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THE VENICE COMMISSION

AT TEN YEARS OLD

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I. General presentation

A. Introduction

In the year 2000, the European Commission for Democracy through Law, better known as the Venice Commission (and hereafter called the Commission), celebrates ten years of existence. It 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, it has seen its activities evolve as the early upheavals gave way to a more gradual process of change, for constitutional engineering remains essential to keep machinery in working order that would otherwise tend to seize up. The Commission therefore keeps a close watch on the changes that constantly affect society and are reflected in its fundamental, that is its constitutional, rules.

After a brief description of the Commission's legal status and composition, we will go on to consider its various areas of activity, drawing on recent examples. In general terms the Commission's work falls into three categories, which will be looked at in turn: specific issues relating to particular countries, 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

The Commission is a partial agreement of the Council of Europe, which means that only Council of Europe member states that have acceded to the agreement take part in its activities and contribute to its budget. Its statute was adopted by the Committee of Ministers on 10 March 1990[2]. The Committee of Ministers is currently considering turning it into an enlarged partial agreement, which would enable non-member states of the Council of Europe, particularly ones with observer status, to join the Commission.

The Venice Commission is composed of "independent experts who have achieved international fame through their experience in democratic institutions or by their contribution to the enhancement of law and political science"[3]. The members are mainly senior academics, particularly in the fields of constitutional or international law, supreme or constitutional court judges, national members of parliament and senior public officials.

The members are appointed by the partial agreement's member states for four years. Nearly all the Council of Europe's member states are now members of the partial agreement: Albania, Andorra, Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark,

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[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] *As an appendix to Resolution (90) 6.*

[3] *Article 3 of the Statute.*

Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, the Netherlands, Norway, Poland, Portugal, Romania, San Marino, Slovakia, Slovenia, Spain, Sweden, Switzerland, "The former Yugoslav Republic of Macedonia", Turkey, Ukraine and the United Kingdom.

In addition, Armenia, Azerbaijan, Belarus and Bosnia and Herzegovina, countries that are not yet members of the Council of Europe, are associate members, while Argentina, Canada, the Holy See, Israel, Japan, Kazakhstan, the Republic of Korea, Kyrgyzstan, the United States and Uruguay are observers. South Africa has special co-operation status.

C. The Commission's activities

The work of the European Commission for Democracy through Law is geared to the three underlying principles of Europe's constitutional heritage: democracy, human rights and the rule of law, the basis of all the Council of Europe's activities.

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. Going beyond the purely national setting, the Commission produced a draft act on European citizenship as an auxiliary contribution to the intergovernmental conference that led to the Amsterdam treaty.

The Commission's Statute does not restrict its geographical scope. However, the Committee of Ministers must approve any requests from non-member states[4], as in the case of co-operation with South Africa, to which we will return later. There has also been co-operation with Kazakhstan, Kyrgyzstan, Argentina and Uruguay, which have secured observer status.

II. Constitutional assistance

The Commission's primary task is to assist and advise individual countries in constitutional matters – provide constitutional first-aid, as it were -, and this requires it to scrutinise constitutional legislation, generally at countries' own request. However, it may also be asked to examine a specific document of this type by the Council of Europe's Parliamentary Assembly or Secretary General[5]. The Committee of Ministers asked it to examine the Russian constitution as part of that country's accession process[6], for example, while at the request of the Parliamentary Assembly it produced a report on the Ukrainian constitution following that country's accession[7].

As a rule, the Commission is consulted on constitutions at the drafting stage rather than after their adoption, when it becomes much harder to change them. Its involvement in different

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[4] *Article 2 paragraph 3 of the Statute.*

[5] *Article 2 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] *See below, II.E.*

stages of 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 the opinion on the Ukrainian constitution.

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.

A number of examples can be cited to illustrate the Commission's bilateral activities. Its activities in Albania and Bosnia and Herzegovina, which have been particularly significant, and the recent opinion on the Ukrainian constitution will be considered in greater detail.

A. Co-operation with Albania

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, has in fact extended over several years.

In 1991, the Commission took part in constitutional review in Albania and then gave its opinion on the first draft democratic constitution[8].

The transition from a totalitarian system to 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 delegation[9], a large number of changes and improvements were incorporated into this section, which was adopted by the Albanian parliament in April 1993.

Albania joined the Council of Europe in 1995. One of the undertakings entered into on its accession was the adoption of a new constitution compatible with Council of Europe principles. In 1994 a Commission working group examined the draft constitution that was put to a referendum – and rejected – on 6 November 1994. The Commission opinion was submitted to the Albanian authorities after the vote, so that the Commission would not be drawn into the referendum campaign[10]. It thought 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, the general ban on parties with a religious or ethnic basis was felt to be excessive, as was the rule restricting the leadership of "large" religious communities to Albanian citizens born in Albania who had been resident in the country for at least twenty years. Certain provisions needed greater clarification, particularly those concerning restrictions on fundamental rights, to ensure that these restrictions 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

[8] *CDL (91) 37.*

[9] *See CDL (93) 13.*

[10] *The opinion was published in the Commission's 1994 annual report, p.p 22 ff.*

minister could be simplified. The Commission noted that the president enjoyed extensive powers. There should also be constitutional provision for access to the courts in administrative disputes and rules to ensure that all judges were appointed for life or up to retirement age to safeguard the independence of the judiciary.

