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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

ANNUAL REPORT OF ACTIVITIES FOR 1997

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MEMBERSHIP

At the end of 1997, the Commission totalled 37 full members, 5 associate members and 7 observers.

Members

Croatia and Ukraine acceded to the Partial Agreement establishing the Commission. Mr Stanko Nick, Chief Legal Adviser, Ministry of Foreign Affairs and Mr Serhiy Holovaty, Minister of Justice, President, Ukrainian Legal Foundation were appointed Commission members in respect of Croatia and Ukraine respectively.

Mr Heiki Loot, Head of the Division of Public Law, Ministry of Justice, was appointed member in respect of Estonia, Mr Vladimir Solonari, Chairman of the Committee on Human Rights and National Minorities, Parliament of Moldova member in respect of Moldova and Mr Tito Bellicanic, Professor, Faculty of Law, University of Skopje, member in respect of "The Former Yugoslav Republic of Macedonia" respectively replacing Mr Peep Pruks, Mr Mihai Petrachi and Mr Ilo Trajkovski who have resigned from their functions.

Observers

Mr Akira Ando, Consul, Consulate General of Japan, Strasbourg was appointed observer in respect of Japan and Mr Miguel Angel Semino, Ambassador of Uruguay in Paris replacing Mr Takeshi Goto and Mr Héctor Gros Espiell respectively who left their functions.

Kazakhstan, Mexico and the Republic of Korea expressed interest in the Commission's work and may apply for observer status.

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

Sub-Commissions

The Sub-Commission on Emergency Powers finished its work during 1997. A Sub-Commission on Administrative and Budgetary Questions was created.

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

ACTIVITIES

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

During 1997, the Commission continued to co-operate with several countries on matters principally related to constitutional reform as well as their application.

The establishment of constitutional guarantees in those countries which have recently suffered the horrors of war, constituted a challenge which the Commission took up without hesitation. The setting in place of coherent constitutional systems and of institutions and mechanisms which are aimed at re-establishing confidence in justice and the rule of law in those populations traumatised by violence is the duty par excellence of a consultative organ which operates in "the field of guarantees offered by law in the service of democracy". Co-operation with the Croatian authorities concerning the application of the constitutional law on the protection of human rights and minorities, and the Commission's continuing activity in Bosnia and Herzegovina are witness to this commitment.

The adoption of the Constitution of Ukraine and the interpretation of its provisions regarding the right to life and the question of the death penalty were at the centre of the Commission's activities throughout 1997. Likewise, at the end of 1997, the constitutional process in Albania is another constitution building site to which the Commission attaches the utmost importance.
In parallel to the process of democratisation, European integration appears to be a major factor in constitutional reform on our continent. The Commission has also been requested to study constitutional reforms which could be necessary in certain countries before accession to the European Union.

The Commission also closely followed the constitutional reform process in Italy and, in this context, carried out a study on the federal and regional State.

Respect for democratic rules is the corner stone of democratic security. It is therefore natural that a "Commission for Democracy through Law" aims its activity towards electoral laws, which govern the access to power and constitutional justice, which is the guarantee of the constitution against any abuse of power. The Commission studied the draft electoral laws in Albania, Armenia and in Bosnia and Herzegovina. The establishment and functioning of constitutional jurisdictions in Armenia, Azerbaijan, Estonia, Georgia, Latvia and Ukraine have been the sites of fruitful co-operation between the Commission, on the one hand, and the legislator and national judges on the other.

The Commission also took note of the commitment of the Heads of State and Government of the member States of the Council of Europe to "continue active support for democratic development in all member States and increase our efforts to promote an area of common legal standards throughout Europe". Major constitutional developments during 1997 clearly show the three axes of constitutional reform in Europe: Democratic stability, European integration and bringing decision making power closer to the regions and the citizen are the aim of any reform. The Commission, in its privileged position as a forum for exchanges of information, experiences, ideas and projects in the constitutional field, has a particular role to fulfil within the framework of these reforms: the promotion of a European legal culture based on democratic heritage, the principle of the rule of law and the respect of human rights. Furthermore, the Commission fully assuming responsibility for its role as an observatory of democratic institutions, emphasises the need for continuous democratic vigilance and the necessity for active co-operation in the field of guarantees offered by law in the service of democracy.

Finally, co-operation with countries outside the European continent was stepped up in 1997. Co-operation with certain Latin American countries seems to be well under way in particular with the creation of a consultative Commission on constitutional law in Latin America. Co-operation with South Africa continued with the programme "Democracy, from the law book to real life", concluded between the Swiss Federal Ministry of Foreign Affairs, the South African Department of Constitutional Development and the Venice Commission.

A short description of the Commission's work in this area (Chapter A) is followed by the presentation of some opinions which the Commission has decided to make public (Chapter B).

A. Description of the Activities of the Commission

1. CO-OPERATION WITH ALBANIA

During 1997 the Commission continued its assistance to Albania in its process of constitutional and legislative reform.

As a result of the crisis which affected the country in 1997 the international organisations were heavily involved in Albania.

The Commission's main areas of co-operation in 1997 were :

a. Electoral law

The Venice Commission participated in the process of electoral reform in Albania. Two meetings took place in April and May 1997 in conjunction with the OSCE/ODIHR concerning the preparation of the elections and, in particular, the review of the electoral law.

A new electoral law had been enacted providing for the election of 115 members of parliament on a majority-vote system and 40 by proportional representation. This was applied for the elections held on 29 June and 6 July.

b. Constitutional Reform

Mr Arben Imami, Albanian Minister responsible for legislative reforms and relations with Parliament, participated in the 32nd Plenary Meeting and gave information on recent constitutional developments in Albania and current work to prepare the new Constitution. He stressed the need for a Venice

Commission presence in Albania. The Commission replied positively to this request and since October 1997 a liaison officer has been present in Albania whose role is to ensure the liaison between the Venice Commission and the Albanian Commission charged with the drawing up of the new Constitution as well as with other international organisation present in Albania.

Furthermore, a Working Group for Albania was set up within the Commission. This Group assists the Albanian authorities, at the request of the President of the Republic, in particular in the drafting of a new Constitution, which should provide Albania with a basic law which is fully in conformity with European standards of democracy, human rights and the rule of law. This Working Group will continue its co-operation with the Albanian authorities during 1998.

Opinion on the Constitutional Law on the High Council of Justice and on amendments to Law No 7491 "For the main constitutional provisions" (interim Constitution)

The Committee on Legal Affairs and Human Rights of the Parliamentary Assembly had asked the Venice Commission to prepare an opinion on the Constitutional Law on the High Council of Justice and on amendments to Law No 7491 "For the main constitutional provisions" (interim Constitution). The Commission appointed Messrs. Lopez Guerra and Said Pullicino as rapporteurs concerning the Constitutional Law on the High Council of Justice and Messrs. Bartole and Holovaty as rapporteurs concerning Law No 7491 "For the main constitutional provisions". The opinions are to be dealt with at the Sub-Commissions on Democratic Institutions and Constitutional Reform respectively in March 1998.

2. CO-OPERATION WITH ARGENTINA

During the 32nd Plenary Meeting, the President, Mr La Pergola and Mr Masnatta informed the Commission that COVENARG (Venice Commission for Argentina) had been set up at a meeting held on 19 September in Buenos Aires. It is an advisory body chaired by Mr Granillo Ocampo, Minister of Justice, and administered by Mr Massatta, set up to provide institutional and intellectual support for the establishment of COVENAL (Venice Commission for Latin America) - a similar body to the Venice Commission with which links of co-operation should be formed.

3. CO-OPERATION WITH ARMENIA

During its 30th Plenary Meeting the Commission held an exchange of views with Mr Gagik Harutunian, President of the Constitutional Court of Armenia, concerning the Constitutional Court's decision on elections.

During the 31st Plenary Meeting two requests for opinion were addressed to the Commission :

on the draft electoral code drawn up by the Parliamentary Committee on State and Legal Affairs. Subsequently, the Armenian Minister of Foreign Affairs made a more specific request for an opinion on two draft electoral laws. Work on this issue is still continuing.

on whether the Constitution permitted individuals to appeal to the Constitutional Court and ordinary courts to verify constitutional legality. Messrs Bartole and Endzins were appointed rapporteurs on these two questions.

A consolidated opinion was drawn up on the control of constitutionality, based on the Rapporteurs' reports together with the reports presented during the seminar on "Constitutional Control and the Protection of Human Rights", held in Yerevan on 22-24 October 1997. This opinion was presented to the Commission at its 33rd Plenary Meeting. The text of this opinion appears in Part B.

It was later pointed out that Article 7 of the draft Law on the Organisation of the Judiciary had been modified during the first reading in Parliament and would no longer give the courts the right to assess the constitutionality of laws themselves. The new version of this text was not yet available. Work will continue during 1998 once new information on the draft Law on the organisation of the Judiciary is available.

In addition, the Commission participated in the Electoral Law Forum organised by the International Foundation for Election Systems held in Yerevan on 16-17 April 1997.

4. CO-OPERATION WITH AZERBAIJAN

Throughout 1997, the Commission continued its fruitful co-operation and was kept informed of recent constitutional developments in Azerbaijan. The main issues are as follows :

a. Law on the Constitutional Court

A new law on the Constitutional Court had been adopted, which took into account the opinion of the European Commission for Democracy through Law on the subject of individual right of appeal (CDL-INF (96) 10).

b. Opinion on the draft Constitution of the Nakhichevan Autonomous Republic

On 27 September 1997, the Director of Administration of the President of the Azerbaijan Republic submitted a request to the Council of Europe for its opinion on the draft Constitution of the Nakhichevan Autonomous Republic. For this purpose a Rapporteur Group was set up within the Venice Commission consisting of Messrs Malinverni, Suviranta and Lesage. The Commission held an exchange of views with the Rapporteurs during its 32nd Plenary Meeting on the basis of their preliminary comments. The rapporteurs then met in Brussels on 31 October 197 in the presence of Mr Hajiev. The opinion which was drawn up during this meeting was adopted by the Commission during its 33rd Plenary Meeting. The text of this opinion appears in Part B.

c. Other activities

- A moratorium had been established with respect to the death penalty, which had not been pronounced since 1996. [1]

- At the proposal of Mr Hajiev, a seminar on the theme "Essential elements of a Constitutional Court" was organised in co-operation with the Constitutional Court of Azerbaijan and took place in Baku on 4-5 December 1997.

5. CO-OPERATION WITH BELARUS

At the 30th Plenary Meeting, Mr Russell reported on the European Union's mission to Belarus, in which the Council of Europe and the OSCE had participated. The mission had been instigated by the Council for General Affairs of the European Union and had been led by Mr Kosto, former Minister for Justice of the Netherlands. The members of the party had been received by President Lukashenko and had met members of the government and of the opposition, representatives of the media and some judges.

In regard to constitutional developments in Belarus, Mr Russell said that the President of the Republic had proposed a revision of the constitution with a view to strengthening his powers; he had planned to submit the new draft to a referendum. The communist and agrarian groups in parliament had submitted an alternative draft revision of the constitution. In its judgment of 4 November 1996 (CDL-(97) 9), the Constitutional Court of Belarus had noted that the referendum procedure being followed did not satisfy the necessary conditions for an in-depth revision of the constitution and for that reason the referendum could only be declaratory. The President had then adopted a decree according to which the decision by the Constitutional Court would not have to be obeyed while the parliament had stipulated that the result of the referendum would be consultative. The consultative nature of the referendum had been indicated on the voting papers.

The referendum had been marked by a number of irregularities though it was difficult to determine exactly their extent. In regard to the situation prior to voting, the final text of the presidential draft had been published on 12 November whereas the final text of the parliamentary draft had been published on 19 November. Despite this, the polling stations had been open from 9-24 November. The President and the parliament had substantially amended their texts a few weeks before the date of the referendum, which had made it difficult for the international experts, and in particular for the European Commission for Democracy through Law, to give their opinion. The opinion of the European Commission for Democracy through Law had none the less been adopted at the 29th meeting of the Commission in November 1996 (CDL-INF (96) 8). As regards access to the media, television was controlled by the President while the written press complained of restrictions. According to the official results of the referendum, about 70% of voters had approved the President's draft; the text submitted by the opposition had been rejected. Other elections had taken place on the same day as the referendum; the number of votes cast had been lower for those elections than for the referendum. The President of the Electoral Commission had spoken of numerous irregularities in the preparation for the referendum; the President of the Republic had replaced him although, under the constitution, the power to do so belonged to the parliament.

The President of the Republic had subsequently considered the result of the referendum as binding. The members of a new lower chamber had been chosen from among the outgoing deputies without fresh elections. Numerous judges of the Constitutional Court had resigned and been replaced.

The report of the European Union's mission, in which the Council of Europe and the OSCE had participated, had been submitted to the Council of the Union which, on the basis of that report, had made proposals to President Lukashenko.

At the 32nd Meeting, Mr Russell further informed the Commission of recent constitutional developments in Belarus, particularly the difficulties encountered with the tripartite meetings of the European Union, the representatives of the President of the Republic of Belarus and the representatives of the former Parliament.

Moreover, the Venice Commission was informed that the Parliamentary Assembly had suspended Belarus' status of special guest in January. It was also pointed out that Belarus had not been accepted as a full member of the conference of constitutional courts, and had not been invited to the Summit of Heads of State and Government of the Council of Europe. Nevertheless, the Venice Commission decided to continue co-operation with Belarus as at present awaiting new constitutional developments.

6. CO-OPERATION WITH BOSNIA AND HERZERGOVINA

In recent years co-operation with Bosnia and Herzegovina has been one of the Commission's on-going priority activities. During 1997 the Commission continued its fruitful co-operation with Bosnia and Herzegovina and thus confirmed its commitment to the consolidation of peace and stability in this country.

The main areas of co-operation with Bosnia and Herzegovina were the following :

Draft law on the territorial limits of the municipalities in the Federation of Bosnia and Herzegovina

At the 30th Plenary Meeting Mr Scholsem reported to the Commission on developments within the framework of co-operation with the Federation of Bosnia and Herzegovina. He had visited Sarajevo on 27-28 January 1997 at the request of the High Representative. He said that he had been appointed by the "Federation Forum" as Chairman of an advisory committee on the status of municipalities. That committee, at its meeting on 15 February 1997, had proposed a draft law amending the boundaries of municipalities divided by the demarcation line between entities and establishing new municipalities in the Federation while leaving open certain issues of a more political nature.

b. Ombudsman of the Republika Srpska

A Working Group consisting of Messrs. Batliner, Scholsem and Ms Serra Lopes together with Messrs Gil Robles, former *Defensor del Pueblo* in Spain and Bardiaux from the French Ombudsman Office, both experts from the Human Rights Directorate of the Council of Europe was set up to examine this question. A first meeting was held in Strasbourg on 24 April 1997 during which the Working Group made the following observations :

- there was general consensus within the international community (High Representative, Council of Europe, OSCE, UN) that an ombudsman-type institution should be established as soon as possible in the Republika Srpska ;

- for this purpose, consideration had to be given to the judicial systems for the protection of human rights in Bosnia and Herzegovina, characterised by the complexity in the Federation of Bosnia and Herzegovina and the simplicity, if not non-existence, in the Republika Srpska; the need to give some immediate thought to the nature of the long-term relationship between the Ombudsman structure in the Republika Srpska and the existing Ombudsman structures in Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina, as well as the relationship between these structures and the judicial apparatus.

The Venice Commission was instructed to prepare a draft legislation for an Ombudsman of the Republika Srpska, as a follow-up to the study it carried out concerning human rights protection mechanisms in Bosnia and Herzegovina. Within this framework, the Venice Commission should initiate discussions on this matter with the authorities in the Republika Srpska.

Following this meeting, the Commission Secretariat contacted the authorities of the Republika Srpska and Messrs Gil Robles, Giakoumopoulos and Titian from the Directorate of Human Rights met, on 3 June 1997 in Banja Luka, Ms Plavsi , President of the Republika Srpska and Mr Mijanovic, President of the Constitutional Court. The representatives of the Commission's Working Group indicated that the creation of the Ombudsman in the Republika Srpska was underway. It was agreed that representatives of the Republika Srpska should participate in the work of the Commission's Working Group.

The representatives from Republika Srpska gave an outline of the major points under consideration :

The Ombudsman will be nominated by the National Assembly by qualified majority.

- The Ombudsman will examine those cases presented by individuals according to a non-judicial procedure. He will control both the functioning of the administration and complaints of violation of human rights ; this wide scope seems necessary taking into account the absence of individual petition to the Constitutional Court.

- The Ombudsman should be able to initiate certain procedures (e.g. before the Constitutional Court), in particular cases of violation of human rights. However, he should not appear to be a substitute for the judicial apparatus. His competences should be limited in the case of *res judicata*.

- In addition to his role of defender of individual rights, the Ombudsman could also be competent in matters of public moral and corruption.

- Recommendations made to the authorities by the Ombudsman should be available to the public.

- The person nominated as Ombudsman should have high moral qualities. His mandate should be of reasonable length. The status of Ombudsman is incompatible with carrying out other functions.

- Contrary to the Ombudsperson mentioned in Appendix 6 to the Dayton Agreement, the Ombudsman of the Republika Srpska will not deal with complaints against an Entity but with complaints against an authority of the Republika Srpska. He will, of course, take due account of the activities of the Ombudsperson and the Ombudsmen of the Federation of Bosnia and Herzegovina.

Further meetings of the Working Group together with the Ombudsperson for Bosnia and Herzegovina and with representatives from the Office of the High Representative of Bosnia and Herzegovina and the OSCE Mission were held in Venice prior to the 32nd and 33rd Plenary Meetings. It was stressed that it was important to endow the institution with strong legitimacy. Special attention should be paid to appointment procedures and guarantees of independence. Citizens' direct access to the Ombudsman institution had been considered, as had its possible authority to initiate certain judicial procedures. Emphasis was laid on the importance of human rights institutions for the consolidation of peace, the establishment of a coherent federal system meeting the needs of the country, and the integration of Bosnia and Herzegovina into Europe.

Mr Gil Robles has drawn up a preliminary draft text which should govern the activites of the Ombudsman of the Republika Srpska and this will be examined by the Working Group at its meeting in Paris in February 1998.

Opinion on the establishment of a Human Rights Court of the Federation of Bosnia and Herzegovina

The Commission continued its work on the question of human rights protection in Bosnia and Herzegovina. By letter dated 16 June 1997, the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly requested an opinion on the legal questions raised by the setting up of the Human Rights Court of the Federation of Bosnia and Herzegovina.

During its 31st Plenary Meeting, the Commission examined a draft opinion, prepared by the Secretariat on the basis on the Commission's previous opinion on the constitutional situation in Bosnia and Herzegovina, concerning human rights protection mechanisms (CDL-INF (96) 9).

Following discussion the Commission adopted the opinion on the establishment of a Human Rights Court of the Federation of Bosnia and Herzegovina and decided to forward it to the Parliamentary Assembly. The text of the opinion appears in Part B.

Competence of the Federation of Bosnia and Herzegovina in criminal matters

An opinion on the competence of the Federation of Bosnia and Herzegovina in criminal matters was requested by the Justice Minister of the Federation. Mr Scholsem was appointed rapporteur.

During the 32nd Plenary Meeting Mr Scholsem presented his preliminary report on the question of the powers of the Federation of Bosnia and Herzegovina in criminal matters in accordance with the Constitution appended to the Dayton Agreements. The opinion was in response to a request for consultation made by the Justice Minister of the Federation of Bosnia and Herzegovina. A further report was presented at the 33rd meeting. Even though the legislative powers in the penal field lie primarily with the entities, the Republic has powers in the field of international criminal law and collaperation with Interpol. The central State has furthermore an implied competence to legislate on criminal offences in areas where it had a primary competence (e.g. customs offences). In the Federation of Bosnia and Herzegovina, the situation is further complicated by the fact that legislative powers in criminal matters are vested in the cantons, most of which, however, have delegated these powers to the Federation.

Mr Van Lamoen, from the Office of the High Representative, suggested widening the scope of the opinion in order to also deal with the question of the power of entities to legislate on criminal acts against the Republic (a field in which the Federation had already taken legislative action). Further information on this subject would be made available to the Commission by the Office of the High Representative. Work on this question is continuing with a view to adopting the report in March 1998.

Opinion on the interpretation of certain provisions of the Constitution of the Republika Srpska

During the 32nd Plenary Meeting, Messrs Economides and Malinverni presented the opinion which they had prepared at the request of the Office of the High Representative of the international community in Bosnia and Herzegovina concerning certain aspects of the constitutional crisis in the Republika Srpska. According to the Rapporteurs, the President of the Republic could not dissolve the National Assembly without seeking the opinion of the Prime Minister and the President of the National Assembly, albeit a purely advisory opinion. In the event, the fact that the President of the Republic had not received a reply to her request within the specified time had not prevented her from lawfully deciding a dissolution. Moreover, the former government was to continue dealing with routine business up to the new elections. Finally, the government was not able to suspend the President's decision on dissolution.

The Commission adopted the Rapporteurs' opinion on certain aspects of the constitutional crisis in the Republika Srpska. The text of this opinion appears in Part B.

Guidelines of the draft electoral code for Bosnia and Herzegovina

At the request of the Office of the High Representative, the Commission commenced work on guidelines for the draft electoral code for Bosnia and Herzegovina.

At the 33rd Plenary Meeting Ms Schein from the Office of the High Representative and Mr Owen, Secretary General of the Centre for comparative studies on elections, Paris, presented the guidelines of the draft electoral code for Bosnia and Herzegovina prepared within the framework of the Commission's activities in the country. The main thrust of the work is the adoption of a permanent electoral code providing for the establishment of a permanent electoral commission which, at least initially, would also include international members. The establishment of the electoral lists would have to be made in a public and transparent way and in co-operation with the international community in order to preempt later criticism by parties who lose elections. The work done presupposed that the crossing of internal borders in Bosnia and Herzegovina would become easier.

Work on this question will continue during 1998.

g. Participation in Seminars

The Commission took part in a Round table on the constitutional aspects of protection of property held in Sarajevo on 30 September 1997. The round table, attended by sixty or more persons, was aimed at discussing reform of property laws in the Federation of Bosnia and Herzegovina, on the basis of three draft laws proposed by the OHR, in order to speed up the reform process.

The Commission was also represented at a seminar on practical issues of organising the work of a constitutional court for the staff of the Constitutional Court of Bosnia and Herzegovina in Sarajevo on 24 November 1997, organised by the Office of the High Representative.

The organisation of a further seminar in co-operation with the Constitutional Court of Bosnia and Herzegovina is under discussion and will probably take place during 1998.

7. CO-OPERATION WITH CROATIA

Throughout the year the Commission continued to co-operate with Croatia. During the 30th meeting the Commission adopted Mr Malinverni's report on the state of progress of co-operation with Croatia (CDL-INF (97) 3). He reminded members that, when Croatia applied to become a member of the Council of Europe, the Parliamentary Assembly had requested an opinion concerning constitutional questions in general and more specifically the Croatian Constitutional Law of 1991 on human rights and freedoms and the rights of national minorities. The text of this report appears in Part B.

During the 33rd meeting Ms Err informed the Commission that several problems had been identified by the Parliamentary Assembly in respect of commitments made by Croatia upon its accession to the Council of Europe. The Parliamentary Assembly was concerned with the progress of return of refugees which appeared less satisfactory then expected, the co-operation with the International Criminal Tribunal for the former Yugoslavia which seemed to be insufficient, Croatia's role in the settlement in the town of Mostar in Bosnia and Herzegovina, the freedom of the media and the termination of the mandate of UNTAES in Eastern Slavonia. Ms Err requested the Commission to provide the Parliamentary Assembly with a second report on the progress of co-operation between Croatia and the Venice Commission. This report is being prepared.

It is recalled that the Venice Commission had recommended:

the reinstatement and revision of the suspended provisions of the law of 1991;

that, in cases concerning the rights of minorities brought before the Croatian Constitutional Court, the Court should be enlarged to comprise international advisers;

an information campaign to promote the implementation of human rights and the rights of minorities.

The implementation of these three recommendations was among the commitments made by Croatia at the time of its accession to the Council of Europe.

a. Revision of the Constitutional Law

A Working Group on this question had been established in October 1996 and included members of the Commission. This Working Group held two meetings in Zagreb in March and May 1997 with the Croatian Commission dealing with this revision. During the second meeting, the Working Group also met representatives from several minority groups.

During the Commission's 31st meeting, the Croatian Delegation informed that, following the above-mentioned meetings and in conformity with the proposal made by the Commission's Working Group, an informal meeting was held, on 9 June 1997, between the representatives of minority groups and representatives of the authorities. Moreover, it had been decided to formalise these meetings and it is now foreseen to create a "Forum" of minorities, which will meet regularly. Members of Government and Parliament could participate in this "Forum" without being members.

In addition, the Commission took note of the draft memorandum prepared by the Working Group with a view to its transmission to the Croatian authorities. The text of this memorandum appears in Part B.

