]. However, amendment of the constitution is often a cumbersome, complicated process, and may even be a politically sensitive issue.

It has been suggested that, to avoid amending their constitutions, states could choose to interpret the relevant constitutional provisions in such a way a to avoid conflict with the statute. In that case those provisions should be construed as conferring immunity, by reason of a person's *official capacity*, only in the national - and not the international - courts. This amounts to establishing two tiers of responsibility of office-holders, at the national and the international levels. Although superimposed, those responsibilities would be separate one from the other. In other words, where responsibility was subject to exceptions at national level, these would not

necessarily apply at the international level.

A state could also maintain that a tacit exception from immunity was inherent in its constitution. In the case under consideration here, it might be conceived that, where the court required a state to surrender one of its leaders enjoying immunity, the state could justify handing that person over by interpreting the relevant constitutional provisions in the light of their intended purpose. Since the court's principal task is to combat impunity for perpetrators of the most serious crimes of concern to the international community as a whole, a head of state or government who committed such a crime would probably violate the fundamental principles of his or her own constitution and could therefore be surrendered to the court, despite the protection normally guaranteed by the constitution.

Another possible interpretation in the same direction would be to maintain that lifting the immunity of heads of state or government has become a customary practice in public international law. In the House of Lords decision on General Pinochet's immunity, three of the five Law Lords confirmed this trend in international law. Lord Nicholls expressed the majority opinion in the following terms: *International lawhas made plain that certain types of conduct, including torture and hostage-taking, are not acceptable conduct on the part of anyone. This applies as much to heads of state, or even more so, as it does to everyone else. The contrary conclusion would make a mockery of international law.* This decision led some scholars[167] to conclude that the fact that an individual is acting in an official capacity can never be an impediment to prosecution. They contend that for the past half-century it has been a well-established principle, repeatedly relied on by the courts, that the immunity from prosecution of incumbent or former heads of state or government cannot apply to crimes under international law. He makes specific reference to the *Versailles Treaty*[168], *Charter of the Nuremberg Tribunal*[169], the *Convention on the Prevention and Punishment of the Crime of Genocide* [170], the work of the International Law Commission[171] and the Statutes of the International Criminal Tribunal for the Former Yugoslavia[172] and the International Criminal Tribunal for Rwanda[173]. A number of states with monistic tradition could moreover be said to give this principle tacit recognition, in that their constitutions expressly state that the generally recognised principles of international law are part and parcel of their national law[174].

This point of view can be substantiated by the example of Italy. Under Italian constitutional law immunity from prosecution in national public law is not enforceable against the court, since, as a result of Articles 10 and 11 of the constitution, the domestic legal system is automatically brought into line with Articles 27 and 98 of the Rome Statute. Article 10 in fact states *Italy's legal system shall conform with the generally recognised principles of international law* and Article 11 that Italy *shall agree, on condition of reciprocity, to such limitations of sovereignty as may be necessary to a legal system ensuring peace and justice between nations*[175]. Article 9 of the Austrian constitution has virtually the same effect[176] [177].

In some constitutions, in particular in those of Central and Eastern Europe, provisions of international treaties in the field of Human Rights take precedence over conflicting provisions of the Constitution. This could facilitate the ratification of the Statute of Rome.

Finally, it should be noted that some States have a specific ratification procedure, permitting to ratify international treaties by qualified majority even though their content is deemed to be in conflict with other provisions of the constitution. Article 91 para 3 of the Constitution of the Netherlands allow to ratify a treaty, by two thirds majority of the members of both chambers, even though it seems that there could be conflicts between the treaty and the Constitution.

2. Surrender of Persons

Article 89 of the Rome Statute provides *The Court may transmit a request for the arrest and surrender of a person to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person.* This surrender procedure, which applies irrespective of the nationality of the person concerned, may be at variance with the ban on extraditing or expelling nationals to be found in many countries' constitutions[178]. To get around this problem and facilitate ratification, the statute's authors inserted Article 102, which differentiates between surrender and extradition. The article states that for the purpose of the statute: a) *'Surrender' means the delivering up of a person by a State to the Court, pursuant to this Statute; b) 'Extradition' means the delivering up of a person by one State to another as provided by treaty, convention or national legislation.* This differentiation between extradition and surrender has enabled a number of countries to ratify the statute without amending their constitutions, and will permit other countries to do so in the future. On ratifying the statute, some states will choose to incorporate this distinction into their domestic law with higher legal value. However, some other states will have no other choice than to proceed with a constitutional amendment, as their domestic law does not admit this interpretation or because they wish to avoid any confusion on this subject in their national legal system.

Countries choosing to adopt the interpretation proposed in the statute, which may include Poland, Slovakia and Slovenia, will follow in the footsteps of Italy and Norway, which have already ratified it. On this issue, Italy took the view that there was no constitutional impediment[179], since extradition existed only in inter-state relations and the concept did not apply to a state's relations with the court. Norway arrived at the same conclusion by holding that the transfer of nationals to the Court must be distinguished from extradition to another state, which is in fact prohibited by the constitution.

A number of other states[180] will probably proceed by amending their constitutions. Some, such as Germany and the Czech Republic, have already prepared bills of amendment. Germany proposes to add to Article 16 (2) of its Basic Law, which states *No German may be extradited to a foreign country*, a provision to the effect that *A regulation in derogation of this may be made by statute for extradition to a Member State of the European Union or to an international court*[181]; and the Czech Republic intends to incorporate an Article 112c, providing: *c) the Czech Republic shall release for prosecution by the respective international criminal court its own citizen or a foreigner,* [182] The advantage of this approach lies in the fact that it will undoubtedly eliminate all possibility of conflict with the rules of domestic law and ensure that the national courts comply with the obligations imposed by the statute, despite their reluctance to allow a national to be tried under another legal system. Its main drawback is - as already outlined above - that amending the constitution is a long and difficult process in some countries.

3. Sentencing

The third constitutional problem that can arise from the ratification of the Rome Statute concerns the sentences which may be imposed by the court. Under Article 77 of the statute, the penalties to which a person found guilty is liable include imprisonment for a term of thirty years and life imprisonment, where justified by the extreme gravity of the crime and the individual circumstances of the convicted person. This provision is at variance with a number of constitutions, which prohibit the imposition of a life sentence[183] or a prison term as long as thirty years.

As far as the underlying reason for this is that such penalties allow no chance of rehabilitation, it should be pointed out that the statute nonetheless makes provision for the possibility of rehabilitation, since Article 110 (3) requires the court to review the sentence to determine whether it should be reduced *when the person has served two-thirds of the sentence, or 25 years in the case of life imprisonment.*

To the extent that the prohibition is based on the concept that these penalties expose the individual to a treatment prohibited in an absolute manner by the constitution, an amendment to the latter seems necessary. Such an amendment might simply consist in establishing an exception by providing that, where the court imposed a term of life imprisonment in accordance with the statute, this would not be anti-constitutional. Alternatively, it might provide that the country can surrender an accused person to the court despite the possibility that a life sentence may be pronounced[184].

In any event, for the vast majority of states no constitutional problem arises with this provision. It is also important to note that, by virtue of Article 80 of the statute, states parties are not obliged to prescribe the same penalties for similar offences in their national law[185].

The solution to another aspect of the same problem may lie in Article 103 of the Rome Statute, which defines the role of states in enforcing prison sentences. This article provides that sentences shall be served in a state designated by the court from a list of states which have indicated their willingness to accept sentenced persons. A state may make its acceptance subject to conditions, which must be agreed with the court and also be compatible with the provisions of Part 10 of the statute, which concerns enforcement. The state can also inform the court of any circumstances which could materially affect the terms or duration of imprisonment, and the court will then take a decision on this change under a well-defined procedure. States are therefore able to specify that they will not accept sentenced persons for periods longer than the maximum sentence permissible under national law. This is the approach followed by Spain, where the law ratifying the statute reads: *Spain declares that, at the right moment, it will be prepared to receive persons condemned by the International Criminal Court, on the condition that the length of time of the imposed penalty does not exceed the highest maximum established for any crimes under Spanish legislation..*

It should be noted that this article may also offer a solution to the problem of the prerogative of pardon, provided for in many countries'

constitutions[186]. On this subject, the French Conseil Constitutionnel found *whereas under Article 103 of the statute, a state which declares its willingness to accept persons sentenced by the International Criminal Court may attach conditions to its acceptance, which must be agreed by the court; whereas those conditions could 'materially affect the terms or extent of the imprisonment';* [187] adding in the next paragraph *it follows from the above that, on declaring its willingness to accept sentenced persons, France could attach conditions to its acceptance, in particular concerning the application of national law on the enforcement of prison sentences; that it could also indicate that persons sentenced might be dispensed from serving all or part of a term of imprisonment as a result of exercise of the prerogative of pardon; consequently, the provisions of part 10 of the statute do not violate the essential conditions of the exercise of national sovereignty, nor Article17 of the Constitution*. Following this interpretation given to Article 103[188], it would seem that states do not need to amend the provisions of their constitution concerning the prerogative of pardon. They are merely required to inform the court of their conditions, in particular the fact that the head of state or government may exercise the prerogative of pardon, or to follow the procedure for modifying the terms or duration of imprisonment laid down in the statute.

4. Other problems

Ratification of the statute may raise other constitutional issues. Apart from immunity, the decision by the French Conseil Constitutionnel addresses two other problems. Article 99 (4) of the statute provides *where it is necessary for the successful execution of a request which can be executed without any compulsory measures, including specifically the interview of or taking evidence from a person on a voluntary basis, including doing so without the presence of the authorities of the requested State Party if it is essential for the request to be executed, and the examination without modification of a public site or other public place, the Prosecutor may execute such request directly on the territory of a State* according to a well-defined procedure[189].

The French Conseil Constitutionnel issued the following finding with regard to the above paragraph: *whereas under paragraph 4 of Article 99 of the statute, the Prosecutor may, even in circumstances where a national judicial authority is not unavailable, take certain investigatory measures outside the presence of the authorities of the requested State on the latter's territory; failing special circumstances, although the measures are in no way compulsory, the authority granted to the Prosecutor to take such measures without the presence of the competent French judicial authorities may violate the essential conditions of the exercise of national sovereignty* [190].. It therefore held that this provision breached the French constitution of 1958 and ratification necessitated a constitutional amendment.

The Luxembourg Conseil d'Etat reached a conclusion which is different from that of its French counterpart. It held that *paragraph 4 of Article 99 of the Rome Statute does not result in any conflict with provisions of our Fundamental Law. In so far as application of Article 99 of the Statute could lead to interference with the powers of the judicial authorities, in particular, Article 49bis[191] of the Constitution would allow a temporary transfer of powers*[192].