With certain exceptions, these comments did not imply that the text was incompatible with European constitutional standards. However, when making known its views the Commission prefers to highlight the provisions that could be interpreted as being contrary to those standards so that problems can be avoided at an early stage, rather than later when the law is actually applied.

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 organisation of the judiciary (Chapter VI of the provisional constitution)[11]. 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 rotation of Constitutional Court judges and the new provisions on public administration of unlawful economic activities[12].

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, the Commission's Working Group for Albania, established in 1997, played an active part in writing the new constitution and has 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 a bicameral system.

The new Albanian constitution was approved in a referendum on 22 November 1998. Albania therefore has a fundamental law that is fully consistent with Europe's – and the Council of Europe's – constitutional standards, in terms of democracy, human rights and the rule of law.

In 1999, after a request from the Parliamentary Assembly, the Commission adopted an opinion in which it found that the death penalty was incompatible with the new Albanian constitution[13]. This finding was based on the absence of any exception to the protection of life as laid down in the constitution, the requirement that any restriction on the rights and freedoms laid down in the constitution did not infringe the very essence of these rights and freedoms and the trend in European legal systems towards abolition of the death penalty. The Commission's opinion was accepted by the Albanian Constitutional Court, which, following the example of the Ukranian Constitutional Court, has declared the death penalty to be unconstitutional.

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[11] *CDL (95) 74 rev.*

[12] *CDL-INF (98) 9.*

[13] *CDL (99) 1.*

The Commission has co-operated closely with Albania in the electoral field. In 1997, it helped to draft the revised law on parliamentary elections which was to be passed in order 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 that was organised in order to seek a consensus on an electoral code that could be applied to all elections and voting procedures and met the requirements set out in the new constitution.

B. Co-operation with Bosnia and Herzegovina

In recent years, co-operation with Bosnia and Herzegovina has been a standing feature of the Commission's activities[14]. Several recent examples are presented below.

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 looked at whether the constitutions of the two entities of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Srpska, were compatible with the constitution of Bosnia and Herzegovina as laid down in the Dayton agreement. The working group's views were extensively heeded by the authorities of the two entities.

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 during the period from the entry into force of the constitution of Bosnia and Herzegovina as shown in appendix 4 of the Dayton agreement (14 December 1995) to the elections of 14 September 1996[15].

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. It took the opportunity to point out the need to simplify the system for protecting human rights[16].

In 1998, the High Representative put a number of questions to the Commission concerning the interpretation of Bosnia and Herzegovina's constitutional law. In its reply, the Commission concluded, on the basis of a methodical analysis of appendix III of the Dayton agreement, that Bosnia and Herzegovina, rather than the entities, had general responsibility for legislating on entity and municipal, as well as national, elections[17]. The Commission also considered whether there was a need to establish a judicial institution in the State of Bosnia and Herzegovina in addition to the Constitutional Court which already existed. In itself, it decided, the absence of a supreme court in Bosnia and Herzegovina was not unconstitutional. However, Bosnia and Herzegovina did have the authority to establish specific courts at state level, and to deal with electoral and administrative disputes such courts appeared to be

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[14] *For a summary of relevant 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*

[15] *CDL (96) 94.*

[16] *Annual report 1997, pp 32 ff..*

[17] *CDL-INF (98) 16.*

required[18]. The Commission has also found that there can be no appeal against decisions of the Human Rights Chamber to the Constitutional Court[19].

In 1999, the Commission issued an opinion on the extent of Bosnia and Herzegovina's responsibilities in immigration and asylum matters, having regard to a possible sharing of powers with the two entities[20]. It expressed its views on the proposed legislation of Bosnia and Herzegovina on immigration and asylum. Firstly, it found that Bosnia and Herzegovina, and not its entities, had legislative, regulatory and administrative jurisdiction in this area. Nevertheless, some delegation of administrative powers to the entities was not excluded. The Commission also commented that the draft legislation that had been submitted to it provided a perfect illustration of the need for a federal court. It concluded by offering its full support to the approach adopted by the draft legislation on immigration and asylum on the sharing of responsibilities between Bosnia and Herzegovina and its entities, subject to the need to include additional provisions relating to the courts.

The Commission has also approved an opinion on powers of concluding and implementing international agreements under the constitution of Bosnia and Herzegovina[21]. The main legal issue was whether Bosnia and Herzegovina had the power to conclude international agreements in areas which, domestically, were entity responsibilities. The Commission said that it did, but did not specify the extent of the central state's jurisdiction since it was for the organs of state of Bosnia and Herzegovina, in particular the Constitutional Court, to rule on the subject. It observed that, with the agreement of Bosnia and Herzegovina's Parliamentary Assembly, the entities could conclude international agreements in their areas of responsibility. Consultation machinery should be established to deal with this issue, and that of agreements concluded by Bosnia and Herzegovina in areas falling within the entities' domestic jurisdiction.