During the 32nd Meeting Ambassador Matek, Permanent Representative of Croatia to the Council of Europe, gave the Commission a progress report on work to revise the Croatian Constitutional Law on Human Rights and Minorities and establish the Council of Ethnic and National Communities or Minorities. It had been decided that the Council would be composed of one representative per national or ethnic community or minority. The Council's relations with the Croatian Commission for the revision of the Constitutional Law on Human Rights and Minorities and the Government had yet to be defined more precisely.

During the 33rd meeting, Mr Nick informed the Commission about the establishment of the Council of Ethnic and National Minorities for which most ethnic communities had already appointed their members. So far, there was no progress on the issue of revision of the Croatian constitutional law on the protection of human rights and minorities.

b. Enlargement of the Constitutional Court - International advisers

The Venice Commission and the Constitutional Court of Croatia drew up a list of international advisers to participate in the deliberations of the Croatian Constitutional Court (two titular advisers and three substitutes). The Committee of Ministers' Deputies, during their 592nd meeting (12-14 May 1997) nominated Messrs Malinverni and Marques Guedes as Advisers and Messrs Orasi, Russell and Simon as substitutes.

A meeting of the international advisers took place in Zagreb on 23 June 1997. During this meeting. It was agreed that the international advisers would be invited to sessions and deliberations and take part in all procedures except voting. The Constitutional Court informed the Commission that if intended to refer, at the beginning of 1998, three cases to the international advisers.

During the 32nd meeting, Mr Matek, Permanent Representative of Croatia to the Council of Europe, stated that in one case the Constitutional Court had dispensed with consultation of the international advisers and that the necessary explanations would be given by the Constitutional Court in due course.

During the 33rd meeting Mr La Pergola voiced regret about the fact that the Constitutional Court of Croatia had not made use of the international advisers when it had dealt with minority issues. This seemed to be in breach of the agreement concerning the participation of international advisers in the work of the Constitutional Court. The Commission therefore expected the Constitutional Court to clarify this issue and to take immediately the necessary steps for the participation in its work of the advisers appointed by the Committee of Ministers of the Council of Europe. The Commission decided to address a letter to the Constitutional Court of Croatia requesting it to explain the non-implementation of the mechanism of complementing the Court with international advisers when dealing with minority issues, which had been agreed upon.

c. Information campaign

The text of the European Convention on Human Rights had been translated and distributed and a brochure is under preparation describing the means available to citizens in the Croatian legal system for protecting their rights.

d. Seminar on the legal protection of the individual

The Commission co-organised a meeting on "the legal protection of the individual" in co-operation with the Directorate of Legal Affairs of the Council of Europe and the United Nations Transitional Administration for Eastern Slavonia (UNTAES). This meeting was held in Strasbourg on 13-14 November 1997. The major achievement of this seminar was to bring together lawyers from majority and minority groups from the UNTAES region.

8. CO-OPERATION WITH CYPRUS

During the 31st Meeting, Mr Triantafyllides informed the Commission that fresh efforts towards a solution to the Cyprus problem were being carried out under the auspices of the United Nations. Any possible solution will necessarily raise constitutional questions. In its capacity as a constitutional advisory body having acquired significant expertise in European constitutional matters the Commission should offer its services to the negotiators.

The Commission took note of this information and declared itself ready to assist, within the limits of its competence, when requested by the interested parties and authorities in their efforts for a solution of the Cyprus problem

9. CO-OPERATION WITH ESTONIA

Co-operation with Estonia started in earnest during 1997.

At the 31st Plenary Meeting Mr Loot, the newly appointed member for Estonia, informed the Commission that the Estonian Government had recently decided to establish a commission to review the present Constitution in order to assess whether amendments are needed relating to the possible accession of Estonia to the European Union. He said that the Governmental Commission would welcome the Venice Commission's expertise during this process.

The Commission appointed Messrs Niemivuo and Lopez Guerra as rapporteurs.

During its 32nd Meeting the Commission was requested to study the control of constitutionality in Estonia to ascertain the comparative advantages of the current system, a Supreme Court with a constitutional review panel, and a specialised constitutional court. Messrs Bartole and Steinberger were appointed rapporteurs.

During its 33rd Plenary Meeting the Commission held an exchange of views on both these questions on the basis of reports by Mr Niemivuo and Mr Bartole. The Commission will continue its examination of Estonian constitutional reform during 1998.

It is recalled that the study of Constitutional Law and European Integration was commenced owing to the constitutional changes in Estonia.

Finally, the Commission participated in the Seminar on 5 years of the Estonian Constitution which took place in Tallin on 26-27 September 1997.

10. CO-OPERATION WITH GEORGIA

Co-operation with Georgia continued during 1997 in particular with the Constitutional Court.

During the 31st meeting Mr Demetrashvili informed the Commission that the process of constitutional development was progressing well. In the eight months of its existence, the Constitutional Court had examined more than 20 cases. The Civil Code and the law on the courts had recently been adopted and the President had created a commissioner for human rights.

The Commission welcomed the fact that, as it had proposed in 1995, the death penalty had been abolished in Georgia during 1997.

A Workshop on the execution of decisions of constitutional courts was held in Tbilisi on 17-18 November 1997 in co-operation with the Constitutional Court.

11. CO-OPERATION WITH HUNGARY

During its 30th Plenary Meeting the Commission held an exchange of views with Mr Solyóm, President of the Hungarian Constitutional Court. Mr Solyóm said that the work which was expected to lead to the adoption of a new constitution was progressing but no date could yet be given for its completion. The main elements of the reform concerned relations between the government and the parliament and the enshrining of social rights in the constitution.

The Commission affirmed its willingness to continue to assist Hungary in its process of constitutional reform.

12. CO-OPERATION WITH ITALY

At the invitation of the Veneto region, a group made up of Messrs La Pergola, Bartole, Malinverni and Matscher participated in a meeting held in Venice on 23 May 1997 to study the role of the second Chamber and municipalities in a federal structure.

13. CO-OPERATION WITH KYRGYZSTAN

During its 31st Plenary Meeting the Commission was informed about the seminar which took place on 17-18 June 1997 in Bishkek, organised by the Commission and the Council of Europe, which dealt with the constitutional dimension of judicial reform.

14. CO-OPERATION WITH ROMANIA

The Romanian authorities requested the Commission's opinion on the draft law on the organisation of Government and on the functioning of Ministries

Messrs Reuter and Robert were appointed rapporteurs. This issue is to be dealt with in the Sub-Commission on Democratic Institutions at its meeting in March 1998.

15. CO-OPERATION WITH RUSSIA

A seminar was held on 22-24 September 1997 in Petrozavodsk (Russia) in cooperation with the Constitutional Court of the Republic of Karelia. During this seminar the relations between the federal constitutional courts and constitutional courts of federated entities was studied. The situation of constitutional courts in Russia was compared with the situation in Germany, where constitutional courts exist also on the level of the *Länder*. The seminar was judged very useful by the participating courts of subjects of the Russian Federation, who showed their interest in establishing closer cooperation with the Venice Commission.

16. CO-OPERATION WITH SOUTH AFRICA

The Commission followed constitutional developments in South Africa throughout 1997. In particular, it was informed at its 30th meeting that the new constitution had been signed in December 1996 and had entered into force in February 1997, thereby marking the end of the transitional period. It was further informed at its 33rd meeting that the Western Cape had become the first province to have its new provincial constitution certified by the Constitutional Court in November 1997.

A number of activities were carried out during 1997 within the framework of the programme "Democracy, from the law book to real life", implemented by the Commission in co-operation with the South African Department of Constitutional Development and financed by Switzerland. Several visits were organised for delegations from the South African Human Rights Commission (SAHRC) to Europe on topics which included racial intolerance, complaints handling, equal status and rights of women and sensitising the media to human rights issues. The Commission also supported the first Annual Human Rights Conference of the SAHRC, providing an expert from Europe to speak at the conference. Mr Steinberger (Germany) delivered a series of lectures on constitutional issues at the National School of Government, Administration and Development of the University of South Africa (UNISA). The School also benefited from two research fellowships in Europe on participatory rural appraisal and European schools of administration. A visit was

organised for a delegation from the Department of Constitutional Development to authorities in Russia, Spain, Belgium, Germany and Switzerland to gain more experience of intergovernmental relations in practice. Finally, South African experts participated in seminars organised by the Commission on nationality and state succession, the constitutional foundations of foreign policy and the evolution of the nation state in Europe at the dawn of the 21st century as well as in a seminar organised by the Council of Europe on minorities.

Negotiations took place during most of 1997 between the Commission, the Department of Constitutional Development and the Swiss Federal Department of Foreign Affairs with a view to creating chairs in intergovernmental relations and co-operative governance at two South African universities. Switzerland agreed to finance the two chairs for a period from the beginning of the academic year in 1998 until the end of 1999. A framework agreement outlining the modalities for setting up the chairs was signed between the three parties at the 32nd meeting of the Commission. It was decided that individual agreements with the two universities chosen would be signed at a later date. A total of twelve universities in South Africa applied to the Department of Constitutional Development to host the chairs and these applications were evaluated on the basis of a number of criteria, first by a panel in South Africa and then at the meeting of the Sub-Commission on South Africa (32nd meeting). It was decided that one chair should go to a previously disadvantaged university and one to a previously advantaged university. The University of Fort Hare was chosen in the first category and the University of Natal in the second.

17. CO-OPERATION WITH "THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA"

At its 31st Plenary Meeting the Commission agreed to provide an opinion on the draft law on referendum of "the former Yugoslav Republic of Macedonia". Messrs. Malinverni, Bartole and Gewirtz were appointed rapporteurs.

A revised bill will shortly be available and work will continue on this question during 1998.

18. CO-OPERATION WITH UKRAINE

Throughout 1997 the Commission continued its co-operation with Ukraine in particular on the following issues.

a. Constitution of Ukraine

At its 30th meeting the Commission adopted the draft consolidated opinion on the Constitution of Ukraine prepared by the Secretariat on the basis of contributions by Mrs Milenkova and Messrs Bartole, Batliner, Klu ka, Steinberger and Delcamp. This opinion had been requested by the Parliamentary Assembly on 10 July 1996.

Mr Holovaty pointed out that certain shortcomings in the text of the constitution were for political reasons (for example, the absence of a clear differentiation between fundamental freedoms and economic, social and cultural rights, the role of President, the status of Crimea) but that Ukraine would do what was necessary to respect, in its legislation, the standards laid down by the Council of Europe in questions of democracy, human rights and the primacy of law.

The text of the consolidated opinion appears in Part B.

b. Draft law on the Constitutional Court of Ukraine

The Commission also continued its examination of the draft law on the Constitutional Court of Ukraine. This opinion had been requested by the Parliamentary Assembly during the 28th plenary meeting in September 1996.

During its 31st meeting the Commission adopted its opinion on the draft law on the Constitutional Court of Ukraine. It emphasised that the Law represents an important step forward in the protection of individual rights in Ukraine. It enlarges the functions of the Constitutional Court, in particular by allowing individuals to request the Constitutional Court for an official interpretation of the Constitution - which in practice amounts to giving a right of individual complaint - and by providing the possibility for ordinary courts to refer cases to the Constitutional Court. Neither of these procedures are provided for by the Constitution. However, provisions concerning the way in which a case may be referred to the Constitutional Court by a judge as well as the involvement of parties in cases before the Constitutional Court are missing from the Law, and it was stressed that such important procedural rights should be included in the Law rather than left to the practice of the Constitutional Court.

The text of the consolidated opinion appears in Part B.

c. Constitutionality of the death penalty in Ukraine

At the request of the Parliamentary Assembly the Commission examined the constitutional questions that might arise regarding the death penalty in Ukraine.

The Commission examined this issue at its 31st, 32nd and 33rd meeting.

During the 33rd meeting, Messrs Batliner, Helgesen and Malinverni presented the draft consolidated opinion on the constitutionality of the death penalty in Ukraine together with revised conclusions which had been agreed upon by the rapporteurs before the meeting. Mr Malinverni explained that the rapporteurs had jointly come to the conclusion that the death penalty in Ukraine was unconstitutional. Given the high complexity of the issue, the rapporteurs requested to have their individual opinions annexed to the consolidated report. These opinions would be considered neither dissident nor concurrent and would constitute simply an appendix to the opinion.

Mr Holovaty stressed that by virtue of the Statute of the Council of Europe, the accession to the latter created legal obligations to fulfil the commitments given upon accession. Furthermore, the signature of Protocol 6 to the European Convention on Human Rights had created the obligation not to defeat the object and purpose of this treaty according to the Vienna Convention on the Law of Treaties. The execution of the death penalty would undoubtedly defeat the object and purpose of Protocol 6 ECHR.

The Commission adopted unanimously this opinion and decided to forward it to the Parliamentary Assembly before its session in January 1998.

The text of this opinion appears in Part B.

B. Opinions of the Commission

i. Opinion on the possibility of an individual complaint to the Constitutional Court and the constitutionality of Article 7 of the draft law on the organisation of the judiciary presented to the Commission at its 33rd Plenary Meeting

I. Introduction

1. Mr Gagnik Harutunian, Chairman of the Constitutional Court and Co-President of the State Commission on Judicial Reform of the Republic of Armenia, has submitted to the Venice Commission two questions. The first question concerns the possibility of an individual complaint being made to the Constitutional Court of Armenia. The second question regards the constitutionality of Article 7 of the Draft Law on the Organization of the Judiciary of the Republic of Armenia.

2. The present opinion is based on written contributions by Mr Endzi (Latvia) and Mr Bartole (Italy). It also takes into account the relevant comments made, in particular by Mr Harutunian, at the International seminar on Constitutional Control and the Protection of Human Rights, held in Yerevan from 22 - 24 October, 1997.

II. The Possibility of an Individual Complaint to the Constitutional Court

3. The Constitution of the Republic of Armenia was adopted by referendum on 5 July 1995. Article 6 of the Constitution proclaims the supremacy and the direct effect of the Constitution: 'The Constitution of the Republic has supreme juridical force, and its norms are applicable directly.' Moreover, it states that 'Laws found to contradict the Constitution, as well as other juridical acts found to contradict the Constitution and the laws, shall have no legal force.'

4. Article 100 of the Constitution delimits the competencies of the Constitutional Court. It presents an apparently exhaustive list of the subject matter jurisdiction of the Constitutional Court. The Law on the Constitutional Court of the Republic of Armenia reproduces this provision in its Article 5, thus reiterating and confirming the Court's competencies. The Article is thus likely to be comprehensive and it does not mention complaints by individuals as to the violation of constitutional rights.

5. Elsewhere, in Article 101 of the Constitution, a list is offered of persons or bodies entitled to submit a case to the Constitutional Court. These are:

1) the President of the Republic;

2) at least one third of the Deputies;

3) Presidential and parliamentary candidates on disputes concerning election results;

4) the Government in cases prescribed by Article 59 of the Constitution.

[Article 59 of the Constitution concerns the procedure for declaring the President of the Republic unfit or unable, whether for health or other reasons, to perform his duties as President.]

A further provision in the Constitution, Article 57, provides that the National Assembly may request a determination by the Constitutional Court 'on questions pertaining to the removal of the President of the Republic from office...' Arguably, this provision indicates that the list, in Article 101 of the Constitution, of those invested with the right to seize the Constitutional Court with a matter, is not exhaustive. However, under Article 57, the National Assembly may *by majority vote* seize the Court for this particular subject matter. Effectively, this means of seizing the Court constitutes a special case of the general provision of Article 101 2), which allows the Court to be seized by *at least one third* of the Deputies on any matter listed in Article 100 (except disputes concerning election results and cases prescribed by Article 59). Therefore, Article 57 does not constitute an extension of the list of persons or bodies which have standing before the Constitutional Court. Article 101 of the Constitution is, therefore, exhaustive. Furthermore, after the list, Article 101 concludes: "The Constitutional Court shall only hear cases that have been properly submitted."

Similarly to Article 100, Article 101 of the Constitution is reiterated in the Law on the Constitutional Court, in Article 25, which also includes the case foreseen under Article 57 of the Constitution. Chapter 9 of the Law on the Constitutional Court sets out the requirements and characteristics of a case under review at the Constitutional Court. These requirements also cover the scope of the above provisions.

Thus, one may conclude that the Constitution of the Republic of Armenia and the Law on the Constitutional Court thoroughly specify the competence of the Constitutional Court and the scope of subjects entitled to submit an appeal to the Constitutional Court. Moreover, in admissibility proceedings, the Court must reject the claim if the claimant is not entitled to bring an action to the Court (Article 32, para. 2).

6. Normally, if individuals are to be allowed to take actions to the Constitutional Court, this right should be included in the Constitution and strictly regulated by the Constitutional Court Statute. This is also generally the case in practice, either in the original constitutional draft and not least in recently drafted Constitutions, or as a later amendment to the Constitution.

A noteworthy exception to this rule of thumb is Germany, where the possibility of an individual complaint was expressly enacted in the *Grundgesetz* (Article 93(1)(4a)) in 1969, although in practice the possibility of bringing an individual complaint to the *Bundesverfassungsgericht* existed well before 1969. From 1949, when the *Grundgesetz* was passed, until 1969 Article 93 contained no reference to the individual, but Article 93(2) provided that the Court 'shall also rule in such other cases as are assigned to it by federal legislation. The Law on the Federal Constitutional Court of 1951 made reference to the individual complaint (*Verfassungsbeschwerde*) in its Article 95. One can distinguish this exception from the constitutional framework of the Republic of Armenia. In the Armenian Constitution, Article 101 makes express provision for the parties allowed to submit applications to the Constitutional Court without including the individual, whereas Article 93(2) of the *Grundgesetz* of the Federal Republic of Germany made it clear that the parties mentioned in Article 93 by no means constituted an exhaustive list.

One must bear in mind that the Federal Republic of Germany eventually amended its Constitution and Constitutional Court Statute to include an express provision for the availability of an individual complaint in 1969. This was due not to the lack of legal basis for the individual complaint prior to the amendment, but was done in the interest of clarity and in recognition of the fact that such a possibility should normally be expressly provided for in the Constitution.

Furthermore, the Commission noted already in its Opinion on the Law on the Constitutional Court of Ukraine (CDL(97) 10) that, although the existence of the possibility of an individual complaint to the Constitutional Court should be clearly entrenched in the Constitution, there might be exceptions, such as the case of Ukraine. There the Constitution provides that one of the tasks of the Constitutional Court is to give an official interpretation of the Constitution and the laws of Ukraine (Article 150(2)). However, it is not made clear who may seize the Constitutional Court with such a question. The Law on the Constitutional Court gives this right to request an interpretation both to State bodies (Article 41) via petition and to individuals and legal entities (Article 43) by way of constitutional complaint of violation of the constitutional rights and freedoms of the appellant. However, the Ukrainian case is similar to the German one, as a gap in the Constitution was then filled by the Law on the Constitutional Court. No such gap is apparent in the Constitution of the Republic of Armenia.

The Constitutional Requirement of Articles 38 and 91. Are constitutional rights sufficiently guaranteed without the availability of an individual complaint?

7. Article 38, para. 2, of the Constitution states that 'Everyone is entitled to defend in court the rights and freedoms engraved in the Constitution.' This does not mean that the individual has the right to bring an action to the Constitutional Court. The words 'in court' refer to the general judicial system of the State.

Article 91 of the Constitution states that 'justice shall be administered solely by the courts in accordance with the Constitution and the laws', and Article 92 proceeds to list the courts of general jurisdiction, then it mentions the existence of courts of special jurisdiction without mentioning the Constitutional Court. Viewed together with Article 91, Article 38, para. 2 is referring to the administration of justice by courts of general jurisdiction. These two articles are to be seen as general norms, whereas Articles 100 and 101 should be seen as special norms, which, as per the principle of *lex specialis derogat legi generali* apply to the extent of conflict with general norms. The Constitutional Court may not interpret the Constitution on its own initiative. The Constitution would have to provide for this possibility expressly, as the Bulgarian Constitution does in its Article 149. Under Articles 100 and 101 of the Constitution, the Constitutional Court may only interpret the Constitution when it reviews cases, initiated by subjects entitled to submit an application, and when it decides whether laws, National Assembly resolutions, orders and decrees of the President of the Republic, Government resolutions and obligations assumed in international treaties which are yet to be ratified are in conformity with the Constitution.

8. By virtue of Articles 100 and 101 of the Constitution, the Armenian Constitutional Court shall 'only hear cases that have been properly submitted' (i.e. instituted by the list of subjects and bodies in Article 101) and the jurisdiction of the Constitutional Court is restricted to the subject matter set out in Article 100.

Individuals are not entitled to lodge complaints with the Constitutional Court challenging the constitutionality of acts or decisions affecting their rights. This lack of the possibility of an individual complaint to the Armenian Constitutional Court may give rise to problems with regard to the Constitutional requirement for legal protection of the freedoms and of the exercise of duties entrenched in the Constitution (in Articles 38 and 91).

Article 7 and Diffuse Constitutional Control

Article 7 of the Draft Law on the Organisation of the Judiciary reads as follows:

Courts administer justice in accordance with the Constitution of the Republic of Armenia, international agreements of the Republic of Armenia, and laws.

Revealing the incompatibility of the acts of the state or other body with the Constitution of the Republic of Armenia, international agreements of the Republic of Armenia or laws of the Republic of Armenia, the court passes its decision in accordance with legal provisions having higher supremacy.

9. The two questions put to the Venice Commission are linked, as the construction of Article 7 of the Draft Law on the Organisation of the Judiciary would differ according to whether an individual complaint to the Constitutional Court were permissible. If an individual complaint were possible, Article 7 might present problems of construction. If, however, no complaint to the Constitutional Court is available to the individual in the Republic of Armenia, which definitely appears to be the case under the present constitutional system, then Article 7 constitutes the basis for a so-called diffuse constitutional justice system.

10. An example of the diffuse system of constitutional justice is the United States model, under which all judges are competent to review the conformity of laws to the Constitution within the particular cases before them. This is in direct contrast to the European model of constitutional justice, in which a central State body, the Constitutional Court, holds exclusive power to review the constitutionality of legislation. This type of Court is often invested with specific powers of constitutional relevance such as the relationship between superior State bodies.

The effects of decisions in these two systems differ. In the European system the decisions have general application, whereas in the US system judges decide on a case-by-case basis. European decisions of unconstitutionality generally render a provision null and void, so that it cannot be applied again in any other court, whereas an American judge's decision not to give legal effect to a law in a particular case will affect that case alone.

11. Article 7 of the Draft Law on the Organisation of the Judiciary appears to be an attempt to fulfil the above-mentioned constitutional requirement of the legal and judicial protection of freedoms and the exercise of duties entrenched in Articles 38 and 91 of the Constitution. This provision concerns the administration of justice by the courts, and requires them to observe the hierarchy of laws, whereby the Constitution is paramount, followed by international agreements and laws of the Republic of Armenia. Where a court recognises the legal inconsistency of an act of the State or of another body, the court must pass its decision according to this hierarchy of laws. Article 7 effectively provides a guarantee for the protection of the rights and freedoms entrenched in the Constitution in so far as it allows every judge to apply the Constitution directly and refuse to implement an act of the State, if that act infringes a constitutional right. This interpretation is in conformity with Article 6 of the Constitution, which proclaims the supremacy and direct effect of the Constitution and, conversely, the lack of force of 'acts found to contradict the Constitution'.

The Constitutionality of Article 7 of the Draft Law on the Organisation of the Judiciary

12. The constitutionality of Article 7 is in question here, as it allows courts other than the Constitutional Court to decide on issues of inconsistency with the Constitution. Thus, arguably, Article 7 conflicts with Article 100 of the Constitution, which gives the Constitutional Court the power to decide on the conformity of legislation with the Constitution.

However, Article 7 of the Draft Law on the Organisation of the Judiciary does not authorise courts to supervise the constitutionality of acts of the State. Instead, what it allows courts of general jurisdiction to do, is, when reviewing a particular case and deciding that a norm contradicts either the Constitution, international treaty obligations or law, to apply the Constitutional norm, international treaty or legal norm directly. Article 7 does not allow a court to declare the conflicting act to be null and void.

13. The Armenian system of constitutional justice appears to comprise elements of both the European and the American models. On the one hand, it has a Constitutional Court with a specific jurisdiction and corresponding subjects and bodies empowered to petition the Court, as outlined in Articles 100 and 101, which is akin to the European model. On the other hand, competence regarding constitutional issues is by no means exclusive to the Constitutional Court, because whenever the issue of a law's conformity with the Constitution arises in a case before any court, the judge may refuse to apply a law he or she considers to be contrary to the Constitution and may apply the Constitution directly.

VI. Problems Surrounding Diffuse Constitutional Control in Armenia

14. One might envisage some problems in the cohabitation of these two forms of constitutional justice. Conflicts may foreseeably arise between the Constitutional Court and other courts if they come to different conclusions concerning a law's conformity with the Constitution. However, this eventuality has, arguably, already been resolved by the provisions presently in force in Armenia.