The second problem identified by the French Conseil Constitutionnel lies in the fact that the International Criminal Court *could properly have jurisdiction to hear a case merely as a result of the application of an Amnesty Act or a national statute of limitations; in such circumstances, France, without being unwilling or unable, could be obliged to arrest a person and surrender him or her to the Court by reason of offences which, under French law, were covered by an amnesty or a limitation period; this would amount to a violation of the essential conditions of the exercise of national sovereignty*[193]. France adopted a new constitutional article which solves all the constitutional problems raised. It should be noted that most constitutions say nothing about whether crimes are subject to limitation. However, should a constitution need to be revised, the amendment could provide that limitation or an amnesty would not apply in the event of a request from the court to surrender an individual.

Article 39 (2)b)ii of the Statute may also cause constitutional problems. It provides that accused persons shall be heard by a Trial Chamber consisting of three judges, whereas some constitutions provide for a trial by jury[194]. It should be noted, however, that these constitutional provisions aim at regulating the procedure before the national criminal courts, and do not seem to require, as a general rule, a trial by jury in proceedings outside the national jurisdiction.

It has been claimed that Article 59 paras. 4 and 5 endanger the principle of habeas corpus as outlined specifically within Article 5 of the European Convention of Human Rights. Article 59 paras. 4 and 5 state that when the competent authority deals with a request for an interim release it "*...[may not]...consider whether the warrant for arrest was properly issued in accordance with Article 58, para. 1 (a) and (b)*", it cannot therefore examine whether there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court and whether the arrest of the person appears necessary: to ensure the person's appearance at trial; or to ensure that the person does not obstruct or endanger the investigation of the court proceedings or, where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.[195] The Pre-Trial Chamber is informed of this request for interim release and shall "*make recommendations, to the competent authority in the custodial State*" which must, before rendering its decision, take such considerations clearly into account.

It must however be emphasised that the character of deprivation of liberty in question is not of the nature foreseen in Article 5 para. 1 (c) of the European Convention of Human Rights, which states that a person may be detained "for the purpose of bringing him before the competent judicial authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so". It is rather a deprivation of liberty within the meaning of Article 5 para. 1 (f) which authorises a deprivation of liberty if it is "...the lawful arrest or detention of a person ... against whom action is being taken with a view to deportation or extradition." In effect, the surrender of a person to an international organisation can be assimilated in this respect to an extradition[196].

The scope of the obligation contained within Article 5 para. 4 is not identical for each type of deprivation of liberty; indeed this is particularly so as regards the scope of the judicial review required[197]. The Convention requires a review of the necessary conditions for the legality of a deprivation of liberty of an individual in relation to paragraph 1 of Article 5.[198] In respect of Article 5 para. 1 (f), the competent authority is not required to examine whether a "reasonable suspicion" exists to believe that the person arrested and detained has committed a crime, nor whether there is risk of fleeing, collusion or commission of other crimes. These elements are related to police custody and interim detention before criminal trial (envisaged in Article 5 para. 1 (c)). In the context of detention under Article 5 para. 1 (f), the judicial authority must investigate whether the detention was "lawful" with the frame of this provision; it must thus verify whether a procedure of extradition is effectively underway. The competent authority is not therefore asked to look into the elements referred in Article 58 paras. (a) and (b) of the Statute of Rome.

Another issue they may be raised is the question whether Articles 59 and 60 of the Statute are compatible with the constitutional principle that nobody can be deprived of the Court which his national law assigns as the competent court. It is true that, as a consequence of Articles 59 and 60, the accused after surrender to the Court can no longer request release on bail from the competent national judge in the country where he is detained but only from the Pre-Trial chamber. This does not seem to infringe upon the abovementioned principle, though, because after surrender the Pre-Trial Chamber becomes the "lawful court" competent to decide on the conditional release of the accused.

Conclusion

As we have just seen, ratification of the Rome Statute may raise a number of problems of constitutional law. Several constitutional problems can be identified in connection with the ratification of the Statute of Rome. They concern mainly the immunity of Heads of state or Government and persons with "*official status*", the extradition of nationals and sentences which may be pronounced by the Tribunal. In order to resolve these problems the European states could:

inserting a provision into the constitution which would allow to settle all constitutional problems, thus avoiding the introduction of exceptions to each article concerned;

introduce and/or apply a special procedure to ratify a treaty if any of its provisions are deemed to conflict with the Constitutions;

systematically revising all constitutional provisions which are in conflict with the Statute;

interpreting certain provisions of the constitution in a way to avoid conflict with the Statute of Rome

Ratification by members of Council of Europe will be necessary for the statute to enter into force. If member states comply with the recommendation[199] of the Parliamentary Assembly of the Council of Europe and the resolution[200] adopted by the European Parliament, ratifying the Rome Statute as quickly as possible, the international criminal court will become one of the architects of a solution putting an end to impunity to violation of humanitarian law and human rights.

xvi. Report on the creation of a general judicial authority of the Council of Europe (CDL-INF (2001) 5) adopted by the Commission at its 45th Plenary Meeting (Venice, 15-16 December 2000)

Introduction

At its 707th meeting (26 April 2000), the Committee of Ministers forwarded Recommendation 1458 (2000) entitled Towards a uniform interpretation of Council of Europe conventions: creation of a general judicial authority to the Venice Commission for an opinion.

This recommendation forms part of a process of reflection which began some years ago. Following the 2nd Summit of Heads of State and Government of the Council of Europe, the Czech Republic drew up a proposal for a general judicial authority. Following this, Mr Schwimmer, then a member of the Parliamentary Assembly, tabled a motion, along with a number of colleagues, with a view to recommending to the Committee of Ministers that such a judicial body be set up. It was as a result of this motion that the Parliamentary Assembly adopted the recommendation in question.

The Committee of Wise Persons, in its final report to the Committee of Ministers (CM (98) 178), suggested that the Venice Commission might be consulted by the Committee of Ministers on the interpretation of conventions and other Council of Europe legal instruments lacking specific interpretation mechanisms.

This document will begin by defining the concept of a general judicial authority (I), then examine the main questions that would be raised if such an authority were set up: choice of the appropriate body (II), its decision-making powers and the procedures by which matters would be referred to it (III), and its jurisdiction *ratione materiae* (IV).

The Venice Commission will not express an opinion on the expediency of setting up a general judicial authority. It simply notes that the creation of a flexible mechanism, which has some chance of being achieved, may be considered desirable, even if it is not absolutely necessary, inasmuch as Council of Europe conventions have been applied until now despite the absence of such a mechanism. Nor does such a mechanism exist within the framework of The Hague Conference on Private International Law or the Red Cross Conventions. The Commission will, however, examine the alternative to the establishment of a general judicial authority, which would be to make systematic use of its own expertise in interpreting conventions (V).

I. A general judicial authority: the principle and the implications of such a choice

The value of having a general mechanism for interpreting the Council of Europes conventions should be stressed from the outset. Such a mechanism would have to be clearly differentiated from the supervision machinery provided for under a number of conventions (cf. the distinction between paragraphs 3 and 4 of Recommendation 1458 (2000) and Mr Svobodas explanatory memorandum (Doc. 8662, point II.D.1, p.7)).

This says nothing about the actual *nature* of the body responsible for interpreting conventions or its *powers*. In other words, two questions arise:

- Is it necessary to set up a *judicial authority* or would a non-judicial body be more appropriate?

- If a judicial authority is set up, should it be empowered to interpret only a limited number, or a large number, of conventions? In other words, should it be a *general* judicial authority?

1. Recommendation 1458 (2000) recommends the establishment of a general *judicial* authority. According to the explanatory memorandum this could be the European Court of Human Rights or a new body. In both cases, the aim is to set up a fully-fledged judicial authority, in other words a body with binding powers. The binding nature of this bodys decisions would greatly facilitate the uniform application of conventions. However, it would be inconceivable to set up a general judicial authority without adopting new treaties or revising existing texts.

2. Although it does talk of a general judicial authority, the recommendation does not insist that the mechanism should be of a general nature right from the outset; it would be possible to start with treaties still to be concluded and a selected number of the existing conventions (paragraph 9). However, in the longer term, the authority should cover most of the Council of Europe conventions, failing which it would not be truly general in nature (cf. last paragraph of the conclusions of the explanatory memorandum).

3. The question of the extent of the jurisdiction of the general judicial authority will be dealt with in more detail below (section IV). However, it should be borne in mind that the establishment of a judicial authority would involve *an extensive process of change* in the first two of the following cases:

- The gradual extension of the authoritys jurisdiction, on a case-by-case basis, one convention at a time, would require many successive amendments to conventions.

- Adopting a mechanism applying only to certain conventions would make it possible, on the other hand, to adopt a single treaty, but there is a risk that states would be reluctant to ratify it and that this would delay its entry into force. If all the member states were required to ratify, this would be likely to delay the whole process for many years. As an interim measure, the general judicial authority could have jurisdiction only in respect of those states which had ratified the new treaty.

- A third approach, namely the establishment of the jurisdiction of the general judicial authority for new conventions only, would have the merit of not increasing the number of new treaties to be adopted. However, it would have the major drawback of not meeting an existing need.

The following sections of this opinion will assume that the choice has been made in favour of a general judicial authority and will examine the options available. It will then go on to examine a scenario in which the idea of a general judicial authority with binding powers has been rejected in favour of an advisory role for the Venice Commission.

II. The appropriate body to exercise general judicial authority

Recommendation 1458 (2000) does not specify which body should exercise general judicial authority. The explanatory memorandum, on the other hand, concludes (in section II.G) that there are two possible solutions: (i) assign general judicial authority to the European Court of Human Rights; or (ii) create a new body. It does not take a stance in favour of one or other of these solutions.

1. The Venice Commission considers that assigning the role of a general judicial authority to the *European Court of Human Rights* could have advantages, in view of the judicial experience of this institution. However, it would be for the Court itself to express an opinion on this matter. As pointed out in the explanatory memorandum (section II.F), the Court itself would have to be prepared to take on the task; the Committee of Ministers has put the question to the Court. The Venice Commission would like to reiterate that the granting of new powers to the Court should not hamper it in the performance of its existing functions and in particular should not prevent it from delivering judgments within a reasonable time. Considering that the President of the Court has drawn the attention of the Council of Europe organs to the growing difficulties in this area, any extra workload would require the necessary human and material resources to be made available. Assigning new functions to the Court, thereby enabling a single authority to interpret conventions, whether or not they relate to human rights, would lead to a more systematic approach in the application of Council of Europe conventions.