At the request of the High Representative, the Commission has also examined the machinery for protecting human rights in Bosnia and Herzegovina, and has made proposals for reorganising it after the transition period provided for in the Dayton agreement. The aim is to make the machinery more effective by simplifying procedures and avoiding duplication. This would entail a merger of the Human Rights Chamber and the Constitutional Court of Bosnia and Herzegovina so that a single judicial authority at the highest level would be responsible for protecting fundamental constitutional rights. It has also recommended establishing 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, the Commission approved a report on mediation institutions in Bosnia and Herzegovina, which includes three draft laws on the Ombudspersons of the state and the two entities[22]. It then adopted an opinion on reform of the judicial system for the protection of human rights in the Federation of Bosnia and Herzegovina, which gives practical form to the proposed constitutional amendment

[18] *CDL-INF (98) 17.*

[19] *CDL-INF (98) 18.*

[20] *CDL-INF (99) 8.*

[21] *CDL-FED (99) 2 rev 2.*

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

abolishing the Court of Human Rights of the Federation[23]. In 2000, it approved conclusions regarding 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 Rights[24].

The Commission has also been closely involved in drawing up the electoral law of Bosnia and Herzegovina since 1997. The draft submitted to parliament at the beginning of 2000 was based on a text drawn up by one of the Commission's groups of experts.

C. Co-operation with Estonia

At the request of the Estonian authorities, the Commission has examined the constitutional problems associated with Estonian membership of the European Union. The rapporteurs said that membership, which would be accompanied by a massive transfer of sovereignty, would result in significant changes. Attention was also drawn to the principles of the direct effect of Community law and its precedence over domestic law, including the constitution. Finally, and most importantly, they recommended the adoption of a general delegation of powers, or empowerment, clause[25]. The Estonian governmental commission then produced an interim report setting out its proposals for the constitutional amendments necessitated by European Union membership[26]. The Venice Commission noted with satisfaction that the comments in its previous opinions had been heeded. Nevertheless, in a June 1998 opinion[27] it again stressed the need to include a general empowerment clause to allow sovereignty to be transferred to the European Union.

D. Co-operation with Moldova

In 1995, the Commission examined the draft Moldovan laws on the status of minorities and on the organisation and holding of meetings[28]. Regarding the former, the 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 the guarantee of education in the mother tongue and the unclarity 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.

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, the desire to deal exhaustively with every eventuality was creating an obstacle to freedom of assembly, the proposals made spontaneous gatherings impossible, the authorities' discretionary powers

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[23] *CDL-INF (99) 16.*

[24] *CDL-INF (2000) 8; see also CDL-INF (99) 12.*

[25] *CDL (97) 52 and CDL (98) 5.*

[26] *CDL (98) 39.*

[27] *CDL-INF (98) 10.*

[28] *See documents CDL (95) 1, 2, 9 and 14.*

were too broad and the extent of judicial supervision was imprecise, which could raise problems of compatibility with international legal instruments[29]. The Moldovan representatives thought that these comments would help to improve the draft legislation.

In 1998 the Commission adopted an opinion on the proposed statute for Gagauzia[30]. 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.

In 1999, following a request by the Parliamentary Assembly's Monitoring Committee and the Moldovan authorities, the Commission studied the compliance of the laws on local authorities and territorial organisation and the law on local public administration with legislation currently in force concerning minorities[31]. With regard to the position of the head of the Gagauz administration and that of the prefect, there were risks of the law on local administration clashing with the law on the special status of Gagauzia, which takes precedence. Even before the Commission had given its final opinion, the Moldovan parliament had amended the law on territorial organisation so that in no longer conflicted with the law establishing the special status of Gagauzia.

Following a request by the Parliamentary Assembly and the Moldovan authorities, the Commission closely monitored the process of constitutional reform in Moldova from 1999. In particular, the Commission gave an opinion on a draft reform that was designed to establish a presidential system of government in Moldova, whereas the parliament wished to move away from such a system. The criticism expressed by the Commission concerned the text of the draft as a whole. Certain provisions of the draft were acceptable if taken alone but presented a serious problem if combined with other articles. The principle of the separation of powers was not fully respected and there was a lack of balance between the executive and the legislature[32].

The Commission helped to seek a consensual solution to the question of constitutional reform: the Moldovan authorities have set up a joint working group made up of members of the Constitutional Commission and the parliament with the task of drawing up a single draft of the constitutional reform, and this group co-operates closely with the Commission.

E. Co-operation with Ukraine

[29] *CDL (95) 33, 35, 36 and 37.*

[30] *CDL (98) 41.*

[31] *CDL-INF (99) 14.*

[32] *See documents CDL (2000) 53 and CDL (99) 88.*

Since 1992, the Commission has played an active part in the drafting of 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 means of a constitutional agreement between the president and parliament. Following this agreement, the Commission was asked to assess the constitutional situation in the country and concluded that the document 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, the independence of the judiciary and the powers of the prosecution service. There also had to be stable rules, which could not be altered unilaterally by those involved in the political process[33].