Only the President of the Republic or one-third of the Members of the National Assembly may submit to the Constitutional Court cases dealing with the constitutionality of laws, National Assembly resolutions, decrees and orders signed by the President of the Republic, and Government resolutions. No deadline is set for these submissions, therefore the President of the Republic and the Members of the National Assembly may still contest the constitutionality of laws long after they have come into force. This absence of a deadline is no accident, as deadlines are set for two other types of petitions to the Court, under Articles 57 and 58 of the Law on the Constitutional Court.

Article 64 of the Law on the Constitutional Court provides that judgments of the Constitutional Court 'shall be mandatorily applicable throughout the territory of the Republic.' This effectively removes the possibility of conflict between the Constitutional Court and other courts regarding a law's conformity with the Constitution. Other courts are bound by the decisions of the Constitutional Court: they are not allowed to apply a law that the Constitutional Court has declared contrary to the Constitution.

VII. Conclusions

15. The wish to institute an individual complaint to the Armenian Constitutional Court is thoroughly commendable, as it would be a positive step in the direction of securing the protection of rights and freedoms as entrenched in the Constitution of Armenia. However, it seems that there is no possibility of an individual complaint to the Constitutional Court of Armenia, unless the Constitution is amended to include it.

By virtue of Article 7 of the Draft Law on the Organisation of the Judiciary, the constitutional rights of individuals may be defended before courts of general jurisdiction, and Article 6 of the Constitution states that ' ..its norms are applicable directly.' The draft provision introduces a system of diffuse control which allows a compliance with the constitutional requirement of legal protection of the constitutional rights and freedoms of individuals

16. Although the Armenian system of constitutional justice is a mixture of two different models it could very well work in a satisfactory manner. It reserves for the Constitutional Court the important role of resolving conflict with regard to the conformity of a law with the Constitution. In certain systems it is essential to provide for a court charged with the task of examining the law critically, not least where the individual is the aggrieved party.

However, such cases must be submitted to it by the President of the Republic or one-third of the Members of the National Assembly and thus the involvement of the Constitutional Court is reliant on political will. It would be preferable for the Constitutional Court, which is supposed to be the supreme guardian of the Constitution, to be called upon when it matters most or when the constitutional rights of individuals are at stake. Thus Armenia should amend its Constitution to allow individuals access to the

Constitutional Court or to afford jurisdiction to the Constitutional Court on constitutional matters, so that whenever the issue of the constitutionality of a law arises before any court, that court could suspend proceedings and refer the constitutional question to the Constitutional Court.

ii. Opinion on the draft Constitution of the Nakhichevan autonomous Republic adopted by the Commission at its 33rd Plenary Meeting prepared by a Working Group of the Venice Commission consisting of : Mr G. Malinverni (Switzerland), Mr A. Suviranta (Finland) and Mr M. Lesage (France)

Introduction

On 27 September 1997, the Director of Administration of the President of the Azerbaijan Republic submitted a request to the Council of Europe for its opinion on the draft Constitution of the Nakhichevan Autonomous Republic. For this purpose, a rapporteur group was set up within the European Commission for Democracy through Law (Venice Commission), consisting of Messrs Malinverni, Suviranta and Lesage. The Commission held an exchange of views with the Rapporteurs during its 32nd plenary session (Venice, 16-17 October 1997) on the basis of their preliminary comments (CDL (97)45, 46 and 48 rev.). The Rapporteurs then met in Brussels, on 31 October 1997, in the presence of Mr Hajiyev, President of the Supreme Court and Associate member of the Commission for Azerbaijan and Mr Giakoumopoulos, Deputy Secretary to the Commission. At the end of the meeting, the Rapporteurs adopted the present Opinion which was approved by the Commission at its 33rd Plenary Meeting (Venice, 12-13 December 1997).

1. The autonomy of the Nakhichevan Republic

The status of the Autonomous Nakhichevan Republic, a territory which has no common border with the rest of Azerbaijan, is determined by Chapter VIII (Art. 134) of the Azerbaijan Constitution of 12 November 1995. It is "an autonomous state within the Azerbaijan Republic". In accordance with the International Agreements concluded in Moscow and Kars in 1921, referred to in the Preamble and Article 1 of the draft Constitution of the Nakhichevan Autonomous Republic:

the Autonomous Republic is not a separate legal entity in international law, but may have contacts with foreign States and international organisations (See Article 37, paragraph 11 of the draft Constitution);

the territory of the Autonomous Republic is an integral part of the territory of the Azerbaijan Republic which is "inviolable and indivisible" (Article 11 of the Constitution of the Azerbaijan Republic);

the Autonomous Republic's powers are determined solely by the Constitution of the Azerbaijan Republic, to the exclusion of any agreement between the Autonomous Republic and Azerbaijan; furthermore, the provisions of the Constitution of the Autonomous Republic may not be contrary to the Constitution of the Azerbaijan Republic, which takes precedence over the Nakhichevan Constitution (See Article 134 of the Constitution of the Azerbaijan Republic). Similarly, Article 137 establishes that legislation passed by the Ali Majlis (the Parliament of Nakhitchevan, "Supreme Assembly") must be compatible with the Azerbaijan Constitution and with all legislation of the Azerbaijan Republic. It is therefore clear that the constituent power Assembly of the Azerbaijan Republic has the sovereign power to determine the degree of autonomy granted to the Autonomous Republic. The acts of the Autonomous Republic's authorities in no way limit this power of the Azerbaijan Constituent Assembly; in particular, the Nakhichevan authorities' consent is not required in order to modify the rules governing autonomy. The safeguard for these rules lies in the rigidity of the Azerbaijan Constitution which may only be amended on the basis of a referendum (see Chapter XI of the Azerbaijan Constitution).

On the other hand, it should be noted that according to the Azerbaijan Constitution, relatively important areas are the exclusive competence of the Nakhichevan legislature. In this regard, Article 138 of the Azerbaijan Constitution lists elections to the Supreme Assembly, issues concerning economic development, social protection, environmental protection, tourism, health, the sciences and culture. The Azerbaijan Constitution also grants the legislature of the Autonomous Republic budgetary powers; Article 139 of the Azerbaijan Constitution provides that the Supreme Assembly shall approve the Autonomous Nakhichevan Republic's budget. The Azerbaijan Republic also grants the Supreme Assembly tax-raising powers and the draft Constitution of the Autonomous Republic (Article 29) specifies that the Supreme Assembly is responsible for local taxes.

The Republic of Nakhichevan therefore enjoys a considerable amount of autonomy.

2. Hierarchy of standards and monitoring of constitutionality

Both Azerbaijan national legislation and the Autonomous Republic's own legislation are applicable on the territory of the Autonomous Republic. Articles 135, paragraphs 4 and 5 of the Azerbaijan Constitution and Article 61 of the draft Constitution of the Autonomous Republic determine the hierarchical relationship between the provisions.

The Constitutional Court of the Azerbaijan Republic has the power to determine whether legal acts of the Autonomous Republic are in conformity with those of the Azerbaijan Republic (Article 130, paragraph 3.8). However, neither the Azerbaijan Constitution nor the draft Nakhichevan Constitution refer to the monitoring of conformity of the Autonomous Nakhichevan Republic's standards with its Constitution.

It would be advisable to use the appropriate procedures to attribute this power to the Azerbaijan Constitutional Court.

3. Human rights

The Rapporteurs note that, in accordance with Article 71 of the Azerbaijan Constitution, the rights and freedoms of individuals and of citizens are directly applicable on the territory of the Autonomous Nakhichevan Republic. This could be stated in the Constitution of the Autonomous Republic.

Since the Azerbaijan Constitution contains comprehensive guarantees of human rights, it might seem superfluous to include in the Constitution of the Azerbaijan Republic a provision concerning only the right to property but it can be justified on historical grounds. In any case, if a special provision on this right is incorporated into the Azerbaijan Constitution, it would be wise to emphasise that the right to own property may be subject to restrictions and limitations; Article 1 of Protocol N°1 to the European Convention on Human Rights and also Article 29 of the Azerbaijan Constitution could be used as a model in this regard.

4. Separation of powers - the duties and powers of the President of the Supreme Assembly

Article 5 of the draft Constitution of the Autonomous Nakhichevan Republic states that the President of the Ali Medjlis is the Republic's highest official; among other duties, he or she is responsible for representing the Republic abroad and for ensuring state succession in the Nakhichevan Autonomous Republic. Article 37 also lists the competences of the President of the Ali Medjlis (Parliament).

Taken together, Articles 5 and 37 result in a concentration of competences in the President of the Ali Medjlis which is difficult to reconcile with the principle of the separation of powers enshrined in Article 3 of the draft Constitution. The Autonomous Republic's Head of State cannot promote cooperation between the executive, the legislature and the judiciary unless he or she is outside and above them; this is not the case of the President of the Ali Medjlis who is also President of the legislature. Article 37 of the draft Constitution lists the competences of the Ali Medjlis which include not only duties relating to the legislature but also functions which traditionally fall to the executive. For example, the President of the Ali Medjlis establishes Central Executive Authorities (paragraph 9), suspends resolutions and decrees of the Cabinet of Ministers (paragraph 10), represents the Republic (paragraph 11), deprives members of the Ali Medjlis of their credentials where necessary (paragraph 12), appoints working groups with a view to preparing drafts of laws and decrees (paragraph 13) and presents proposals for the nomination and dismissal of judges and public prosecutors (paragraphs 16 and 17).

The duties of the President of the Ali Medjlis should therefore be reconsidered, in particular the following provisions of Article 37:

paragraph 3 which states that the President of the Ali Medjlis shall "promote cooperation" among the various State bodies;

the provision contained in paragraph 10 which states that the President of the Ali Medjlis may suspend certain decisions of both central and local executive authorities; in fact, the President must ask the judiciary to suspend the effect of the decisions concerned; moreover, only courts should be able to declare such decisions void;

paragraph 23 which apparently repeats paragraph 14 (power of the President to adopt decisions and resolutions);

paragraph 18 which states that the President shall appoint the head of the Central Bank of the Nakhichevan Autonomous Republic and paragraphs 19, 26, 27, 28 and 29 which state that the President shall implement the military doctrine of the Azerbaijan Republic, set up and head the Security Council, be responsible for declaring a general mobilisation, take the decision to call up citizens for military service and ensure the implementation of a state of emergency or martial law: all these duties traditionally belong to the executive.

paragraphs 16 and 17 which give the President of the Ali Medjlis the authority to make proposals for the appointment and dismissal of judges and public prosecutors (see point 6 below).

5. Functioning of the legislature

Some provisions are such as to diminish parliamentary sovereignty. For example, the Ali Medjlis is authorised to amend draft laws submitted to it only with the consent of the body exercising the right of legislative initiative (Article 31, paragraph 3 of the draft).

According to the Rapporteurs, the legislature must remain free to adopt and amend laws, without being subject to the opinion of the bodies which initiated the law concerned.

The provision whereby the Ali Medjlis must adopt a law within one month from the day on which the draft law was submitted to it (Article 31, paragraph 4) also limits parliamentary sovereignty. The Ali Medjlis should have as much time as it considers necessary to legislate.

6. The independence and functioning of the judiciary

While the appointment of judges by the Ali Medjlis on the basis of proposals by its President is a normal procedure, granting the latter the right to propose the dismissal of judges of the Supreme Court (Article 51, paragraph 2) and of the Economic Court (Article 52, paragraph 2) is a serious distortion of the principles of judicial independence and of the separation of powers.

These provisions are also contrary to Article 128 of the Azerbaijan Constitution which, in its final paragraph, determines the procedure for dismissing judges in Azerbaijan.

In addition, Article 53 which empowers the Public Prosecutor's Office to undertake investigations and bring criminal proceedings, may raise serious problems in respect of the requirement of the European Convention on Human Rights that the judicial body responsible for carrying out an investigation should demonstrate its independence and impartiality. This requirement has been interpreted by the European Court of Human Rights in particular in the following judgements: Schiesser v. Switzerland of 4 December 1979 (A Series, n°34), Huber v. Switzerland of 23 October 1990 (A Series, n °188) and Brincat v. Italy of 26 November 1992 (A Series, n °249-A).

Lastly, granting the Supreme Court the power to supervise the activities of the general courts (Article 51, paragraph 1) would seem to be contrary to the principle of the independence of such general courts. While the Supreme Court must have the authority to set aside, or to modify, the judgements of lower courts, it should not supervise them.

7. Conclusion

The Rapporteurs consider that the draft Constitution, taken as a whole, constitutes a sound basis for determining the rules governing autonomy in Nakhichevan.

The failure to distinguish between the duties of the Head of State and the President of the Ali Medjlis and to attribute them to a single individual and the concentration of important powers in the hands of this one individual raises problems in respect of the separation of powers.

Some provisions of the draft infringe the sovereignty of the legislature, which is deprived of its power to freely amend drafts which are submitted to it.

Similarly, infringements of judicial independence are incompatible with the fundamental principles of a democratic State which respects human rights and the rule of law: they should therefore be removed from the draft.

iii. Opinion on the establishment of a Human Rights court of the Federation of Bosnia and Herzegovina adopted by the Commission at its 31st Plenary Meeting

By letter of 16 June 1997 the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly requested the European Commission for Democracy through Law to give an opinion on the legal questions raised by the setting up of the Human Rights Court of the Federation of Bosnia and Herzegovina (hereafter "FBH"). This opinion, in response to the above-mentioned request, was adopted by the Venice Commission at its 31st plenary meeting (Venice, 20-21 June 1997).

The Commission feels that these legal questions should be analysed on two levels:

On the one hand, an analysis of the current situation of constitutional law in Bosnia and Herzegovina (hereafter "BH") is called for (*de lege lata* analysis, point 1 below); on the other hand, given the Committee of Ministers' responsibilities for this, the system of human rights protection mechanisms should be examined with a view to giving an opinion on the advisability of setting up the Court in question (*de lege ferenda* analysis, point 2 below).

The current state of constitutional law applicable in Bosnia and Herzegovina

Membership and powers of the Human Rights Court of the Federation of Bosnia and Herzegovina under the Washington Agreements and the FBH Constitution

The Human Rights Court of FBH is an institution provided for by the Constitution of the Federation, itself proposed in the Washington Agreements of 18 March 1994 reached by FBH and the Republic of Croatia.

The proposed Constitution was adopted by Parliament on 30 May 1994.

The Human Rights Court is provided for in Chapter IV, Section C, Articles 18 to 23 of that Constitution. It has 7 members: 3 judges from Bosnia and Herzegovina (one Bosnian, one Croat and one "Other") and 4 members to be appointed by the Committee of Ministers of the Council of Europe in accordance with its Resolution (93)6. The participation of the foreign judges is a transitional arrangement (Chapter IX, Article 9 of the Constitution).

The Court's competence covers any question concerning a constitutional or other legal provision relating to human rights or fundamental freedoms or to any of the instruments listed in the Annex to the Constitution of the Federation of Bosnia and Herzegovina. After having exhausted the remedies before the other courts of the Federation, one may appeal to the HR Court on the basis of any question within its competence. An appeal may also be taken to the court if proceedings are pending for an unduly long time in any other court of the Federation or any Canton. The Human Rights Court may also, on request, give binding opinions for the Constitutional Court, the Supreme Court or a cantonal court on matters falling within its competence. The decision of the Court shall be final and binding.

The effects of the Dayton Agreements

The first question asked concerns the effects of the Dayton Agreements on the arrangements for the Washington Agreements. In other words, questions should be asked about whether the Dayton Agreements, coming after the Washington Agreements and the adoption of the Federation's Constitution resulted, through the setting up of the Human Rights Commission (Annex 6 to the Dayton Agreements), in the formal revocation of the provisions relating to the Human Rights Court of FBH.

This does not seem to be the case from a legal point of view.

The Dayton Agreements and the Washington Agreements do not involve the same parties. The Dayton framework agreement was signed by the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia and Annex 6 by the Republic of Bosnia and Herzegovina, FBH and the Republika Srpska, whereas the Washington Agreements were signed by FBH and the Republic of Croatia.

Similarly, Annex 6 is intended to set up an institution to monitor the respect for human rights throughout the state of Bosnia and Herzegovina, whereas the Federation's constitution apparently only covers one entity of that state (even though the original aim of the Washington Agreements was to create a Federation covering the whole territory of Bosnia and Herzegovina).

Since the two international Agreements neither have the same parties nor govern the same subject, it cannot be considered that the Dayton Agreements have affected the legal validity of the provisions relating to the Human Rights Court of FBH.

The appointment of "foreign" judges by the Committee of Ministers of the Council of Europe

The Human Rights Court has not yet been set up. The three national members have been appointed but the "foreign" members, necessary for setting up the institution during the initial period, have not yet been appointed by the Committee of Ministers.

The legal base of the Committee of Ministers' action calls for clarification.

The Washington Agreements (between FBH and Croatia) and the FBH constitution are not binding on the Council of Europe and its bodies. These texts provide the legal base foreseeing, so as to meet the requirements of domestic law, action by an international institution for the setting up of the Court.

The Committee of Ministers' action on this is therefore not governed as such by the Agreements or the Constitution but is exclusively founded on its own Resolution (93)6 to which, furthermore, the Washington Agreements and the Federation Constitution refer. Resolution (93)6 states in Article 1 that:

"At the request of a European non-member state, the Committee of Ministers may, after consultation with the European Court and Commission of Human Rights, appoint specially qualified persons to sit on a court or other body responsible for the control of respect for human rights set up by this state within its internal legal system"

By acting under this provision the Committee of Ministers must, when necessary, appoint foreign judges. It should be emphasised, in this respect, that the condition for carrying out this appointment is that a request has been made to it by a European non-member state, ie Bosnia and Herzegovina, and not an Entity. On the other hand, it is not at all necessary for the body responsible for the control of human rights to be at the top of the state's pyramid of legal bodies; it might well be the legal body of a federate entity.

Resolution (93)6 also states that the Committee of Ministers "may" appoint foreign judges to sit on a body responsible for the control of respect for human rights in a European non-member state. This allows the Committee of Ministers a certain amount of leeway in assessing the advisability of its actions. This leeway will be greater when, as in this case, it is requested to act to set up a second control body in the same state. It should, therefore, not be overlooked that the Committee of Ministers has already set up the Human Rights Chamber in BH, as provided for in Annex 6 to the Dayton Agreements, in accordance with Resolution (93)6. In these circumstances, the Committee of Ministers could decide against proceeding with the appointment requested if it believes that the aims of Resolution (93)6 are not served by setting up a second control body. The observations of the Venice Commission contained in its **opinion on the constitutional situation in Bosnia and Herzegovina with particular regard to human rights protection mechanisms** (opinion adopted at the Commission's 29th meeting 15-16 November 1996, CDL-INF (96) 9) might be taken into consideration in this case.

Problems linked to the functioning of the Human Rights Court of the Federation possibly affecting the efficiency of the human rights protection mechanism in Bosnia and Herzegovina

At the Parliamentary Assembly's request the Venice Commission has examined the constitutional situation in Bosnia and Herzegovina with regard to the human rights protection mechanism. This examination has revealed a certain number of problems linked, in particular, to the proliferation of control bodies.

In its opinion on the constitutional situation in Bosnia and Herzegovina with particular regard to human rights protection mechanisms, the Commission found,

"that the human rights protection mechanism foreseen in the legal order of Bosnia and Herzegovina presents an unusual degree of complexity. The co-existence of jurisdictional bodies entrusted with the specific task of protecting human rights and of tribunals expected to deal with allegations of violations of human rights in the context of the cases brought before them inevitably creates a certain degree of duplication.

...

However, duplication should be avoided as it may be detrimental to the effectiveness of human rights protection. In particular, it may be advisable to proceed with amendments of the entities' Constitutions where the creation of specific human rights bodies may be unnecessary from a legal point of view".

With reference in particular to the Human Rights Court of FBH, the Commission stated that the co-existence of two human rights jurisdictional bodies (the Human Rights Court of FBH and the Human Rights Commission provided for in the Dayton Agreements) may create certain problems.

Firstly,

"the exhaustion of domestic remedies available to a citizen of FBH becomes extremely lengthy. It involves the (eventual) excessive intervention of a municipal court, a cantonal court, the Supreme Court, the Human Rights Court (with a possible intervention of the Constitutional Court of FBH) and then of the Ombudsman of FBH before reaching, finally, the Constitutional Court of BH or the Human Rights chamber (first a Panel and then the Plenum). This long process of exhaustion of domestic remedies may also discourage citizens from FBH from applying to the European Commission in Strasbourg when BH becomes party to the European Convention on Human Rights."

In addition,

"it cannot be excluded that possible discrepancies in the case-law of the Human Rights Court of FBH and of the Human Rights chamber of BH (both composed of a majority of international judges) might affect the authority of those courts".

Obviously these problems, linked to the establishment and the functioning of the Human Rights Court of FBH, jeopardise the efficiency of the human rights control mechanism both in that entity and in BH as a whole.

As a possible solution to these problems, the Venice Commission has recommended amending the FBH Constitution so as to do away with the Human Rights Court. The lacunae which might result from such an amendment in the judicial system of FBH would easily be covered by granting human rights responsibilities to the Constitutional Court and/or the Supreme Court of the Federation and by the possibility offered to any individual, including the Ombudsmen of FBH, to refer cases to the Human Rights Chamber.

In addition, this solution would simplify the judicial system of human rights protection in FBH and, consequently, shorten the legal avenues of exhaustion of domestic remedies.

It would also lead to the creation of a coherent human rights case-law equally applicable to both entities by a single international body, ie the Human Rights Commission.

The Commission finds that this solution is compatible with the international Agreements which are the basis of the judicial system of BH, in that the Washington Agreements, which includes the Constitution of BH and foresees the creation of the Human Rights Court, has been politically "superseded" by the Dayton Agreements.

The Commission reiterates its position that, bearing in mind the mechanism set up by Annex 6 to the Dayton Agreements, the creation of the Federation's Human Rights Court now seems superfluous and runs the risk of slowing down proceedings.

However, given the possible expectations raised among the local people by the prospect of human rights protection mechanisms, political imperatives might well require the

establishment of the Human Rights Court of FBH. The Commission has neither the information nor the competence to give an opinion on this political aspect of the question.

However, if this court were to be established, work would have to be undertaken immediately in order to bring about, as quickly as possible, a simplification of the system, for example by means of merging this court with the Supreme Court or the Constitutional Court of the Federation. On this score, the Commission recalls that a similar simplification was carried out successfully in Croatia, where the provisional Human Rights Court (foreseen by the Croatian Constitutional Act of 1991 on human rights and minorities, also based on Resolution (93)6 of the Committee of Ministers) was replaced by a mechanism enabling the Croatian Constitutional Court to turn to international advisers taking part in its proceedings. This simplification, for which the Commission would be willing to lend any assistance to interested parties, would contribute to the efficiency of human rights protection mechanisms, a cornerstone of the peace agreements in Bosnia and Herzegovina.

3. Conclusions

The Commission finds

- that the provisions of the FBH Constitution concerning the Human Rights Court of FBH have not been formally revoked by the Dayton Agreements;

- that the action requested of the Committee of Ministers of the Council of Europe is not governed by the Washington Agreements or by the FBH Constitution but exclusively by Resolution (93)6;

- that, in accordance with that Resolution, the request for setting up a control body, in the meaning of Article 1 of that Resolution, must come from a non-member state and not by an entity of that state;

- that the Committee of Ministers may decide as to the advisability of the appointment of international judges to the Human Rights Court of FBH, in accordance with Resolution (93)6;

- that the Committee of Ministers must take into consideration the fact that it has already set up a control body, in the meaning of Article 1 of Resolution (93)6, in that same state, and assess to what extent the setting up of a second body, ie the Human Rights Court of FBH, serves the aims of that Resolution; in this respect, it will be for the Committee of Ministers of the Council of Europe to take into account the considerations set out above, together with any other political consideration which the state empowered to make that request, ie Bosnia and Herzegovina, might convey to it and on which the Commission, by its nature, has no competence to give an opinion;

- that, if the Human Rights Court of FBH were to be established, work would have to be undertaken immediately to bring about, as quickly as possible, a simplification of the system of legal human rights protection and, for example, the merger of that court with the Supreme Court or the Constitutional Court of the Federation might be envisaged.

iv. Opinion on the interpretation of certain provisions of the Constitution of the Republika Srpska adopted by the Commission at its 32nd Plenary Meeting

On 8 July 1997, the Office of the High Representative in Bosnia and Herzegovina sent a letter to the European Commission for Democracy through Law asking the following questions:

1. Does the President of the Republika Srpska have the power to dissolve the National Assembly without first having obtained the opinion of the Prime Minister and the President of the Assembly?

2. Does the President of the Republika Srpska have the authority to appoint a government following dissolution of the National Assembly on the basis of Article 94 of the Constitution?

3. Can the Government, pursuant to Article 114 of the Constitution, suspend the decision taken by the President of the Republika Srpska to dissolve the National Assembly?

The rapporteurs appointed, Mr G. Malinverni (Switzerland) and Mr C. Economides (Greece), assisted by Mr C. Giakoumopoulos (Deputy Secretary of the Venice Commission), held a meeting in Geneva on 10 July 1997.

