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THE VENICE COMMISSION

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I. Overview

A. Introduction

1. The European Commission for Democracy through Law, better known as the Venice Commission, was established just after the fall of the Berlin Wall, and has played a leading role in the adoption, in Eastern Europe, of constitutions that conform to the standards of Europe's constitutional heritage. Initially conceived as a tool for emergency constitutional engineering at a time of revolutionary change, the Commission has seen its activities evolve as the early upheavals have given way to a more gradual process of change, for constitutional engineering remains essential to keep machinery, that would otherwise tend to seize up, in working order. The Commission therefore keeps a close watch on the changes that constantly affect society and are reflected in fundamental – that is constitutional – rules.

2. After a brief description of the Commission's legal status and composition, we shall use recent examples to illustrate the wide scope of its activities. Generally speaking, its work falls into three categories, which we shall look at in turn: specific issues relating to certain states, more general topics, to which a comparative approach is adopted, and the documentation centre for constitutional case-law.

B. The Commission's legal status and composition

3. The Commission is a Council of Europe enlarged agreement: in addition to the member states of the Council of Europe, non-member states which accede to the agreement will take part in its activities and contribute to its budget. Its statute, in its current form, was adopted by the Committee of Ministers on 21 February 2002².

4. The Venice Commission is composed of “independent experts who have achieved eminence through their experience in democratic institutions or by their contribution to the enhancement of law and political science”³. Most of them are senior academics, particularly in the fields of constitutional or international law, supreme or constitutional court judges or members of their national parliament.

5. The members are appointed for four years by the member states of the enlarged agreement. The latter now include all the Council of Europe member states.

6. In addition, Belarus and Bosnia and Herzegovina, which have not yet joined the Council of Europe, are associate members, while Argentina, Canada, the Holy See, Israel,

¹ This is an updated version of the article by Pierre Garrone, Administrative Officer, Secretariat of the European Commission for Democracy through Law, published in the *Rivista di studi politici internazionali*, anno LXVI (1999) n. 264, pp. 527-548.

² See the Appendix to Resolution (2002) 3..

³ Article 2, para. 1 of the Statute.

Japan, Kazakhstan, the Republic of Korea, Kyrgyzstan, Mexico, the United States and Uruguay are observers. South Africa has special co-operation status.

C. The Commission's activities

7. The work of the European Commission for Democracy through Law is geared to upholding the three underlying principles of Europe's constitutional heritage: democracy, human rights and the rule of law, which are the cornerstones of the Council of Europe.

8. The Commission is active throughout the constitutional domain. Far from confining its attention to constitutions in the narrow sense, it has covered such areas as legislation on constitutional courts and national minorities, election laws and other legislation with implications for national democratic institutions. It monitors the European integration process, and above all its constitutional implications, closely.

9. The Commission's Statute does not restrict its geographical scope. However, the Committee of Ministers must approve any requests from non-member states of the enlarged agreement⁴, as in the case of co-operation with South Africa, to which we will return later.

II. Constitutional assistance

10. The Commission's primary task is to assist and advise individual countries in constitutional matters – to provide constitutional first-aid, as it were – and this requires it to scrutinise constitutional legislation, generally at the request of states themselves. It may also, however, be asked to examine a specific text of this type by the Council of Europe's Committee of Ministers, Parliamentary Assembly, Congress of Local and Regional Authorities of Europe or Secretary General, or by an international organisation or body participating in the work of the Commission⁵. At the Committee of Ministers' request, for example, it examined the Russian constitution as part of the process for Russia's joining the Council of Europe⁶. It also drew up an opinion on the establishment of a general Council of Europe judicial authority⁷ and a study on a general legal reference framework to facilitate the settlement of ethno-political conflicts in Europe⁸. At the Secretary General's request, it produced a study on the prohibition of political parties and similar measures⁹. The most frequent source of requests is, however, the Parliamentary Assembly. In 2001 alone, the Commission adopted opinions based on requests from the Parliamentary Assembly on the following subjects:

⁴ Article 3 paragraph 3 of the Statute.

⁵ Article 3 paragraph 2 of the Statute.

⁶ Opinion on the Constitution of the Russian Federation adopted by popular vote on 12 December 1993, CDL (94) 11.

⁷ CDL-INF (2001) 5.

⁸ CDL-INF (2000) 16.

⁹ CDL-INF (2000) 1.

- the implications of the decision of the Constitutional Court of Bosnia and Herzegovina on the issue of the “constituent peoples”¹⁰;
- the Electoral Law of Bosnia and Herzegovina¹¹;
- the amendments of 9 November 2000 and 28 March 2001 to the Constitution of Croatia¹²;
- the Ukraine Constitutional Reform Project¹³;
- the constitutional situation in the Federal Republic of Yugoslavia¹⁴;
- the legal system of the Palestinian autonomous territories¹⁵.

11. As a rule, the Commission is consulted on constitutions at the drafting stage, rather than after their adoption, when changing them becomes much harder. Its involvement at various stages in the adoption process makes it easier for its comments to be taken into account – a very constructive approach, illustrated by the work on the Albanian constitution and constitutional reforms in Moldova and Ukraine.

12. Although its opinions are generally reflected in the final version, the Commission does not set out to impose solutions, but adopts a non-directive approach based on dialogue.

13. The following are examples of the Commission's “bilateral” activities.

A. Co-operation with Albania

14. The Commission co-operates particularly closely with Albania. On a number of occasions, a Commission liaison officer has made lengthy visits to Tirana to maintain close links with the Albanian authorities. The process of adopting a new Albanian constitution, which started at the outset of the country's democratisation, in fact extended over several years. In 1991, the Commission took part in a constitutional review in Albania and then gave its opinion on the first draft democratic constitution¹⁶. The transition from a totalitarian system to a liberal democracy created an urgent need for constitutional provisions on human rights. The emphasis was therefore placed on the human rights chapter of the revised draft constitution. Following discussions with an Albanian delegation¹⁷, a large number of changes and improvements were incorporated into this section, which was adopted by the Albanian parliament in April 1993.

15. Albania joined the Council of Europe in 1995. One of the commitments it accepted on doing so was adoption of a new constitution compatible with Council of Europe

¹⁰ CDL-INF (2001) 6.

¹¹ CDL-INF (2001) 21.

¹² CDL-INF (2001) 15.

¹³ CDL-INF (2001) 11.

¹⁴ CDL-INF (2001) 23.

¹⁵ CDL (2001) 21 rev.

¹⁶ CDL (91) 37.

¹⁷ See CDL (93) 13.

principles. In 1994, a Commission working group examined the draft constitution put to referendum – and rejected – on 6 November 1994. The Commission submitted its opinion to the Albanian authorities after the vote, to avoid being drawn into the referendum campaign¹⁸. It considered that the proposals represented a serious attempt to produce a constitution complying with European standards of democracy, human rights and the rule of law. However, it made a certain number of observations. In particular, certain provisions – notably those concerning restrictions on fundamental rights – needed clarification to ensure that they were not excessive. Further clarification was also required on the relationship between international and domestic law, the use of referendums and the powers of parliament, the president and the government in the field of international treaties, while the procedure for appointing the prime minister could be simplified. With certain exceptions, these comments did not imply that the text was incompatible with European constitutional standards. In making known its views, however, the Commission prefers to highlight provisions which could be interpreted as being contrary to those standards, so that problems can be avoided at an early stage, before the law is actually applied.