Members of the Commission also commented on the preliminary draft of the new constitution submitted in 1995, which was subsequently amended. In its opinion[34], the Commission said that it represented a considerable advance on previous proposals. However, certain areas required further clarification, such as the powers of the Crimea, protection of the fundamental rights of legal persons, the death penalty, the protection offered by social rights and the scope of presidential powers.

The Commission was later asked by the Parliamentary Assembly to comment on the Ukrainian constitution, following its adoption.

In its opinion[35], the Commission noted that the final version of the constitution took into account many of the Commission's comments on earlier drafts. It was particularly pleased with the chapter on general principles, which included the main elements of the rule of law, and the chapter on the judicial system, which in particular safeguarded the independence of the judiciary. It expressed approval of the decision to set up a permanent constitutional court, entirely consistent with the new democracies' practice of protecting the constitutionality of the new legal order by means of permanent and independent special judicial bodies.

The list of human rights was comprehensive. The constitution had adopted the right approach by providing for restrictions to fundamental rights article by article and not on the basis of a common general clause. However, there was not a clear enough distinction between directly applicable freedoms and social rights requiring legislative measures. The Commission deeply regretted that the death penalty had not been expressly abolished.

It approved of the constitution's no longer referring to the excessively radical concept of direct democracy while introducing the popular initiative.

The final version of the provisions on the Autonomous Republic of Crimea was clearer than in the preliminary draft, but it was still difficult to ascertain whether Crimea had a reserved sphere of competence.

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[33] *The opinion is included in the 1995 annual report, pp. 17 ff..*

[34] *CDL-INF (96) 6; see also CDL (96) 25.*

[35] *CDL-INF (97) 2.*

In conclusion, while the text established a strong executive under the leadership of a powerful president, there were enough checks and balances to prevent authoritarian excesses. The principles of the rule of law were securely enshrined in the constitution. The setting up of democratic local government and the essential role assigned to the Constitutional Court should help firmly establish a democratic culture in Ukraine.

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 – in practice - allowing individuals to petition the Constitutional Court. However, provisions were needed on referral of cases to the Constitutional Court by the courts[36] and on parties' involvement in cases before the Constitutional Court.

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 explicit constitutional authorisation, the importance the constitution attached to the right to life and the "evolution of European public order towards abolition of the death penalty"[37].

At the request of the Parliamentary Assembly, the European Commission for Democracy through Law has rendered an opinion concerning the Ukrainian bill on the judicial system[38]. The Commission was pleased that the authors of the bill had undertaken to establish a judicial system based on the principle of the independence of the judiciary from the executive power. It was of the view, however, that this goal had not yet been achieved in the bill submitted for its consideration, which needed to be thoroughly re-drafted. In particular, the rules for appointing judges should be recast to ensure the clear involvement of the Judicial Service Commission; provisions entailing a strict hierarchy in the judicial apparatus and allowing higher courts to formulate "recommendations or explanations" for the lower courts should be revised; the powers of the military tribunals were excessive, and the economic (arbitration) courts, which stemmed from the Soviet period, should be abolished.

At the request of the Council of Europe's Parliamentary Assembly and Secretary General, the Commission rendered an opinion in March 2000 on the referendum scheduled for the following month[39]. This national referendum, which had to be seen against the background of political disputes between the President and the Parliament, posed six questions aimed at amending the Constitution to the detriment of Parliament. Briefly, the Commission was of the opinion that the referendum did not have - and could not have - the effect of directly amending the Ukrainian Constitution and that the hypothesis of a consultative referendum was highly questionable. It also doubted whether it was constitutional for the President to insist in his decree on a positive response to the referendum. The very content of the

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[36] *1997 annual report, pp. 58 ff; CDL (97) 18 rev..*

[37] *CDL-INF (98) 1R.*

[38] *CDL-INF (2000) 5.*

[39] *CDL-INF (2000) 11.*

proposed changes was in part unconstitutional and contrary to international norms, because it shifted the balance of power too heavily in favour of the President to the detriment of the Parliament, notably by allowing the people to approve a vote of no confidence in the current Parliament and restrict parliamentary immunity. More generally, the analysis of each question revealed the presence of many ambiguities and inconsistencies. The Ukrainian Constitutional Court has endorsed the Commission's opinion, declaring two questions unconstitutional and deciding that although other questions had been approved in the referendum, that could not be regarded as a direct amendment to the Constitution, but that state bodies must be required to consider these proposals and take the relevant decisions in keeping with the chapter of the Constitution on amendments to that instrument.

F. Collaboration with South Africa

South Africa is the country outside Europe with which the Commission has developed the closest links, 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 (which included Dr Kissinger and Lord Carrington) which in April 1994 was invited to visit South Africa to submit proposals for breaking the deadlock caused by ANC and Inkatha opposition on certain constitutional questions.