On the basis of the information available to them and within the very short space of time at their disposal, the rapporteurs gave the following opinion which was approved by the Commission at its 32nd plenary meeting.

Question 1

Under the terms of Amendment LX to Article 72 of the Constitution, the President of the Republic may dissolve the National Assembly after consulting the Prime Minister and the President of the National Assembly.

The wording of this provision states that the President is required to seek the opinion of the Prime Minister and the President of the Parliament, but that such an opinion is purely advisory. The decision to dissolve Parliament falls to the President of the Republic alone. Accordingly, the position taken by the Prime Minister and the President of the Assembly is in no way binding on the President of the Republic.

In the circumstances in question, the President of the Republic, in accordance with the aforementioned provision, requested the opinion of the Prime Minister and the President of the Assembly. The latter, however, did not reply within the requested time. Nevertheless, such a situation need not prevent the President from lawfully taking her decision, given that the opinion of the Prime Minister and the President of the Assembly is not binding. To make the President's decision subject to receiving the opinion of the Prime Minister and the President of the Assembly would serve to halt the dissolution process and render the provision ineffective.

The deadline given for their opinion may appear tight. However, the Constitution does not specify any deadline and decisions of this importance must often be taken urgently. In any case, a deadline of some 20 hours seems sufficient to enable the two persons consulted to express their opinion or at least ask for more time, which they did not do.

Question 2

In accordance with Amendment XXXIX as amended by Amendment LX, the Government's mandate ends upon the dissolution of Parliament.

However, pursuant to Article 94 para. 9, a government whose mandate has been revoked following the dissolution of the National Parliament shall remain in office until the appointment of a new government.

Article 94 para. 10, which the President claims allows her to form a new government, at this point cannot be regarded as a constitutional basis for this purpose. This provision clearly stipulates that the President must propose a candidate for the position of Prime Minister. The very fact that the President may only "propose a candidate" implies that this nomination must be approved by another organ of the state. It is clear from this provision that the candidate must secure the confidence of Parliament.

Consequently, this provision cannot be applied if there is no parliament, which is the case at present, since the previous parliament has been dissolved and the new parliament has not yet been elected.

Clearly, Article 94 para. 10 is not intended to apply until after the elections of 1 September 1997. Until then, the present government must remain in office to deal with routine business, as specified moreover in Article 94 para. 9.

Question 3

Pursuant to Article 114 of the Constitution, the Government does not have the authority to suspend the decision taken by the President of the Republic to dissolve Parliament. In fact, Article 114 refers exclusively to the *"enforcement of a regulation, general or specific enactment"*, ie legislative or administrative acts. Clearly, the decision to dissolve Parliament, which is of an obvious political nature, does not fit into the category of acts referred to in Article 114.

Furthermore, the dissolution of Parliament requires no intervention whatsoever by the Government. As an executive organ, the Government should not intervene with regard to a presidential act concerning the Parliament in any way other than that provided for in Amendment LX of the Constitution (opinion of the Prime Minister at the request of the President).

Accordingly, the Government cannot rely on Article 114 of the Constitution to suspend the President's decision to dissolve Parliament.

v. Memorandum on the revision of the Croatian Constitutional law on Human Rights and Freedoms and the rights of national minorities adopted by the Commission at its 31st Plenary Meeting

The Commission adopted the following Memorandum, and decided to forward it to the Croatian authorities :

"This Memorandum summarises the conclusions and proposals of the Group of Rapporteurs following their meetings with the Croat Commission for the Revision of the Constitutional Law, chaired by Mr eks, Vice-President of the Sabor, on 26 March and 19-20 May 1997 in Zagreb and with representatives of minorities.

1. The "Forum of Minorities"

The meetings revealed the need for regular consultation of the authorities with the representatives of minorities or communities. Such a consultation can easily be achieved within the framework of an institution (the "Forum of Minorities"), comprising representatives of the minorities, which could meet regularly and act as an informal consultative body for the authorities in the field of minority policies.

The Commission welcomes the initiative of the Croat authorities to convoke already at this early stage and on an ad hoc basis this "Forum". It further finds that the existence and functioning of this body should be provided by law, for instance, by the Revised Constitutional Law.

Inclusion of elements of the *"Letter of intent of the Government of the Republic of Croatia on the peaceful reintegration of the region under transitional administration"* in the Revised Constitutional Law

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". The Commission is of the opinion that the Revised Constitutional Law should

set out the principle of representation of the Serb ethnic community notably from the region under transitional administration in State bodies and bodies of local self Government acting in the region;

set out the framework for the functioning and competence of the "Joint Council of Municipalities" and of the "Council of the Serb Ethnic Community", 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;

guarantee educational and cultural autonomy;

set out the principle of proportionate representation of the Serb ethnic community and other national minorities in the Parliament;

Constitutional support for the participation of international advisers in the work of the Constitutional Court

In substitution for the Provisional Court of Human Rights provided for in Article 60 of the Constitutional Law of 1991 on Human Rights and Rights of National or Ethnic Communities or Minorities, the Commission has suggested that international advisers participate, on a transitional basis, in the work of the Constitutional Court when dealing with minority rights. This suggestion was successfully followed by the Constitutional Court. The Commission would welcome it if the current praxis could find a legal support, for instance, in the Revised Constitutional Law."

vi. Report on co-operation with Croatia adopted by the Commission at its 30th Plenary Meeting

I. Introduction

In a letter dated 7 November 1996, the Chairman of the Parliamentary Assembly Committee on Legal Affairs and Human Rights requested the Venice Commission to provide information on the state of progress of its co-operation with the Croatian authorities concerning the carrying into effect of the recommendations contained in the Commission's report on the implementation of the Constitutional Law on Human Rights and Freedoms and on the Rights of Ethnic Communities or Minorities in the Republic of Croatia (CDL (96) 26)). At its 29th plenary meeting (Venice 15-16 November 1996), the Commission requested Mr G Malinverni to prepare a draft report on this matter for examination and adoption.

This report was adopted at the 30th meeting of the Commission (Venice, 7-8 March 1997), on the basis of the draft prepared by Mr Malinverni .

The Commission's recommendations referred to in the Assembly's request are recapitulated (Chapter 1), followed by a description of the various phases in the joint efforts by the Republic of Croatia and the Commission to apply these recommendations (Chapter 2) and, lastly, by an outline of the prospects for co-operation in the near future (Chapter 3).

Chapter 1: The recommendations of the Venice Commission

In connection with Croatia's application for accession to the Council of Europe, the Committee on Legal Affairs and Human Rights of the Council of Europe Parliamentary Assembly requested an opinion from the Venice Commission on 16 February 1996 concerning the constitutional situation in Croatia, more specifically the application of the Constitutional Law on Human Rights and Freedoms and on the Rights of Ethnic Communities or Minorities in the Republic of Croatia, and the machinery for the protection of human rights.

At its 26th meeting (1-2 March 1996), the Venice Commission set up a working group and appointed Messrs Matscher, Malinverni and Nicolas as rapporteurs. The latter visited Zagreb on 14-16 March 1996 and were able to consult representatives of the Croatian authorities and of the minority groups.

In their report, they focused their comments on the question of the suspension of several provisions of the Constitutional Law of 1991. The suspended clauses related to matters such as the special status granted to districts where members of ethnic and national communities represent a majority of the population. The right of representation and participation in public institutions by communities and minorities which make up more than 8% of the population in accordance with the census of 1991, together with the international supervision of the implementation of this Law and the legal protection of the rights embodied therein (including the question of the provisional Court of Human Rights in Croatia, provided for in Article 60) were also affected by this suspension. Having regard to the constitutional situation in Croatia and to the Constitutional Law of 1991 on Human Rights and the Rights of Minorities and their Judicial Protection, the rapporteurs recommended:

"- that the suspended provisions of the 1991 Constitutional Law 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);

- in order to subject the protection of minorities to a certain degree of international supervision, that an enlargement of the Constitutional Court be provided for such as to allow it, when deciding upon cases concerning the rights of minorities, to comprise international judges. Such a proposal may be considered to be an adequate confidence-building measure;

- that a large information campaign for the promotion of the legal and procedural possibilities of protection of human rights and the rights of minorities be launched, in particular through the Croatian Human Rights Institute and with the help of the Council of Europe."

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.

Chapter 2: Implementation of the recommendations

2.1 Revision of the Constitutional Law

The suspended provisions of the 1991 Law conferred specific rights of representation and participation in public institutions (parliament, government and supreme judicial bodies) to all minorities representing 8% of the population; these provisions were designed mainly to protect the largest minorities in Croatia, particularly the Serb minority, 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 affected by these provisions. All the provisions relating to the rights of minorities amounting to at least 8% of the population have been suspended. This also applies to provisions granting special status to districts with a Serb majority. 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 Commission expressed the view (which it now reiterates) 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.

At the meeting of the Commission working group (comprising Messrs Matscher, La Pergola, Russell, Nicolas and Nick) attended by representatives of the Croatian authorities and held in Paris on 20-21 June 1996, the Croatian authorities announced the setting-up of a group to study the revision of the Constitutional Law under consideration. They also announced their intention of inviting members of the Venice Commission to take part in the work of this group.

On 10 October 1996, the Government of Croatian Republic created the study group to examine and propose the revision of the Constitutional Law. The membership of this group is as follows:

- Mr Vladimir eks, Vice-President of the Chamber of Deputies, Commission Chairman,

- Ms Ljerka Mintas-Hodak, Deputy Prime Minister,

- Mr Davorin Mlakar, Minister for Administration,

- Mr Miroslav Separovic, Minister of Justice,

- Mr Marijan Prus, Director of the Governmental Bureau for Legislation,

Mr Jaksa Mulja_i_, Assistant Minister, Ministry of Foreign Affairs,

- Mr Smiljko Sokol, member of parliament,

- Mr Branko Smerdel, Professor at the Zagreb Faculty of Law.

In a letter dated 16 October 1996, the Croatian authorities announced the creation of the study group to revise the Constitutional Law and requested the Council of Europe's assistance.

At its 29th plenary meeting (Venice, 15-16 November 1996), the Venice Commission learned of these developments and appointed the following members to take part in the proceedings of the above-mentioned Croatian group: Messrs Gérard Batliner, (Liechtenstein), Jan Helgesen (Norway), Godert Maas Geesteranus (Netherlands), Franz Matscher (Austria), Ergun Özbudun (Turkey), Ms Hanna Suchocka (Poland). The Commission Secretariat informed the Croatian authorities accordingly on 3 December 1996, requesting them to send details for the timetable of meetings of the study group and proposals regarding a first meeting between the group and members of the Venice Commission.

At the time of adopting this report, the Venice Commission had not yet received details of the dates of the meetings of the study group to revise the Constitutional Law.

2.2 Participation of international advisers in the work of the Constitutional Court

In their report, the Venice Commission rapporteurs suggested that, when taking decisions on matters relating to minority rights, the Constitutional Court could sit with an enlarged membership. For considering such cases, the Constitutional Court would consist of Croatian constitutional judges assisted provisionally by a number of international judges; with this enlarged membership, the Constitutional Court would deal exclusively with cases relating to alleged violations of minority rights.

At the 27th plenary meeting of the Commission (Venice, 17-18 May 1996), the representatives of Croatia announced that, owing to the difficulties entailed and the time necessary for a constitutional amendment of the kind proposed by the rapporteurs, it would be preferable to appoint international advisers or advisers, rather than international judges to participate in the deliberations of the Court, a measure which would be possible under the Court's rules of procedure which authorise the consultation of experts. The Venice Commission found this proposal fully compatible with the rapporteurs' conclusions and instructed the latter to continue their efforts, in conjunction with the Croatian authorities, to study the technical aspects of this proposal.

At successive meetings to discuss the participation of international advisers in the work of the Constitutional Court (Paris, 20-21 June 1996; Venice, 12 September 1996), the Venice Commission and the representatives of the Croatian authorities reached agreement on the legal basis for participation by international advisers, the arrangements for their appointment, the qualifications they should possess and the publication of their opinions. In order to ensure the independence of these advisers, it was suggested that their participation in the deliberations of the Croatian Constitutional Court should be financed by the Council of Europe (see Appendix I).

On 12 September 1996, the Croatian authorities submitted to the Venice Commission draft rules of procedure for the participation of international advisers in the deliberations of the Constitutional Court. After studying this text, the Commission concluded at its 28th plenary meeting (Venice, 13-14 September 1996):

that the participation of international advisers in the work of the Constitutional Court should be implemented through the designation by the Committee of Ministers of the Council of Europe of two advisers and two or three substitutes, chosen from a list proposed by the President of the Croatian Constitutional Court and the President of the Venice Commission; that the said advisers should be authorised to participate in the deliberations of the Constitutional Court, without the right to vote; that the Court decision should mention their participation; and that their opinions should be published;

that the necessary steps should be taken to organise the proposed participation of international advisers in the near future;

that the participation by international advisers should be regarded as a provisional measure; in principle, it should last until ratification by Croatia of the European Convention on Human Rights, but should not extend beyond 1999; the possibility should be considered of extending the advisers' term of office on the expiry of the aforementioned period.

On 22 October 1996, in accordance with Rule 21, paragraph 1, sub-paragraph 4 of its Rules of Procedure, the Constitutional Court took the decision approving participation by international advisers in the proceedings of the said court (see Appendix II).

This decision was communicated to the Venice Commission on 17 January 1997.

In accordance with the decision by the Constitutional Court, which complies with the terms agreed between the representatives of the Croatian authorities and the Venice Commission at the latter's 28th plenary meeting, the Committee of Ministers will be called upon to appoint two advisers and three substitutes drawn from a list prepared by the Croatian Constitutional Court and the Venice Commission.

Costs pertaining to the translation of documents, interpretation during hearings and the publication of advisers' opinions (in the Official Gazette simultaneously with the Court's decision) are to be borne by the Constitutional Court. On the other hand, other costs relating to participation by the advisers (travel and subsistence and other allowances) are to be borne by the Council of Europe.

At its 30th plenary meeting (Venice, 7-8 March 1997), the Commission, in consultation with the Croatian Constitutional Court, drew up the list of five persons.

This list was submitted to the Committee of Ministers which is responsible for appointing the two advisers to the Constitutional Court and their three substitutes.

The Commission understands that Article 5, para 2 of the decision of the Constitutional Court will be interpreted and implemented in such a way as to allow the international advisers to attend not only the hearing but also the deliberations of the Constitutional Court as agreed between the representatives of the Croatian authorities and the Commission at its 28th plenary meeting.

The Commission also understands that the necessity or opportunity to prolong the mandate of the international advisers will be considered on its expiry, i.e. at the time of the ratification by Croatia of the European Convention on Human Rights or at the end of 1999 (Article 9 of the decision of the Constitutional Court), in the light of the experience acquired, as agreed at the abovementioned meeting.

Information campaign on possibilities for protecting human rights and minority rights in Croatia

In order to restore confidence among the minority populations concerned, the Venice Commission had suggested launching a vast information campaign on human rights and minority rights.

This proposal met with the approval of the Croatian authorities.

At the 28th plenary meeting of the Commission, the Croatian delegation announced that a translation of the European Convention on Human Rights had been widely distributed throughout the population. The Commission welcomed this initiative, while stressing that the campaign should also cover the legal and procedural possibilities for protecting human rights and minority rights available under Croatian domestic law.

Since January 1997, the Venice Commission has been preparing a brochure describing the legal means for securing the protection of human rights and minority rights in Croatia. This publication could be distributed among the population, including those persons currently placed under United Nations administration.

The Commission considers this to be an on-going activity.

Chapter 3: Prospects for co-operation in the near future

Although the efforts already made give cause for considerable satisfaction, co-operation should undoubtedly be intensified in the near future.

The Commission hopes that the Croatian commission responsible for **revising the Constitutional Law** will begin operating as soon as possible, that it will make rapid progress and that the specifically nominated members of the Venice Commission will soon be invited to participate. The Commission had already noted the importance of the proposed revision and the undoubtful disincentive resulting from the suspension of certain provisions of the Constitutional Law for members of minorities. Any prolongation of the suspension of the constitutional guarantees, which by the same token would prolong uncertainty regarding the legal system to be applied in the long term to minorities, would put the latter at a disadvantage. The Commission recalls that, in its report adopted on 17-18 May 1996, it expressed the wish that the Constitutional Law should be revised as soon as possible. It notes that several months have since elapsed.

On the other hand, the Commission can only welcome the adoption of the rules concerning the **participation of international advisers in the deliberations of the Constitutional Court.** Though it has proved possible, thanks to the efficiency and spirit of co-operation of the Constitutional Court, to devise a technical arrangement in a relatively short space of time, its application is now a matter of great urgency.

With regard to the **campaign on the means of protecting human rights**, activities should be launched in close collaboration between the Croatian authorities and the Council of Europe. The brochure which the Venice Commission is preparing on the protection of human rights and minority rights in Croatia, forms part of this exercise.

Conclusions

The Commission is satisfied with the co-operation established with the Republic of Croatia which has already produced a number of commendable results. This co-operation, which testifies to Croatia's attachment to the values on which present-day Europe is founded, would not have been possible without the expertise and efficiency of the delegation of the Croatian Republic at the successive meetings of the Commission and without the unstinting collaboration of the Croatian Constitutional Court.

The Commission trusts that this co-operation will intensify in the coming months and will begin to produce practical results in the field of human rights and minority rights.

APPENDIX I

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

Meeting of the Working Group on the Implementation of the Croatian Constitutional Law on the Protection of Human and Minority Rights

Paris, 20-21 June 1996

MEMORANDUM

Introduction:

At the request of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly, Mr Mattschas, Mr Malinverni and Mr Nicolas went to Zagreb from 14 to 16 March 1996 and drew up a report on the implementation of the Constitutional Law on human rights and freedoms and on the rights of national and ethnic communities and minorities in the Republic of Croatia.

As part of the procedure for joining the Council of Europe, Croatia officially undertook to implement the recommendations resulting from the opinion of the European Commission for Democracy through Law and in particular to co-operate with the Council of Europe in the implementation of the Constitutional Law (Opinion No 195 (1996) of the Parliamentary Assembly of the Council of Europe on Croatia's request for membership of the Council of Europe, paragraph 9 (vii); Resolution (96) 31 of the Committee of Ministers of the Council of Europe).

The report on the implementation of the Croatian Constitutional Law adopted at the 27th plenary meeting of the Venice Commission recommended, inter alia:

that the suspended provisions of the Constitutional Law on the protection of human rights and the rights of minorities be revised as soon as possible;

that an enlargement of the Constitutional Court be provided for in order to subject the protection of minorities to a certain degree of international supervision.

At its 27th plenary meeting, the Venice Commission instructed its Rapporteurs to pursue their work in close cooperation with the representatives of the Republic of Croatia. A working group made up of Mr Mattschas, Mr La Pergola, Mr Russell, Mr Nicholas and Mr Nick and representatives of the Ministry of Foreign Affairs (Dr Ivanovic , First Vice-Minister), the Ministry of Justice (Ms Imamovic , Counsellor, Department of International Relations), the Constitutional Court (Mr Mal..i , Constitutional Court judge) met on 20 and 21 June 1996 in Paris. Mr Buquicchio, Mr Giakoumopoulos and Ms Martin also participated.

Revision of the suspended provisions of the Constitutional Law on the protection of human rights and the rights of minorities: the Croatian authorities announced that a working group would be set up in the near future (before September 1996) which would be responsible for studying the revision of the constitutional law in question, taking into account the European Charter on Local Self-Government and Recommendation 1201 (1995) of the Parliamentary Assembly. Members of the Venice Commission would be invited to participate in this group's work.

Enlargement of the Constitutional Court: the working group studied the technical aspects of this matter and agreed on the points outlined below.

Legal basis of the participation of international advisers

The participation of international advisers would initially be based on the Constitutional Court's current rules of procedure, Article 21 paragraph 4 of which allows the Constitutional Court to adopt "separate acts" concerning cooperation with international organisations. Enlargement of the Constitutional Court to comprise international advisers would thus be possible without amending the Constitution or the Constitutional Law on the Constitutional Court, thereby avoiding a long and complex legislative procedure (which requires a two-thirds majority in the two chambers of Parliament) whose outcome would, moreover, be uncertain. Under Article 21 of the rules of procedure, separate acts are adopted by a simple majority of the Constitutional Court.

Subsequently, the participation of international advisers in the Constitutional Court's work might also be incorporated into the revised text of the Constitutional Law on the protection of human and minority rights.

- Appointment of international advisers

It was agreed that the Committee of Ministers of the Council of Europe would be requested to draw up a list of candidates comprising 7 persons with extensive experience in constitutional matters involving the protection of minorities.

When a case brought before the Constitutional Court required the participation of international advisers, the President of the Venice Commission and the President of the Constitutional Court would select two persons from the list who would participate in the Croatian Constitutional Court's work on the case in question.

Alternatively, international advisers could be called on to participate in accordance with a rotation system.

The term of office of international advisers could provisionally last to the end of 1999 and would be renewable.

International advisers would benefit from privileges and immunities similar to those of members of international courts, on the basis of an agreement to be made between the Council of Europe and Croatia. A draft agreement would be drawn up based on the second, fourth and sixth protocols to the General Agreement on Privileges and Immunities of the Council of Europe.

- Powers of international advisers

The participation of international advisers would be solicited as follows in cases concerning minority rights brought before the Constitutional Court: automatically in cases of alleged violation of a right guaranteed by the Constitution, the Constitutional Law on the rights of minorities or an international instrument for the protection of rights of minorities; and by a decision of the President of the Constitutional Court in any case relating to minorities or members of minorities.

According to information provided by the Constitutional Court, of the 107 constitutional appeals made between 1991 and 1996 which were accepted by the Court as falling within its sphere of competence, 74 were brought by members of minorities. It could thus be anticipated that international advisers would be called on several times per year.

The Constitutional Court would provide the two international advisers with the main elements of the case file in one of the two official languages of the Council of Europe.

The advisers would submit a provisional written opinion within a maximum period of three months so as not to delay the procedure.

The international advisers would participate in any debates and deliberations of the Court. Interpreters would be provided by the Croatian Constitutional Court.

Constitutional Court judgments would mention the participation of international advisers.

Publication of provisional and final opinions of international advisers

Provisional opinions would be made public at the request of international advisers.

It was also agreed that the final opinion of international advisers would be published. The Croatian Constitutional Court would be in charge of publication under the following conditions: any dissenting opinion must be published; concordant opinions would be published at the request of the international advisers.

The publications of the Croatian Constitutional Court could constitute a means of circulating the provisional opinions of international advisers.

The Croatian authorities would be invited to propose any other publication in order to increase the possibilities of access by the public and professionals to the views of international advisers.

Provisional and final opinions of international advisers should be published in their original language and in translation as soon as possible after judgment has been delivered by the Constitutional Court; final opinions should in principle be concomitant with the publication of the judgment in the Croatian Official Gazette (*Narodne novine*).

Financing

The participation of international advisers in the Croatian Constitutional Court's work should, to help ensure their independence, be financed by the Council of Europe.

* * *

This memorandum of the Rapporteurs of the Venice Commission on the technical aspects of enlargement of the Constitutional Court will be sent to the Constitutional Court so that it can prepare the necessary act on the basis of the working group's proposals.

The participation of international advisers in the Constitutional Court's deliberations should thus be possible in the very near future.

APPENDIX II

UNOFFICIAL TRANSLATION

In accordance with Rule 21, § 1, sub-paragraph 4, of the Rules of Procedure of the Constitutional Court of the Republic of Croatia, the Constitutional Court, at its sitting on 22.10.1996, issued the following:

DECISION

on the participation of international advisers in proceedings concerning the protection of the rights of national minorities conducted within the Constitutional Court of the Republic of Croatia

Article 1

The international advisers will participate in the work of the Constitutional Court in cases involving the protection of the constitutional rights of national minorities and persons belonging to a national minority (herein after: minority rights), brought before the Court by virtue of a constitutional action in accordance with Section 28 of the Act on the Constitutional Court of the Republic of Croatia. The arrangements and conditions for participation by international advisers are specified in this Decision.

Article 2

The international advisers shall participate in all proceedings concerning the protection of minority rights in which the applicant refers directly to the infringement of his constitutional rights under Article 15 of the Constitution of the Republic of Croatia, or indirectly by reference to the infringement of minority rights specified in the Constitutional Act, in international treaties. Article 134 of the Constitution of the Republic of Croatia or other legal provisions.

Article 3

At the invitation of the Constitutional Court, the international advisers shall participate in other proceedings in which a person belonging to a minority alleges the breach of other constitutional rights and claims that the infringement has been committed on account of his or her membership of a minority.

Article 4

In the cases mentioned in Articles 2 and 3 of this Decision, the Constitutional Court shall provide the international advisers with the main contents of the case file translated into one of the two official languages of the Council of Europe (English or French).

Article 5

Once the Court has decided that the international advisers should participate in a case, the Court shall require the following from the international advisers:

1. The drafting of a preliminary written opinion and its transmission to the Constitutional Court at the latest three months after receipt of the case file. This preliminary opinion will be published if the international adviser so requests.