16. In 1995, at the request of the Parliamentary Assembly's Committee on Legal Affairs and Human Rights, the Commission adopted an opinion on the Albanian law on the organisation of the judiciary (Chapter VI of the provisional constitution)¹⁹. In 1998, the same committee asked the Commission to consider the recent amendments to the major constitutional provisions then in force in Albania concerning the High Council of Justice, the additional provisions on the rotation of Constitutional Court judges and the new provisions on public administration of unlawful economic activities²⁰.

17. What makes the Commission's involvement in drawing up a new Albanian constitution particularly noteworthy is the fact that it continued throughout the process. At the request of the country's president, its Working Group for Albania, established in 1997, played an active part in writing the new constitution and liaised constantly with the Albanian constitutional commission at each of the drafting stages. Several meetings were held in 1998 to consider the different versions of the draft constitution, article by article. The Commission was also invited to give its views on the major issues raised, such as whether to opt for a unicameral or bicameral system.

18. The new Albanian constitution was approved in a referendum on 22 November 1998, with the result that Albania now has a fundamental law which is fully consistent with European – and Council of Europe – constitutional standards in the matter of democracy, human rights and the rule of law.

19. In 1999, at the Parliamentary Assembly's request, the Commission adopted an opinion in which it found that the death penalty was incompatible with the new Albanian constitution²¹. This finding was based on the absence of any exception to the protection of life laid down in the constitution, the requirement that any restriction on the rights and

¹⁸ *The opinion was published in the Commission's 1994 annual report, pp. 22 ff.*

¹⁹ *CDL (95) 74 rev.*

²⁰ *CDL-INF (98) 9.*

²¹ *CDL (99) 1.*

freedoms laid down in the constitution should not violate the essence of those rights and freedoms, and the trend in European legal systems towards abolition of the death penalty.

20. The Commission's opinion was followed by the Albanian Constitutional Court, which, like the Ukrainian Constitutional Court, has ruled that the death penalty is unconstitutional.

21. The Commission has co-operated closely with Albania in the field of electoral law. In 1997, it helped to draft the revised law on parliamentary elections, needed to ensure that the early general election necessitated by the political crisis in the country ran smoothly. In 2000, it took part in a round table, chaired by the OSCE, which set out to reach consensus on an electoral code, applying to all elections and voting procedures, which satisfied the new constitution's requirements. In 2001, Commission experts took part in a seminar in Tirana on electoral disputes and organised a training session on this subject for judges.

22. In 2000-2001 alone, the Commission also examined draft legislation on the Supreme Court, the organisation and functioning of the Council of Ministers²², and the functioning of parliamentary investigation commissions²³.

B. Co-operation with Armenia and Azerbaijan

23. The Commission started working with Armenia and Azerbaijan long before they joined the Council of Europe, but this co-operation has intensified since they became members.

24. In 2000, the Commission set up a working group on reform of the Armenian Constitution. This group co-operates closely with the Armenian Committee responsible for revising the Constitution. A programme for co-operation between the Commission and Armenia has been adopted, covering not only revision of the Constitution²⁴, but also electoral laws, reform of the judicial system, and draft legislation on the ombudsman, political parties, local self-government and the civil service.

25. In 2000, the Commission also produced an opinion on the law on parliamentary elections in Azerbaijan²⁵, making recommendations on some of its provisions, and particularly their interpretation. The Central Electoral Committee promised to follow these recommendations. The Commission later re-examined the law in the light of the November 2000 elections, and decided that several changes were necessary. Specifically, it found that a credible procedure for the examination of election appeals was essential.

26. The programme for co-operation between the Commission and Azerbaijan²⁶ covers constitutional reform, the Constitutional Court, electoral reform and minorities.

²² CDL (2000) 91, 92 and 108.

²³ CDL (2001) 47, 48 and 49.

²⁴ CDL-INF (2001) 17.

²⁵ CDL-INF (2000) 17.

²⁶ CDL (2001) 5.

C. Co-operation with Bosnia and Herzegovina

27. In recent years, co-operation with Bosnia and Herzegovina has been a standing feature of the Commission's programme²⁷. Several recent examples are presented below.

28. The Commission has produced several reports at the request of the High Representative of the international community in Bosnia and Herzegovina. For example, a working group examined the constitutions of the two entities – the Federation of Bosnia and Herzegovina, and the Republika Srpska – to see whether they were compatible with the constitution of Bosnia and Herzegovina, laid down in the Dayton Agreement. Its views were largely accepted by the authorities in the two entities.

29. On 10 December 1996, the Commission issued an opinion on the legislative acts adopted by the Constituent Assembly of the Federation of Bosnia and Herzegovina from the entry into force, on 14 December 1995, of the Constitution of Bosnia and Herzegovina set out in Appendix 4 to the Dayton Agreement, to the elections held on 14 September 1996²⁸.

30. At its June 1997 session, the Commission adopted an opinion – requested by the Parliamentary Assembly's Committee on Legal Affairs and Human Rights – on the establishment of a human rights court in the Federation of Bosnia and Herzegovina, in which it insisted that the human rights protection system needed to be simplified²⁹.

31. In 1998, the High Representative put a number of questions to the Commission concerning the interpretation of Bosnia and Herzegovina's constitutional law. Having systematically analysed Appendix III to the Dayton Agreement, the Commission concluded that Bosnia and Herzegovina, and not the entities, was generally responsible for legislating on entity and municipal, as well as national, elections³⁰. It also considered whether Bosnia and Herzegovina required a state court, in addition to the existing Constitutional Court. It decided that the absence of a supreme court was not, in itself, unconstitutional, but pointed out that Bosnia and Herzegovina had authority to establish specific courts at state level – and that such courts seemed necessary to deal with electoral and administrative disputes³¹. It also found that there could be no appeal against decisions of the Human Rights Chamber to the Constitutional Court³².

32. In 1999, the Commission adopted an opinion on the scope of Bosnia and Herzegovina's responsibilities in the field of immigration and asylum, with special reference

²⁷ For a summary of the Commission's work in this area from September 1994 to June 1998, see the opinion on the constitutional system in Bosnia and Herzegovina, CDL-INF (98) 15.

²⁸ CDL (96) 94.

²⁹ Annual report 1997, pp. 32 ff..

³⁰ CDL-INF (98) 16.

³¹ CDL-INF (98) 17.

³² CDL-INF (98) 18. The Constitutional Court accepted this view in its judgment of 26.02.99 (Case U7/98, Human Rights Law Journal, Vol. 20, p. 390).

to a possible sharing of powers with the entities³³, and expressed its views on the proposed immigration and asylum laws. It found that Bosnia and Herzegovina, and not the entities, had legislative, regulatory and administrative jurisdiction in this area, but that some delegation of administrative powers to the entities was not excluded. It also noted that the draft legislation submitted to it perfectly exemplified one case where a federal court was indispensable. It fully supported the approach to the sharing of responsibilities between Bosnia and Herzegovina and its entities adopted in the draft immigration and asylum laws, but stressed that provisions relating to the jurisdiction of the courts must be added.