2. The advantage in creating a *new specialised judicial authority* would be that such a body would have exclusive powers to interpret Council of Europe conventions. However, this would not necessarily mean setting up a permanent body. The extent of the activities of such a body should in fact depend on the extent of its powers, i.e. the conventions in respect of which it would have jurisdiction, and the arrangements for the referral of matters to it. The number of matters referred to this authority should be relatively small, at least, that is, if the general judicial authority only had jurisdiction in respect of a small number of conventions or if it could not have matters referred to it by the national courts. The drawback of this approach is that different bodies would be called on to interpret the Council of Europes conventions. In any case, if the specialised judicial authority were to take into account the case law of the European Court of Human Rights and if a co-ordination procedure between the two jurisdictions were to be applied, such inconvenience could to a significant extent be avoided.

A specialised judicial authority of this type might be composed of seven to nine part-time judges chosen. They could be chosen from national judges or law professors specialising in public international law. They might be appointed by the President of the European Court of Human Rights.

III. Decision-making powers and referral procedures

Recommendation 1458 (2000) proposes that three types of competencies could be assigned to the general judicial authority:

i. [giving] binding opinions on the interpretation and application of Council of Europe conventions at the request of one or several member states or at the request of the Committee of Ministers or of the Parliamentary Assembly;

ii. [giving] non-binding opinions at the request of one or several member states or of one of the two organs of the Council of Europe;

iii. making preliminary rulings, at the request of a national court, on lines similar to those of Article 177 of the Rome Treaty of 1956 establishing the European Economic Community.

Two questions therefore arise: (i) should the opinions of the general judicial authority always be binding? and (ii) which bodies should have the power to refer matters to it?

A. Decision-making powers

The Parliamentary Assemblys proposal leaves open the question of whether the legal opinions of the general judicial authority should be binding.

The Commission believes that, if it is decided to establish a new judicial body, it should be able to adopt *binding decisions*. If, on the other hand, only non-binding opinions are to be given, then the idea of setting up a new general judicial authority should be abandoned, for at least the two following reasons. Firstly, it is difficult to imagine how an authority could really be regarded as judicial if it only had advisory powers. Secondly, and above all, the creation of a general judicial authority would imply, as mentioned above, the adoption or amendment of treaties.

If it is decided that the general judicial authority will issue both binding decisions and non-binding opinions, then the type of document adopted (judgment or opinion) should depend on the referring authority. On the model of the system adopted at the International Court of Justice (and the European Court of Human Rights in cases other than individual applications), binding judgments could be delivered on matters referred to the authority by a state and non-binding opinions on matters referred to it by one of the statutory organs. Furthermore, any referral by the national judicial authorities should also give rise to a binding decision, which would be in keeping with the Assemblys recommendation. However, the Commission considers that it would not be wise for the decisions of the authority to be binding for some conventions and not for others.

If the European Court of Human Rights were turned into a general judicial authority it would be entirely conceivable for it to act in an advisory capacity. The combined power to issue both judgments and non-binding opinions would not be anything new in the area of international courts.

- The European Court of Human Rights has the power both to deliver binding judgments (Article 46, ECHR) and to give advisory opinions (Article 47, ECHR). However, the latter power is only of very secondary importance and arises not from an application by an individual or a state, as the Courts ordinary power does, but from a request by the Committee of Ministers.

- The Court of the European Communities also mostly delivers judgments. However, at the request of the Commission, the Council, or a member state, it can also give opinions on the compatibility of a proposed agreement with the provisions of the Treaty of Rome; these opinions are binding (Article 300.6 of the Treaty of Rome).

- Advisory opinions form a much larger proportion of the case-law of the International Court of Justice. However, here again, the bodies empowered to refer matters to the Court differ according to whether it is a binding judgment or an advisory opinion that is sought (see, on the one hand, Articles 34 et seq. of the Statute of the Court and in particular Article 59, and, on the other, Articles 65 et seq.): states may ask the Court to deliver a judgment, whereas the General Assembly, the Security Council, other organs of the United Nations and specialised agencies may only request an advisory opinion (Article 96 of the Charter of the United Nations).

In any case, if it were necessary that the European Court of Human Rights in its role of judicial organ were to acquire powers in a new domain, it would seem appropriate to empower it also to render mandatory decisions and not just consultative opinions.

B. Bodies empowered to refer cases to the authority: practical implications

Two types of referral are proposed, firstly referral by political bodies, either the organs of the Council of Europe or member states (sub-paragraphs (i) and (ii)), and secondly referral by national judicial authorities (sub-paragraph (iii)).

Whatever the case, there would be some significant innovations, particularly if the general judicial authority were assigned binding powers.

1. If provision were made for *referral by political bodies* only, it is likely that this would take place only rarely, as is shown by the infrequency of requests to the Legal Adviser for interpretative opinions on conventions. States, in particular, might be reluctant to refer to this authority on cases which are pending before national courts or in which their interpretation differs with that of other states. On the latter point, it is worth quoting the conclusions of the explanatory memorandum, according to which, under existing law:

- judicial settlement procedures are purely hypothetical and have never been used;

- the same may be said of arbitration (paragraph 46, page 13).

Even if the hypothetical possibility of referral by a political body were to increase in the event of a general judicial authority being set up, it is likely that the actual number of cases brought would remain limited. The practical significance of the mechanism would therefore be somewhat limited.

2. *If national courts were allowed to refer cases to the general judicial authority,* it would have to deal with a larger number of cases. For example, the system of preliminary rulings established in Article 177 of the Treaty of Rome - which became Article 234 after the Treaty of Amsterdam - has been very successful, even if we exclude cases of compulsory referral. However, there is a considerable difference between the situation of a supranational community and an international organisation such as the Council of Europe, both in

terms of the number of texts which might form the subject of a referral to a judicial authority and in terms of the number of cases in which they are applicable. The introduction of compulsory preliminary rulings (cf. Article 234.1 of the Treaty of Rome) should not be considered the exclusive preserve of supranational communities and might form the subject of an optional declaration on the part of states. In fact, article 3 of the draft European Agreement on the competence of the European Court of Human Rights relating to the production of consultative opinions regarding interpretation of European Treaties foresees that national courts of the highest instance have the obligation to refer to the European Court for a consultative opinion before rendering a decision which departs from an interpretation given in the matter by a higher court of another Contracting Party. The conditions relating to obligatory referral that imply an obligation on the courts to take into account the case law of judicial organs of other states would clearly however require revision, due to difficulties that domestic courts would experience in taking foreign case-law into account.

IV. The jurisdiction *ratione materiae* of the general judicial authority

The recommendation of the Parliamentary Assembly leaves open the question of the jurisdiction *ratione materiae* of the general judicial authority; it does not specify which conventions it would be entitled to rule on. It merely states, in paragraph 9, that it should start with treaties still to be concluded and a selected number of existing conventions.

Consideration might be given to the possibility of introducing a new judicial mechanism for a limited number of conventions on a trial basis, but one should not lose sight of the possible future extension of the system (cf. the last paragraph of the conclusions of the explanatory memorandum). Once the need for such an authority has been established, it should be truly general in nature, and not just a new mechanism among many others. The Commission would therefore be in favour of assigning *general* powers to the *general* judicial authority.

If this general judicial authority were distinct from the European Court of Human Rights it would not of course have jurisdiction in respect of the European Convention on Human Rights and its protocols. Neither should it have jurisdiction in respect of the European Social Charter (ETS No. 35), which is the only Council of Europe convention to provide for systematic reviews, at regular intervals, of the commitments entered into by the Contracting Parties and whose Additional Protocol (ETS No. 158) authorises collective complaints in cases of allegations of violations of the Charter (cf. explanatory memorandum, para. 26, p. 8).

Apart from human rights texts, it is the conventions on *criminal matters*, in particular the European Convention on Extradition (ETS No. 24) and the European Convention on Mutual Assistance in Criminal Matters, which, of all the Council of Europe conventions, give rise to the largest number of judicial decisions. These conventions could be brought within the jurisdiction of the general judicial authority; another approach, suggested by the Legal Affairs Directorate, would be to set up a flexible system for the settlement of disputes in this area and possibly also a non-permanent European Criminal Court (document GR-J (99) 12, para. 21). However, the Venice Commission considers that the Council of Europes supervisory systems and the power to interpret its treaties should not become too complex and that any new supervisory powers should be assigned to the European Court of Human Rights or a general judicial authority.

Once human rights were excluded, the workload of a general judicial authority covering all the other conventions should be relatively small. If this were the case, it would seem appropriate for it to be able to give rulings on conventions which already have a monitoring system (cf. explanatory memorandum, section II.D.1, p. 7, particularly the reference to the European Charter for Regional or Minority Languages (ETS No. 148) and the European Code of Social Security (ETS No. 48) as well as section II.D.4, pp. 11-13). Where there are already procedures for the settlement of disputes, be they judicial or arbitration procedures (cf. explanatory memorandum, pp. 9-11), the most simple solution from the point of view of logic would be to transfer such to the general judicial authority, yet from the judicial and political points of view, such would be far more complicated. Indeed, the fact that such procedures have hardly ever been used limits the scope of choice of the competent jurisdiction, as any case of referral would in all respects be a rare occurrence. On the other hand, referral of a case to the general judicial authority by the statutory organs or the national courts could be provided for within the field of application of conventions which already have a procedure for the settlement of disputes at the request of states.

V. An alternative: interpretation of conventions by the Venice Commission

If it were decided not to establish a general judicial authority but a system of non-binding opinions, the *Venice Commission* could be assigned the task of interpreting Council of Europe conventions lacking their own interpretation mechanisms. This is what was proposed by the Committee of Wise Persons in its final report to the Committee of Ministers (CM (98) 178, para. 59). The Commission confirms its willingness to issue non-binding opinions on conventions. Although the Commission is not a judicial body and cannot give binding opinions on the basis of existing texts, its statute does empower it to give non-binding opinions, particularly at the request of the statutory organs, the Secretary General or any member state of the Council of Europe (Article 2.2 of the Statute of the European Commission for Democracy through Law). Governments are also entitled to refer questions that are pending or have been raised before national authorities. Furthermore, international law is a traditional area of activity for the Commission and, on two occasions, Parliamentary Assembly committees have asked it for such opinions (an opinion on the provisions of the European Charter for Regional or Minority Languages which should be accepted by the Contracting Parties (CDL-INF (96) 3) and an opinion on the interpretation of Article 11 of the draft protocol to the European Convention on Human Rights appended to Recommendation 1201 of the Parliamentary Assembly (CDL-INF (96) 4).

The advantage of this solution is that it *would not require the amendment of any conventions* , and that it could be set up immediately because it would involve the systematic application of an existing procedure rather than the creation of a new one. It is unlikely that it would result in a major increase in the Commissions workload.

From the practical viewpoint, the Commission could designate a limited number of its members (for example, seven) to render non-binding opinions on the interpretation of conventions. Once made, the appointment would have a duration of four years. Where necessary, a member of state from which the request for the consultative opinion originated will be added to the group. Such an individual would have the status of ad hoc member in cases where the member of the State concerned does not sit on the sub-commission.