2. Participation at the consultative hearing which is compulsory for all proceedings according to Article 44 of the Rules of Procedure of the Constitutional Court, and during which the Court shall provide translation or interpretation into one of the official languages of the Council of Europe.

3. Participation at the other hearings connected with the case, with the exception of the sitting where the voting and judgment take place.

4. The communication and publication of the final opinion following the Court's decision. This is compulsory if the opinion differs from the decision, or is provided at the advisers' request in the event of an opinion which complies with the decision but not with the reasons for the decision.

Article 6

The Court shall make arrangements for the opinion mentioned in Article 5 of this Decision to appear in a publication accessible to the public and in the language in which it was drafted, accompanied by a translation into Croatian.

The final opinion shall be published simultaneously with the publication of the Court's decision in the Official Gazette.

Article 7

The two international advisers and three substitutes are nominated by the Committee of Ministers of the Council of Europe on the basis of a list proposed jointly by the Constitutional Court and the Venice Commission.

For each set of proceedings to which this Decision relates, two advisers will be jointly nominated by the President of the Constitutional Court and the Chairman of the Venice Commission.

Article 8

The costs of translating the documents relating to the proceedings and the opinion of the advisers, together with interpretation during consultative hearings and other hearings, will be borne by the Constitutional Court.

Article 9

This decision shall enter into force on the date of its adoption and shall become invalid on the date on which the Parliament of the Republic of Croatia ratifies the European Convention for the Protection of Human Rights and Fundamental Freedoms, and at the latest by the end of 1999.

APPENDIX III

CO-OPERATION BETWEEN THE VENICE COMMISSION
AND THE REPUBLIC OF CROATIA -
CHRONOLOGY OF EVENTS

Request by the Committee on Legal Affairs and Human Rights for a report on the implementation of the Croatian Constitutional Law on Human Rights and the Rights of

Minorities.

Creation of a group of rapporteurs of the Venice Commission on the implementation of the said Croatian Constitutional Law (Messrs Malinverni, Matscher and Nicolas).

Visit by the group of rapporteurs to Croatia.

Preparation of the said report.

Parliamentary Assembly Opinion No. 195 (1996) on Croatia's request for membership of the Council of Europe (commitment by Croatia to implement the Venice Commission's recommendations).

Examination and adoption of the rapporteurs' report by the Venice Commission at its 27th plenary meeting (document CDL (96) 26).

Meeting in Paris between the Commission working group (Messrs Matscher, La Pergola, Nick, Nicolas, Russell) and the Croatian delegation. Examination of questions concerning the participation of international advisers in the deliberations of the Constitutional Court.

Committee of Ministers Resolution (96) 31: invitation to Croatia to become a member of the Council of Europe.

Meeting in Venice of the Commission working group and the Croatian delegation. Examination of the draft rules adopted by the Constitutional Court on the participation of international advisers in the deliberations of the Constitutional Court.

20th plenary meeting of the Commission. Examination of the state of co-operation with Croatia in the presence of the delegation of the Republic of Croatia.

Creation of the commission to revise the Croatian Constitutional Law on Human Rights and Minority Rights.

The Council of Europe is invited to assist the Commission responsible for revising the Croatian Constitutional Law on Human Rights and Minority Rights.

Adoption by the Constitutional Court of the rules on the participation of international advisers.

29th plenary meeting of the Venice Commission. Messrs Batliner, Helgesen, Maus Geesteranus, Matscher, Öhrdudan and Ms Suchocka nominated to participate in the work of the Commission to revise the Constitutional Law.

Adoption of the list of candidates to act as international advisers to the Constitutional Court.

vii. Opinion on Constitution of Ukraine adopted by the Commission at its 30th Plenary Meeting on the basis of the contributions submitted by: Messrs S. Bartole (Italy), G. Batliner (Liechtenstein), Mr J. Kliu_ka (Slovakia), Ms A. Milenkova (Bulgaria), Messrs H. Steinberger (Germany) and A. Delcamp (CLRAE)

Introduction

By letter dated 10 July 1996 the Chairperson of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly, Mr Hilgard, asked the Commission to give an assessment of the new Constitution of Ukraine from the point of view of human rights, the rule of law, parliamentary democracy and the rights of minorities.

It is recalled that the Commission adopted at its 27th meeting on 17-18 May 1996 an opinion on the draft Constitution of Ukraine (CDL-INF(96)6) and that the Constitution finally adopted is based on the draft already examined by the Commission on this occasion. Since the text of the Constitution has now been finalised, not all comments made in the previous opinion are repeated in the present text. The present opinion emphasises those issues which seem relevant for the further development of the constitutional structure of Ukraine and with respect to the monitoring carried out by the Parliamentary Assembly of the Council of Europe.

The opinion is based on written contributions from Mr Bartole (Italy), Mr Batliner (Liechtenstein), Mr Kliu_ka (Slovakia), Ms Milenkova (Bulgaria) and Mr Steinberger (Germany), as well as from Mr Delcamp (Congress of Local and Regional Authorities of Europe). Previous comments submitted with respect to the drafts by Mr Aguiar de Luque (Spain), Ms Suchocka (Poland) and Mr Svoboda (Czech Republic) have also been taken into account, as well as discussions during the 28th and 29th meeting of the Commission.

Chapter I
General Principles

This chapter deserves a positive assessment and has been improved further with respect to previous drafts. Like the rest of the Constitution, this chapter reflects Ukraine's determination to be a democratic, social and law-based state (see in particular Article 1).

The important elements of the rule of law have found a proper expression in this chapter:

the Constitution has the highest legal force and its norms have direct effect; laws and other legal acts are adopted on its basis and have to conform to it (Article 8);

the principle of separation of powers is recognised and the bodies of the legislative, executive and judicial power exercise their authority within the limits established by the Constitution and in accordance with the laws (Article 6);

the principle of legality has found a further clear expression in Article 19:

the constitutional provisions concerning human rights are directly applied by the courts (Article 8, para. 3).

Article 9 makes ratified international treaties part of internal law. While references to customary international law and generally accepted principles of law are still missing in this article, a reference to generally acknowledged principles and norms of international law has been introduced into Article 18 concerning the foreign policy of Ukraine.

A further positive change is that Article 5, para. 2, now states that "the people exercise power directly and through bodies of state power *and bodies of local self-government*".

A criticism of drafting remains in that Article 3 still considers the human being as the highest social value and not simply the highest value.

Chapter II
Human and Citizens' Rights, Freedoms and Duties

General comments

First of all, it should be noted that the catalogue of rights protected is very complete and that it shows a willingness to protect the full scope of rights guaranteed by the European Convention on Human Rights and to ensure that these rights are implemented in practice. It is also very much appreciated that Articles 22 and 157 guarantee the protection of the essence of human rights by forbidding the abolition of human rights by way of constitutional amendment. Of particular importance are also Article 8, para. 3, and Article 55, para. 1, providing that human rights are directly applied and protected by the courts.

On the other hand, certain weaknesses pointed out in the opinion of the Commission on the draft Constitution remain, concerning in particular the lack of structure in this chapter and the use of the same wording for social, economic and environmental rights on the one hand and for fundamental freedoms on the other. Reference is made in this respect to the Commission's previous opinion.

The Commission is aware that in the former socialist countries there is a tradition of enshrining a large number of social rights in the Constitution and that the societies in these countries are strongly attached to this tradition.

On the other hand, the situation has now changed fundamentally with respect to the socialist period in Ukraine, since the country now has a Constitution which is to be applied directly by the courts and which gives to the courts the task to protect the rights set out in the Constitution. Care has therefore to be taken not to overburden the courts with tasks they cannot fulfil by treating without distinction rights which can be implemented directly by the courts and other rights which have to be implemented on the basis of parliamentary statutes and executive action. For this reason, it is unfortunate that generally the wording "everyone has the right to" is also applied to social, economic, cultural and environmental rights. In many cases, e.g. Article 47 on the right to housing and Article 49 on the right to health protection, the sentence immediately following according to which the state creates conditions for the fulfilment of this right may indicate that the right cannot be implemented directly by the courts. Other rights like the right to a sufficient standard of living (Article 48) and to a safe environment (Article 50) are however in no way qualified and therefore risk creating unrealistic expectations. If the courts prove unable to fully implement these rights, this risks additionally undermining the credibility of the constitutional provisions guaranteeing the protection of fundamental freedoms.

The possible restrictions of human rights

The Ukrainian Constitution adopts a correct approach by providing for the possible restrictions article by article and not by means of a common, necessarily vague, general clause covering without distinction all rights. The newly introduced Article 64, para. 1, according to which constitutional human and citizens' rights and freedoms cannot be restricted, except in cases envisaged by the Constitution of Ukraine, takes up a recommendation made in the Commission's opinion on the draft and closes an important gap in the protection of human rights.

Unfortunately, together with the general clause on the possible restrictions of human rights contained in the previous Article 64, para. 1, the previous paragraph 2 of the same Article containing the principle of proportionality has also been deleted. Since many of the restrictions permitted by the individual articles of the Constitution, e.g. the restrictions on freedom of thought and speech authorised by Article 34, para. 3, are quite large, it will be essential that the Ukrainian Constitutional Court interprets the various restrictions of human rights as being subject to a general principle of proportionality.

It would also have been useful to include a provision on the rights of legal persons.

Comments on specific articles

Article 27

It is regrettable that capital punishment does not seem to be abolished (no arbitrary deprivation of life instead of no deprivation of life).

Article 33

In the Commission's previous opinion, it was criticised that the draft allowed restrictions on freedom of movement for too large a catalogue of reasons. Now this catalogue has been replaced by a clause generally allowing restrictions established by law. This makes, without any limitations, the constitutional protection of the freedom of movement subject to derogations by ordinary statute.

Article 55

It is very important that Article 55, para. 2, grants the right to everybody to challenge decisions by public bodies and thus provides a constitutional basis for the judicial control of administrative authorities. It is however regrettable that no provision guaranteeing the constitutional right of access to independent and impartial tribunals also in civil and criminal matters has been added.

Article 64, para. 2

The catalogue of rights which may not be restricted in emergency situations seems unrealistically long, e.g. the references to Articles 47 and 56.

Chapter III
Elections, Referendum

This chapter merits a positive assessment. It is welcome that the text no longer contains provisions inspired by too radical a concept of direct democracy but provides for an adequate balance between representative and direct democracy.

In particular, it seems correct that Article 85, No. 2 limits the power of the Verkhovna Rada to designate an all-Ukrainian referendum to issues of altering the territory of Ukraine. Taking into account the potential instability of frontiers of the countries of the Commonwealth of Independent States and the problems of minorities inevitably resulting from the destruction of the former Soviet Union, the provision in Article 73 that the territory may be altered only by referendum seems legitimate and may constitute a supplementary guarantee for the sovereignty of the state and its territorial integrity.

The introduction of the popular initiative, as set out in Article 72, enables citizens to take part in the legislative process. It provides for an additional means of popular control of the functioning of the state organs. It is also fully appropriate that issues of taxes, the budget and amnesties are excluded from the possible scope of referenda by Article 74.

Chapter IV
Verkhovna Rada of Ukraine

General comments

The text of the Constitution as adopted differs substantially from the draft which was the subject of the previous opinion by the Commission insofar as the bicameral parliament envisaged by the draft has been replaced by a unicameral one. However, in other respects, the chapter is very similar to the previous draft and certain questionable provisions contained in earlier texts, like the requirement of a 80% quorum for the validity of parliamentary elections, have been dropped.

Article 75

The general description of the role of the Parliament given in this Article is both appropriate and concise.

Article 78

This Article is quite correctly based on the need for full-time parliamentarians. It would have been preferable to give some detail in the Constitution concerning the incompatibility of the mandate of a deputy with other activities.

Article 87

The requirement that only one third of the constitutional composition of the Verkhovna Rada may raise the issue of responsibility of the Cabinet of Ministers seems very high. The provision that such motions may not be submitted within one year of the approval of the programme of activity of the Cabinet of Ministers does not seem to be well thought through. The responsibility of the government may arise for issues which are of the highest importance although they did not appear in the programme of activity. Such debates also do not have as their only aim the removal of the government but they give an occasion for public debate of highly important issues which, for varying reasons, may not be dealt with adequately by the executive.

Article 90

The Constitution provides a sufficiently stable basis for the activities of Parliament. A procedure for self-dissolution is no longer envisaged and the President may dissolve Parliament only under very exceptional circumstances. The rule in Article 90, para. 1, that the powers of Parliament end only on the day of the opening of the first meeting of the following Parliament avoids periods of absence of a legislative body which may be abused by other bodies.

Article 92

This Article contains a list of areas to be determined exclusively by laws. While it is positive that these areas are reserved to a parliamentary statute, there is no general provision clarifying the relationship between statutes adopted by Parliament, the power of the President (on the basis of Article 106, para. 2) to issue decrees and directives mandatory for execution on the territory of Ukraine, and the power of the Cabinet of Ministers (on the basis of Article 117, para. 1) to issue resolutions and orders that are mandatory for execution.

Article 93

It seems questionable whether the right of legislative initiative should be given both to the President and the Cabinet of Ministers. The Head of State exercises very specific functions and should not be involved too closely in current political activities by submitting draft laws to the Verkhovna Rada.

It seems also questionable whether the right of legislative initiative should be granted to the National Bank which should remain outside the political field.

The explanation given for these provisions was that in Ukraine unusual measures have to be applied to overcome the economic crisis linked to the transition to a market economy (Cf. the wide-ranging power of the President to issue decrees in the economic field under Transitional Provision 4).

Article 94

The requirement of a two thirds majority of members of the Verkhovna Rada to overturn a presidential veto against legislation seems excessive.

Chapter V
The President of Ukraine

General Comments

The Constitution provides for a semi-presidential system which is in many ways similar to the French system without copying it. The President has very strong powers.

Certain questionable provisions contained in earlier drafts, such as the possibility of a vote of no-confidence in the President by popular referendum, have rightly been removed in the final text.

Comments on specific articles

Article 102

It is the task of the courts to guarantee the observance of human rights. It is therefore questionable to call the President guarantor of the observance of human and citizens' rights and freedoms.

It is however positive that the provision giving to the President the power to assist the co-ordination of the activity of the bodies of state power and their interaction with bodies of local self-government has been deleted.

Article 111

It is positive that the procedure of impeachment of the President is not only in the hands of Parliament but requires opinions by the Constitutional and Supreme Court.

Chapter VI
Cabinet of Ministers of Ukraine
Other bodies of executive power

General Comments

According to Article 113, para. 2, the Cabinet of Ministers is responsible to the President and accountable to the Verkhovna Rada. In practice dependence on the President prevails. For example, the term of office is linked to the term of office of the President and not of the Verkhovna Rada.

The Prime Minister is appointed by the President with the consent of more than one half of the constitutional composition of the Verkhovna Rada. The Constitution contains no provisions on what happens if the Verkhovna Rada does not accept the candidate proposed by the President but the President insists.

It seems appropriate that the composition of the government does not have to be approved by Parliament.

Article 118 and 119

These Articles have been vastly improved with respect to earlier drafts and the powers of the executive at the level of oblasts, districts, the cities of Kyiv and Sebastopol and at local level have been defined much more clearly. It is particularly positive that the provisions subordinating local authorities to the bodies of executive power at higher level have been deleted.

Chapter VII
Procuracy

The newly drafted chapter on the procuracy seems compatible with European standards although one might still wonder why a specific chapter of the Constitution is devoted to the procuracy.

It should however be noted that according to Transitional Provision 9 (see Chapter XV below) the procuracy continues to exercise the function of supervision over the observance and application of laws until new legislation has entered into force.

Chapter VIII
Justice

This Chapter also deserves a positive assessment.

Important principles of the rule of law appear in the text:

Article 124: justice is administered exclusively by the courts;
Article 126: independence and immunity of judges;
Article 129: independence of judges, the main principles governing proceedings.

The introduction of the High Council of Justice is also a positive step and may contribute to strengthen in practice the independence of the judiciary.

Chapter IX
Territorial structure of Ukraine

Article 132 is still rather vague and of a mere programmatic than normative character.

Chapter X
Autonomous Republic of Crimea

The text of the Chapter as adopted is more precise and coherent than the text appearing in the draft. It remains however evident that the Verkhovna Rada did not wish to give to Crimea a status comparable to a German Land or a Spanish Region. The text carefully avoids speaking about Crimean laws but only refers to "normative regulation" which has to comply not only with the Constitution of Ukraine but also with the laws of Ukraine.

Articles 137 and 138

It is positive that the text now contains a list of powers of the Autonomous Republic both in respect to normative regulation (Article 137) and to other acts (Article 138). It is however still not clear whether Crimea has a reserved sphere of competence. In principle, the power of the Verkhovna Rada of Crimea to appeal to the Constitutional Court of Ukraine should imply that there is a sphere of competence protected by the Constitution. On the other hand, Crimean normative acts have to comply not only with the Constitution but also with the laws of Ukraine. One could therefore conclude that the central authorities can legislate within the area of application of Article 137 and 138.

To avoid differences and conflicts which could destroy the Crimean autonomy, the limits of the power of central authorities to legislate in this area could be defined in three different ways:

One could say that the Crimean authorities have to respect national legislation which deals with issues which are in the national competence and do not coincide with the issues listed in Articles 137 and 138.

One could say that national legislation is competent to state the principles of law which have to be implemented by the Crimean authorities whose task is to provide for detailed regulation of the issues listed in these articles.

One could say that national legislation can deal with the issues listed in these articles when national interests are at stake.

The last alternative is the most flexible one but it could favour an enlargement of the national competence if the Constitutional Court accepts the central state's interpretation of the definition of national interests. It could imply a large scope for differences of opinion and conflicts.

Chapter XI
Local self-government

This Chapter merits a positive assessment. It has been further refined and improved with respect to previous drafts. The Commission notes that the expert of the Congress of Local and Regional Authorities of Europe, Professor Delcamp, has come to the conclusion that in general the provisions comply with the European Charter of Local Self-Government. The Constitution properly distinguishes between the original competence of local self-government and powers assigned to it. Article 7 of the Transitional Provisions provides for the transfer of powers to elected chairmen responsible before the respective councils.

Since many details are not settled by the Constitution itself, future development will largely depend on legislation.

Chapter XII
Constitutional Court of Ukraine

General comments

This chapter sets up a permanent constitutional court. This fully corresponds to the prevailing practice in the new democracies to protect the constitutionality of the new legal order by a specific, permanent and independent judicial body and can only be welcomed. The text adopted is mostly very similar to the draft previously examined by the Commission. However, the role of the Constitutional Court has been further developed by the Law on the Constitutional Court of Ukraine adopted in October.

This concerns in particular the powers of the Constitutional Court:

The text of the Constitution does not provide for a procedure of constitutional complaints by individuals for violation of their human rights but it gives to the Parliamentary Ombudsman the possibility to seize the Constitutional Court. The Law on the Constitutional Court of Ukraine introduces such a procedure on the basis of the power of the Constitutional Court to officially interpret the Constitution of Ukraine (see in particular Articles 42, 45 and 94 of the Law). The scope of these provisions seems however not entirely clear.

The text of the Constitution provides that the Supreme Court, as well as other State organs, may appeal to the Constitutional Court with a view to a decision on the conformity of laws and other legal acts with the Constitution. Article 83 of the Law provides that if, in the course of examination of cases under general court procedure, a dispute develops concerning the constitutionality of norms, the examination of the case is suspended and the case considered by the Constitutional Court.

The Constitution also lacks a provision on conflicts of competence. Article 75 of the Law on the Constitutional Court deals with such conflicts in the framework of the examination of cases regarding the constitutionality of legal acts. If this proves insufficient, such conflicts might possibly also be dealt with within the official interpretation procedure of Article 150, para. 2, of the Constitution.

On the basis of the new Law, the Constitutional Court will have a very important role to play for strengthening constitutionalism in Ukraine. One may only regret that several of the provisions of the Law have not already found an expression in the Constitution.

Article 148

This Article contains an innovation insofar as one third of the judges of the Constitutional Court are appointed by the Congress of Judges of Ukraine. This may depoliticise the appointment procedure and strengthen the independence of the Constitutional Court. A provision on what happens if one of the three nominated bodies does not proceed with the appointment of judges incumbent upon it is still lacking.

Article 149

This Article extends the guarantees of the independence of judges to the judges of the Constitutional Court. Article 23 of the Law of the Constitutional Court gives to the Constitutional Court the power to decide upon the termination of authority of a judge of the Constitutional Court, with the exception of cases of incompatibility of the office with other activities and the violation of the oath, when the decision is taken by the Verkhovna Rada.

Article 31 of the same Law provides that a separate item is to be included in the state budget of Ukraine for the Constitutional Court.

The oath of the judges of the Constitutional Court is set out in Article 17 of the Law.

Chapter XIII
Introducing amendments to the Constitution of Ukraine

General comments

This Chapter makes it clear that the drafters want to have a rigid constitution difficult to amend. This should contribute to the stability of the constitutional system in Ukraine.

Article 156

It seems excessive to require for the submission of a draft law introducing amendments to certain chapters of the Constitution the participation of two-thirds of the deputies. This is the majority required for the adoption of an amendment.

Article 157

It is to be welcomed that the Constitution tries to guarantee the essence of human rights by outlawing their abolition. This provision, as well as the provision forbidding amendments oriented towards the liquidation of the independence or violation of the territorial indivisibility of Ukraine, leave a large scope for interpretation by the Constitutional Court.

Chapter XV
Transitional provisions

Several of these provisions delay the entry into force of important provisions of the Constitution.

It has already been pointed out above under Chapter VII that Transitional Provision 9 contains no deadline for the entry into force of the new rules on the procuracy.

For a number of areas of particular relevance for human rights the arrest, holding in custody and detention of persons suspected of committing a crime, examination and search of a dwelling place or other possessions of a person the rules in force before the adoption of the Constitution are preserved by Transitional Provision 13 for a further five year period. This seems extremely long.

Transitional Provision 12 postpones the full entry into force of the new provisions on the judiciary and leads to discrepancies within the system during the transitional period.

Conclusions

Summing up these observations, the Commission notes with pleasure that the fairly long period it took Ukraine to adopt its Constitution as an independent State has been used to continuously improve the text and that the text finally adopted takes into account many of the comments made by the Commission on earlier drafts.

On the other hand, several provisions of the Constitution remain unsatisfactory from a legal point of view. These inadequacies have political reasons and can be explained by the fact that it was necessary to reach a political compromise to have the Constitution adopted. When implementing these provisions of the Constitution, Ukraine should take into account the opinion of the Commission as well as the relevant Council of Europe standards.

The Constitution will now have to pass the test of practice and the difficult economic situation of Ukraine may delay the full implementation of the new principles and endanger the realisation of the positive achievements of the text. Particular attention will have to be paid to the adoption of legislation ensuring that the Transitional Provisions of the Constitution do not lead to the maintenance of elements of the old system during a considerable period of time.

However, after having followed closely for several years the constitutional process in Ukraine, the Commission sees more grounds for optimism. While the text establishes a strong executive under the leadership of a powerful President, checks and balances are present which should prevent recourse to authoritarian solutions. The principles of the Rule of Law are well reflected in the text of the Constitution. The setting up of democratic local government as well as the important role assigned to the Constitutional Court should contribute to the establishment of a democratic culture in Ukraine.

viii. Opinion on the draft law on the Constitutional Court of Ukraine adopted by the Commission at its 31st Plenary Meeting on the basis of contributions by Messrs S. Bartole (Italy) and J. Klu_ka (Slovakia)

Introduction

1. The Committee on Legal Affairs and Human Rights of the Parliamentary Assembly has asked the European Commission for Democracy through Law to give an opinion on the Law on the Constitutional Court of Ukraine. The Commission cannot but welcome this request since, as this opinion will show, the Law raises important issues for the constitutional order of Ukraine, and the Constitutional Court is destined, on the basis of this Law, to play an important role in the protection of human rights in Ukraine.

2. The present opinion is based on written contributions by Mr Bartole (Italy) and Mr Klu_ka (Slovakia). It also takes into account the discussions at the 30th plenary meeting of the Commission, in particular the important contribution by Mr Holovaty, Minister of Justice of Ukraine and Ukrainian member of the Commission, and at the 31st meeting of the Commission, in the presence of the Vice-President of the Constitutional Court of Ukraine, Mr Rozenko, and a Judge of the Court, Mr Tylsky.

The Constitutional Framework

3. According to the Constitution of Ukraine, the Constitutional Court of Ukraine has the following tasks:

it decides, on the basis of appeals by the President of Ukraine, no less than 45 national deputies, the Supreme Court, the authorised human rights representative of the Verkhovna Rada and the Verkhovna Rada of the Autonomous Republic of Crimea, issues of conformity with the Constitution of Ukraine of laws and other legal acts of the Verkhovna Rada of Ukraine, acts of the President of Ukraine, acts of the Cabinet of Ministers of Ukraine and legal acts of the Verkhovna Rada of the Autonomous Republic of Crimea (Article 150 no. 1);

it gives an official interpretation of the Constitution of Ukraine and the laws of Ukraine (Article 150 no. 2);

it gives opinions on the conformity of international treaties with the Constitution (Article 151 section 1);

it gives opinions in the framework of the impeachment procedure concerning the President (Articles 111 and 151 section 2).