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 benefitted directly from the "democracy, from the law book to real life" programme, supported by the Swiss Federal Department of Foreign Affairs[40]. A continuous series of seminars, workshops and study visits promoted exchanges between South African and European specialists in the field of democracy. At the same time, the Venice Commission has been following recent constitutional developments in South Africa with a great deal of interest and has on occasions drawn on South African experience in tackling European constitutional problems. For example, in its opinions on European constitutions[41] the Commission 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.

More recently, the emphasis has been on the regional aspects of co-operation between the Commission and South Africa. Other southern African states take part in certain activities and the idea of establishing a network of constitutional specialists in southern Africa based on the Venice Commission model is gaining ground. Norway has recently provided support for a programme which will allow a number of southern African countries to gain an insight into the work of the Venice Commission.

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[40] Recent co-operation with South Africa under this programme is described in CDL-INF (99) 1.

[41] 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).

A key constitutional issue in South Africa is the need for co-ordination between the various tiers of government, national, provincial and local, whose relations – referred to as "intergovernmental" relations – have not received much attention from South African academics in the past. The aim of such co-ordination is to achieve greater effectiveness, for the benefit of ordinary people. The Commission therefore welcomed the proposal of the South African Department of Constitutional Development, with the support of the Swiss Federal Department of Foreign Affairs, to create chairs of intergovernmental relations in the South African universities of Natal and Fort Hare[42]. This programme has given South African specialists the opportunity to exchange ideas in this area with European counterparts from countries with similar systems (particularly Spain, Germany, Italy and Switzerland).

III. "Transnational" topics – the UniDem seminars

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

Transnational topics are covered:

a. as part of the ongoing activities of the Commission, which can initiate its own research, or

b. in the UniDem (universities for democracy) seminars.

A. **Comparative studies** on topics to do with the functioning of democracy offer initial overviews of the law in various countries. Such a comparative approach then makes it possible to identify constitutional values that are shared throughout Europe and, where relevant, any areas of weakness. The third stage is that of harmonisation, in which, on the basis of Commission recommendations, the principles concerned are incorporated into the law of those countries where they have not yet been established.

B. **The UniDem seminars** bring leading specialists from the political and academic worlds and constitutional courts (or equivalent bodies) and the Commission into contact with, for example, a specific university or constitutional court. Reports are presented on particular countries or specific aspects of the topics under discussion. By allowing exchanges between specialists from a variety of backgrounds, 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, whether or not in connection with a UniDem seminar, is usually published in the **Science and Technique of Democracy collection**[43].

Topics the Commission has recently considered include:

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[42] *See CDL-INF (99) 2 and 3.*

[43] *See the appended list of "Science and Technique of Democracy" publications.*

- **Federal and regional states[44]:** in a world where unitary, centralised forms of government no longer automatically serve as models, this is a very topical theme. In recent years one of the major 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[45]**: a study by the Commission of the situation of federated and regional states and states containing autonomous entities led to 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 the system in which international powers parallel domestic responsibilities. In addition to concluding their own treaties, entities may be involved in the preparation or implementation of treaties concluded by central government. Where there is provision for such involvement prior to the conclusion of a treaty, it 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. Entities' participation in international organisations is less highly developed than their involvement in supranational bodies: the fact is that the latter enjoy real legislative powers and it is essential that entities participate in the process of European Community decision-making. In the debate about the allocation of powers – a major issue in the countries considered – the international dimension can no longer be ignored.

- **Law and foreign policy[46]**: the Commission has adopted a report on this topic, which describes the legal foundations of foreign policy in a large number of countries with differing legal cultures and attempts to identify various common factors. Legal rules applicable in decisions about foreign policy – rules whose existence was traditionally only recognised in international law - are now equally a requirement in domestic law. At the same time and as a corollary, there has been a growing trend towards a degree of democratisation in 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.

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[44] The report on Federal and Regional States was published as "Science and Technique of Democracy" series No 19, Council of Europe Publishing.

[45] CDL-INF (2000) 3.

[46] Science and Technique of Democracy, no 24.

- **Prohibition of political parties and analogous measures**[47]: the report on this, drawn up at the Secretary General's request, identified widely differing approaches to banning or restricting political parties' activities. For example, some countries do not lay down any rules or confine themselves to applying general provisions governing voluntary associations. Registration of political parties is not a general requirement. Where controls do exist, they 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 only possible in exceptional circumstances - as witness the extreme restraint shown by the great majority of national authorities. On this basis, the Commission has drawn up guidelines on the prohibition of political parties and analogous measures[48], which include the following points:

    - everyone has the right to associate freely in political parties;

    - any limitations on the exercise of fundamental human rights through the activity of political parties shall be consistent with the relevant provisions of the European Convention for the Protection of Human Rights and other international treaties, in normal times as well as in cases of public emergencies;

    - prohibition or enforced dissolution of political parties may only be justified 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, as a particularly far-reaching measure, should be used with the utmost restraint, in accordance with the principle of proportionality and decided on by the Constitutional Court or another appropriate judicial body in a procedure offering all guarantees of due process, openness and a fair trial.