To sum up, interpretative opinions on Council of Europe conventions, which already fall within the remit of the Venice Commission, could be entrusted to it as part of its statutory responsibilities. This approach would not require any amendment of conventions, but neither would it allow the adoption of binding opinions.

Conclusion

When discussing a general judicial authority, the prime consideration should be the need to have machinery for interpreting Council of Europe conventions. A choice then has to be made between the judicial and the non-judicial approach. The *judicial* approach makes it possible to adopt binding decisions, but could only be applied after treaties have been adopted or amended. The role of this authority - whether it is the European Court on Human Rights or a new body - will depend on the conventions in respect of which it has jurisdiction and the bodies empowered to refer cases to it. If a general judicial authority were set up, it would be advisable to assign it the power, at least in the long term, to interpret most of the Council of Europes conventions. The creation of a judicial authority seems to be the best way of achieving in the long term the aim pursued, namely the binding interpretation of conventions.

The use of the Venice Commission as a *non-judicial* interpretative body is possible however within its current remit without having to undertake conventional amendments. A limited group of members appointed by the Commission under conditions yet to be defined could undertake the task of interpretation of conventions.

APPENDIX I - LIST OF MEMBERS

Mr Antonio LA PERGOLA (Italy), President, Judge at the Court of Justice of the European Communities

(Substitute: Mr Sergio BARTOLE, Professor, University of Trieste)

* * *

Mr Jacques ROBERT (France), Vice-President[201], Honorary President of the Paris University of Law, Economics and Social Science, Former Member of the Constitutional Council

Ms Hanna SUCHOCKA (Poland), Vice-President[1], Member of Parliament

Mr Kaarlo TUORI (Finland), Vice-President[1], Professor of Administrative law, University of Helsinki

(Substitute: Mr Matti NIEMIVUO, Director at the Department of Legislation, Ministry of Justice)

* * *

Mr Constantin ECONOMIDES (Greece), Professor, Pantios University, Former Director of the Legal Department, Ministry of Foreign Affairs

(Substitute: Ms Fani DASKALOPOULOU-LIVADA, Assistant Legal Adviser, Legal Department, Ministry of Foreign Affairs [202])

Mr Giovanni GUALANDI (San Marino), Vice-President of the Council of Presidency of the Legal Institute of San Marino

Mr Giorgio MALINVERNI (Switzerland), Professor, University of Geneva

Mr Franz MATSCHER (Austria), Professor, University of Salzburg, Former judge at the European Court of Human Rights

(Substitute: Ms Ingrid SIESS-SCHERZ, Head of Division, Federal Chancellery)

Mr Ergun ZBUDUN (Turkey), Professor, University of Bilkent, Vice President of the Turkish Foundation for Democracy

Mr Grard REUTER (Luxembourg), Former President of the Board of Auditors

(Substitute : Ms Lydie ERR, Member of Parliament)

Mr Jean-Claude SCHOLSEM (Belgium), Professor, Law Faculty, University of Lige

Mr Michael TRIANTAFYLLIDES (Cyprus), Chairman of the Council of the University of Cyprus, Former President of the Supreme Court and former Attorney-General of the Republic

(Substitute : Mr Panayotis KALLIS, Supreme Court Judge)

Mr Helmut STEINBERGER (Germany), Director of the Max-Planck Institute, Professor, University of Heidelberg

(Substitute : Mr Georg NOLTE, Professor of Public Law, University of Goettingen)

Mr Jan HELGESEN (Norway), Professor, University of Oslo

Mr Gerard BATLINER (Liechtenstein), , Member, Academic Council of the Liechtenstein Institute

Mr Joseph SAID PULLICINO (Malta), Chief Justice

Mr Jn KLUCKA (Slovakia), Judge, Constitutional Court

Mr Peter JAMBREK (Slovenia), Professor, High School of Government Administration, Former Minister of the Interior, Former President of the Constitutional Court, Former Judge at the European Court of Human Rights

(Substitute: Mr Anton PERENIC, Professor of Law, former Judge of the Constitutional court)

Mr Kestutis LAPINSKAS (Lithuania), President, Supreme Administrative Court

Mr Asbjrn JENSEN (Denmark), Judge, Supreme Court[203]

(Substitute: Mr John LUNDUM, High Court Judge)

Mr Cyril SVOBODA (Czech Republic), Shadow Prime Minister, Member of Parliament

(Substitute : Ms Ivana JANU, Vice-Chairman, Constitutional Court)

Mr Aivars ENDZINS (Latvia), President, Constitutional Court

Mr Alexandre DJEROV (Bulgaria), Advocate, Member of the National Assembly

(Substitute: Vassil GOTZEV, Judge Constitutional Court)

Ms Carmen IGLESIAS CANO (Spain), Director of the Centre for Constitutional Studies

Mr Rune LAVIN (Sweden), Justice, Supreme Administrative Court

(Substitute : Mr Hans Heinrich VOGEL, Professor in Public Law, University of Lund)

Mr Stanko NICK (Croatia), Ambassador of Croatia in Hungary

(Substitute: Mrs Marija SALECIC, Legal Adviser, Constitutional Court)

Mr Serhiy HOLOVATY[204], (Ukraine), Vice-President, Member of Parliament, President of the Ukrainian Legal Foundation

(Substitute: Mr Volodymyr SHAPOVAL, Judge, Constitutional Court)

Mr Vladimir SOLONARI (Moldova), Chairman of the Committee on Human Rights and National Minorities, Parliament of Moldova[205]

Mr Tito BELICANEC, ("The former Yugoslav Republic of Macedonia"), Professor, Faculty of Law, University of Skopje

(Substitute: Mr Igor SPIROVSKI, Counsellor, Constitutional Court)

Mr James HAMILTON (Ireland), Director of Public Prosecutions

Mr Luan OMARI (Albania), Vice President, Sciences Academy of Albania

Mr Hjrtur TORFASON (Iceland), Former Judge, Supreme Court of Iceland

Mr Lszl SLYOM (Hungary), Former President of the Constitutional Court

Mr Valeriu STOICA (Romania), Member of Parliament

(Substitute: Mr Alexandru FARCAS, Director General for Legal Affairs, Ministry of Foreign Affairs)

Mr Vital MOREIRA (Portugal), Professor, Law Faculty, University of Coimbra

Ms Maria de Jesus SERRA LOPES, State Counsellor, Former Chairman of the Bar Association

Mr Pieter VAN DIJK (The Netherlands), State Councillor, Former Judge at the European Court of Human Rights

(Substitute: Mr Erik LUKACS, Former Legal Adviser, Ministry of Justice)

Mr Avtandil DEMETRASHVILI (Georgia), President, Constitutional Court

(Substitute: Mr Gela BEZHUASHVILI, Director, Department of International Law, Ministry of Foreign Affairs)

Mr Franois LUCHAIRE (Andorra), Honorary President of the University of Paris I, Former member of the French Constitutional Council, former President of the Constitutional Tribunal of Andorra

Mr Peeter ROOSMA (Estonia), Adviser, Supreme Court of Estonia

Mr Jeffrey JOWELL (United Kingdom), Professor of Public Law, University College London

Mr Khanlar I. HAJIYEV (Azerbaijan), President, Constitutional Court[206]

Mr Gaguik HARUTUNIAN (Armenia), President, Constitutional Court[207]

ASSOCIATE MEMBERS

Mr Anton MATOUCEWITCH (Belarus), Deputy Rector, Commercial University of Management

Mr Cazim SADIKOVIC (Bosnia and Herzegovina), Dean, Faculty of Law, University of Sarajevo

Mr Vojin DIMITRIJEVIC, (Federal Republic of Yugoslavia), Director, Belgrade Human Rights Centre[208]

OBSERVERS

Mr Hector MASNATTA (Argentina), Ambassador, Executive Vice-Chairman, Centre for constitutional and social studies

Mr Grald BEAUDOIN (Canada), Professor, University of Ottawa, Senator

(Substitute : Ms Ruth BARR, Acting/General Counsel, International Law and Activities Section, Ministry of Justice)

Mr Vincenzo BUONOMO (Holy See), Professor of International Law, Latran University

Mr Amnon RUBINSTEIN (Israel), Chairman, State Control and Ombudsman Committee, Knesset

Mr Yoshihide ASAKURA (Japan), Consul, Consulate General of Japan, Strasbourg

Mr Oljas SOULEIMENOV (Kazakhstan), Ambassador of Kazakhstan in Rome

Mr Choi DAE-HWA (Republic of Korea), Ambassador of the Republic of Koreato Luxembourg, Belgium and the European Union

Mr Serikul KOSAKOV (Kyrgyzstan), Director General, Committee on Science and New Technologies

Mr Jed RUBENFELD (United States of America), Professor, Yale Law School

Mr Miguel SEMINO (Uruguay), Ambassador of Uruguay in Paris

SECRETARIAT

Mr Gianni BUQUICCHIO

Mr Christos GIAKOUMOPOULOS

Mr Thomas MARKERT

Ms Simona GRANATA-MENGHINI

Mr Pierre GARRONE

Mr Rudolf DRR

Mr Sergue KOUZNETSOV

Ms Helen MOORE

Ms Caroline MARTIN

Ms Sarah BURTON

Mrs Michelle REMORDS

Ms Helen MONKS

Ms Brigitte AUBRY

Mrs Agns READING

Ms Marian JORDAN

Mrs Emmy KEFALLONITOU

Mme Marie-Louise WIGISHOFF

Ms Jo FARMER

APPENDIX II - OFFICES AND COMPOSITION OF THE SUB-COMMISSIONS [209]

- President : Mr La Pergola

- Vice-Presidents : Mr Robert, Ms Suchocka, Mr Tuori

- Bureau : Mr Hamilton, Mr Lapinskas, Mr Lavin, Mr Steinberger, Mr Triantafyllides

- Chairmen of Sub-Commissions : Mr Batliner, Mr Economides, Mr Helgesen, Mr Jambrek, Mr Jowell, Mr Malinverni, Mr Matscher, Mr Moreira, Mr zbudun, Mr Said Pullicino, Mr Scholsem, Mr Solyom, Mr van Dijk

- Constitutional Justice : Chairman: Mr Slyom - members: Mr Bartole, Mr Batliner, Mr Demetrashvili, Mr Djerov, Mr Endzins, Mr Gotzev, Mr Hamilton, Mr Haruntunian, Ms Janu, Mr La Pergola, Mr Lapinskas, Mr Lavin, Mr Malinverni, Mr Moreira, Mr Reuter, Mr Robert, Mr Roosma, Mr Said Pullicino, Mr Scholsem, Mr Spirovski, Ms Stanik, Mr Steinberger, Mr Stoica, Ms Suchocka, Mr Torfason, Mr Triantafyllides, Mr Vogel, Mr Zahle; Obs : Canada, Israel