33. The Commission also adopted an opinion on powers of concluding and implementing international agreements under the constitution of Bosnia and Herzegovina³⁴. The main legal issue was whether Bosnia and Herzegovina had power to conclude international agreements in areas for which the entities were internally responsible. The Commission found that it had such power, but that determining the actual scope of that power was a matter for the federal authorities, and particularly the Constitutional Court. It noted that the entities could, with the agreement of Bosnia and Herzegovina's Parliamentary Assembly, conclude international agreements in their areas of responsibility. Consultation machinery should be established to deal with this issue, and with that of agreements concluded by Bosnia and Herzegovina in areas for which the entities were internally responsible.

34. At the High Representative's request, the Commission also looked at human rights protection in Bosnia and Herzegovina, and adopted a proposal on reorganising the machinery after the transition period provided for in the Dayton Agreement. The aim is to make that machinery more effective by simplifying procedures and avoiding duplication. One part of this is merging the Human Rights Chamber and the Constitutional Court of Bosnia and Herzegovina, thus making one supreme judicial authority responsible for protecting fundamental constitutional rights. The Commission also recommended setting up an ombudsman's office in the Republika Srpska, recasting the Human Rights Ombudsman's activities in Bosnia and Herzegovina, and redefining his responsibilities to bring them into line with the entities' ombudsmen. On this basis, it approved a report on mediation institutions in Bosnia and Herzegovina, which includes three draft laws on the Ombudspersons of the state and the two entities³⁵. It later adopted an opinion on reform of the judicial system for human rights protection in the Federation of Bosnia and Herzegovina, giving practical form to the proposed constitutional amendment abolishing the Court of Human Rights of the Federation³⁶. In 2000, it adopted conclusions on the reorganisation of human rights protection machinery at state level in Bosnia and Herzegovina. In particular, it recommended that the Chamber of Human Rights and the Constitutional Court should merge, once Bosnia and Herzegovina had ratified the European Convention on Human Rights³⁷.

35. One of the Commission's main concerns in its work on Bosnia and Herzegovina in recent years has been to harmonise the country's human rights protection machinery. In

³³ *CDL-INF (99) 8*.

³⁴ *CDL-FED (99) 2 rev 2*.

³⁵ *CDL (2000) 22 rev*; see also *CDL-INF (99) 10*.

³⁶ *CDL-INF (99) 16*.

³⁷ *CDL-INF (2000) 8*; see also *CDL-INF (99) 12*.

2000-2001, it concentrated on exploring the implications of merging the Chamber of Human Rights and the Constitutional Court in greater detail. Its main concern is how best to achieve this merger – or, more precisely, how the Chamber’s powers and responsibilities can best be transferred to the Constitutional Court – without lowering the level of human rights protection. Its proposal is that the Chamber should cease functioning once the country has ratified the European Convention on Human Rights. The Chamber and the Court disagreed on two important aspects of this operation. First, the nature of the legal act needed to effect the merger must be decided: it was noted that an ordinary, not a constitutional, law offers the best solution. Second, the Chamber believed that its disappearance will leave a gap, which will require amendment of the Constitution. The Court did not agree. The Commission proposed a compromise³⁸.

36. For several years, the Commission had been arguing that a Court of Bosnia and Herzegovina was needed³⁹. It took part in a joint Commission/Directorate General of Legal Affairs Working Group set up to draft the necessary legislation in co-operation with the Office of the High Representative. The Court of Bosnia and Herzegovina was set up by decision of the High Representative on 12 November 2000⁴⁰.

37. The Commission has also worked on the implementation of the decision on “constituent peoples” given by the Constitutional Court of Bosnia and Herzegovina, which finds that the privileged treatment enjoyed by certain peoples under the federal entities’ Constitutions is incompatible with the requirement under the national Constitution that all must be treated equally. Implementing this decision in the Republika Srpska depends less on amending its Constitution than on abolishing discriminatory practices affecting non-Serbs. Within the Federation, however, the Constitution needs to be rewritten in more neutral terms, applying the lessons learnt from traditional federalism⁴¹. The Commission was also closely involved in drawing up the electoral law of Bosnia and Herzegovina, from 1997. The draft adopted in August 2001 was based on a text prepared by one of its groups of experts.

D. Co-operation with Moldova

38. In 1995, the Commission examined the draft Moldovan laws on the status of minorities and on the organisation and holding of meetings⁴². Regarding the former, its rapporteurs identified a number of problems, such as the lack of a definition of the term “minority”, the privileged status of the Russian language, the possible consequences of guaranteeing education in the mother tongue and the unclear nature of certain provisions. The representatives of the Moldovan authorities said that the draft legislation had been amended to take account of the Commission's views.

39. In the case of the draft legislation on the organisation and holding of meetings, the Commission said that the proposed administrative approach was too restrictive, that the

³⁸ See, most recently, document CDL (2001) 62 rev.

³⁹ CDL-INF (98) 17.

⁴⁰ CDL (2000) 106.

⁴¹ CDL-INF(2001)6 and CDL(2001) 23.

⁴² See documents CDL (95) 1, 2, 9 and 14.

desire to anticipate every possible eventuality was obstructing freedom of assembly, that the proposals made spontaneous gatherings impossible, that the authorities' discretionary powers were too broad and that the extent of judicial supervision was imprecise, which could raise problems of compatibility with international legal instruments⁴³. The Moldovan representatives thought that these comments would help to improve the draft legislation.

40. In 1998 the Commission adopted an opinion on the proposed statute for Gagauzia⁴⁴. It commented on the lack of a clear hierarchy of legal rules (in particular as between Moldovan legislation and the statute); the doubtful division of responsibilities, with certain articles granting Gagauzian bodies powers belonging to the central Moldovan authorities, particularly that of organising local referendums on constitutional matters; problems caused by simply incorporating other legislative provisions into the statute as they stood; the fact that the chapter on human rights was lifted straight from the Moldovan constitution and therefore added nothing new to Gagauzia's legal system; the failure to observe certain provisions of the European Charter of Local Self-Government; the incomplete description of the electoral system and the lack of a clear statement on the powers of the Gagauzian courts to review constitutionality.

41. In 1999, at the request of the Parliamentary Assembly's Monitoring Committee and the Moldovan authorities, the Commission examined the compatibility of the laws on local government and territorial organisation, and the law on local public administration, with the existing laws on minorities⁴⁵. As far as the position of the head of the Gagauz administration and that of the prefect were concerned, there was a danger that the law on local government might clash with the law on the special status of Gagauzia, which took precedence. Even before the Commission had given its final opinion, the Moldovan parliament amended the law on local government to remove any risk of conflict.

42. At the request of the Parliamentary Assembly and the Moldovan authorities, the Commission monitored the process of constitutional reform in Moldova closely from 1999. In particular, it gave an opinion on a proposed aimed at establishing a presidential system of government in Moldova, in direct opposition to the wishes of Parliament. Its criticisms applied to the new draft text as a whole. Some provisions were acceptable, taken on their own, but raised serious problems in conjunction with others. The principle of separation of powers was not fully respected, and there was a lack of balance between executive and legislature.

43. The Commission helped Moldova to find a consensual solution to these problems: the Moldovan authorities set up a joint Constitutional Commission/parliamentary working group to prepare a single draft text. This group worked closely with the Commission and adopted a compromise solution, which all its members accepted⁴⁶. In the end, however, Parliament adopted a text which increased its own and the Government's powers in dealing with the

⁴³ CDL (95) 33, 35, 36 and 37.