  The Commission is also examining the **financing of political parties**[49]**.**

- **The protection of minorities:** because of the importance of the minorities question in modern-day Europe, the Commission has made it a priority from its inception. In particular, in 1991 it produced proposals for a European convention for the protection of minorities[50], which formed the basis for the Framework Convention for the Protection of National Minorities[51]. The Commission then undertook a detailed

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[47] *CDL-INF (98) 14.*

[48] *CDL-INF (2000) 1.*

[49] *See CDL-PP (99) 3.*

[50] *See "The protection of minorities", Science and Technique of Democracy, no 9, Council of Europe Publishing, pp 9 ff.*

[51] *ETS 157.*

examination of the protection of minorities in national law, and the specific approaches adopted in federal and regional states[52].

- More recently, the Commission has focused on **participation in public life by persons belonging to minorities.** The first step was a report concerned specifically with entry to the public service, which described the different forms of discrimination to be overcome and positive measures that had been introduced to assist minorities. It found that such positive measures were far from universal[53].

- Still in the context of its work on participation in public life by members of minorities, the Commission has approved a document on **electoral law and national minorities[54]**. According to this, few countries have specific rules governing minorities' representation on elected bodies. A study of minority membership of such bodies, particularly national parliaments, therefore implies a more general examination of electoral law, in particular the influence of voting systems on representation of political groups. The following conclusions may be noted:

  a. The effect of voting systems on minority representation is most clearly identifiable when there are specific national-minority parties, which are authorised in the majority of countries, in accordance with the principle of freedom of association.

  b. The more proportional the voting system, the more likely it is that minority groups that are dispersed or few in number 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.

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

- **Self-determination and secession in constitutional law[55]**: the question of self-determination, which is often dealt with in international law but much less so in constitutional law, is once more attracting interest in the wake of the vast political changes that have taken place in Europe over the past ten years. The Commission has noted that, on the whole, as the fundamental law of the state, the Constitution is opposed to secession and instead emphasises concepts such as territorial integrity,

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[52] *"The protection of minorities", Science and Technique of Democracy, no 9, pp. 40 ff..*

[53] *CDL-MIN (98) 1.*

[54] *See CDL-MIN (99) 1*

[55] *CDL-INF (2000) 2.*

indivisibility of the state and national unity. In certain cases, these principles allow of restrictions on fundamental rights. As is evident in the case-law of the European Court of Human Rights, such restrictions must nonetheless comply with the principle of proportionality and accordingly be applied only in very serious circumstances. The term "self-determination", unlike "secession", is by no means alien to constitutional law. However, there is no general recognition in constitutional law of the right to self-determination, nor any common definition of those who are entitled to it and its content. Moreover, the constitutions studied, when they recognise the right to self-determination, do not deal with the procedure which allows for its implementation. The term "self-determination", in constitutional law may in particular denote: decolonisation in the few cases where the issue still arises; the right to independence of a state which is already constituted; the right of peoples freely to determine their political status and to pursue their development within the state's frontiers (internal self-determination). Furthermore, internal self-determination may be exercised by the assertion of specific fundamental rights, of a collective nature, in particular in the cultural sphere, or even in the form of federalism, regionalism or other forms of local self-government.

- **Nationality and state succession:** the recent upheavals in Europe have again thrown the nationality issue, particularly in the context of state succession, into sharp relief. A seminar on this subject was held in Vilnius in May 1997, the very week in which the European Convention on Nationality was adopted[56]. The Commission has also undertaken a comparative study of the consequences of state succession for nationality[57]. In this connection, it has adopted a "declaration on the consequences of state succession for the nationality of natural persons"[58], which particularly emphasises each individual's right to a nationality and the principle of non-discrimination in the granting of nationality.

- **The transformation of the nation-state in Europe at the dawn of the 21st century[59]**: the Nancy seminar in November 1997 was concerned with the institutional and structural changes that are having a profound effect on that traditional, and almost exclusive, method of organising European political society: the nation-state. It showed how, over time, the concept of the nation-state became established and grew in strength, only then to become weaker through a process of transformation in terms of both dissociation and association, particularly in the context of European integration.

- **New trends in electoral law in a pan-European context[60]**: Sarajevo seminar, April 1998. The seminar took place in a country where the electoral issue was highly topical. While recognising the variety of national practices, it concentrated on the fundamental principles of electoral law – guaranteed universal, equal, free, secret and

[56] *Science and Technique of Democracy, no 21.*

[57] *Science and Technique of Democracy, no 23.*

[58] *Ibid, pp 5-7.*

[59] *Science and Technique of Democracy, no 22.*

[60] *Science and Technique of Democracy, no 25.*

direct suffrage – and their implementation, particularly at the time of voter registration and in the composition of electoral commissions.

- **The European constitutional heritage**[61]: seminar in Montpellier, July 1998. In the first part the participants used a questionnaire as a basis for defining and assessing the legal force of the principle of human dignity. In the second part, members of constitutional courts were asked to comment on a fictitious case, which constituted a noteworthy experience and added a practical dimension to the seminar's academic emphasis.