- Federal State and Regional State : Chairman: Mr Malinverni - members: Mr Bartole, Mr Belicanec, Mr Hajiev, Ms Iglesias, Mr Jowell, Mr La Pergola, Mr Matscher, Mr Sadikovic Mr Scholsem, Ms Serra Lopes, Mr Steinberger, Mr Triantafyllides; Mr Tuori Obs. : Canada, USA

- International Law : Chairman: Mr Economides - members: Mr Djerov, Mr Farcas, Mr Gotzev, Mr Helgesen, Mr Klucka, Mr La Pergola, Mr Luchaire, Mr Lukacs, Mr Malinverni, Mr Matscher, Mr Moreira, Mr Nick, Mr Steinberger, Mr Triantafyllides

- Protection of Minorities : Chairman: Mr Matscher - members: Mr Bartole, Mr Belicanec, Mr Economides, Mr Farcas, Mr Gualandi, Mr Hamilton, Mr Helgesen, Mr Klucka, Mr Malinverni, Mr Nick, Mr zbudun, Mr Scholsem, Mr Slyom, Mr Stoica, Mr Torfason, Mr Triantafyllides, Mr Tuori, Mr van Dijk Obs. Canada

- Constitutional Reform : Chairman: Mr Batliner -members: Mr Bartole, Mr Djerov, Mr Endzins, Mr Farcas, Mr Gotzev, Mr Hajiev, Ms Iglesias, Ms Janu, Mr La Pergola, Mr Lapinskas, Mr Luchaire, Mr Lukacs, Mr Malinverni, Mr Moreira, Mr Nolte, Mr Omari, Mr zbudun, Mr Reuter, Mr Robert, Mr Roosma, Mr Said Pullicino, Mr Scholsem, Ms Serra Lopes, Mr Spirovski, Mr Steinberger, Mr Stoica, Ms Suchocka, Mr Torfason, Mr Triantafyllides, Mr Tuori Obs. Israel

- Democratic Institutions : Chairman: Mr Scholsem - members: Mr Belicanec, Mr Economides, Mr Endzins, Mr Farcas, Mr Hamilton, Mr Haruntunian, Ms Iglesias, Mr Jambrek, Ms Janu, Mr Jowell, Mr Klucka, Mr Lapinskas, Mr Lavin, Mr Luchaire, Mr Malinverni, Mr Moreira, Mr Omari, Mr zbudun, Mr Reuter, Mr Robert, Mr Roosma, Ms Serra Lopes, Mr Stoica, Mr Svoboda, Mr Triantafyllides, Mr Tuori, Mr Vogel

- UniDem Governing Board : Chairman: Mr Jowell - members: Mr Batliner, Mr Djerov, Mr Gualandi, Mr Helgesen, Mr Jambrek, Ms Janu, Mr La Pergola, Mr Lavin, Mr Moreira, Mr zbudun, Mr Reuter, Mr Robert, Ms Suchocka, Mr Svoboda, Mr van Dijk, Mr Vogel Obs. : Holy See, ODIHR

Co-opted members : Prof. Evans (Johns Hopkins University, Bologna), Prof. von der Gablentz (College of Europe, Bruges), Prof. Masterson (European University Institute, Florence), Mr Koller (Federal Office of Justice, Berne)

- South Africa : Chairman: Mr Helgesen - members: Mr Hamilton, Mr Helgesen, Mr Jambrek, Mr Jowell, Mr Lavin, Mr La Pergola, Mr Torfason, Mr Tuori, Mr Vogel Obs. : Canada, USA

- Mediterranean Basin : Chairman: Mr Said Pullicino - members: Mr Batliner, Mr Djerov, Mr Economides, Mr Gotzev, Ms Iglesias, Mr La Pergola, Mr Nick, Mr zbudun, Mr Robert, Mr Triantafyllides Obs. : Israel

- Administrative and Budgetary Questions : Chairman: Mr van Dijk - members: Mr Economides, Mr Malinverni, Mr Matscher, Mr Tuori

- South-East Europe : Chairman: Mr Jambrek members: Mr Belicanec, Mr Djerov, Mr Economides, Mr Farcas, Mr Gotsev, Mr Luchaire, Mr Lukacs, Mr Moreira, Mr Nick, Mr Omari, Mr Robert, Mr Sadikovic, Mr Spirovski, Mr Torafason

- Emergency powers : Chairman: Mr zbudun

- Latin America : Chairman: Mr Moreira

APPENDIX III - MEETINGS OF THE EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW IN 2000 [210]

Plenary Meetings

43rd Meeting 31 March-1 April

44th Meeting 16 June

45th Meeting 13-14 October

46th Meeting 15-16 December

Ceremony to commemorate the 10th Anniversary

17 June

Bureau

23rd Meeting - Meeting enlarged to include the Chairmen of Sub-Commissions

- 30 March

24th Meeting - Meeting enlarged to include the Chairmen of Sub-Commissions

- 15 June

25th Meeting - Meeting enlarged to include the Chairmen of Sub-Commissions

- 12 October

26th Meeting - Meeting enlarged to include the Chairmen of Sub-Commissions

14 December

SUB-COMMISSIONS

Constitutional Justice

Meeting of Working Group on the systematic thesaurus

28 March

17th meeting - 29 March

(Meeting with Liaison officers from Constitutional Courts)

Democratic Institutions

9th Meeting 15 June

10th Meeting 12 October (Joint meeting with Sub-Commission on Federal and Regional State)

11th Meeting 14 December

Federal and Regional State

14th Meeting 15 June

15th Meeting 12 October (Joint meeting with Sub-Commission on Democratic Institutions)

South-East Europe

1st Meeting 30 March

Unidem Governing Board

26th Meeting 30 March

27th Meeting 15 June

28th Meeting 12 October

29th Meeting 14 December

Exchange of views on draft law on High Court of Albania

2-3 March (Tirana)

Working Group on electoral code in Albania

8-12 March (Tirana)

15-19 March (Tirana)

Working Group on the revision of the Constitution of Armenia

25-26 April (Strasbourg)

16-17 November (Yerevan)

Preparatory meeting on the opinion on the Constitution of Azerbaijan

29 November-1 December (Baku)

Working Group on the merging of the Human Rights Chamber and the Constitutional Court of Bosnia and Herzegovina

24 March (Paris)

Working Group on the State Court of Bosnia and Herzegovina

26 May (Strasbourg)

Working Group on the revision of the Constitution of Federation Bosnia and Herzegovina

10-11 July (Strasbourg)

11-12 October

Working Group on revision of constitutional law Croatia

1 September (Paris)

22 September (Paris)

Working Group on the revision of the Constitution of Moldova Joint Committee

10-11 March (Chisinau)

7-8 April (Strasbourg)

26-27 May (Chisinau)

Working Group on the implementation of the Constitutional Referendum in Ukraine

14-15 September (Kiev)

Working Group Kosovo

18 February (Paris)

30 March

Meeting UNMIK on provisions of interim constitutional arrangements in Kosovo

6-8 July (Pristina)

Working Group on a General Judicial Authority

14 December

Working Group on the financing of political parties

30 November (Paris)

Working Group on the constitutional amendments necessary for the ratification of the Statute of the International Criminal Court

1 December (Paris)

CONSTITUTIONAL JUSTICE SEMINARS

Seminar on the draft amendments to the law on the Constitutional Court of Latvia

25-26 February (Riga)

Seminar on the possible extension of the powers of the Constitutional Court in the field of conflict solution between powers

28-29 February (Bucharest)

Seminar on Ensuring Human Rights protection in the activity of the Constitutional Court of Azerbaijan

17-18 April (Baku)

Seminar on Efficiency of Constitutional Justice in a society in Transition

6-7 October (Yerevan)

Seminar of Presidents of Constitutional Courts of Central Europe on Direct access of the citizen to the Constitutional Court

6-7 October (Zakopane, Poland)

Participation in preparatory meeting for Conference of European Constitutional Courts

20-21 October (Brussels)

Seminar on the Implications of the New Century and Striving to Join European Structures for Constitutional Courts

17-18 November (Tartu, Estonia)

UNIDEM SEMINARS

Conference on The protection of human rights in the 21st Century : towards a greater complementarity within and between European Regional organisations in co-operation with the Irish Presidency of the Committee of Ministers

3-4 March (Dublin)

UniDem Seminar on Democracy in a Society in Transition in co-operation with the University of Lund

19-20 May (Lund)

UniDem Seminar on Constitutional Law and European Integration in co-operation with the Office of the Attorney General of Cyprus

29-30 September (Cyprus)

STABILITY PACT

Conference on The Ombudsman Institution in Europe and the challenge of consoldating democracy in co-operation with the Marangopoulos Foundation for Human Rights

12-13 May (Athens)

General Seminar on the creation of a UniDem Campus for the legal training of civil servants

11-12 December (Trieste)

PROGRAMME DEMOCRACY FROM THE LAW BOOK TO REAL LIFE

Conference for Constitutional and supreme Court Judges from Southern Africa

12-13 February (Lake Siavonga, Zambia)

OTHER SEMINARS AND CONFERENCES

Participation in a meeting on the draft regulation of municipalities in Kosovo organised by the CRLAE

6-7 March (Pristina)

Participation in a Working Table on a Transniestrian settlement organised by the OSCE

20-24 March (Kiev)

Participation in Conference on Strengthening civil society in the Balkans

15 April (Athens)

Participation in a Seminar on a Contract for Community protection and self-government

16 April (Prizren, Kosovo)

Participation in the 8th International Judicial Conference on Courts of Ultimate Appeal : Judicial independence in Constitutional and Supreme Courts

25-27 May (San Francisco)

Regional training seminar ACCPUF

15-17 July (Antananarivo, Madagascar)

Accompany the Chairman of the Committee of Ministers on official visit to Moldova

21 July (Chisinau)

Forum on Federalism

26-28 July (Banja Luka, Sarajevo, Mostar)

Participation in Organisation Meeting Colloquy Universit de la Paix (Nancy) and Centre Mondial de la Paix (Verdun)

29 September (Nancy)

Participation in Conference on Unification and Development of Decision-making of Constitutional Courts

25-27 October (Levoca, Slovakia)

Participation in the Ministerial Conference on Human Rights

2-4 November (Rome)

Participation in the Seminar Moving towards democracy and rule of law in the Balkans : Factors for success organised by the Friedrich Ebert Stiftung

9-10 November (Strasbourg)

Participation in the Third International Conference on Constitutional, Legal and Political Regulation and Management of Ethnic Relations

8-10 December (Ljubljana)

Seminar on the possible contribution of foreign experience on the division of responsibilities to the solution of the problem of Transnistria