⁴⁴ CDL (98) 41.

⁴⁵ CDL-INF (99) 14.

⁴⁶ CDL (2001) 37.

President⁴⁷ - a text which did not, in the Commission's view, raise any major problems concerning modern democratic constitutional norms. The balance of powers is maintained, and the Moldovan authorities have achieved their initial aim of strengthening the government. The Commission hopes, at all events, that the changes will secure a measure of constitutional stability. Powers should not be transferred from one institution to another, or the Constitution be amended, whenever the political situation changes, or a new parliamentary majority emerges. The new system offers tremendous scope for establishing and strengthening genuine, effective democracy in Moldova. Some adjustments may still be envisaged, but the basic principles stated in the new text raise no problems⁴⁸.

E. Co-operation with Ukraine

44. Since 1992, the Commission has played an active part in helping to draft a new Ukrainian constitution. As part of the constitutional review process, legislation on the powers of the state and of local authorities was enacted in May 1995. The issue of this legislation's compatibility with the 1978 Constitution, which was still in force at the time, was settled by constitutional agreement between the president and parliament. The Commission was then asked to assess the constitutional situation in the country. It concluded that the text in question bore the hallmarks of a period of transition and in many respects constituted remarkable progress, but that in future Ukrainian constitutional law would have to be based on firmer and more stable principles regarding human rights, independence of the judiciary and the powers of the prosecution service. There must also be stable rules, which those involved in the political process cannot alter unilaterally⁴⁹.

45. Some members of the Commission also commented on the preliminary draft of the new constitution submitted in 1995, which was subsequently amended. In its opinion on the amended draft⁵⁰, the Commission noted that it marked a considerable advance on previous proposals, but that certain questions – e.g. the powers of Crimea, protection of the fundamental rights of legal persons, the death penalty, the scope of social rights protection and the extent of the president's powers – needed further clarification.

46. The Parliamentary Assembly later asked the Commission to comment on the Ukrainian constitution, after its adoption.

47. In its opinion⁵¹, the Commission noted that the final version of the Constitution incorporated many of its comments on earlier drafts. In particular, it welcomed the decision to set up a permanent Constitutional Court, which was wholly consistent with the new democracies' practice of protecting the new legal order's constitutionality with the help of a special, permanent and independent judicial body.

⁴⁷ CDL (2000) 55 rev.

⁴⁸ On the whole question of revision of the Moldovan Constitution, see CDL-INF (2001) 3.

⁴⁹ The opinion is included in the 1995 annual report, pp. 17ff.

⁵⁰ CDL-INF (96) 6; see also CDL (96) 25.

⁵¹ CDL-INF (97) 2.

48. The list of human rights was comprehensive. The approach to restrictions on fundamental rights – provided for article by article, and not on the basis of a general clause – was the right one. However, directly applicable freedoms were not distinguished clearly enough from social rights requiring legislative measures. The Commission deeply regretted that the death penalty had not been expressly abolished.

49. In conclusion, although the text established a strong government headed by a powerful president, there appeared to be enough checks and balances to prevent authoritarian excesses. Rule of law principles were securely enshrined, and the setting-up of democratic local government and the essential role assigned to the Constitutional Court should help to give democracy a solid footing in Ukraine.

50. In 1997, the Commission also adopted an opinion on the draft Ukrainian law on the Constitutional Court. It emphasised that this law represented an important step for the protection of individual rights in Ukraine, in particular by allowing individuals to petition the Constitutional Court in practice. However, provisions were needed on referral of cases to the Court by the ordinary courts and on parties' involvement in cases before it⁵².

51. Once the Constitution had been adopted, an important question of interpretation arose. The Parliamentary Assembly asked the Commission to rule on the constitutionality of the death penalty. The Commission concluded that the death penalty could not be deemed compatible with the Ukrainian Constitution, particularly in view of the absence of any explicit authorisation in the text, the latter's insistence on the right to life, and the general trend in Europe towards abolition⁵³.

52. At the request of the Parliamentary Assembly, the Commission gave an opinion on the Ukrainian bill on the judicial system⁵⁴. It was pleased that the authors of the bill had set out to establish a system based on independence of the judiciary, but felt that this goal had not been attained in the text submitted, which needed thorough re-drafting. In particular, the rules on appointment of judges should be recast to ensure clear involvement of the Judicial Service Commission; the provisions establishing a strict judicial hierarchy, and allowing higher courts to issue 'recommendations or explanations' to lower ones, courts should be revised; the powers of the military tribunals were excessive, and the economic (arbitration) courts, dating from the Soviet period, should be abolished.

53. At the request of the Council of Europe's Parliamentary Assembly and Secretary General, the Commission gave an opinion in March 2000 on the All-Ukraine referendum on the People's Initiative scheduled for April⁵⁵. This referendum, a product of the political disputes between the President and Parliament, contained six questions, aimed at amending the Constitution to Parliament's detriment. Briefly, the Commission took the view that a referendum did not, and could not, amend the Constitution directly, and that the concept of holding a consultative referendum was highly questionable. Moreover, the President's

⁵² 1997 annual report, pp. 58 ff; CDL (97) 18 rev..

⁵³ CDL-INF (98) 1R.

⁵⁴ CDL-INF (2000) 5.

⁵⁵ CDL-INF (2000) 11.

insistence, in his decree, on a positive response in the referendum, was constitutionally dubious. The very content of the proposed changes was partly unconstitutional and contrary to international norms, since it tipped the balance of power too heavily towards the President and away from Parliament, notably by allowing the electorate to approve a vote of no confidence in the current Parliament, and by restricting parliamentary immunity. More generally, its analysis of the individual questions had revealed many ambiguities and inconsistencies. The Ukrainian Constitutional Court agreed with the Commission, declaring two questions unconstitutional and deciding that others, although approved in the referendum, could not be regarded as directly amending the Constitution. The state authorities must examine and decide on these proposals, in accordance with the section of the Constitution covering amendments to the text.

54. The Commission identified a number of concerns: the nature of the projected second parliamentary chamber had not been clearly defined; it was also essential that parliamentary immunity from arbitrary arrest or detention be guaranteed by the Constitution, and not an ordinary law; finally, the reason given as a basis for dissolution of Parliament was ambiguous and needed to be reworded. The Commission proposed a number of amendments to the Ukrainian President's draft, and felt that this draft – if adopted without such changes – might well raise serious problems concerning democracy, the rule of law and the balance of powers⁵⁶.

55. Following the referendum, in which the four remaining questions received an overwhelming “yes”, the President and a group of 152 members of parliament submitted proposals to Parliament for implementation of the referendum results.

56. In July 2001, at the Parliamentary Assembly's request, the Commission adopted an opinion on changes to the Constitution proposed by a number of Ukrainian parliamentarians. These changes were intended to give Parliament the leading role, but the Commission felt that they gave undue weight to political parties, while restricting individual members' independence⁵⁷.