- **The division of powers**[62]: 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 the organs of state, which must not now be seen as a separation in the strict sense, but as distinguishing between various functions and different organs, which still need to work closely together. The practice of democratic states, coupled with political wisdom, leads them to seek a balance of powers, particularly between the executive and legislative branches, safeguarded by a strong and independent judiciary, at the summit of which is the constitutional court.

- **The right to a fair trial** (Brno, September 1999)[63]: this seminar on a fundamental aspect of the legal system comprised two parts. In the first part, general reports were presented on the situation with regard to the European Convention on Human Rights and the constitutional law of several European and non-European states. In the second part, members of the Constitutional Courts or equivalent bodies in about twenty countries discussed a concrete example and showed that approaches in this area are converging in Europe and on other continents and that the values guaranteed by fair trials are universal in nature.

- **Societies in conflict – the contribution of law and democracy to conflict resolution** (Bled, Slovenia, November 1999)[64]: the purpose of this seminar was to examine different forms of conflict and attempt to identify appropriate legal instruments for settling them. Most of the participants were experts on the various zones of conflict 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. As regards the effectiveness of constitutional human rights standards, it was stated that international human rights standards must be incorporated into national legal systems and implemented and guaranteed by the national institutions. The importance of including specific rights for minorities at the highest, that is to say constitutional, level was stressed. As regards the constitutional framework for the apportionment of

[61] *Science and Technique of Democracy, no 26.*

[62] *CDL-INF (99) 11.*

[63] *Science and Technique of Democracy, no 28.*

[64] *Science and Technique of Democracy, no 29.*

powers, the need for specific constitutional rules on the powers of the various institutions was highlighted. Otherwise, there was a risk that the old system of a single seat of power would creep back because of loopholes in the rules. A balanced relationship between the two branches of power was essential to a more democratic, responsible and stable political life in these countries.

- **The Protection of Human Rights in the 21st Century** (Dublin conference, March 2000): the main subject of this conference was the question of complementarity, in particular between the various European international 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). Emphasis was put on the implications of the European Union draft Charter of Fundamental Rights. The universal (United Nations) and inter-American systems were also examined.

- 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 contemporary Europe – ever closer supranational integration (so-called "deepening") at the same time as the current enlargement. The Commission has focused on two aspects:

▪ The Commission made a contribution, in the form of an **Act on European Citizenship**[65]**,** to the intergovernmental conference that led to the adoption of the Amsterdam treaty. This text identifies the rights of citizens of the Union. It codifies the existing law, but there are also important innovative elements. The Commission's contribution was the basis for new provisions of the Treaty of Rome relating to non-discrimination[66]. The Commission has also recommended the creation of a European district.

▪ The study on **constitutional law and European integration**[67], in contrast, has demonstrated the extent to which the constitutional law of member states of the Communities, and then the Union, has adapted to supranational law and reflects not only its substance but also its very nature. The study was conceived with enlargement in mind and draws on member states' experience to identify a number of constitutional questions linked to membership of the Union. The conference will be followed by a seminar to be held in Cyprus in September 2000 to examine the constitutional implications of membership of the European Union for each applicant country.

▪ In response to the increasingly complex division of powers between the nation state, its entities and supranational bodies, the Commission organised a seminar in Bologna in March 1999[68] on **federal and regional states in the context of European**

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[65] *CDL-INF (96) 5.*

[66] *Article 13 of the Treaty of Rome; see Article 5 of the Act on European Citizenship.*

[67] *CDL-INF (99) 7.*

[68] *Science and Technique of Democracy, no 27.*

integration, which focused on relations between the different tiers of authority. The seminar looked at non-European views on issues of regional integration and federalism, with particular emphasis on the North American Free Trade Area and the Southern African Development Community.

IV. Co-operation with constitutional courts

A. The Centre on Constitutional Justice

In constitutional law, exchanges of information and ideas between the long-established and new democracies are extremely important. 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, so that it could be made available to as many people as possible. 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.

The *Bulletin of Constitutional Case-Law*, first published in January 1993, contains summaries of the most important decisions sent in by the constitutional courts or their equivalents of nearly 50 countries[69], 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, with each issue containing the main judgments handed down over a four-month period. The contributions to the *Bulletin* are supplied by liaison officers appointed by the courts themselves.

The regular issues are supplemented by a series of special bulletins containing descriptions of the courts and 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 new series on leading cases presents the basic decisions of the participating courts before the *Bulletin's* inception in 1993.

The *Bulletin's* main purpose is to encourage exchange of information between courts 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.