13 December

APPENDIX IV - LIST OF PUBLICATIONS OF THE VENICE COMMISSION

Collection[211] - **Science and technique of democracy**

No. 1 : Meeting with the presidents of constitutional courts and other equivalent bodies[212] (1993)

No. 2 : Models of constitutional jurisdiction
by Helmut Steinberger[213] (1993)

No. 3 : Constitution making as an instrument of democratic transition(1993)

No. 4 : Transition to a new model of economy and its constitutional reflections (1993)

No. 5 : The relationship between international and domestic law (1993)

No. 6 : The relationship between international and domestic law
by Constantin Economides[3] (1993)

No. 7 : Rule of law and transition to a market economy (1994)

No. 8 : Constitutional aspects of the transition to a market economy (1994)

No. 9 : The Protection of Minorities (1994)

No. 10 : The role of the constitutional court in the consolidation of the rule of law (1994)

No. 11 : The modern concept of confederation (1995)

No. 12 : Emergency powers[3]
by Ergun zbudun and Mehmet Turhan (1995)

No. 13 : Implementation of constitutional provisions regarding mass media in a pluralist democracy (1995)

No. 14: Constitutional justice and democracy by referendum (1996)

No. 15 : The protection of fundamental rights by the Constitutional Court[214] (1996)

No. 16: Local self-government, territorial integrity and protection of minorities (1997)

No. 17: Human Rights and the functioning of the democratic institutions in emergency situations (1997)

No. 18: The constitutional heritage of Europe (1997)

No. 19 : Federal and Regional States (1997)

No. 20 : The composition of Constitutional Courts (1997)

No. 21 Citizenship and state succession (1998)

No. 22 The transformation of the Nation-State in Europe at the dawn of the 21st century (1998)

No. 23 Consequences of state succession for nationality (1998)

No. 24 Law and foreign policy (1998)

No. 25 New trends in electoral law in a pan-European context (1999)

No. 26 The principle of respect for human dignity in European case-law (1999)

No. 27 Federal and Regional States in the perspective of European integration (1999)

No. 28 The right to a fair trial (2000)

N. 29 Societies in conflict : the contribution of law and democracy to conflict resolution (2000)

10th anniversary of the Venice Commission speeches presented at the ceremony to commemorate the Commissions at 10th anniversary

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Bulletin on Constitutional Case-Law - 93-1,2,3

94-1,2,3

95-1,2,3

96-1,2,3

97-1,2,3

98-1,2,3

99-1,2,3

2000-1,2,3

Special Bulletins - 1994 - Description of Courts

1999 - Description of Courts

Basic texts 1,2,3,4 and 5 (extracts from constitutions and laws on Constitutional Courts)

Leading cases - European Court of Human Rights

Freedom of religion and beliefs

Leading cases - European Court of Human Rights (1963-2000) 2 volumes in Russian

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Annual Reports - 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000

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[1] *At its 742nd meeting (15 February 2001) the Ministers Deputies took note of the opinion of the Venice Commission on Parliamentary Assembly Recommendation 1458 (2000) on a uniform interpretation of Council of Europe conventions: creation of a general judicial authority.*

[2] *Provision is also made in Articles IV.A.18 and IV.B.6(1) for an expedited procedure before the Constitutional Court to resolve questions concerning the vital interests of any of the constituent peoples. However, this question does not*

not concern us in the present opinion.

[3] Decision on Freedom of Information and the Decriminalisation of Libel and Defamation. High Representative. Sarajevo, 30 July 1999, para 3 (Appendix I to this report).

[4] Application N 11854/85, Clavel v. Switzerland, 15 October 1987 .

[5] Observer and Guardian v. United Kingdom (26 November 1991, Series A, n 216), and Autronic v. Switzerland (22 May 1990, Series A, n 178).

[6] Guerra and others v. Italy (19 February 1998). A summary of the case (as published in the Bulletin of Constitutional Law Edition 1998, 1) appears in Appendix II to this report.

[7] Concurring opinion of Judge Palm, joined by judges Bernhardt, Russo, Macdonald, Makarczyk and Van

Dijk (Appendix III).

[8] Rec. 0582 (1973).

[9] In a number of countries, legislative work is still going on (Germany, Norway, Poland, Sweden, Russian Federation and United Kingdom). Important political developments are taking place in the Netherlands where the right of access to official information will be included in the human rights chapter of the Dutch Constitution [as is already the case in Sweden and Belgium].

[10] See also: European Commission for Democracy through Law Implementation of constitutional provisions regarding mass media in a pluralist democracy. Nicosia, 16 18 December 1994. Collection Science and technique of democracy, N 13. Reports by Mr Arthur F. Plunkett, Barrister-at-Law, Deputy Senior Legal Assistant, Office of the Attorney General, Dublin. Pp. 102

115 and by Prof Paul Lewalle, Professeur ordinaire at the University of Lige, Pp. 116-144.

[11] E/CN.4/1996/39, annex .

[12] The text of the Resolution appears in Appendix IV to this report.

[13] Canada . 05/05/99. CCPR/C/ 65/ D/ 663/1995.

[14] The General Comment N25 reads in part In order to ensure the full enjoyment of rights protected by article 25, the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. General Comment N25, paragraph 25, adopted by the Human Rights Committee on 12 July 1996.

[15] Communication N 633/ 1995. Canada. 05/05/99. CCPR/C/ 65/ D/ 663/1995, page 14.

[16] Report

of the Special Rapporteur Mr. Abid Hussain on the protection and promotion of the right to freedom of opinion and expression (E/CN.4/2000/63, 18 January 2000), p. 7 para. 42.

[17] Idem, para 43.

[18] Idem (Appendix V).

[19] For instance, the Italian Law on Historical Minorities only asks for a percentage of persons using the minority language of 15 %, the Slovak Law on the use of Minority Languages for a percentage of 20 %.

[20] A similar provision in a previous draft was criticised by Council of Europe experts, as teachers belonging to the majority population should not be excluded from potential employment in schools for minorities.

[21] The Venice Commission has underlined the importance of

integration of minorities and their broad participation in the work of different state bodies, including the Constitutional Courts. For this issue see The composition of constitutional courts , Collection : Science and technique of democracy, N20. Venice Commission, December 1997.

[22] For more detailed analysis of the constitutional law on the Constitutional Court of the Republic of Croatia see docs CDL (2000) 96 and CDL (2000) 97 .

[23] For a more detailed description of possible solutions see individual opinion of Mr P. Vandernoot pages 13 14 (docCDL(2000)96).

[24] See doc CDL(2000)96 pages 18- 19, Paras 48 49.

[25] See pages 4- 6 and 10 of the Interim Report on the constitutional reform in the Republic of Moldova

prepared by M. Serhiy Holovaty (Member, Ukraine), Mr Giorgio Malinverni (Member, Switzerland), Mr Vital Moreira (Member, Portugal), Mr Kaarlo Tuori (Member Finland), Mrs Florence Benot-Rohmer (Expert, France, Mr Joan Vintro (Expert, Spain) adopted by the Venice Commission at its 41st Plenary meeting (Venice, 10-11 December 1999), Doc.CDL(1999)88.

[26] Press Release of 7 December 1999; Strasbourg, Council of Europe.

[27] Mrs Postoiko, Member of the Joint Committee decided not to sign the text before consulting her Parliamentary Group (Communist Group), even though she personally was in agreement with the wording of the text.

[28] Press Release of 7 December 1999; Strasbourg, Council of Europe.

[29] The members of the Constitutional Committee believe that the

President must have the power to dismiss not only the members of the Government but also the Prime Minister. This point of view is not shared by the parliamentarians.

[30]
The representatives of the Constitutional Committee believe that this title must include provision stipulating that Parliament may not refuse the holding of a constitutional referendum and constitutional amendment if initiated by 200,000 citizens. The representatives of Parliament do not agree with this proposal.

[31]
The Parliamentary representatives propose that the words "no less than six months" be included at this point. The representatives of the Constitutional Committee do not agree with this proposal.

[32]
In a recent judgment, the Portuguese Constitutional Tribunal emphasised this approach by clearly stating that the

subject of the referendum should be constitutional. Ultimately, subjecting decisions taken by referendum to constitutional review amounts to reconciling the principle of majority with the principle of constitutionality (Dirio da Republica n 91, 18.04.1998, 1714(2)-1714(35); Bulletin of Constitutional case law POR-1998-1-001). The Venice Commission has on several occasions stressed the need to closely observe the constitutional provisions on amending the Constitution, even when it comes to constitutional referenda (cf. Opinion on the Constitutional Referendum in Ukraine, of 31 March 2000, CDL-INF(2000)11; cf. also the Commissions position concerning the constitutional referendum in Moldova).

[33] Article 5.3 of the Russian Constitution.

[34] Section 235 of the Constitution.

[35] Bulletin on Constitutional Case-Law RSA-96-

3-
020.

[36]
Bulletin
on
Constitutional
Case-
Law
CAN-
1998-
3-
002.

[37]
On
the
subject
of
self-
determination
and
secession
in
constitutional
law
see
document
CDL-
INF(2000)2
,
adopted
by
the
Commission
at
its
41st
meeting
(December
1999).

[38]
With
regard
to
self-
determination
and
secession
in
public
international
law
see
the
memorandum
to
the
Political
Affairs
Committee
of
the
Parliamentary
Assembly
on
this
subject
(AS/Pol
(1996)
24,
drawn
up
in
consultation
with
Mr
Severin,
rapporteur,
by
Centrul
Pentru
Drepturile
Omului,
Bucharest).

[39]
Cf.
Yves
Lejeune,
Contemporary
concept
of
confederation
in
Europe
-
Lessons
drawn
from
the
experience
of
the
European
Union,
in
"The
modern
concept
of
confederation",
Science
and
technique
of
democracy
(STD)
collection,
No.
11

*11,
Council
of
Europe,
Strasbourg,
1995,
pp.122-
142.*

[40]
*Cf.
Murray
Forsyth,
Towards
a
new
concept
of
confederation,
in
"The
modern
concept
of
confederation",
STD
No. 11,
pp.
59
to
67,
63.*

[41]
*Cf.
Lejeune,
op.
cit,
pp.
122
ff.;
and
Giorgio
Malinverni,
The
classic
notions
of
a
confederation
and
of
a
federal
state,
in
"The
modern
concept
of
confederation",
STD
No.
11,
pp.
39
to
51.*

[42]
*Cf.
Malinverni,
op.
cit.,
p.
41.*

[43]
*Although
Lejeune
(op.
cit.)
regards
them
more
as
a
confederation.*

[44]
*Article
6
of
the
1977
Constitution
of
the
USSR.*

[45]
*The
concept
is
construed
here
in
the
restrictive
sense
of
states
where
legislative
authority
is
divided
between
central*

central government and regional entities, that is to say first and foremost Italy and Spain.