57. The Commission also commented on the draft law on the Ukrainian judicial system; it felt that the draft needed total revision, particularly to settle the question of the rights and duties of judges. The Justice Minister's participation in plenary sessions of the Supreme court, which could issue instructions to the judiciary, also needed to be reviewed⁵⁸. In October 2001, the Commission gave an opinion on the draft electoral law, adopted by the Ukrainian Parliament. It welcomed the fact that the new text was far more detailed than the old one, since this removed many doubts concerning its application. A number of points still needed improving, however, particularly that concerning appeals. The opinion insisted on the need to guarantee equality of the various political parties and tendencies, particularly through the composition of electoral committees and legislation on the media⁵⁹.

⁵⁶ CDL-INF (2000) 14.

⁵⁷ CDL-INF (2001) 11.

⁵⁸ CDL (2001) 55 and 78.

⁵⁹ CDL-INF (2001) 22.

F. Co-operation with the Federal Republic of Yugoslavia

58. As a result of the political changes which took place in 2000, the Commission is now working with Yugoslavia, particularly on revision of the Federal and Serbian Constitutions. In 2001, it adopted an interim report⁶⁰, in which it noted that the Federal Republic's lack of a sound constitutional basis was obstructing the democratic reforms required on all levels and creating an atmosphere of uncertainty. Constitutional reforms should therefore be carried out as soon as possible. Concerning Montenegro, the Commission considered that solving its specific problems by referendum raises problems both of lawfulness and legitimacy. It urged the parties concerned to try to negotiate a solution, which could then be confirmed by referendum.

- Kosovo

59. The Commission has been involved in seeking a constitutional solution to the Kosovo problem for several years, and took part in the Rambouillet and Paris conferences. It has also co-operated with UNMIK since it was established, and was especially involved in drafting the UNMIK Regulations on the municipal elections in Kosovo and self-government of municipalities. It welcomed UNMIK's publication of a regulation appointing an Ombudsman for Kosovo, based on a draft prepared by the Joint Working Group of the Commission, the Directorate General of Human Rights and the OSCE Mission in Kosovo⁶¹.

60. The Commission helped to prepare a constitutional framework for provisional self-government in Kosovo, introduced by UN Resolution 1244. This framework makes it possible to set up democratic structures, while maintaining the powers of the Secretary General's Special Representative. It safeguards the balance of powers and specific rights for minorities.

F. Collaboration with South Africa

61. South Africa is the country outside Europe with which the Commission has developed the closest co-operation, starting with the constitutional negotiations leading to the adoption of the South African Constitution in 1996. The Commission's President, Mr La Pergola, was a member of the group of mediators (including Dr Kissinger and Lord Carrington) which was invited, in April 1994, to visit South Africa and make proposals for breaking the deadlock caused by ANC and Inkatha opposition on certain constitutional questions.

62. A 1996 agreement with the South African Department of Constitutional Development was aimed at encouraging professional exchanges between Europe and South Africa in matters of democracy and constitutional law. The Constitutional Court, the South African Human Rights Commission, the University of South Africa (UNISA) and the Department of Constitutional Development all benefited directly from the "Democracy, from the Law Book to Real Life" programme, supported by the Swiss Federal Department of Foreign Affairs⁶². Under this programme, seminars, workshops and study visits were organised to promote exchange between South African and European specialists on democracy.

⁶⁰ CDL (2001) 105.

⁶¹ Cf. CDL (99) 80.

⁶² See final report, CDL-INF (2001) 4C.

63. One key constitutional issue in South Africa is the need for effective co-ordination between the various levels of government (national, provincial and local). The Commission accordingly welcomed the initiative taken by the South African Department of Constitutional Development, with the support of the Swiss Federal Department of Foreign Affairs, in establishing university chairs in “intergovernmental relations”. This programme has given South African specialists an opportunity to exchange ideas with experts from European states with similar systems (particularly Spain and Italy).

64. At the same time, the Venice Commission has followed recent constitutional developments in South Africa with great interest, and has occasionally drawn on South African experience in tackling European constitutional problems. For example, in its opinions on European constitutions⁶³, it has more than once quoted the arguments put forward by the South African Constitutional Court in its judgment on the constitutionality of the death penalty.

65. More recently, the emphasis has been on the regional aspects of co-operation between the Commission and South Africa. At the initiative of the Constitutional Court of South Africa, several conferences have been held with representatives of constitutional or supreme courts in southern Africa, and a network of liaison officers is currently being set up. A conference on democracy and constitutionalism in southern Africa in the last forty years was also held late in 1999, and explored the possibility of stepping up co-operation in this field by establishing a Venice-type Commission in Southern Africa. This idea is gaining ground, and Norway has recently provided support for a programme, enabling a number of southern African countries to follow the Commission’s work.

III. “Transnational” topics and UniDem seminars

66. The Commission's transnational activities enable it to carry out the main task laid down in its Statute – working to improve the functioning of democratic institutions, knowledge of legal systems and understanding of the legal culture of countries working with it.

67. Transnational topics are covered:

- a. as part of the ongoing activities of the Commission, which can initiate its own research, or
- b. in UniDem (universities for democracy) seminars.

A. Comparative studies on topics connected with the functioning of democracy first provide an overview of the law in various countries. They then make it possible to identify constitutional values which are shared throughout Europe, and also any weak points. The third stage is harmonisation, which may involve the incorporation of those principles, on the basis of Commission recommendations, into the law of countries which do not yet apply them.

⁶³ CDL-INF (98) 1R, p. 12 (*opinion of the Venice Commission on the constitutional aspects of the death penalty in Ukraine*); CDL (99) 1 p. 5 (*opinion on the compatibility of the death penalty with the Albanian constitution*).

- B. UniDem seminars** are attended by leading specialists from the political and academic worlds and constitutional courts (or equivalent bodies), and are organised by the Commission and, for example, a specific university or constitutional court. Reports are presented on particular countries or specific aspects of the topics discussed. By allowing specialists from a wide range of backgrounds to exchange views, the UniDem seminars help to define the rules common to democratic states in which human rights and the rule of law are respected.
- C.** Research on transnational topics, connected or not with a UniDem seminar, frequently forms the basis of **publications** in the **Science and Technique of Democracy series**⁶⁴.

68. Topics the Commission has recently considered include:

1. Federalism and regionalism

- **Federal and regional states**⁶⁵: in a world where unitary, centralised forms of government are no longer the archetype, this is a very topical theme. In recent years, one of the main constitutional developments has been the trend towards increased powers for lower tiers of government. The Commission's comparative study presents various aspects of federalism in Europe and North America. It identifies their common features but also highlights the diversity and complexity of constitutional approaches. It lays particular stress on the allocation of powers and on relations between the central authorities and the entities.
- **Federated and regional entities and international treaties**⁶⁶: a Commission study on the situation of federated and regional states and states containing autonomous entities reached the following conclusions. Participation by federated and regional entities in international relations (particularly treaty-based relations) is increasingly common, not only because of the growth in international links but also because of developments in the apportionment of powers, with a tendency for federated states and regions to have a greater share of international responsibilities. But national arrangements vary widely, from the concentration of responsibility for international questions at central government level, to systems in which international powers parallel domestic responsibilities at the domestic level. In addition to concluding their own treaties, entities may be involved in the preparation or implementation of treaties concluded by central government. When involvement prior to the conclusion of treaties is provided for, this takes the form of consultation or, more rarely, participation in negotiations. The extent to which entities are involved in implementing treaties generally depends on the apportionment of responsibilities at the domestic level. Their participation in international organisations is less highly developed than in supranational bodies: in fact, the latter have real legislative powers, and it is essential that entities should participate in the Community decision-making

⁶⁴ See the appended list of 'Science and Technique of Democracy' publications.