4. The Commission noted already in its opinion on the Constitution of Ukraine (document CDL-INF(97)2) that several procedures which could play an important role for the consolidation of constitutionalism in Ukraine were not specifically mentioned in the text of the Constitution:

constitutional complaints by individuals concerning violation of their human rights;

concrete norm control by means of the referral of a law or other normative act by an ordinary court to the Constitutional Court;

a provision on conflicts of competence between State organs.

In its opinion, the Commission noted that the Law on the Constitutional Court seeks to remedy these gaps by using the procedures mentioned in the Constitution in a way producing effects similar to the missing procedures.

5. In fact, Article 13 of the Law on the Constitutional Court enumerates the four procedures specifically mentioned in the Constitution as being within the authority of the Constitutional Court. Two of these procedures, the procedure to examine the constitutionality of laws and other legal acts and the procedure for giving an official interpretation of the Constitution, are, however, further developed in a way that gives them more importance than would be expected at first sight.

The Procedure for the Examination of the Constitutionality of Laws and Other Legal Acts

6. The Law on the Constitutional Court distinguishes between two ways of seizing the Constitutional Court:

State bodies may seize the Constitutional Court by way of a constitutional petition;

individuals and legal persons may seize the Constitutional Court by way of a constitutional appeal.

In the framework of the procedure for examining the constitutionality of laws and other legal acts, the Law, in accordance with the text of the Constitution, provides for a constitutional petition only by the State bodies enumerated in the Constitution (cf. Articles 40 and 71 of the Law).

7. The Law then distinguishes (Articles 75-85) four particular procedures which are considered as being part of the general procedure. This approach is not without problems. There is a danger that there may be cases falling under the general provision which cannot be included in one of the particular procedures and are thereby left without explicit legislative coverage.

For example, Article 71 of the Law and Article 151 of the Constitution do not specify on which grounds the unconstitutionality of a law or legal act must be based. By contrast, the four specific procedures concern only specific grounds for unconstitutionality. Article 75 deals with the unconstitutionality of legal acts which conflict with the rules concerning the authority of the mentioned organs, Article 78 concerns elections and referendums and Articles 84 and 86 the violation of constitutional rights and freedoms. The Constitutional Court will have to be very attentive in dealing with this kind of problem and will have to avoid this division of the Court's functions diminishing the protection provided by the Constitution. It would appear unnecessary to have divided what the Constitution keeps united.

8. Within the framework of the procedure for examining the unconstitutionality of laws, Article 83 of the Law is of particular importance. According to this Article, an ordinary court shall stay the proceedings if a dispute develops concerning the constitutionality of norms of a law to be applied by the court and the case shall be considered by the Constitutional Court of Ukraine immediately. This provision fills an important gap in the Constitution but has weaknesses. In particular, no details are given on the way in which the case is referred to the Constitutional Court, and there is no provision on the involvement of the parties to the original dispute in the procedure before the Constitutional Court. Are they allowed to submit briefs and to participate in the oral proceedings? These are questions which can hardly be left to the discretion of the court or to the procedural regulations of the court but that should be settled by law. This difficulty may be partly explained by the fact that ordinary courts are not among the subjects enumerated in the Constitutions which may seize the Constitutional Court under this procedure. It would therefore remain desirable to provide in the Constitution for an express provision on concrete norm control.

IV. **The Procedure for the Official Interpretation of the Constitution**

9. The law gives the right to request an official interpretation of the Constitution both to State bodies via petition (Article 41) in cases of practical necessity (Article 93) and to individuals and legal entities (Article 43) by way of constitutional appeal in case of inappropriate application of provisions of the Constitution or the laws that may lead or have led to a violation of the constitutional rights and freedoms of the appellant (Article 94).

10. It is unusual to give the right to seek an interpretation of the Constitution from the Constitutional Court also to individuals and private bodies. However, the solution is certainly favourable to the realisation of fundamental rights in Ukraine and therefore has to be welcomed. It may also partly replace the constitutional complaints procedure missing in the Constitution, in particular since according to Article 93 the Constitutional Court may decide the unconstitutionality of a law in this context.

It should however also be noted that this procedure provides less protection than a fully fledged constitutional complaints procedure, as in Germany or Spain, since under it the Constitutional Court may not decide on the legality of acts of state bodies other than those (of mainly normative character) listed in Article 151 of the Constitution and Article 13 No. 1 of the Law (see in particular Article 14 of the Law).

11. In addition, another serious weakness of the procedure is the absence of any indication on the procedural rights of the private parties to the dispute. The law contains a provision on the introduction of the appeal (Article 42) and that the decision has to be sent to the appellant (Article 70). There is however no indication whether the individual has the right to submit additional briefs to the Constitutional Court and whether he, perhaps assisted or represented by a lawyer, can attend and take part in the session of the Court on his case. It seems indispensable that the individual who has brought a case should also have the right to intervene before the Court. The tendency of the European Court of Human Rights to apply Article 6 of the European Convention also to disputes before a Constitutional Court concerning individuals should be noted. The Court would therefore be well advised to adopt a liberal attitude but, in any case, it seems scarcely acceptable that such an important matter touching individual rights should be left to the internal regulations or the discretion of the Court and not be settled by law.

V. Problems Common to the Various Procedures Before the Constitutional Court

12. The lack of provisions on the procedural rights of the parties mentioned above with respect to individuals having launched a constitutional appeal also applies, to an only slightly less ser extent, to State bodies involved in a dispute. Article 54 treats State bodies as well as individuals as potential providers of information and more as objects than as subjects of the procedure. With respect to State bodies, Articles 72 and 80 of the Law require that certain State bodies particularly concerned by a dispute have to be involved by the Court. No details are given however, apart from the right to appoint three representatives (Article 71, paragraph 3). Article 76 does not contain the right of State bodies actively to take part in a case which may influence the scope of their authority but only gives them a right to submit a petition in such a case.

13. The inner working of the Court has received more attention in the law than the rights of the parties, although the very strict time limits contained in Article 57 of the Law will require the establishment of additional rules in the internal regulations of the Court. The Law provides for a preliminary procedure on admissibility, to be examined by a collegium of judges (Article 46). While a negative decision of the collegium on admissibility has to be confirmed, according to Article 50, by the full Court, it is not quite clear whether a positive decision on admissibility is final.

14. It seems ill-advised that Article 19 should give a single judge of the constitutional court the right to request information while Article 54 gives the same right to the collegium of judges and the plenary Court. There should be no individual initiatives of judges. This point might be clarified by the regulations of the Court.

15. According to Article 73, unconstitutional acts or their separate parts are declared null and void as of the day of adoption of the decision. According to Article 57, a decision has to be signed no later than 7 days after its adoption and is officially promulgated the next working day after its signature. Therefore the interested parties will be officially informed about the end of the effect of the act more than 7 days after the adoption of the decision and in the meantime they could find themselves in the position of thinking of having to stick to a law which is devoid of effects on the basis of a decision of the Constitutional Court which is not yet known to them. This should be carefully reconsidered.

16. According to Article 68, the Constitutional Court may resume consideration of a case upon the discovery of new circumstances concerning the case. Such a provision is highly unusual for a constitutional court and several questions should be clarified with respect to it, in particular who is entitled to initiate this kind of proceeding, what is the relationship with earlier decisions and what is the legal position of the laws the constitutional situation of which has changed in the meantime.

VI. The Status of Judges

17. According to Article 23, there are nine grounds for the termination of the office of a judge of the Constitutional Court, certain requiring a decision by the Constitutional Court itself and two by the Verkhovna Rada. Among the reasons for termination by the Constitutional Court appears the inability of a judge to perform his or her duties due to the state of his health. It would seem appropriate to set down in the law itself the time period of inability which would make such a decision of the Constitutional Court possible instead of leaving this issue to the discretionary practice of the Court.

18. It would also be desirable to require for decisions under Article 23 a qualified majority of judges, since these decisions are of particular importance for the work of

the Court. According to Article 50, discussions of the Constitutional Court are legally binding, provided that 11 of the 18 judges were present and decisions are deemed adopted provided they received the votes or more than half of the judges who took part in the session. Applied to Article 25 this would mean that the office of a judge could be terminated by a vote of less than half of the members of the Court.

VII. The Hierarchy of Norms

19. The present law was adopted on the basis of Article 153 of the Constitution of Ukraine providing "the procedure for the organisation and operation of the Constitutional Court of Ukraine and the procedure for its review of cases, are determined by law". This provision may be interpreted either narrowly, ie. that the Parliamentary statute may not add new elements to the central features of the Court but only implement the provisions of the Constitution, or more widely by stating that the law may entrust additional functions to the Court if these are compatible with the main characteristics of the Court as designed by the Constitution.

20. With respect to the present law it can said that, on the one hand, it remains formally within the framework prescribed by the Constitution and tries at the same time to give in this framework the court as much room as possible for the realisation of its tasks of guaranteeing the constitutional order of Ukraine and securing human rights.

21. On the other hand, this constitutional provision also requires that the main aspects of the procedure for the organisation and operation of the Court should be determined by law. Accordingly, Article 3 of the Law states that the organisation, authority, and arrangement of activities of the Constitutional Court of Ukraine are established by the Constitution of Ukraine and this Law and given to the Constitutional Court of Ukraine only the power to adopt acts which would regulate the organisation of its internal work in conformity with the Law. The notion of internal work is defined nowhere. However, the present opinion has shown that in many respects the rights of the parties involved in a dispute before the Constitutional Court are in no way defined by the Law and will therefore have to be clarified by the rules of procedure of the Court and its practice. This creates a risk that the Law itself is not in conformity with the constitution since it leaves to other normative sources matters which should be regulated by parliamentary statute.

Conclusions

22. In conclusion, the Commission therefore welcomes the Law as an important further step on Ukraine's way to becoming a full-fledged constitutional democracy and because of the great emphasis the Law puts on making fundamental rights and freedoms enforceable by the Constitutional Court. On the other hand, it has to be noted that the text of the Constitution places certain limits upon a more extensive role for the Court, and that the Law on the Constitutional Court itself in many respects does not contain all the rules, in particular concerning the rights of parties to a dispute, which should be set down by statute. According to the Commission, the principle of the rule of law requires that the status of the parties in the proceedings before the courts, their rights and the time limits to be complied with during the trial shall be established by the Law. Leaving these items to the internal rules of procedure of the Court does not comply with the mentioned principle.

23. The Commission therefore recommends completion of the text of the Law according to the indications given in this opinion and believes that it would not be inappropriate to reconsider, possibly on the basis of experience gained during the early period of the Court's activity, the relevant constitutional provisions with a view to ensuring that the Constitutional Court is able to fulfill all functions Ukrainian society wishes to confer upon it.

ix. Opinion on the constitutionality of the death penalty in Ukraine adopted by the Commission at its 33rd Plenary Meeting on the basis of comments by Messrs G. Batliner (Liechtenstein), J. Helgesen (Norway), J. Klucka (Slovakia), and G. Malinverni (Switzerland)

INTRODUCTION

On 10 March 1997 the Committee on Legal Affairs and Human Rights of the Council of Europe Parliamentary Assembly decided to consult the Venice Commission on the constitutional aspects of the death penalty in Ukraine. The Venice Commission received the request for an opinion by letter of 12 March 1997 from the Chairman of the Assembly Committee, Mr Birger Hagard.

Mr Batliner as Rapporteur submitted his comments on the constitutional issues which might be raised by the death penalty in Ukraine in the light of the Constitution of 28 June 1996 at the 31st Plenary Meeting of the Venice Commission (Venice, 20-21 June 1997), in the presence of Mr Vitaly Rozenko, President-in-Office of the Court and Mr Volodymyr Tykhy, constitutional judge as delegates of the Constitutional Court of Ukraine (CDL (97) 15). Following discussion, the Commission instructed a working group (Messrs Batliner, Helgesen, Klu ka and Malinverni) to investigate the question and report back to it. At the 32nd Plenary Meeting (Venice, 17-18 October 1997), the Commission exchanged views with Mr Rozenko on the basis of the Rapporteurs' reports (CDL (97) 15, 31, 32 and 33). The Rapporteurs also had another preparatory meeting in Venice, on 11-12 December 1997.

The present opinion was adopted by the Commission at its 33rd Plenary Meeting (Venice, 12-13 December 1997). At their request, the individual opinions and comments of Messrs Batliner, Helgesen and Malinverni are appended to the present opinion.

OPINION OF THE VENICE COMMISSION

Subject of the opinion

1. The Commission stresses at the outset that its position on the death penalty has remained unchanged since it was set up. In full agreement with the Parliamentary Assembly's position as stated in Resolution 1044 (1994) on the abolition of the death penalty, the Commission has, in its proceedings, consistently advocated the abolition of this penalty. Accordingly, in its "Opinion on the draft Constitution of Albania submitted for popular approval on 6 November 1994" [1], it criticised the provision in Article 19 of the draft (allowing the death sentence to be passed in the case of males over 18 years of age for the most serious crimes), recalling *inter alia* the prohibition of the death penalty in time of peace in Protocol No. 6 of the European Convention on Human Rights (hereinafter ECHR). Likewise, in its opinion on the Constitution of Georgia, it made the proposal - which was followed - that the Constitution should provide that, pending the abrogation of the death sentence, this penalty must not be passed except for the most serious crimes threatening the life of an individual.[2] It now welcomes the abolition of capital punishment in this country.

2. In addition, during its work on the draft Constitution of Ukraine, the Commission proposed the adoption of a constitutional provision explicitly abolishing death penalty.[4]

3. In this instance, however, the Commission is not required to give its opinion on capital punishment in general or as it specifically affects Ukraine, but to consider the constitutionality of the death penalty in relation to the Constitution of Ukraine of 28 June 1996 and in particular to Article 27 which guarantees the right to life.

4. It is thus appropriate to begin by examining the actual wording of Article 27, also bearing in mind the spirit of the Constitution as a whole.

5. The Commission further considers that, while it need not comment on the obligations incurred by Ukraine's signature of Protocol No. 6 to the ECHR and by the commitments it made on acceding to the Council of Europe, these points must nevertheless be considered when examining the effect of certain constitutional clauses. This is required not only due to the status assigned to international law in the Constitution (see Articles 9 and 18) but also because of the intensive osmosis between domestic and international law and the growing tendency for the review of constitutionality to overlap with the review of compliance with treaty provisions. In the European legal area "international constitutionality" or "supra-constitutionality" are increasingly frequent concepts, particularly where human rights are concerned. In the European legal area it is becoming more and more unnatural, where fundamental human rights are concerned, to make separate categories of the obligations to be met by a State under its constitutional law and under public international law.

Article 27 para. 2, first sentence

6. Article 27 of the Constitution of Ukraine provides:

"Every person has the inalienable right to life.

No one shall be arbitrarily deprived of life. The duty of the State is to protect human life.

Everyone has the right to protect his or her life and health and the life and health of other persons against unlawful encroachments."

The relevant provision for the purpose of this opinion is no doubt the first sentence of para. 2. Whereas para. 1 safeguards the right to life, the second paragraph, by its use of the word "arbitrarily", seems to contain an exception to the guarantee in paragraph 1, an exception which would accommodate the death penalty. Despite the inalienability of the right to life established by the first paragraph and despite the State's duty to protect life, by virtue of the use of the adverb "arbitrarily", the Constitution would enable the legislator to prescribe the death penalty for certain crimes, provided it is applied in a lawful, predictable, non-arbitrary and equitable manner. As a result, this provision would allow for capital punishment to the extent that if a competent court imposed the death penalty in the cases prescribed by law, it would no longer be possible to contend that the sentenced person was "arbitrarily" deprived of his life.

7. The Commission takes the view that the interpretation set out above isolates the substance of Article 27 para. 2 from its constitutional and international environment and therefore can be neither complete nor correct; it observes that several considerations would be such as to modify or completely invalidate this interpretation.

The absence of an explicit reference to capital punishment in the Ukrainian Constitution

8. The Commission did not have access to the *travaux préparatoires* of the Constitution of Ukraine in their entirety and cannot therefore make use of these as a means of interpreting the above-mentioned constitutional provisions. Nonetheless, the Commission closely followed the constitutional process in Ukraine and has actively participated in the preparation of several parts of the draft Constitution. It recalls in this respect that Article 22 of the draft Constitution provided that "every person has the inalienable right to life. No one shall be arbitrarily deprived of life. The duty of the State is to protect human life". The Commission concluded from this text that the death penalty was abolished (cf. CDL (96) 19). However, having regard to some doubts expressed by Mr Holovaty at the 27th Plenary Meeting (CDL-PV (96) 27), it suggested in its opinion on this draft that the Constitution should expressly state that the death penalty is abolished (CDL-INF (96) 6). This suggestion was not followed and Article 22 of the draft was incorporated without any change in the Constitution of Ukraine of 28 June 1996, in which it became Article 27. The Commission regretted this in its opinion on the Constitution of Ukraine adopted at its 30th Plenary Meeting (CDL-INF (97) 2).

9. Furthermore, the Commission observes that Article 27 para. 2 of the Ukrainian Constitution reproduces word for word Article 6 para. 1, third sentence of the United Nations Covenant on Civil and Political Rights. However, there is a major difference between the two provisions. After laying down that "no one shall be arbitrarily deprived of life", Article 6 of the Covenant explicitly mentions the death penalty (Article 6 para. 2) and precisely identifies the cases in which it can be imposed and carried out. There is, however, no such provision in Article 27 para. 2 of the Ukrainian Constitution. Whereas Article 6 of the Covenant, in para. 2, treats the death penalty as an exception to the general rule of the right to life laid down in para. 1, this argument of general rule and exception seems untenable as regards the death penalty in the context of Article 27 of the Constitution. If the Ukrainian constitution-making body had in fact intended to permit the death penalty, using Article 6 of the Covenant as a model, it should have reproduced the model in full and explicitly mentioned the cases where the death penalty may be imposed. As Article 27 para. 2 has incorporated only the general rule of Article 6 of the Covenant, without replicating the exception, one may assert that the Ukrainian Constitution does not countenance the death penalty.[3]

10. The same reasoning can be sustained on the basis of Article 2 para. 1, second sentence of the ECHR. This provision stipulates that death may not be inflicted on anyone intentionally, save in the execution of a sentence of death. Here too, the exception to the principle of right to life constituted by the death penalty is expressly provided for. But this is not so in Article 27 of the Constitution.[4]

11. In these circumstances, it seems that the constitutionality of capital punishment in Ukraine cannot be established on a sound basis merely by interpreting the adverb "arbitrarily".

Interpretation of the adverb "arbitrarily" in constitutional case-law relating to capital punishment

12. In constitutional case-law, the adverb "arbitrarily" has often been interpreted as prohibiting (rather than allowing) the death penalty. It has indeed been argued that a capital punishment system is impossible to manage without bringing a certain degree of arbitrariness into it. No judge or jury are really in a position to decide according to objective criteria whether one person deserves a death sentence and another person a sentence of life imprisonment. Moreover, whatever safeguards are guaranteed in criminal proceedings in a State founded on the rule of law, one cannot rule out the possibility of a mistake. These very safeguards, paradoxically, can even yield situations which from the convicted person's standpoint may be considered arbitrary (including the death row phenomenon).[5]

The Ukrainian constitutional context

13. Another issue concerns reconciling the idea that the interpretation of "arbitrarily" in the first sentence of paragraph 2 of Article 27 may permit capital punishment with the fundamental provision of Article 3 of the Constitution that "the human being, his or her life and health, honour and dignity, inviolability and security are recognised in Ukraine as the highest social values". It is difficult to reconcile this idea with the overabundance of other provisions which expressly secure to everyone the inalienable subjective right to life, compel the State to protect life, enshrine the right to dignity, and prohibit cruel, inhuman or degrading treatment or punishment. The Ukrainian Constitution in fact contains a broad array of provisions attaching special importance to life[6] and dignity which may come into play as regards the death penalty and, above all, Article 28 paras. 1 and 2 of the Constitution, which reads as follows:

"Everyone has the right to respect of his or her dignity.

No one shall be subjected to torture, cruel, inhuman or degrading treatment or punishment that violates his or her dignity" .

14. The constitutionality of the death penalty in the Ukrainian constitutional context presupposes that the penalty and its execution are permitted in the light of the provision prohibiting cruel punishment or treatment. While positive law (see the ukrainian criminal code) may conceive capital punishment *per se* not to be inhuman or degrading, the reality of the death penalty, its conditions and its effects which are even inherent and inevitable (proceedings, extensions, delays, uncertainties, anxieties, torments and desinvestion of the human being) have on some occasions been regarded as prohibited types of treatment. The Soering judgment of the European Court of Human Rights is a familiar example of this approach. Another is the opinion of A. Chaskalson, President of the South African Constitutional Court in the case of the State v. Makwanyane and Mchunu (Judgment No. CCt/3/94, 6 June 1995):

"Death is a cruel penalty and the legal processes which necessarily involve waiting in uncertainty for the sentence to be set aside or carried out, add to the cruelty. It is also an inhuman punishment for it involves, by its very nature, a denial of the executed person's humanity and it is degrading because it strips the convicted person of all dignity and treats him or her as an object to be eliminated by the state."

15. In practice, Article 28 of the Constitution of Ukraine does not leave any room for the execution of the death penalty.

Consideration of the European constitutional context

16. It may be helpful to consider the European legal environment to clarify the obscure meaning of the adverb "arbitrarily". Judge Solyom, in his concurring opinion in the judgment of the Hungarian Constitutional Court[7], recommended that "the present international position regarding capital punishment be taken into account as an objective frame of reference by the Constitutional Court".

17. In this respect, it must not be forgotten that although Protocol No. 6 to the ECHR is an optional protocol, the intention to ratify it has become one of the conditions of a State's accession to the Council of Europe. In Resolution 1044 (1994), the Parliamentary Assembly issued an unequivocal appeal for the abolition of capital punishment.[8][9] Furthermore, since Latvia's accession to the Council of Europe in 1994, all new member States have undertaken to sign and ratify not only the ECHR but also the Protocols thereto including Protocol No. 6 concerning the death penalty. Ukraine, when it acceded on 9 November 1995, undertook to place a moratorium on executions and to abolish the death penalty without reservations within three years by ratifying Protocol No. 6 to the ECHR. On 5 May 1997 Ukraine signed the protocol and is consequently obliged to refrain from acts which would defeat its object and purpose.[10][11] Still more recently, the Heads of State and Government of the Council of Europe member countries solemnly issued an appeal for the universal abolition of the death penalty, insisting on the maintenance, in the meantime, of existing moratoria on executions in Europe (Final Declaration of the Second Summit of Heads of State and Government of the Council of Europe, Strasbourg, 11 October 1997).

18. In its Mc Cann v. UK judgment (Series A, No. 324), the European Court of Human Rights stresses that the safeguarding of the right to life is one of the Convention's most fundamental provisions. Together with Article 3, it enshrines one of the basic values of the democratic societies making up the Council of Europe.[12]

19. The Commission therefore feels able to assert that European law, in its national and international dimension, tends towards the abolition of the death penalty and that this evolution is apt to become a basic component of European public order. Where the death penalty is still provided, it is only admitted within a strict logic of transition. In any case, its execution is no longer tolerated. This position must necessarily be taken into consideration in interpreting the Constitutions of Council of Europe member States.

CONCLUSIONS

20. The Commission finds that the Constitution of Ukraine contains no provision expressly prescribing the death penalty; nor does it contain any provision for its explicit abolition.

21. The question of the constitutionality of the death penalty must therefore be addressed by interpreting the relevant provisions of the Constitution in the light of the Constitution as a whole but also having regard to international commitments binding upon the State of Ukraine seen in the light of relevant international developments.

22. The Commission notes the outstanding importance which the Ukrainian Constitution attaches to the right to life and the right to respect for human dignity. It also draws attention to the obscurantism of the term "arbitrarily" in the first sentence of Article 27 para. 2, re-emphasising that this terminus not necessarily introduce an exception to the right to life and that on occasion it has served as a legal basis for abolitionist contentions. Moreover, the effect of Article 28 of the Constitution protecting the right to human dignity and prohibiting cruel, inhuman or degrading treatment or punishment would be to confine any possibility of instituting and carrying out the death penalty to a virtually non-existent field. It notes lastly that the death penalty is not admitted in the European legal area except on a transitional basis and that in any case its execution is no longer tolerated.