[46] Article 115.

[47] Article 116.

[48] Article 143.2.

[49] Cf. Articles 148 and 149 of the Constitution and Article 150 on delegation of legislative authority.

[50] For Northern Ireland, see also infra point B.e.

[51] On this subject see mi Olafsson, A note on the Faeroe Islands home rule case, in "Local self-government, territorial integrity and protection of minorities", Science and technique of democracy collection, No. 16, Council of Europe, Strasbourg, 1997, pp.103 ff.

[52] See Markku Suksi, The land Islands in Finland, in "Local self-government, territorial integrity and protection of minorities", STD

STD No. 16, pp. 20 ff.

[53] Articles 6.2 and 225 ff. of the Constitution.

[54] Article 111 of the Constitution.

[55] Section 1 of the Act.

[56] Section 2 of the Act.

[57] Concerning the situation in Gagauzia see Alexei Barbaneagra, The situation in Moldova, in "Local self-government, territorial integrity and protection of minorities", STD No. 16, pp. 174 ff, 175-180.

[58] Articles 134-139 of the Constitution.

[59] On the subject of Crimea see Serhiy Holovaty, Territorial autonomy in Ukraine - the case of Crimea, STD No. 16, pp. 135-150.

[60] For a fuller description of the Northern Ireland institutional arrangements see Brendan

OLeary, The Nature of the British-Irish Agreement, New Left Review 233, 1999.

[61] Cf. the relevant article of the draft Protocol to the European Convention on Human Rights appended to Parliamentary Assembly Recommendation 1201 and the Venice Commission's opinion on its interpretation, annual activities report for 1996, pp. 93 ff, 97-98.

[62] On this subject see Jnos Bthory, Local and national minority self-government in Hungary, in STD No. 16, pp. 213 ff.

[63] For a study of this question see "The protection of minorities", Collected texts of the European Commission for Democracy through Law, Science and Technique of Democracy collection, No. 9, Council of Europe, Strasbourg, 1994.

[64] On this subject see Law and

Foreign Policy, Science and Technique of Democracy, vol. 24, Strasbourg: Council of Europe 1998, pp. 10-11.

[65]
Cf. Malinverni, op. cit., p. 46.

[66]
Article 116 of the Italian Constitution.

[67]
Articles 81.1 and 145-146 of the Constitution.

[68]
Suksi, op. cit., in particular p. 31.

[69]
Cf. Article 111 of the Constitution.

[70]
Article 135.1 of the Constitution.

[71]
Article 226 of the Constitution.

[72]
For a more detailed discussion of this question see "Federal and regional states", Science and Technique of Democracy collection, No. 19, Council of Europe, Strasbourg, 1997.

[73]
Articles 71-73 of the Constitution, in particular Article 72 on joint

jurisdiction.

[74]
See Article 11.3 of the Constitution.

[75]
Articles 117 and 118 of the Constitution.

[76]
Articles 227 and 228 of the Constitution.

[77]
Articles 137 and 138 of the Constitution.

[78]
Article 70 of the Constitution.

[79]
Article 73 of the Constitution.

[80]
Article 3 of the Constitution.

[81]
Tenth amendment to the Constitution.

[82]
Article 5.1 of the Treaty establishing the European Community.

[83]
Article 35 of the Constitution.

[84]
Articles 91 ff. of the constitutional law of 1867.

[85]
Articles 148 and 149 of the Constitution.

[86]
Article 116 of the

Constitution.

[87]
Article 117.

[88]
Articles 116 and 117 previously cited.

[89]
Article 65 of the Constitution.

[90]
For more details see "Federal and regional states", STD No. 19 (previously cited).

[91]
Article 167 of the Constitution.

[92]
Article 56.3 of the Constitution.

[93]
Article 16.2 of the Constitution.

[94]
For further details regarding the distribution of powers in the field of international relations see the report on "Federated and regional entities and international treaties" adopted by the Commission at its 41st meeting, CDL-INF(2000)3.

[95]
Article 136 of the Constitution.

[96]
Article V of the Constitution.

[97]
Articles

38 ff of the constitutional law of 1982.

[98] Article 195 of the Constitution.

[99] Article 138 of the Constitution.

[100] Suksi, op. cit., pp. 30 and 31.

[101] Article 75 of the Constitution.

[102] Article 141 of the Constitution.

[103] Article 160.2 of the Swiss Constitution: Article 71.1 of the Italian Constitution.

[104] Article 104.1 of the Constitution.

[105] Article 87.2 of the Constitution.

[106] Article 51.1 of the Constitution.

[107] Article 35 of the Constitution.

[108] Article 95.2.

[109] Amendment XVII to the Constitution.

[110] Article 57.1 of the Constitution.

,,,,,

[111] Article 95.2 of the Constitution.

[112] Article I, section 3 of the Constitution.

[113] Article 150 of the Constitution.

[114] Article 34 of the Constitution.

[115] Article 51.2 of the Constitution.

[116] Article 148.2 of the Constitution.

[117] Articles 42 ff. of the Constitution.

[118] Articles 76 ff. of the Constitution.

[119] Articles 102 ff. of the Constitution.

[120] Regarding legislative procedure in general, see Article I section 7 of the Constitution; regarding powers to ratify treaties and appoint senior officials, see Article II section 2.2 of the Constitution.

[121] For further details see Federal and regional states, STD No. 19, pp.

50 ff.

[122] See, for example, Articles 4.3, 115.1, 117.2, 121.1 and 123 of the Constitution.

[123] Article 203 of the Treaty establishing the European Community.

[124] Article 99.2 of the Constitution.

[125] Article 189.4 of the Constitution.

[126] Article 93.1 of the Constitution.

[127] Articles 138.1.c and 138.2 of the Constitution.

[128] Section 1 (1) of the special Act on the Court of Arbitration; also see section 2.

[129] Article VI.3.a of the Constitution.

[130] Article 125.3.b of the Constitution.

[131] Articles 161.1.c and 161.2 of the Constitution.

[132] Article 134.2 of the Constitution.

[133] Under Article

Article III section 2 (1) and (2) of the Constitution the Supreme Court has jurisdiction in disputes to which the United States are a party and has original jurisdiction in all cases in which a state is a party.

[134] Articles 189.2 and 190 of the Constitution.

[135] See, in particular, section 35.1 of the Supreme Court Act.

[136] Section 53.1 of the Supreme Court Act.

[137] Article 150 of the Constitution.

[138] Article 278.2 of the Constitution.

[139] Article 280 of the Constitution.

[140] Section 18 of the Home Rule Act.

[141] Article 226 of the Treaty establishing the European Community.

[142] Article 230

of the Treaty establishing the European Community.

[143] ETS No. 157.

[144] Concerning the protection of minorities under international treaties see "The protection of minorities", STD No. 9, p. 52 ff.

[145] Suksi, op. cit.

[146] See The Protection of minorities, STD No. 9, pp. 182 and 183, and the report by Sergio Bartole entitled "Federalism and protection of minorities - regional aspects in Italy" in the same volume, pp. 387 ff.

[147] Annex 1A to the Dayton Agreements.

[148] Annex 10 to the Dayton Agreements.

[149] In the case of this crime, the Court will exercise its jurisdiction only when a provision will adopted in accordance with articles 121 and 122

123 of the Statute of Rome. (see, Article 5 of the Statute of Rome).

[150] See EU Bulletin 12-1999 (en): 1.1.11.

[151] See Recommendation 1408 (1999), Official gazette of the Council of Europe - May 1998.

[152] Austria, Belgium, Finland, France, Germany, Iceland, Italy, Luxembourg, Norway, San Marino and Spain. It should be noted that since the adoption of this report, on 15 December 2000, two other countries, members of Council of Europe(Austria and Finland), ratified the Statute of Rome.

[153] Article 27 of the Rome Statute.

[154] Idem, Articles 59 and 89.

[155] Idem, Article 77 (1) (b).

[156] Idem, Article 99.

[157] Idem, Article 29.

[158] Idem, Article 39 (2) (ii).

[159] See, in particular, Article 91 (3) of the Constitution of

Netherlands.

[160] See, in particular, Article 46 of the Constitution of Germany, Articles 57, 58 and 96 of the constitution of Austria, Article 76 of the Constitution of Estonia, Articles 26, 68 and 68-1 of the Constitution of France, Article 75 of the Constitution of Georgia, Article 49 of the Constitution of Greece, Article 20 of the Constitution of Hungary, Article 7 of the Constitution of Liechtenstein, Articles 64, 83 and 89 of the Constitution of "the former Yugoslav Republic of Macedonia", Article 42 of the Constitution of the Netherlands, Article 130 of the Constitution of Portugal, Articles 54 and 65 of the Constitution of the Czech Republic, Articles 69 and 84 of the Constitution of Romania, Articles 83 and 100 of the Constitution of Slovenia

Slovenia, Articles 83 and 85 of the Constitution of Turkey and Articles 80 and 105 of the Constitution of Ukraine.

[161] States may provide in their national law that the national courts shall be competent to try a leader who has committed crimes within the jurisdiction of the International Criminal Court. This is possible because the statute is based on the principle of complementarity, but, whatever solution is adopted, perpetrators of such crimes cannot plead immunity.

[162] This solution could be adopted by the Czech Republic, Greece, Hungary, Portugal and Turkey.

[163] Constitutional Law No. 99-568 of 8 July 1999.

[164] On this subject, see, in particular, the article by CLERCKY Jocelyn, Le Statut de la Cour pnale internationale et le droit constitutionnel franais, Rev. Trim.

Dr. h. (2000), p. 641-681; Benot Tabaka, Ratification du Statut de la Cour pnale internationale: rvision constitutionnelle franaise et rapide tour du monde des problmes poss, http://jurisweb.citeweb.net/articles/17051999.htm .

[165] Law of 8 August 2000 amending Article 118 of the constitution, A- No. 83, 25 August 2000, page 1965.

[166] Government Bill (extract) on the constitutional law amending the constitutional law of the Czech National Council No. 1/1993 Coll., Constitution of the Czech Republic, as amended by constitutional law no. 347/1997 Coll.

[167] David E., cited in Themis, Laffaire Pinochet ou le crpuscule des dictateurs ? , http://wwwulb.ac.be/assoc/elsaulb/themi2.htm .

[168] Article 227 of the Versailles Treaty.

[169] Article 7 of the Charter of the International Military Tribunal, Nuremberg.

[170] Article IV of the Convention on the

Prevention and Punishment of the Crime of Genocide, 9 December 1948.

[171] Principle III of the Principles of International Law recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, 1950, International Law Commission; Article 2 of the Draft Code of Offences against the Peace and Security of Mankind, 1954, International Law Commission; Article 7 of the Draft Code of Crimes against the Peace and Security of Mankind, 1996, International Law Commission.