⁶⁵ The report on Federal and Regional States was published as 'Science and Technique of Democracy' series No 19, Council of Europe Publishing.

⁶⁶ CDL-INF (2000) 3.

process. This is why the debate on the distribution of powers – a major issue in these countries – can no longer ignore the international dimension.

- See also, below, the general legal reference framework to facilitate the settlement of ethno-political conflicts in Europe.

2. Settlement of conflicts

- **Societies in conflict – the contribution of law and democracy to conflict resolution** (seminar in Bled, Slovenia, November 1999)⁶⁷: the purpose of this seminar was to examine different forms of conflict and attempt to identify legal instruments which could be used to settle them. Most of the participants were experts from the various conflict zones in Europe, especially south-eastern Europe. The seminar was followed by a conference in Brdo on 29 and 30 November on “The Contribution of Constitutional Arrangements for the Stability of South-Eastern Europe”. The two main themes of this conference were the effectiveness of constitutional human rights standards and the constitutional framework for the apportionment of powers. Concerning the first, the conference declared that international human rights standards must be incorporated into national law, and implemented and guaranteed by national institutions. The importance of including specific rights for minorities at the highest, i.e. constitutional, level was stressed. Concerning the constitutional framework for the apportionment of powers, the need for detailed constitutional rules on the powers of the various institutions was highlighted. Otherwise, there was a risk that the old system, with power concentrated in just one place, would creep back through the loopholes in the present rules. A balanced relationship between the two branches of power was essential to a more democratic, responsible and stable political life in these countries.
- At the request of the Italian Chair of the Committee of Ministers, the Commission drew up a **general legal reference framework to facilitate the settlement of ethno-political conflicts in Europe**⁶⁸. The following conclusions were formulated. Detailed solutions to the problems which arise when powers are divided between various levels of the state structure must be tailored to each specific case. The issues, on the other hand, are similar. The report shows that respect for territorial integrity can accommodate autonomous and regional status, federalism and even confederation, not forgetting the rules on protection of minorities. Whenever several levels of authority coexist, various decisions must be taken on the division of powers: first, on the basis of that division and on who is to exercise residual powers; next, on selecting the various types (exclusive, concurrent, governed by framework laws, etc.); or on the symmetrical or non-symmetrical nature of the division. Further, do the entities participate, directly or indirectly (e.g. through a second chamber) in the central state’s decision-making process? Is the approach to division of powers and to decision-making symmetrical or asymmetrical? The way in which differences between the central state and the entities are settled (court proceedings or arbitration) is another important question. Finally, in settling conflicts, an international guarantee may be sought.

⁶⁷ *Science and Technique of Democracy*, no 29.

⁶⁸ *CDL-INF (2000) 16*.

3. Protection of minorities

- Because of the importance of the minorities question in Europe today, the Commission has made it a priority from its inception. Specifically, in 1991, it produced proposals for a European Convention for the Protection of Minorities⁶⁹, which formed the basis for the Framework Convention for the Protection of National Minorities⁷⁰. It then undertook a detailed examination of the protection of minorities in national law, and the specific approaches adopted in federal and regional states⁷¹.
- More recently, the Commission has focused on **participation in public life by persons belonging to minorities**. The first step was a report concerned with entry to the public service, which described the various forms of discrimination which needed to be overcome, and the positive measures taken to assist minorities. It found that such positive measures were far from universal⁷².
- Still in the context of its work on participation in public life by members of minorities, the Commission approved a document on **electoral law and national minorities**⁷³. This points out that few countries have specific rules on the representation of minorities on elected bodies. To study minority membership of such bodies, particularly national parliaments, one therefore has to take a more general look at electoral law, and particularly the influence of electoral systems on representation of political groups. The following conclusions may be noted:
 - a. The effect of electoral systems on minority representation is clearest when national minorities have their own parties, which most states permit, in accordance with the principle of freedom of association.
 - b. The more proportional the electoral system, the likelier it is that dispersed or small minority groups will be represented in the elected body; a key factor in the proportionality of a system is the number of seats per constituency.
 - c. When lists are not blocked, voters can take account of candidates' origins. Whether such freedom of choice works to minorities' advantage or disadvantage depends on a number of factors, including their numerical strength.

⁶⁹ See 'The protection of minorities', *Science and Technique of Democracy*, No 9, Council of Europe Publishing, pp. 9ff.

⁷⁰ ETS 157.

⁷¹ 'The protection of minorities', *Science and Technique of Democracy*, no 9, pp. 40 ff..

⁷² CDL-MIN (98) 1.

⁷³ See CDL-MIN (99) 1.

- d. Granting constituency status to an area where a national minority is in the majority facilitates the national minority's representation in elected bodies, particularly where a majority system is used.

4. Political parties

- **Prohibition of political parties and analogous measures**⁷⁴: the report prepared on this question at the Secretary General's request identified widely differing approaches to banning or restricting political parties' activities. For example, some countries have no rules in this area, or simply apply the general rules on associations. Registration of political parties is not a universal requirement. Where controls do exist, these may be preventive or punitive. However, a number of common features emerge from the replies. In particular, political parties everywhere enjoy freedom of association and any restrictions on this freedom must respect the proportionality principle. Bans are therefore possible only in exceptional circumstances – witness the extreme restraint shown by the great majority of governments. On this basis, the Commission has drawn up guidelines on the prohibition of political parties and analogous measures⁷⁵, which include the following points:
 - everyone has the right to join political parties;
 - any restrictions on the exercise of fundamental human rights through the activity of political parties must respect the relevant provisions of the European Convention on Human Rights and other international treaties, both in normal times and in national emergencies;
 - the prohibition or enforced dissolution of political parties is justified only in the case of parties which advocate the use of violence, or use violence as a political means to overthrow the democratic constitutional order, thereby undermining the rights and freedoms guaranteed by the constitution;
 - the prohibition or dissolution of political parties are particularly far-reaching measures. They must be used with the utmost restraint, must respect the principle of proportionality, and must be decided by the Constitutional Court or some other appropriate judicial body, following a procedure which offers full procedural guarantees, openness and a fair hearing.
- **The financing of political parties**⁷⁶: the Commission first made a comparative study of national solutions to the problem of the financing of political parties, and later adopted guidelines. These stipulate that political parties should be able to seek and receive both public and private funding. Public funding must at least be available to all the parties represented in parliament and must be conditional on auditing of their accounts by specific public bodies, to ensure financial transparency. Transparency of the parties' private funding must also be guaranteed. As regards the funding of

⁷⁴ CDL-INF (98) 14.

⁷⁵ CDL-INF (2000) 1.

⁷⁶ See CDL-PP (99) 3.

election campaigns, each candidate's electoral spending might be subject to a ceiling, determined every year in proportion to the number of voters concerned; transparency of electoral spending should be achieved by publishing campaign accounts.

5. Electoral law

- **New trends in electoral law in a pan-European context** (seminar held in Sarajevo, April 1998): this seminar took place in a country where electoral issues were highly topical. While recognising the variety of national practices, it concentrated on the fundamental principles of electoral law – guaranteed universal, equal, free, secret and direct suffrage – and their implementation, particularly in voter registration and in the composition of electoral commissions.
- See also the above-mentioned study on electoral law and national minorities.