The Commission's secretariat in Strasbourg has established a data base called CODICES, which represents approximately 12 000 pages of printed text. Apart from the 2000 summaries published in the *Bulletin*, the data base contains the full texts of more than 1700 decisions, mainly in English or French but also in other languages. All the special bulletins are also included in CODICES, as are a number of constitutions. It is available on CD-ROM

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[69] *Albania, Argentine, Armenia, Austria, Azerbaijan, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Kazakhstan, 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 States of America* .

and via the Internet. CODICES is updated three times a year to coincide with the publication of the *Bulletin.*

The *Bulletin* offers an additional tool of great benefit to CODICES, in the form of the systematic thesaurus, which is regularly updated to take account of new developments in constitutional case-law. The thesaurus makes it possible to search the data base under specific topics, such as freedom of expression or the presumption of innocence.

The *Bulletin of Constitutional Case-Law* and CODICES make information available that has hitherto been largely inaccessible other than to first-rate polyglots with a specialist library at their disposal. It therefore greatly facilitates comparative research by practitioners, who can 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 practice of their counterparts elsewhere.

B. Seminars for newly established constitutional courts (CoCoSem)

Following 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, Georgia, Kyrgyzstan, Latvia, Moldova, Russia and Ukraine. They have covered practical issues such as managing cases or the budget, as well as ones relating to the principles of the rule of law, such as the separation of powers or judicial independence.

V. Conclusion

The Venice Commission makes a significant contribution to the dissemination of the European constitutional heritage, made up of the continent's fundamental legal values. The dissemination process is effected by the *Bulletin of Constitutional Case-Law*, comparative seminars and the UniDem seminars. This all serves to strengthen "trans-constitutionalism", the search for a common basis for different countries' case-law, which in turn helps develop a common constitutional heritage throughout Europe.

Apart from that, the Commission's main activity, constitutional assistance, is still as relevant today as it was at its inception. Far from being a one-off phenomenon associated with the transition from authoritarian to democratic regimes, constitutional revisions, whether total or partial, are an inherent feature of a world subject to perpetual change. The close co-operation between the Commission and the countries seeking its advice, in an atmosphere of mutual confidence, also facilitates the adoption of standards compatible with our shared values.

The European Commission for Democracy through Law is therefore helping to ensure that the third millennium will be the one in which democracy, human rights and the rule of law are recognised throughout Europe.

A P P E N D I X

LIST OF PUBLICATIONS OF THE VENICE COMMISSION

Collection[1] **- Science and technique of democracy**

No. 1 : Meeting with the presidents of constitutional courts and other equivalent bodies
Piazzola sul Brenta, 8 October 1990[2]

No. 2 : Models of constitutional jurisdiction
by Helmut Steinberger[3]

No. 3 : Constitution making as an instrument of democratic transition
Istanbul, 8-10 October 1992

No. 4 : Transition to a new model of economy and its constitutional reflections
Moscow, 18-19 February 1993

No. 5 : The relationship between international and domestic law
Warsaw, 19-21 May 1993

No. 6 : The relationship between international and domestic law
by Constantin Economides[4]

No. 7 : Rule of law and transition to a market economy
Sofia, 14-16 October 1993

No. 8 : Constitutional aspects of the transition to a market economy
Collected texts of the European Commission for Democracy through Law

No. 9 : The Protection of Minorities
Collected texts of the European Commission for Democracy through Law

No. 10 : The role of the constitutional court in the consolidation of the rule of law
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Santorini, 22-25 September 1994

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1 *Also available in French*
2 *Speeches in the original language*
3 *Also available in Russian*
4 *Also available in French*
5 *Also available in Russian.*

No. 14: Constitutional justice and democracy by referendum
Strasbourg, 23-24 June 1995

No. 15 : The protection of fundamental rights by the Constitutional Court[6]
Brioni, Croatia, 23-25 September 1995

No. 16: Local self-government, territorial integrity and protection of minorities
Lausanne, 25-27 April 1996

No. 17: Human Rights and the functioning of the democratic institutions in emergency situations
Wroclaw, 3-5 October 1996

No. 18: The constitutional heritage of Europe
Montpellier, 22-23 November 1996

No. 19 : Federal and Regional States

No. 20 : The composition of Constitutional Courts

No. 21 Nationality and state succession
Vilnius, 16-17 May 1997

No. 22 The transformation of the Nation-State in Europe at the dawn of the 21st century
Nancy, 6-8 November 1997

No. 23 Consequences of state succession for nationality

No. 24 Law and foreign policy

No. 25 New trends in electoral law in a pan-European context
Sarajevo, 17-18 April 1998

No. 26 The principle of respect for human dignity
Montpellier, 2-6 July 1998

No. 27 Federal and Regional States in the perspective of European integration
Bologna, 18-19 March 1999

No. 28 The Right to a Fair Trial
Brno, 23-25 September 1999

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

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Bulletin on Constitutional Case-Law -	93 – 99 / n° 1, 2, 3 2000 / n° 1
Special Bulletins -	Description of Courts Basic texts 1, 2, 3, 4 and 5 (extracts from constitutions and laws on Constitutional Courts) Leading cases - Freedom of religion and beliefs Leading cases - European Court of Human Rights

To be published during 2001

Bulletin on Constitutional Case-Law -	2000 / nos 2, 3
Special Bulletins	Basic texts 6

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Annual Reports -	1993, 1994, 1995, 1996, 1997, 1998