[172] Articles 1 and 6 of the statute, adopted on 25 May 1993 and amended on 13 May 1998. It should not be forgotten that the Prosecutor of this ad hoc tribunal indicted Slobodan Milosevic when he was still in power as head of state. http://www.un.org/icty/indictment/english/mil-ii990524e.htm.

[173] Articles

1 and 5 of the statute of the tribunal. It should be noted that this tribunal has, inter alia, sentenced Jean Kambanda, the former Prime Minister of the interim government, to life imprisonment.

[174]
See, in particular, Article 25 of the Constitution of Germany, Article 3 of the Constitution of Estonia, Articles 2 and 28 of the Constitution of Greece, Article 7 of the Constitution of Hungary, Article 135 of the Constitution of Lithuania, Article 3 of the Constitution of Andorra, Article 9 of the Constitution of Poland and Articles 8 and 16 of the Constitution of Portugal.

[175]
Article 11 of thelitalian constitution.

[176]
This article of the constitution provides: (1) The generally recognised rules of international law shall be regarded as an integral part

of federal law (2) The Federation may, by legislation or a treaty requiring approval in accordance with Article 50 (1), transfer specific federal competencies to intergovernmental organisations or their organs and may make the activities of foreign states' organs inside Austria and Austrian organs abroad subject to the rules of public international law

[177] On this subject see Constantin Economides, The relationship between international and domestic law, in the Science and Technique of Democracy Collection, European Commission for Democracy through Law, Council of Europe, 1993.

[178] See, in particular, Article 19 of the Constitution of Germany, Articles 11(2f) and 14 of the Constitution of Cyprus; Article 9 of the Constitution of Croatia; Article 36 of the Constitution of Estonia; Article 13 of the Constitution of Georgia; Article

69 of the Constitution of Hungary; Article 13 of the Constitution of Lithuania; Article 4 of the Constitution of "the former Yugoslav Republic of Macedonia"; Article 23 of the constitution of Slovakia; Article 47 of the Constitution of Slovenia; Article 55 of the Constitution of Poland; Article 12 of the Constitution of the Czech Republic; Article 19 of the Constitution of Romania; Article 61 of the Russian Constitution and section 7 of the Finnish Constitution.

[179] Article 26 of the Italian Constitution provides: Extradition of a citizen may be permitted only where it is expressly provided for in international conventions. In no instance shall extradition be granted for political offences.

[180] This could be the case of Cyprus, Lithuania, Malta, Portugal, "the former Yugoslav Republic of

Macedonia" and Turkey.

[181] Summary of the implications of ratification and implementation of the Rome Statute of the International Criminal Court by Germany, Consultation on implications for Council of Europe member States of ratification of the Rome Statute of the International Criminal Court, Strasbourg, 16-17 May 2000, Consult/ICC (2000) 18.

[182] Government Bill (extract) on the constitutional law amending the constitutional law of the Czech National Council no. 1/1993 Coll., Constitution of the Czech Republic, as amended by constitutional law no. 347/1997 Coll..

[183] See, in particular, Article 30 of the Portuguese Constitution.

[184] On this subject, see, in particular, the Manual for the Ratification and Implementation of the Rome Statute, http://209.217.98.79/pdf/Icc-guide-english%20(PDF%20format).pdf .

[185] The article provides Nothing in this Part affects the

application by States of penalties prescribed by their national law nor the law of States which do not provide for penalties prescribed in this Part.

[186] See Article 60 of the Constitution of Germany; Article 1 a) of the Constitution of Andorra; Article 65 of the Constitution of Austria; Articles 103, 111 and 125 of the Constitution of Belgium; Article 98 of the Constitution of Croatia; Article 24 of the Constitution of Denmark; Article 78 of the Constitution of Estonia; section 29 of the Constitution of Finland; Article 17 of the French Constitution; Article 73 of the Constitution of Georgia; Article 47 of the Constitution of Greece; Articles 29/E and 30/A of the Constitution of Hungary; Article 13 of the Constitution of Ireland; Article 87 of the

Italian Constitution; Article 45 of the Constitution of Latvia; Article 84 of the Constitution of Lithuania; Article 83 of the Constitution of Luxembourg; Article 84 of the Constitution of "the former Yugoslav Republic of Macedonia"; Article 93 of the Constitution of Malta; Article 20 of the Norwegian Constitution; Article 139 of the Constitution of Poland; Article 62 of the Constitution of the Czech Republic, Article 94 of the Constitution of Romania; Article 102 of the Constitution of Slovakia; Article 107 of the Constitution of Slovenia; Article 87 of the Constitution of Turkey; and Article 106 of the Constitution of Ukraine.

[187] Conseil Constitutionnel, Paris, Decision No. 98-408 DC of 22 January 1999, page 472.

[188] On this subject, see, in particular, F. Luchaire, La Cour

pnale internationale et la responsabilit du chef de lEtat devant le Conseil Constitutionnel; Revue du Droit Public No 2-1999, page 15.

[189] See Article 99 (4) of the statute.

[190] Page 472 of the decision by the Conseil Constitutionnel mentioned in footnote 39.

[191] This article provides The exercise of powers which the Constitution reserves for the legislature, the executive or the judiciary may be temporarily transferred by treaty to institutions governed by international law

[192] Opinion issued by the Conseil dtat on 4 May 1999, page 5.

[193] Page 471 of the decision by the Conseil Constitutionnel mentioned in footnote 39.

[194] See, in particular, Article 38 of the Irish Constitution; Article 150 of the Belgian Constitution and Article 97 of the Greek Constitution

Constitution.

[195] Article 58 para. 1 (a) and (b) of the Statute of Rome.

[196] The preceding section of this report contains specific discussion on this point..

[197] See Chahal v. United Kingdom, No. 1 European Court of Human Rights, page 127.

[198] Idem.

[199] Referred to in footnote 3.

[200] Referred to in footnote 2.

[201] Nominated following the elections which took place at the Commissions 46th Plenary Meeting (March 2001)

[202] Mr Dimitri Constas was nominated substitute member in February 2001.

[203] Replaced by Mr Henrik Zahle in April 2001.

[204] Ms Suzanna Stanik and Mr Volodymyr Vassylenko were nominated member and substitute member of Ukraine respectively in February 2001.

[205] Ms Maria Postoico and Mr Vasile Rusu were nominated

nominated member and substitute member of Moldova respectively in May 2001.

[206] Azerbaijan acceded to the Commission on 1 March 2001.

[207] Armenia acceded to the Commission on 27 March 2001.

[208] The Federal Republic of Yugoslavia was admitted as an associate member of the Commission on 31 January 2001.

[209] Following the elections which took place at the Commissions 46th Plenary Meeting (March 2001).

[210] All meetings took place in Venice unless otherwise indicated.

1 Also available in French

[212] Speeches in the original language

[213] Also available in Russian

[186] See Article 60 of the Constitution of Germany; Article 1 a) of the Constitution of Andorra; Article 65 of the Constitution of Austria; Articles 103, 111 and 125 of the Constitution

of Belgium; Article 98 of the Constitution of Croatia; Article 24 of the Constitution of Denmark; Article 78 of the Constitution of Estonia; section 29 of the Constitution of Finland; Article 17 of the French Constitution; Article 73 of the Constitution of Georgia; Article 47 of the Constitution of Greece; Articles 29/E and 30/A of the Constitution of Hungary; Article 13 of the Constitution of Ireland; Article 87 of the Italian Constitution; Article 45 of the Constitution of Latvia; Article 84 of the Constitution of Lithuania; Article 83 of the Constitution of Luxembourg; Article 84 of the Constitution of "the former Yugoslav Republic of Macedonia"; Article 93 of the Constitution of Malta; Article 20 of the Norwegian Constitution; Article 139 of the Constitution of Poland; Article 62

of the Constitution of the Czech Republic, Article 94 of the Constitution of Romania; Article 102 of the Constitution of Slovakia; Article 107 of the Constitution of Slovenia; Article 87 of the Constitution of Turkey; and Article 106 of the Constitution of Ukraine.

[187] Conseil Constitutionnel, Paris, Decision No. 98-408 DC of 22 January 1999, page 472.

[188] On this subject, see, in particular, F. Luchaire, ï¿½La Cour pï¿½nale internationale et la responsabilitï¿½ du chef de lï¿½Etat devant le Conseil Constitutionnel; Revue du Droit Public ï¿½ No 2-1999, page 15.

[189] ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ See Article 99 (4) of the statute.

[190] Page 472 of the decision by the Conseil Constitutionnel mentioned in footnote 39.

[191] ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ This article provides ï¿½The exercise of powers which

the Constitution reserves for the legislature, the executive or the judiciary may be temporarily transferred by treaty to institutions governed by international lawï¿½
.

[192] Opinion issued by the Conseil dï¿½ï¿½tat on 4 May 1999, page 5.

[193] Page 471 of the decision by the Conseil Constitutionnel mentioned in footnote 39.

[194] See, in particular, Article 38 of the Irish Constitution; Article 150 of the Belgian Constitution and Article 97 of the Greek Constitution.

[195] ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ Article 58 para. 1 (a) and (b) of the Statute of Rome.

[196] ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ The preceding section of this report contains specific discussion on this point..
ï¿½

[197] ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ See Chahal v. United Kingdom, No. 1 European Court of Human Rights, page 127.
ï¿½

[198] ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ Idem.

[199] Referred

to
in
footnote
3.

[200]
Referred
to
in
footnote
2.

[201]
Nominated
following
the
elections
which
took
place
at
the
Commissionić ½s
46
th
Plenary
Meeting
(March
2001)

[202]
Mr
Dimitri
Constas
was
nominated
substitute
member
in
February
2001.

[203]
Replaced
by
Mr
Henrik
Zahle
in
April
2001.

[204]
Ms
Suzanna
Stanik
and
Mr
Volodymyr
Vassylenko
were
nominated
member
and
substitute
member
of
Ukraine
respectively
in
February
2001.

[205]
Ms
Maria
Postoico
and
Mr
Vasile
Rusu
were
nominated
member
and
substitute
member
of
Moldova
respectively
in
May
2001.

[206]
Azerbaijan
acceded
to
the
Commission
on
1
March
2001.

[207]
Armenia
acceded
to
the
Commission
on
27
March
2001.

[208]
The
Federal
Republic
of
Yugoslavia
was

admitted as an associate member of the Commission on 31 January 2001.

[209] ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ Following the elections which took place at the Commissionï¿½s 46 th Plenary Meeting (March 2001).

[210] All meetings took place in Venice unless otherwise indicated.

1 Also available in French

[212] Speeches in the original language

[213] Also available in Russian