6. Democratic institutions (others)

- **The division of powers**⁷⁷: this seminar was held in three parts, in the capitals of each of the Caucasian republics, in September and October 1998. It looked at the various aspects of the division of powers between state authorities. This division must no longer be seen as separation in the strict sense, but as a distinction between various functions and various authorities, which still had to work closely together. Democratic practice, and also political wisdom, indicate the need for a balance of powers, particularly between the executive and legislature, safeguarded by a strong and independent judiciary, with the constitutional court at its summit.

7. Human rights

- **The right to a fair trial** (Brno, September 1999)⁷⁸: this seminar on a fundamental aspect of the legal system comprised two parts. In the first, general reports were presented on the situation under the European Convention on Human Rights and the constitutional law of several European and non-European states. In the second, members of the Constitutional Courts or equivalent bodies of some twenty countries discussed a specific example, and showed that approaches in Europe and other continents were converging, and that the values guaranteed by a fair trial were universal.
- **The Protection of Human Rights in the 21st Century** (conference held in Dublin, March 2000): the main subject of this conference was complementarity, and particularly complementarity between the various European organisations (Council of Europe, OSCE, European Union), and within the Council of Europe (between the European Court of Human Rights, the Parliamentary Assembly, the Committee of Ministers, the European Committee for the Prevention of Torture, the Commissioner for Human Rights, and so on). The implications of the EU's draft Charter of Fundamental Rights were emphasised. The universal (United Nations) and inter-American systems were also examined.

⁷⁷ CDL-INF (99) 11.

⁷⁸ *Science and Technique of Democracy*, no 28.

8. Constitutional Justice

- **Decisions of constitutional courts and equivalent bodies and their execution**⁷⁹:
- This study is not confined to issues relating to the execution of constitutional decisions, but sets out to provide a general picture of the way in which constitutional courts operate in states taking part in the Venice Commission's work, on the basis of contributions from forty-five of them. Greater or lesser problems may be encountered in the execution of such decisions, according to the extent of the powers of the court or body in question. For example, preventive or even abstract review raises fewer problems of execution than review of specific cases, giving rise to general judgments. A decision which stops a law from coming into force or invalidates it is easier to execute than a decision which requires an authority to reverse measures taken, or, worse, the government to depart from a long-established practice. Political or financial considerations may also be major impediments to the execution of judgments. Clearly, this does not mean that only easily enforceable judgments should be given, since this might have the undesirable effect of reducing the scope of constitutional review. Nor does it mean that subtle judgments, leaving the legislator a measure of leeway, are not an acceptable alternative to judgments which result in unrealistically high expenditure or create a gap in the law. The procedural rules, however, must be sufficiently clear to avoid leaving the way open for non-execution or creating doubts concerning the effects of judgments; the law must provide for authorities responsible for executing judgments, and for taking action when they are not respected. It is fortunate that, despite their imperfections, current systems generate only a limited number of cases of non-execution.

9. General issues

- **Law and foreign policy**⁸⁰: the Commission adopted a report on this topic, describing the legal foundations of foreign policy in a large number of countries with differing legal cultures and attempting to identify various common factors. Legal rules applicable in decisions concerning foreign policy – rules whose existence was traditionally recognised only in international law – are now a requirement in domestic law too. At the same time and as a corollary, there has been a growing trend towards some democratisation in the implementation of foreign policy. Admittedly the executive retains the main responsibility in this area, but national parliaments, and even the people, are increasingly involved in it.
- **The transformation of the nation-state in Europe at the dawn of the 21st century**⁸¹: the seminar held in Nancy in November 1997 was concerned with the institutional and structural changes which are having profound effects on that traditional, and almost exclusive, method of organising European political society: the nation-state. It showed how the concept of the nation-state emerged and gained

⁷⁹ CDL-INF (2001) 9.

⁸⁰ *Science and Technique of Democracy*, no 24.

⁸¹ *Science and Technique of Democracy*, no 22.

acceptance over a period of time, only to weaken in response to a process of change, involving both dissociation and association, particularly in the context of European integration.

- **Self-determination and secession in constitutional law**⁸²: the question of self-determination – often dealt with in international law, but far less so in constitutional law – is again attracting interest in the wake of the vast political changes which have taken place in Europe in the last ten years. The Commission noted that constitutions, as the basic laws of states, were generally opposed to secession, emphasising concepts such as territorial integrity, indivisibility of the state and national unity instead. In certain cases, these principles permit restrictions on fundamental rights. None the less, as the case-law of the European Court of Human Rights made clear, these restrictions must respect the principle of proportionality, and so be imposed only in very serious circumstances. The term “self-determination”, unlike “secession”, was by no means alien to constitutional law. However, there was no general recognition in constitutional law of the right to self-determination, nor any common definition of those entitled to it, or of its content. Moreover, none of the constitutions studied which recognised the right to self-determination said anything about the procedure for implementing it. When used in constitutional law, the term ‘self-determination’ might denote: decolonisation in the few cases where this was still an issue; the right to independence of an already constituted state; the right of peoples freely to determine their political status and to pursue their development within the state’s frontiers (internal self-determination). Internal self-determination might also be exercised by asserting certain fundamental rights of a collective nature, particularly in the cultural sphere, or even take the form of federalism, regionalism or other patterns of local self-government.

10. European integration

- The Commission has been concerned with the question of **European integration** for several years. The upheavals in the eastern part of the continent must not distract attention from one of the main trends in Europe today – ever deeper supranational integration, paralleled by the current enlargement process. The Commission has focused on two aspects:
 - It made a contribution, in the form of an **Act on European Citizenship**⁸³, to the intergovernmental conference that led to adoption of the Treaty of Amsterdam. This text identified the rights of EU citizens, codifying existing laws, but also making some important innovations. It inspired the new provisions on non-discrimination inserted in the Treaty of Rome⁸⁴. The Commission also suggested establishing a European district.

⁸² *CDL-INF (2000) 2*.

⁸³ *CDL-INF (96) 5*.

⁸⁴ *Article 13 of the Treaty of Rome; see Article 5 of the Act on European Citizenship*.

- The study on **constitutional law and European integration**⁸⁵ showed, on the other hand, how the constitutional law of EU member states, and then of the EU itself, had adapted to supranational law, respecting not only its substance, but its very essence. This study was planned with enlargement in mind, and drew on member states' experience to highlight a number of constitutional issues linked to EU membership. Two seminars were later held on this subject. The first, "European integration and constitutional law" (Nicosia, September 2000), looked at the experience of states already within the EU, and went on to consider the specific situation of the various applicant countries. A seminar on "Constitutional implications of accession to the European Union" was held in Ankara in November 2001, and compared situations in the various countries before discussing relations between the European Union and Turkey in greater detail.
- In response to the increasingly complex division of powers between the nation state, its entities and supranational bodies, the Commission organised a seminar on **federal and regional states in the context of European integration** in Bologna in March 1999⁸⁶. It focused on relations between the various levels of authority, and also looked at non-European views on questions raised by regional integration and federalism, with special emphasis on the North American Free Trade Area and the Southern African Development Community.
- The Commission has also been asked to look more specifically at the changes which Estonia will have to make in its constitution to join the European Union⁸⁷.