23. Having regard to:

the absence of an explicit constitutional foundation allowing for the death penalty;

the ambiguity of the term "arbitrarily" in the first sentence of Article 27, para. 2 of the Constitution of Ukraine;

the fact that Article 27, para. 2 has incorporated only the general rule of Article 6 of the United Nations Covenant on Civil and Political Rights (right to life) without reproducing the exception (death penalty);

the importance which the Ukrainian Constitution attaches to the right to life;

the fact that the constitutional prohibition of cruel and inhuman or degrading treatment or punishment leaves practically no room for maintaining and executing the death penalty in Ukraine;

the evolution of the European public order towards the abolition of death penalty;

the Commission considers that the death penalty cannot be deemed consistent with the Constitution of Ukraine.

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

During 1997 the Commission continued its fruitful co-operation with the statutory organs of the Council of Europe, the European Union and other international organisations.

The Commission was represented by its President Mr La Pergola at the second summit of Heads of State and Government which took place in Strasbourg on 10 and 11 October 1997. Furthermore, the President of the Venice Commission has been invited to take part in the work of the Committee of Wise Persons set up following the summit with the specific task of drafting proposals for structural reform of the Council of Europe.

- Co-operation with the Committee of Ministers

During its 30th Meeting the Commission held an exchange of views with Ambassador Grönberg, Chairman of the Committee of Ministers' Deputies.

Ambassador Grönberg outlined the programme of the Finnish chairmanship of the Committee of Ministers which is based on the observation that the values represented by the Council of Europe had led both to the establishment of a zone of democratic security in Europe and to the promotion of human rights as an integral part of the Council's activities, with human rights understood as covering social and cultural rights as well as civil and political rights; the Venice Commission was playing an important role in the establishment of a European legal area. He further stressed that the enlargement of the Council of Europe and the development of international instruments in the field of human rights were not contradictory and that, if the Council of Europe is to respond to the challenges facing it, it must be given the additional resources it needs.

At its 32nd Meeting the Commission held an exchange of views with Ambassador Warin, Chairman of the Ministers' Deputies, and with Ambassador Matek, Chairman of the ad hoc Working Party on Partial Agreements. Mr Warin informed the Commission of the results of the Second Summit of Heads of State and Government of the Council of Europe (Strasbourg, 10-11 October 1997) which had been a great success. Mr Matek gave an account of the current work of ad hoc Working Party on Partial Agreements which involved the study of the operation of the existing partial agreements. The question of observers' participation in the partial agreement budget was also under discussion.

At its 33rd Meeting, Ambassador Constas, Permanent Representative of Greece to the Council of Europe, informed the Commission about the plan of the Greek presidency of the Committee of Ministers (as from May 1998) to organise a seminar on "Democratic Institutions and Civil Society in South-Eastern Europe" on 5-6 May in Strasbourg. The Greek presidency would like to organise this seminar jointly with the Venice Commission, whose work it values very highly. The Commission welcomed this initiative and agreed to act as a co-organiser of this event.

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

The Commission's fruitful co-operation with the Parliamentary Assembly was further strengthened during 1997. Representatives of the Parliamentary Assembly participated in all the Commission's plenary meetings.

It was stated that future co-operation with the Assembly might be focused on monitoring activities on the one hand and on the development of the rule of law and harmonisation of legislation on the other.

In this respect, at its 31st meeting the Commission held an exchange of views with Mr de Marco, Chairman of the Parliamentary Assembly Committee on the Honouring of Obligations and Commitments (the Monitoring Committee). Mr de Marco informed the Commission about the Monitoring Committee's work and emphasised that its message was one of solidarity with the countries concerned. In accordance with the Parliamentary Assembly's Resolution establishing the Monitoring Committee, the latter may establish contacts with bodies involved in monitoring commitments and the Venice Commission is explicitly mentioned as one such body. Mr de Marco informed the Commission that the Monitoring Committee was very grateful for the legal analysis provided by the Commission. The Commission confirmed its firm commitment to continue working with the Monitoring Committee.

During 1997, the number of requests from the Assembly for the Commission's opinion has continually increased.

In particular it should be noted that the opinions on the Constitution of Ukraine, the Law on the Constitutional Court of Ukraine, the constitutional questions that might arise regarding the death penalty in Ukraine, the establishment of a human rights Court of the Federation of Bosnia and Herzegovina, as well as a report on co-operation with Croatia were drawn up at the request of the Parliamentary Assembly.

In addition the Assembly requested the Commission's opinion on the Albanian Constitutional Law on the High Council of Justice and on amendments to Law N°. 7491 "for the main constitutional provisions" (interim constitution). This opinion is currently under preparation.

The Commission has furthermore co-operated with the Parliamentary Assembly on the following matters :

Control of internal security services in Europe

The Committee on Legal Affairs and Human Rights of the Parliamentary Assembly, requested the Commission's opinion on the control of internal security services in Europe. The Commission appointed Messrs Suviranta, Said Pullicino and Lundum to act as rapporteurs on this question. A consolidated report was prepared by the Secretariat on the basis of the rapporteurs' contributions and this was discussed with the Assembly representative during the 33rd Meeting.

This question will now be dealt with by the Sub-Commission on Democratic Institutions with a view to preparing a final version for adoption by the Commission during 1998.

Report on the legal problems of the coexistence of the Convention on Human Rights and Fundamental Freedoms of the Community of Independent States and the European Convention on Human Rights

The Commission had been requested to give an opinion on the legal problems of the coexistence of the Convention on Human Rights and Fundamental Freedoms of the Community of Independent States (Minsk Convention) and the European Convention on Human Rights. Messrs Malinverni and Matscher were appointed rapporteurs. During the 33rd meeting, the Commission held a preliminary exchange of views on this subject based on Mr Malinverni's report, to which Mr Matscher had indicated his agreement.

This question will now be dealt with by the Sub-Commission on International Law with a view to preparing a final report for adoption by the Plenary Commission in March 1998.

- **Co-operation with the Congress of Local and Regional Authorities of Europe**

Co-operation with the CLRAE continued during 1997. A representative of the Congress participated at the 30th, 31st and 33rd meetings. Moreover, Mr Delcamp, member of the CLRAE, actively participated in the Working Group on the Constitution of Ukraine.

The Commission has already found that the need to bring decision-making power closer to the citizens and to regions is at the centre of recent constitutional reforms. In this respect, the Commission's fruitful co-operation with the Congress of Local and Regional Authorities can only further intensify in the future.

- **Co-operation with the European Union**

The European Commission took an active part in the work of the Venice Commission and supported its activities. In particular, the European Commission made a financial contribution to the organisation of several Commission events concerning the development and consolidation of democracy and human rights in central and eastern Europe. A request for funding for similar activities in 1998 has been submitted to the competent department of the European Commission.

Co-operation with other international bodies

Co-operation with ODIHR continued during 1997. Mr Russell informed the Commission on the OSCE Implementation meeting on Human Dimension issues in Warsaw on 27-28 November 1997, in which he had represented the Commission. Mr Russell had expressed to the governments present the Commission's readiness to provide opinions in its field of competence.

Close co-operation has also taken place with the OSCE on Albania, Bosnia and Herzegovina and Croatia as well as with the Office of the High Representative of Bosnia and Herzegovina.

- **Co-operation with the Conference of Presidents of Constitutional Courts**

Mr Russell, Chairman of the Sub-Commission on Constitutional Justice, represented the Commission at the preparatory meeting of the 11th Conference of Presidents of European Constitutional Courts, in Warsaw where he presented the activities of the Commission.

Following a proposal by its successive Hungarian and Polish presidencies, the European Conference of Constitutional Courts had instructed a Working Group to study ways of possible co-operation between this Conference and the Venice Commission with a view to providing secretariat services to this Conference. By such co-operation the independence of the Conference would be fully maintained.

III. Studies of the Venice Commission

1. Legal Foundations of Foreign policy

A preliminary report on the Legal foundations of Foreign policy, after being adopted by the Sub-Commission on International Law, was approved by the Commission at its 33rd Plenary Meeting.

A questionnaire was first drawn up for submission to members, associate members and observers of the Commission. The Rapporteur subsequently considered it necessary to ask certain supplementary questions to provide further insights into certain matters covered by this study.

The Commission has received replies from the following countries: Albania, Armenia, Austria, Belgium, Bulgaria, Canada, Croatia, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Italy, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Malta, Moldova, Norway, Netherlands, Poland, Portugal, Czech Republic, Romania, Russia, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey and Ukraine.

The purpose of the report is to present the legal foundations of foreign policy in a large number of States with different legal cultures, in order to take account of that diversity but also - and above all - to identify the principal axes of developments in this sphere. The concept of legal foundations of foreign policy covers two different problems:

- first, the legal rules which must be observed when the directions to be taken by foreign policy are determined, and above all the **higher principles which must be observed by the public powers when they define the content of foreign policy**; and

- secondly, the **legal rules concerned with the implementation of foreign policy**, that is to say, the rules which determine the framework within which foreign policy is conducted and especially those relating to the persons responsible for adopting the measures which give concrete form to the general directions to be taken by foreign policy.

Discussion of this topic will continue during 1998.

2. Participation of persons belonging to Minorities in public life

Minorities continued to play a major role in the Commission's activities during 1997, in particular concerning the question of the participation of persons belonging to minorities in public life. A consolidated report is being drawn up based on the replies to the questionnaire, and members were requested to put forward suggestions on how to deal with positive measures on behalf of minorities. This report will be presented to the Commission during 1998 with a view to its adoption.

3. Composition of Constitutional Courts

At its 23rd plenary meeting (May 1995), the Venice Commission decided to undertake a study on the composition of constitutional courts. The purpose of the study was to identify - beyond a simple description of rules governing composition - the techniques employed to ensure the constitutional court's independence and to maintain the representation and balance of different political and legal tendencies within the courts.

On the basis of information available from the Centre on Constitutional Justice of the Commission, and with the assistance of liaison officers and Commission members, the Secretariat had prepared a preliminary information note in the form of synoptic tables on the composition of constitutional courts. The information presented in the tables relates to the appointment of constitutional judges, eligibility criteria, term of office, incompatible concurrent offices, and dismissal. This information was to be supplemented by the replies to the questionnaire.

It was acknowledged that a comparative analysis of the information provided would only serve a limited purpose if the powers exercised by the various courts differ. As a consequence, the report makes a distinction, on certain issues, between constitutional courts *proper* and superior courts which also exercise ordinary jurisdiction. Basic differences in composition may generally be observed between these two types of court.

At its 32nd Plenary Meeting the Commission adopted the report on the Composition of Constitutional courts and decided to publish it in the Series Science and Technique of Democracy.

In the report the Commission found the following :

Notwithstanding the complexity of the various systems of the composition of constitutional courts, three main fields of legislative concern could be identified. These are balance, independence and effectiveness.

Society is necessarily pluralist - a field for the expression of various trends, be they philosophical, ethical, social, political, religious or legal. Constitutional justice must, by its composition, guarantee independence with regard to different interest groups and contribute towards the establishment of a body of jurisprudence which is mindful of this pluralism. The legitimacy of a constitutional jurisdiction and society's acceptance of its decisions may depend very heavily on the extent of the court's consideration of the different social values at stake, even though such values are generally superseded in favour of common values. To this end, a balance which ensures respect for different sensibilities must be entrenched in the rules of composition of these jurisdictions.

Constitutional jurisdictions may, by some of their decisions, appear to curb the actions of a particular authority within a State. The Constitution will often confer to the constitutional court the power to deliver its opinion on issues concerning the separation of powers or the relationships between the organs of the State. Even though constitutional courts largely ensure the regulation of these relationships, it may well be appropriate to ensure in their composition a balanced consideration of each of these authorities or organs.

The pursuit of these balances is limited by the indispensable maintenance of the independence and impartiality of constitutional court judges. **Collegiality**, i.e. the fact that the members adjudicate as a group, whether or not they deliver separate opinions, constitutes a fundamental safeguard in this respect. Even though the rules on the composition of constitutional courts may reflect the coexistence of different currents within a given nation, the guarantees of independence and the high sense of responsibility attaching to the important function of constitutional judge effectively ensure that constitutional judges will act in such a way as to dismiss all grounds of suspicion that they may in fact represent particular interests or not act impartially.

Given the diversity of constitutional justice systems, it is difficult to identify a set of minimum guarantees of independence to be provided in the composition of constitutional courts. Broadly, the following points may provide some guidance, though specific circumstances in a State may well justify a variation of these measures.

A ruling party should not be in a position to have all judges appointed to its liking. Hence, terms of office of constitutional judges should not coincide with parliamentary terms. One way of accomplishing this can be by long terms of office or office until the age of retirement. In the former case, reappointment would be possible either only once or indeed not at all;

The rules of incompatibility should be rather strict in order to withdraw the judge from any influence which might be exerted via his/her out-of-court activities;

Disciplinary rules for judges and rules for their dismissal should involve a binding vote by the court itself. Any rules for dismissal of judges and the president of the court should be very restrictive.

Furthermore, special provision might be necessary in order to maintain the effective functioning of the court when vacancies arise:

Rules on appointment should foresee the possibility of inaction by the nominating authority and provide for an extension of the term of office of a judge until the appointment of his/her successor. In case of prolonged inaction by this authority, the quorum required to take decisions could be lowered.

The effectiveness of a constitutional court also requires there to be a sufficient number of judges, that the procedure not be overly complex and that the court have the right to reject individual complaints which do not raise a serious issue of constitutional law.

All of these points remain necessarily vague and will have to be adapted to each specific case. Taken together, they can, however, provide an idea of some issues to be tackled in order to create a balanced, independent and effective court.

4. Study on Federal and Regional State

The report on Federal and Regional States is the result of the work of the European Commission for Democracy through Law, in particular within the framework of the activities of the Sub-Commission on the Federal State and Regional State. It was adopted by the Commission at its 31st meeting (Venice, 20-21 June 1997).

The report was drawn up following the decision taken by the Venice Commission at its 27th meeting (Venice, 17-18 May 1996) to undertake a study on the current problems of federalism. At its 28th meeting (Venice, 13-14 September 1996), the Commission adopted a questionnaire on federal and regional States. This questionnaire is general in scope and is intended to address all the main issues arising for federal and regional States. It should, moreover, be seen in the context of the constitutional reform which is under way in Italy and, in particular, of the plans to modify Italys constitutional structure along federal lines. Special emphasis has therefore been placed on subjects of current concern in Italy, such as taxation matters.

The report is based largely on the replies to the questionnaire on federal and regional States. The general approach of the questionnaire, and also of this study, is inspired largely by the document drawn up by the President of the European Commission for Democracy through Law, Mr. Antonio La Pergola, entitled : Form and reform of the State: choosing a federal model (doc. CDL-FED (96) 2).

The replies to the questionnaire concern the following federal and regional States: Argentina, Austria, Belgium, Bosnia and Herzegovina, Canada, Germany, Italy, Russia, Spain, Switzerland and the United States.

In addition, members from other States were invited to reply, if they so desired, to the questions which they considered relevant to their particular country. Replies were provided by the following States: Bulgaria, Finland, Portugal and Ukraine. The parts of these replies concerned in particular with decentralised structures are summarised in the footnotes of the report, which otherwise concentrates on federal and regional States.

In the report the Venice Commission found the following :

The continent of Europe has lived through considerable changes over the past few years. These have been expressed in a trend towards both integration and decentralisation, or even, in some cases, disintegration. The integrationist trend, the construction of Europe, in turn combines territorial extension - enlargement - and extension at a practical level-deepening. The decentralisationist trend does not manifest itself solely by decentralisation pure and simple, but also and above all by regionalisation and federalisation. These changes should be seen in a general context of intense constitutional activity, characterised not only by the adoption of new democratic constitutions in central and eastern Europe, but also by structural reforms in western Europe.

In particular, a trend towards transferring powers from the Central State to the periphery is under way in a number of States. For instance, in a quarter of a century Belgium has changed from a traditional unitary State to a regional State, then a federal State, while the powers of Spains autonomous communities are increasingly wide-ranging. The debate on Italys transformation into a federal State is in full swing. Nascent Russian federalism is characterised by great complexity and the way in which it operates still raises a number of questions which have not been fully resolved.

The trend towards transferring powers to the periphery has even been reflected at the supranational and international level. Thus under the Maastricht Treaty the Committee of the Regions within the European Community was set up. The Conference of European Local and Regional Authorities has been transformed into the Congress of Local and Regional Authorities; the latter adopted, at its third session, Resolution 37 (96) on the European Charter of Regional Self-Government, which stresses the importance of transferring powers from the State to the lower-level public authorities in the Europe of tomorrow.

This development is an expression of the principle of subsidiarity, which emerged during the 19th century and has been energetically reiterated in recent decades.

It is in this context that the study should be seen. The approach is therefore not intended to be theoretical but, through examining the situation of federal and regional States, it seeks to answer specific questions, from the perspective of future constitutional reforms.

The key words emerging from the study are complexity and diversity.

First, complexity. The distribution of powers - particularly legislative powers - among a number of legal systems inevitably leads to a hodgepodge of normative, executive and judicial powers. The legal practitioner and, to a certain extent, potential litigants must be able - more so in a federal or regional State than in a unitary State - to pick their way through the legal minefield.

Secondly, diversity. There is no model of a federal State or a regional State which can be replicated exactly. Each State remains a specific case, with its history, its structure and the specific problems which it has had to resolve.

Nor is it possible to establish a clear dividing line between federal and regional States, or even between regional and unitary States. Particularly with regard to the distribution of powers, it is more just a question of degree.

If one wishes to establish criteria for distinguishing between the different types of State - and therefore features which are common to each of the different types - it should be borne in mind that the federal and regional States have two different legal systems, that of the Central State and that of the federated States or regions. This means that both the Central State and the entities have legislative powers.

Other factors would appear to be peculiar to federal States:

in a federal State, there is a second chamber which represents the federated States and participates in the determination of the will of the Central State (the situation in Canada is unusual in that the Senate consists of representatives of the major regions, which may comprise a number of provinces). The closeness of the links between this second chamber and the organs of the federated States varies, however: the links are far closer when the second chamber consists of members of the governments of the federated States than when it is elected by the parliaments of those States, or even the people;

the federated States have the authority to adopt their constitutions and, more generally, the power to govern themselves (in Belgium, however, there is no federated constitution, and only the Flemish community, the Walloon region and the French community have limited powers of self-government);

Furthermore, modern federalism is characterised by a number of features which are common to all the federal States studied:

dual federalism - the rigid separation of the fields of activity of the Central State and of the entities - is no longer the order of the day: on the contrary, co-operative federalism has gradually taken hold in all the States studied. It is reflected in co-operation not only between the Central State and the entities but also between the entities. In particular, taxation may no longer be dealt with by the Central State or an entity in ignorance of the financial situation of its environment, but mechanisms for participating in the revenue of the Central State and for equalisation are increasingly being developed. The ever-increasing overlapping of the two levels of the State structure is also manifested in the development of concurrent powers, framework laws and executive federalism (application of the law of the Central State by the entities);

the precedence of federal law over the law of the federated States is recognised;

while it is true that rules on the distribution of powers remain important for federalism not to be deprived of all substance, the participation of the federated States in the decision-making process of the federal State, particularly via the second chamber, is also very important;

the existence of a federal State does not rule out local autonomy; on the contrary, the federal constitution often guarantees it - if not, it is guaranteed by the law of the federated States.

To sum up, there is no single model and there is no simple model which can be proposed to a State which wishes to become a federal or regional State. There is a whole host of solutions to specific questions, formulated in a given context. The fact remains that the systems of the States examined - of which this study has attempted to identify the broad lines and which have for the most part been in operation for decades if not centuries - may provide inspiration for future constitutional reforms, in general terms or with regard to certain specific aspects.

5. Constitutional law and European Integration

During its 32nd Meeting the Commission adopted a questionnaire on Constitutional Law and European Integration and decided to send it for reply to all Commission members who are appointed in respect of member States of the European Union. This study is intended to focus on areas of possible conflict between national Constitutions and the European legal order and to identify ways of harmonising these legal systems.

Mr Toledano was appointed rapporteur on this question. A preliminary report is being drawn up and should be presented to the Commission during 1998.

IV. Centre on Constitutional Case-Law

Co-operation with Constitutional Courts and courts of equivalent jurisdiction significantly intensified during the year 1997. In addition to the regular publication of the Bulletin on Constitutional Case-Law and the new database CODICES, a series of seminars in co-operation with newly-established constitutional courts has been started.

The Sub-Commission on Constitutional Justice undertook a study on the composition of constitutional courts. This study revealed a diversity of models establishing constitutional courts and courts of equivalent jurisdiction; it was, however, possible to discern a set of common standards and guarantees ensuring the independence and a balanced composition of the courts. The study has been published in the series Science and Technique of Democracy of the Commission.

The Bulletin on Constitutional Case-Law

In 1997, several new courts (those of Armenia, Georgia, Latvia, Malta, Moldova and Ukraine) joined the venture of publishing three times a year the Bulletin on Constitutional Case-Law. 44 courts now contribute to this publication, which has seen a significant increase in its distribution in Europe and abroad.

Two more issues of the series of Special Bulletins on Basic Texts (extracts of constitutions and laws on the courts) have been published during 1997, bringing the number of countries already covered to 35. While a fifth issue in this series is being undertaken, the Sub-Commission on Constitutional Justice and the liaison officers decided to start producing another series of Special Bulletins entitled Leading Cases. This series is to cover important cases of participating courts prior to the creation of the Bulletin or to the participation of the courts in it. A preliminary version of the first issue in this series on the European Court of Human Rights was presented to the liaison officers at their meeting with the Sub-Commission in Brussels on 31 October 1997. A second issue in this new series is to cover the case-law of the Court of Justice of the European Communities. The other courts are to provide summaries (précis) of their most important case-law for their inclusion into the CODICES database. Further Special Bulletins in this series will be produced on specific topics to be chosen by the liaison officers out of the stock of information available in CODICES.

CODICES

In 1997 two versions of the database CODICES were published on CD-ROM. The second version has, in addition, been made available via Internet (http://www.coe.fr/codices). CODICES contains all the regular issues of the Bulletin since 1993, together with over 1250 decisions in full text. Furthermore, the Special Bulletins on descriptions of the courts (1994) and on basic texts have been integrated into CODICES. In addition, the Sub-Commission on Constitutional Justice and the liaison officers charged the Secretariat with integrating the complete texts of available constitutions in the original language and in translations into CODICES and with keeping these texts updated, thus effectively keeping track of constitutional amendments in participating countries. Several constitutions have already been included in CODICES. A full printout of CODICES would represent about 12000 pages of text.

A regular rhythm of three updates of CODICES per year following the schedule of publication of the Bulletin is being maintained as from issue 1997/1 of the Bulletin and CODICES.

Documentation Centre

In addition to the Bulletin and CODICES and due to generous contributions from participating courts, the stock of documentation in paper form of the Documentation Centre has significantly increased. Thus the Centre, in its still embryonic form, already provides useful resources for researchers. The Centre is also becoming more widely known and has seen an increase in requests for information on constitutional justice and constitutional issues in general. Due to the strong increase of documentation in the Centre, problems of sufficient storage space and adequate facilities for users of the Centre have already surfaced.

Seminars with newly-established constitutional courts

Following demands by several newly-established constitutional courts, the Venice Commission undertook to hold a series of seminars in cooperation with these courts. During 1997 a seminar was held on 3-4 July in conjunction with the Constitutional Court of Latvia in Riga dealing mainly with the individual complaint and on practical questions of case-management. Co-operation with the United States Agency for International Development (USAID) allowed for the participation of judges from the Armenian and Georgian Constitutional Courts at this fruitful seminar.

A further seminar was held on 22-24 September 1997 in Petrozavodsk (Russia) in cooperation with the Constitutional Court of the Republic of Karelia. During this seminar the relations between the federal constitutional courts and constitutional courts of federated entities was studied. The situation of constitutional courts in Russia was compared with the situation in Germany, where constitutional courts exist also on the level of the *Länder* level. The seminar was judged very useful by the participating courts of subjects of the Russian Federation, who showed their interest in establishing closer cooperation with the Venice Commission.

On 22-24 October 1997 a seminar on "Constitutional Control and the Protection of Human Rights" was held in Yerevan together with the Constitutional Court of Armenia in cooperation with USAID and the Constitutional and Legislative Policy Institute (COLPI). This cooperation permitted participation from other constitutional courts in the region. The participating courts adopted a resolution welcoming the active role of the Venice Commission in the organisation of such seminars.

A further workshop on "The execution of judgments of Constitutional Courts" was held in Tbilisi on 17-19 November 1997 together with the Constitutional Court of Georgia in co-operation with USAID, the United Nations Development Programme (UNDP) and COLPI. This seminar focused on problems of non-execution of decisions by the Constitutional Court in some countries. The development of a political and legal culture which would ensure these decisions were respected, was seen as a goal towards which the constitutional courts can contribute creating confidence in their independence towards other State powers in society.

Finally, a "Workshop on the Constitutional Court of the Republic of Azerbaijan" held in Baku on 4-5 December 1997, organised in collaboration with the Supreme Court and COLPI, mainly discussed the newly adopted Law on the Constitutional Court of Azerbaijan. Participants from the Supreme Court, Parliament and Government expressed their interest in holding a further seminar once the Constitutional Court has been established.

An indication of the success of the series of seminars can be seen by a number of requests for such seminars to be held in 1998.