IV. Co-operation with constitutional courts

A. The Centre on Constitutional Justice

69. In constitutional law, exchanges of information and ideas between the long-established and the new democracies play a vital role in promoting the Council of Europe's fundamental principles, such as democracy, human rights and the rule of law. The Commission therefore decided in 1991 to set up a documentation centre to collect and disseminate the case-law of constitutional courts and equivalent bodies, making it available to other courts for reference and also to the general public. The Centre's main tools are the *Bulletin of Constitutional Case-Law* and the CODICES data base. The Centre also has a considerable number of constitutional court judgments and other documentation relating to such courts.

70. The *Bulletin of Constitutional Case-Law*, first published in January 1993, contains summaries of the most important decisions sent in by constitutional courts or equivalent

⁸⁵ CDL-INF (99) 7.

⁸⁶ *Science and Technique of Democracy*, no 27.

⁸⁷ CDL-INF (98) 10.

bodies in over 50 countries⁸⁸, the European Court of Human Rights and the Court of Justice of the European Communities. It is published three times a year in English and French, and each issue contains the main judgments given in a four-month period. One of the main advantages of the *Bulletin* is that contributions are supplied by liaison officers appointed by the courts themselves.

71. The regular issues are supplemented by a series of special bulletins containing descriptions of courts and also basic material, such as extracts from constitutions and legislation on the courts, thus enabling readers to put the different courts' case-law in context. A series on leading cases presents the basic decisions of the participating courts before the *Bulletin's* inception in 1993. Issues on the case-law of the Court of Human Rights and on religious freedom have been published in this series.

72. The *Bulletin's* main purpose is to encourage courts to exchange information and help judges to settle sensitive legal issues, which often arise simultaneously in several countries. It is also a useful tool for academics and all those with an interest in this field. It is not only the newly established constitutional courts in central and eastern Europe that benefit from such co-operation and exchange but also the judgments of their counterparts in other countries.

73. The Commission Secretariat in Strasbourg has set up the CODICES database, representing approximately 20 000 pages of printed text. Apart from the 3 000 summaries published in the *Bulletin*, the database contains the full texts of more than 3 500 decisions, mainly in English or French but also in other languages. All the special bulletins are included in CODICES, which also contains full texts of many constitutions. It is available on CD-ROM and via the Internet, and is updated three times a year to coincide with the publication of the *Bulletin*.

74. The *Bulletin* offers a further resource, which is very useful to CODICES users – the Systematic Thesaurus, which is regularly updated to keep pace with new developments in constitutional case-law. It can be used to search the database under specific topics, such as freedom of expression or the presumption of innocence, and also to find relevant case-law and constitutional provisions.

75. The *Bulletin of Constitutional Case-Law* and CODICES provide general access to information previously available only to polyglots with specialised libraries at their disposal. This greatly facilitates comparative research by practitioners, allowing them to draw on approaches already adopted in other countries, particularly in the field of fundamental rights. Variations in case-law between constitutional courts increasingly reflect conscious rather than accidental differences of approach. The circulation of information is therefore a powerful force for “trans-constitutionalism”, enabling courts to draw inspiration from the constitutional

⁸⁸ Albania, Andorra, Argentina, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Kazakhstan, Republic of Korea, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russia, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, “the Former Yugoslav Republic of Macedonia”, Turkey, Ukraine, United Kingdom, United States of America.

practice of their counterparts elsewhere and helping to consolidate the shared constitutional heritage.

B. Seminars organised in co-operation with newly established constitutional courts (CoCoSem)

76. In response to requests from a number of newly established constitutional courts, the Commission has organised a series of seminars with these bodies. Starting in 1996, the seminars, some of which have been organised jointly with OSCE, UNDP, USAID, ABA or COLPI, have been held in Armenia, Azerbaijan, Estonia, Georgia, Kyrgyzstan, Latvia, Moldova, Poland, Russia and Ukraine. They have covered practical issues, such as case or budget management, but also topics relating to rule-of-law principles, such as separation of powers or independence of the judiciary.

V. Conclusion

77. The Venice Commission makes a significant contribution to dissemination of the European constitutional heritage, embodying the continent's fundamental legal values. It does this via the *Bulletin of Constitutional Case-Law*, comparative seminars and the UniDem seminars. All of this promotes “trans-constitutionalism” – the search for shared principles in national case-law – which helps in turn to develop a constitutional heritage shared by all the countries of Europe.

78. Otherwise, the Commission's main activity – constitutional assistance – is as relevant today as it was at its inception. Far from being a one-off operation, marking the transition from authoritarian to democratic government, constitutional review – whether total or partial – is an endemic feature of a world which is changing all the time. Close co-operation between the Commission and the countries which seek its advice, in an atmosphere of mutual confidence, also facilitates the adoption of standards compatible with our shared values.

79. In this way, the Commission is helping to ensure that the third millennium will be the one which sees democracy, human rights and the rule of law recognised throughout Europe.

A P P E N D I XCollection¹**Science and technique of democracy**

- No. 1 Meeting with the presidents of constitutional courts and other equivalent bodies² (1993)
- No. 2 Models of constitutional jurisdiction³
by Helmut Steinberger (1993)
- No. 3 Constitution making as an instrument of democratic transition (1993)
- No. 4 Transition to a new model of economy and its constitutional reflections (1993)
- No. 5 The relationship between international and domestic law (1993)
- No. 6 The relationship between international and domestic law⁴
by Constantin Economides (1993)
- No. 7 Rule of law and transition to a market economy (1994)
- No. 8 Constitutional aspects of the transition to a market economy (1994)
- No. 9 The Protection of Minorities (1994)
- No. 10 The role of the constitutional court in the consolidation of the rule of law (1994)
- No. 11 The modern concept of confederation (1995)
- No. 12 Emergency powers⁵
by Ergun Özbudun and Mehmet Turhan (1995)
- No. 13 Implementation of constitutional provisions regarding mass media in a pluralist democracy (1995)

¹ Also available in French.

² Speeches in the original language.

³ Also available in Russian.

⁴ Also available in Russian.

⁵ Also available in Russian.

- No. 14 Constitutional justice and democracy by referendum (1996)
- No. 15 The protection of fundamental rights by the Constitutional Court⁶ (1996)
- No. 16 Local self-government, territorial integrity and protection of minorities (1997)
- No. 17 Human Rights and the functioning of the democratic institutions in emergency situations (1997)
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- No. 19 Federal and regional States (1997)
- No. 20 The composition of constitutional courts (1997)
- No. 21 Nationality and state succession (1998)
- No. 22 The transformation of the Nation-State in Europe at the dawn of the 21st century (1998)
- No. 23 Consequences of state succession for nationality (1998)
- No. 24 Law and foreign policy (1998)
- No. 25 New trends in electoral law in a pan-European context (1999)
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- No. 27 Federal and Regional States in the perspective of European integration (1999)
- No. 28 The right to a fair trial (2000)
- No. 29 Societies in conflict : the contribution of law and democracy to conflict resolution (2000)⁷
- No. 30 European Integration and Constitutional Law (2001)

⁶ *An abridged version is also available in Russian.*

⁷ *Papers published in their original language.*

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