It is also recalled that Mr Russell, Chairman of the Sub-Commission on Constitutional Justice, represented the Commission at the preparatory meeting of the Conference of Presidents of European Constitutional Courts, in Warsaw where he presented the activities of the Commission.

Following a proposal by its successive Hungarian and Polish presidencies, the European Conference of Constitutional Courts had instructed a Working Group to study ways of possible co-operation between this Conference and the Venice Commission with a view to providing secretariat services to this Conference. By such co-operation the independence of the Conference would be fully maintained.

V. The UniDem (Universities for Democracy) Programme

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

1. Seminar on "Citizenship and State Succession" Vilnius, 16-17 May 1997

The Commission organised, together with the Institute of International Relations and Political Science of Vilnius University and Division I of the Directorate of Legal Affairs of the Council of Europe, on 16 to 17 May in Vilnius a seminar on the topic "Citizenship and State Succession".

The seminar, opened by the President of the Constitutional Court, Mr _ilys, and, on behalf of the President of the Republic of Lithuania, by his legal adviser, Mr Abramavi_ius was attended by scholars and practitioners from Europe, the United States and South Africa.

The first session examined the historical and theoretical foundations of citizenship and statehood, the second session was devoted to the international law rules, in particular the new European Convention on Nationality of the Council of Europe, the third session again treated international aspects with reports on European citizenship and the final session was devoted to country-studies on the Baltic States.

The seminar provided an opportunity for discussions between academic specialists and practitioners responsible for the implementation of rules on citizenship. It proved to be especially timely since it was held the very week the text of the European Convention on Nationality was approved.

A further focus was on the situation in the areas where State succession questions had become relevant recently, in particular following the dissolution of the Soviet Union and of Yugoslavia.

The proceedings of the seminar will be published in the series "Science and Technique of Democracy".

2. Round Table on "The Legal Foundation of Foreign Policy" Santorini, 26-27 September 1997

The Commission organised, in co-operation with the Greek Ministry of Foreign Affairs, on 26-27 September 1997 in Santorini a Round Table on the topic "The Legal Foundation of Foreign Policy".

The Round Table brought together specialists from different areas of Europe and South Africa, who were able to exchange views and experiences on this topic of a universal nature.

The First Working Session was devoted to the foreign policy of the European Union, in particular the highly debated question of the Community's foreign policy and the concurrence of autonomous and external powers.

The Second Working Session dealt with the legal foundations of foreign policy with emphasis on comparative constitutional law and the foundation of foreign policy in public international law. In the ensuing discussions the role of international law in the foreign policy of several European States was stressed.

During the final Working Session, Professor Economides (Athens) put forward guidelines for States in the field of the legal foundation of foreign policy. These guidelines include non-recourse to force or threat of force in international relations; respect for the principles and rules of good neighbourliness; taking into account democratic principles, the rule of law and the protection of human rights; the involvement of Parliament in foreign policy; the intervention of judicial power in support of the respect for the essential principles of foreign policy.

The proceedings of the Round Table, as well as the report on the legal foundation of foreign policy, following its adoption by the Plenary Commission, will be published.

3. Seminar on "The transformation of the Nation State in Europe at the Dawn of the 21st Century", Nancy, 6-8 November 1997

The Commission organised, in co-operation with the University of Nancy 2 and the "Fédération cohérence Europe", on 6-8 November 1997 a UniDem Seminar on "The transformation of the Nation State in Europe at the Dawn of the 21st Century".

This seminar falls within the framework of the institutional and structural changes which profoundly affect the traditional, almost exclusive way in which political societies are organised in Europe, the Nation State. It brought together around 100 people, amongst them a number of high level specialists, from all over Europe, South Africa and Japan, and gave them the opportunity to make known their experiences of the evolution of the Nation State in their respective countries.

In his introductory report, Professor Pierré-Caps (Nancy) showed how, over the years, the concept of the Nation State was built up and strengthened, and later weakened. Nowadays, this concept is able to transform itself at the same time in the direction of dissociation (which goes from decentralisation to the dissolution of the State through federalisation and regionalisation) and association, i.e. delegation of competences at a higher level, in particular within the framework of European integration. This report was followed by statements on the concept of the Nation State according to traditions in various States, and on the problems of State transformation. Following this, specific reports on "Building up : the European Construction" were presented as an example. Finally the question of building down was dealt with, underlining the situation in various European States.

The final working session stressed the difficulties of establishing the Nation State in Central and Eastern Europe. The contrasting situation in States in the Eastern part of the continent was emphasised by Professors from various States. In his summary report Professor Chantebout (Paris) stressed the

progressive disappearance of the concept of the homogeneous Nation State, in a world where power levels are multiplying.

The proceedings of the Seminar will be published in the series "Science and Technique of Democracy".

4. Preparation of forthcoming UniDem Seminars

It is envisaged to hold the following UniDem Seminars during 1998 :

New trends in electoral law in a pan-European context
(Sarajevo, 17-18 April 1998)

Democratic Institutions and Civil Society in South-Eastern Europe (Strasbourg, 5 May 1998 in co-operation with the Greek Presidency of the Committee of Ministers)

Constitutional developments in the Transcaucasian States
(Paris and the Transcaucasian States, June and Autumn 1998)

The principle of respect for human dignity in European case-law
(Montpellier, 2-6 July 1998)

APPENDIX I - LIST OF MEMBERS OF THE EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

Mr Antonio LA PERGOLA (Italy), President, Advocate General at the Court of Justice of the European Communities
(Substitute: Mr Sergio BARTOLE, Professor, University of Trieste)

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Mr Ergun ÖZBUDUN (Turkey), Vice-President, Professor, University of Ankara, Vice President of the Turkish Foundation for Democracy

Mr Jean-Claude SCHOLSEM (Belgium), Vice-President, Professor, Law Faculty, University of Liège

Mr Cyril SVOBODA (Czech Republic), Vice-President, Deputy Minister of Foreign Affairs

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Mr Constantin ECONOMIDES (Greece), Professor, Panteios University, Director of the Legal Department, Ministry of Foreign Affairs
(Substitute: Ms Fani DASKALOPOULOU-LIVADA, Assistant Legal Adviser, Legal Department, Ministry of Foreign Affairs)

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, Judge at the European Court of Human Rights
(Substitute: Mr Klaus BERCHTOLD, Head of Division, Federal Chancellery)

Mr Gérard REUTER (Luxembourg), President of the Board of Auditors

Mr Matthew RUSSELL (Ireland), Former Senior Legal Assistant to the Attorney General

Mr Antti SUVIRANTA (Finland), Former President of the Supreme Administrative Court
(Substitute: Mr Matti NIEMIVUO, Director at the Department of Legislation, Ministry of Justice)

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

Mr Helmut STEINBERGER (Germany), Director of the Max-Planck Institute, Professor, University of Heidelberg

Mr Jacques ROBERT (France), Honorary President of the Paris University of Law, Economics and Social Science, Member of the Constitutional Council

Mr Jan HELGESEN (Norway), Professor, University of Oslo

Mr Gerard BATLINER (Liechtenstein), President, Academic Council of the Liechtenstein Institute

Mr Godert W. MAAS GEESTERANUS (The Netherlands), Former Legal Adviser to the Minister of Foreign Affairs

Mr János ZLINSZKY (Hungary), Judge, Constitutional Court

Mr Joseph SAID PULLICINO (Malta), Chief Justice

Mr Ján KLU_KA (Slovakia), Judge, Constitutional Court

Mr Magnus Kjartan HANNESSON (Iceland), Professor, University of Iceland

Mr Peter JAMBREK (Slovenia), Former President of the Constitutional Court, 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), Judge, Constitutional Court

Mr Petru GAVRILESCU (Romania), Counsellor, Romanian Embassy, Brussels

Mr Asbjorn JENSEN (Denmark), Judge, Supreme Court
(Substitute: Mr John LUNDUM, High Court Judge)

Mr Armando MARQUES GUEDES (Portugal), Former President of the Constitutional Tribunal
Mrs Maria de Jesus SERRA LOPES (Portugal), State Counsellor, Former Chairman of the Bar Association

Mr Aivars ENDZINS (Latvia), Acting Chairman, Constitutional Court

Mrs Hanna SUCHOCKA (Poland), Minister of Justice

Mrs Ana MILENKOVA (Bulgaria), Advocate, Former Member of the National Assembly
(Substitute: Mr Alexander DIFEROV, Advocate, Member of the National Assembly)

Ms Carmen IGLESIAS CANO (Spain), Director of the Centre for Constitutional Studies

Mr Aleks LUARASI (Albania), Professor, University of Tirana

Mr Rune LAVIN (Sweden), Parliamentary Ombudsman

Mr Stanko NICK (Croatia), Chief Legal Adviser, Ministry of Foreign Affairs
(Substitute: Mrs Marija SALE_I_, Legal Adviser, Constitutional Court)

Mr Serhiy HOLOVATY, (Ukraine), President of the Ukrainian Legal Foundation
(Substitute: Mr Volodymyr SHAPOVAL, Judge, Constitutional Court)

Mr Heiki LOOT (Estonia), Head of the Public Law Division, Ministry of Justice

Mr Vladimir SOLONARI (Moldova), Chairman of the Committee on Human Rights and National Minorities, Parliament of Moldova

Mr Tito BELICANEC, ("The former Yugoslav Republic of Macedonia"), Professor, Faculty of Law, University of Skopje
(Substitute: Mr Igor SPIRKOVSKI, Counsellor, Constitutional Court)

ASSOCIATE MEMBERS

Mr Avtandil DEMETRASHVILI (Georgia), Chairman of the Constitutional Court

Mr Anton MATOUCEWITCH (Belarus), Director of the Institute of Public Administration and Legislation

Mr Vladimir TOUMANOV (Russia[13]), Former President of the Constitutional Court

Mr Khatchig SOUKIASSIAN (Armenia), Chairman, Armenian Law Centre

Mr Khanlar I. HAJIYEV (Azerbaijan), Chairman, Supreme Court

Mr Cazim SADIKOVIC (Bosnia and Herzegovina), Dean, Faculty of Law, University of Sarajevo

OBSERVERS

Mr Gérald BEAUDOIN (Canada), Professor, University of Ottawa, Senator
(Substitute : Ms Oonagh FITZGERALD, General Counsel, Department of International Law and Activities, Ministry of Justice)

Mr Vincenzo BUONOMO (Holy See), Professor of International Law at the Latran University

Mr Senkul KOSAKOV (Kyrgyzstan), Director General, Committee on Science and New Technologies

Mr Akira ANDO (Japan), Consul, Consulate General of Japan, Strasbourg

Mr Hector MASNATTA (Argentina), Ambassador, Executive Vice-Chairman, Centre for constitutional and social studies

Mr Miguel SEMINO (Uruguay), Ambassador of Uruguay in Paris

Mr Paul GEWIRTZ (United States of America), Director of Special Projects for the Rule of Law, US Department of State

SECRETARIAT

Mr Gianni BUQUICCHIO, Secretary of the European Commission for Democracy through Law
Mr Christos GIAKOUMOPOULOS, Deputy Secretary of the European Commission for Democracy through Law
Mr Pierre GARRONE
Mr Rudolf DÜRR
Ms Helen MOORE
Ms Michelle REMORDS
Ms Helen MONKS
Ms Brigitte AUBRY
Ms Agnes READING
Ms Marian JORDAN
Ms Emmy KEFALLONITOU

APPENDIX II - OFFICES AND COMPOSITION OF THE SUB-COMMISSIONS

President : Mr La Pergola

Vice-Presidents : Mr Özbudun, Mr Scholsem, Mr Svoboda

Bureau : Mr Batliner, Mr Helgesen, Mr Holovaty, Mr Nick

Chairmen of Sub-Commissions : Mr Economides, Mr Maas Geesteranus,
Mr Malinverni, Mr Matscher, Mr Reuter, Mr Robert, Mr Russell, Mr Steinberger, Mr Suviranta, Mr Triantafyllides

Constitutional Justice : Chairman: Mr Russell - members: Mr Batliner, Mr Djerov, Mr Endzins, Mr Gavrilescu, Mr Jambrek, Mr Jensen, Mr La Pergola, Mr Lapinskas, Mr Lavin, Mr Loot, Mr Marques Guedes, Ms Milenkova, Mr Özbudun, Mr Reuter, Mr Robert, Mr Said Pullicino, Ms Serra Lopes, Mr Steinberger, Ms Suchocka, Mr Suviranta, Mr Triantafyllides, Mr Zlinszky

Federal State and Regional State : Chairman: Mr Malinverni - members: Mr Economides, Ms Iglesias, Mr La Pergola, Mr Matscher, Mr Nick, Mr Scholsem, Mr Steinberger, Ms Suchocka, Mr Triantafyllides; Obs. : Canada, USA

International Law : Chairman: Mr Economides - members: Mr Djerov, Mr Helgesen, Mr Jambrek, Mr Klu_ka, Mr La Pergola, Mr Malinverni, Mr Matscher, Ms Milenkova, Mr Nick, Mr Steinberger, Mr Suviranta, Mr Triantafyllides

Protection of Minorities : Chairman: Mr Matscher - members: Mr Economides, Mr Gavrilescu, Mr Gualandi, Mr Helgesen, Mr Maas Geesteranus, Mr Malinverni, Mr Nick, Mr Özbudun, Mr Scholsem, Mr Zlinszky

Constitutional Reform : Chairman: Mr Triantafyllides, Vice-Chairman: Mr Batliner -members: Mr Djerov, Mr Economides, Mr Helgesen, Ms Iglesias, Mr La Pergola, Mr Maas Geesteranus, Mr Malinverni, Mr Marques Guedes, Ms Milenkova, Mr Özbudun, Mr Reuter, Mr Robert, Mr Scholsem, Ms Serra Lopes, Ms Suchocka, Mr Suviranta

Democratic Institutions : Chairman: Mr Steinberger - members: Mr Economides, Mr Helgesen, Ms Iglesias, Mr Klu_ka, Mr Lapinskas, Mr Lavin, Mr Robert, Mr Suviranta, Mr Svoboda, Mr Triantafyllides

UniDem Governing Board : Chairman: Mr Maas Geesteranus, - members: Mr Helgesen, Ms Iglesias, Mr La Pergola, Mr Lavin, Mr Malinverni, Mr Marques Guedes, Mr Özbudun, Mr Robert, Mr Scholsem, Ms Serra Lopes, Mr Steinberger, Ms Suchocka; Obs. : Holy See

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), Mr Quinn (Federal Judicial Center, USA)

South Africa : Chairman: Mr La Pergola, Vice-Chairman: Mrs Suchocka - members:
Mr Helgesen, Mr Lavin, Mr Maas Geesteranus, Mr Malinverni, Mr Scholsem, Mr Triantafyllides; Obs. : Canada, USA

Mediterranean Basin : Chairman: Mr Robert - members: Mr Batliner, Mr Economides,
Ms Iglesias, Mr La Pergola, Mr Malinverni, Mr Said Pullicino, Mr Triantafyllides

Administrative and Budgetary Questions : Chairman: Mr Reuter, Vice-Chairman: Mr Suviranta

APPENDIX III- MEETINGS OF THE EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW IN 1997 [14]

Plenary Meetings

arch
20-21 June
17-18 October
12-13 December

Bureau

12th meeting - Meeting enlarged to include the Chairmen of Sub-Commissions
6 March

13th meeting - Meeting enlarged to include the Chairmen of Sub-Commissions
19 June
14th meeting - Meeting enlarged to include the Chairmen of Sub-Commissions
16 October
15th meeting - Meeting enlarged to include the Chairmen of Sub-Commissions
11 December

SUB-COMMISSIONS

Minorities
ober

Constitutional Justice
ch
(Meeting with Liaison officers from Constitutional Courts)
e
tober
Rapporteurs meeting on the study on the composition of constitutional courts
30 September (Paris)
tober (Brussels)
(Meeting of Working Group on the Systematic Thesaurus
tober (Brussels)
(Meeting with Liaison officers from Constitutional Courts)

International Law
ch
e
tember (Santorini)

UniDem Governing Board
ch
tober
cember

Federal and Regional State
6 March

Working Group on the conditions for implementation of the Croatian constitutional law on human rights and minority rights
19-20 May (Zagreb)

Constitutional Court of Croatia - Meeting of the International Advisers
23 June (Zagreb)

Working Group on the Creation of Ombudsmen for the Republika Srpska Bosnia and Herzegovina
24 April (Strasbourg)
tober
11 December

Working Group on the interpretation of certains provisions of the Constitution of the Republika Srpska
24 April (Geneva)
10 July (Geneva)

Albanian electoral Law
21-23 April (Tirana)
12-17 May (Tirana)

Working Group on the role of the second Chamber and municipalities in a federal structure
23 May

Working Group on the draft Constitution of the Nakhichevan Autonomous Republic
31 October (Brussels)

Constitutional Justice Seminars

Seminar on Constitutional dimension of judicial reform and the organisation of the judiciary, organised by the Ministry of Foreign Affairs of Kyrgyzstan
16-20 June (Bishkek)

Seminar on the functioning of the Constitutional Court
3-4 July (Riga)
Seminar on Relations between the Constitutional Court of the Russian Federations and the Constitutional Courts of the subjects of the Russian Federation
22-23 September (Petrozavodsk, Russia)

Seminar on the Constitutional Control and protection of human rights
22-24 October (Erevan)

Workshop on the execution of decisions of Constitutional courts
17-18 November (Tbilissi)

Participation in the Workshop on the practical aspects of organising the work of a Constitutional Court
24 November (Sarajevo)

Workshop on the essential components of a Constitutional Court
4-5 December (Baku)

UNIDEM SEMINARS

UniDem Seminar on Citizenship and State Succession
16-17 May (Vilnius)

UniDem Round Table on the Legal Foundation of Foreign Policy
26-27 September (Santorini)

UniDem Seminar on the Transformation of the Nation-State at the Dawn of XXI century
6-8 November (Nancy)

OTHER SEMINARS AND CONFERENCES

Participation in the Electoral Law Forum organised by the International Foundation for Election Systems
16-17 April (Erevan)

Participation in the "Kolloquium die Entwicklung der Verfassungsrechtsprechung in Mittel und Osteuropa" organised by the Max Planck Institute
17-19 April (Heidelberg)

Participation in the meeting on political development in Albania, organised by the Centre for comparative studies on elections
25 April (Paris)

Participation in the First annual Human Rights Conference
20-23 May (Midrand, South Africa)

Participation in Seminar on 5 years of the Estonian Constitution
26-27 September (Tallinn)

Round Table on the constitutional aspects of the protection of property
30 September (Sarajevo)

Participation in the preparatory meeting for the Conference of Chairmen of Constitutional Courts
6-8 October (Warsaw)

Participation in the 2nd Summit of Heads of State and Government
10-11 October (Strasbourg)

Participation in the Meeting of Chairmen of Supreme Courts
20-23 October (Brno)

Participation in the Fifth Annual International Judicial Conference (1997) organised by the Center for Democracy (USA)
3-4 November (Strasbourg)

Participation in the Joint Conference UNTAES-Council of Europe on the legal protection of individuals
13-14 November (Strasbourg)

Participation in ODHIR Human Dimension Seminar
27-28 November (Warsaw)

A P P E N D I X IV- LIST OF PUBLICATIONS OF THE VENICE COMMISSION

Collection[15]
Science and technique of democracy

g with the presidents of constitutional courts and other equivalent bodies
Piazzola sul Brenta, 8 October 1990[16]

s of constitutional jurisdiction
by Helmut Steinberger[17]

tution making as an instrument of democratic transition
Istanbul, 8-10 October 1992

ion to a new model of economy and its constitutional reflections
Moscow, 18-19 February 1993

lationship between international and domestic law
Warsaw, 19-21 May 1993

lationship between international and domestic law
by Constantin Economides[3]

f law and transition to a market economy
Sofia, 14-16 October 1993

tutional aspects of the transition to a market economy
Collected texts of the European Commission for Democracy through Law

otection of Minorities
Collected texts of the European Commission for Democracy through Law

The role of the constitutional court in the consolidation of the rule of law
Bucharest, 8-10 June 1994

The modern concept of confederation
Santorini, 22-25 September 1994

Emergency powers[18]
by Ergun Özbudun and Mehmet Turhan

Implementation of constitutional provisions regarding mass media in a pluralist democracy
Nicosia, 16-18 December 1994

Constitutional justice and democracy by referendum
Strasbourg, 23-24 June 1995

The protection of fundamental rights by the Constitutional Court[19]
Brioni, Croatia, 23-25 September 1995

Local self-government, territorial integrity and protection of minorities
Lausanne, 25-27 April 1996

Human Rights and the functioning of the democratic institutions in emergency situations
Wroclaw, 3-5 October 1996

The constitutional heritage of Europe
Montpellier, 22-23 November 1996

Federal and Regional States

The composition of Constitutional Courts

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94-1.2.3
95-1.2.3
96-1.2.3
97-1

Volume 1[3] (1994 - Descriptions of the Courts)
Volumes 2 and 3 (Basic texts - exracts from constitutions and laws on Constitutional Courts)

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1993, 1994, 1995, 1996

[1] In February 1994, the Commission was informed that the Azerbaijani Parliament had decided to abolish the death penalty.

[2] *See Venice Commission, Annual Report of activities for 1994, p. 23.*

[3] *Venice Commission, Annual Report of activities for 1995, p. 50.*

[4] *Opinion on the draft Constitution of Ukraine approved by the Ukrainian Constitutional Commission on 11 March 1996 (CDL-INF (96) 6, p. 6).*

[5] *According to the logic of Article 27, the adverb "arbitrarily" appears to serves as an introduction to para. 3, which can be validly interpreted as allowing deprivation of life for the purpose of protecting one's own life or the lives of others (i.e. in cases of necessity or emergency; self-defence).*

[6] *It does not seem that the Ukrainian Constitution making power was inspired by the African Charter on Human and Peoples' Rights which is placed in a different legal environment and whose Article 4 follows a different wording: "Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right".*

[7] *See the judgment of the European Court of Human Rights in the case of Soering v. UK, Series A No. 161, 1990. See also the (dissenting) opinion of Justice Blackmun in the case of Callins v. Collins before the Supreme Court of the United States (22 February 1994): "Experience has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death (see Furman v. Georgia, 408 US, 238, 290 (1972)) can never be achieved without compromising an equally essential component of fundamental fairness, ie individual sentencing. (...) Although most of the public seems to desire, and the Constitution appears to permit the penalty of death, it is surely beyond dispute that if the death penalty cannot be administered consistently and rationally, it may not be administered at all. (...) In the years following Furman, serious efforts were made to comply with this mandate. State legislatures and appellate courts struggled to provide judges and juries with sensible and objective guidelines for determining who should live and who should die. (...) Unfortunately, all this experimentation and ingenuity yielded little of what Furman demanded. It soon became apparent that discretion could not be eliminated from capital sentencing without threatening the fundamental fairness due to a defendant when life is at stake. Experience has shown that the consistency and rationality promised in Furman are inversely related to the fairness owed to the individual when considering a sentence of death. A step towards consistency is a step away from fairness". See also the decision of the Hungarian Constitutional Court of 24 October 1990 (judgment 23/1990) concerning the constitutionality of the death penalty in Hungary under a constitutional provision closely akin to Article 27 of the Constitution of Ukraine (Article 54 of the Hungarian Constitution provides in para. 1 that "Every human being in the Republic of Hungary shall have the inherent right to life and dignity, of which no one shall be arbitrarily deprived"). Several judges expressed the opinion that capital punishment was in all circumstances "arbitrary" either because it arbitrarily changes the order of the values protected by the Constitution - human life and dignity being on the top of the hierarchy of these values - (Labady and Tersztanszky), or because the right to life and dignity, in view of its special character, cannot be restricted (Solyom).*

[8] *In particular Articles 27 and 28 but also the Preamble to the Constitution and Articles 3 para. 2, 21 para. 2, 22, 24, 92 para. 1.1, 102 para. 2, 104 para. 3, 116 point 2 and 157 para. 1.*

[9] *See note No. 6 above.*

[10] *See also the Resolution adopted in Geneva by the 53rd session of the United Nations Commission on Human Rights on the question of the death penalty (E/CN.4/1997/1.20) and the European Parliament Resolution of 12 June 1997 on the abolition of the death penalty.*

[11] *Under the terms of Article 18 of the Vienna Convention on the Law of Treaties, "a State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: a) it has signed the treaty ...".*

[12] *The Human Rights Chamber of Bosnia and Herzegovina, in its decision of 7 September 1997 in the case of Damjanovic v. the Federation of Bosnia and Herzegovina of 7September 1997, held that the same was true of the provisions of Protocol No. 6 ECHR.*

[13] *Associate member until its accession to the Council of Europe on 28 February 1996.*

[14] *All meetings took place in Venice unless otherwise indicated.*

[15] *Also available in French*

[16] *Speeches in the original language*

[17] *Also available in Russian*

[18] *Also available in Russian.*

[19] *An abridged version is also available in Russian.*