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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

ANNUAL REPORT OF ACTIVITIES FOR 1995

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INTRODUCTION

Five years after its conception, the Venice Commission can congratulate itself on having widely and efficiently contributed to the recent constitutional

reforms which have taken place in several States throughout Central and Eastern Europe.

In effect, its availability, as well as the quality and independence of its members, have once again allowed the Venice Commission to be at the forefront of constitutional developments and to thus contribute both to helping new States become members of the Council of Europe and to developing knowledge of European legal systems with a view to their comparison.

Apart from constitutional assistance and consultative functions in the preparation of fundamental legal instruments in the new democracies, the Commission's activities have developed considerably during 1995. The Commission has in fact, either on its own initiative or from external requests, in particular within the framework of its co-operation with the Parliamentary Assembly of the Council of Europe, developed the sphere of its research and studies on important legal questions affecting the functioning of democracy and its institutions in both new and old democracies alike.

Strengthened by this considerable experience in the field of legal guarantees of democracy, the Venice Commission has seen its audience spread outside Europe, its sphere of investigation grow, the number of requests increase, and the nature of its clients diversify.

In addition, the Documentation Centre on Constitutional Case-Law is fast becoming the central base for centralising and distributing important decisions taken by both European and non-European jurisdictions in the field of constitutional law and the protection of fundamental rights, which has always been the Commission's aspiration.

The success of the UniDem seminars and the follow-up publications provide a further contribution to the development of legal thought on democracy and the pre-eminence of law.

MEMBERSHIP

At the end of 1995, the Commission totalled 32 full members, 8 associate members and 7 observers.

Members

Estonia and Latvia acceded to the Partial Agreement establishing the Commission. Mr Peep Pruks, Dean of the Law Faculty, University of Tartu and Mr Aivars Endzins, Vice-Chairman of the Saeima Legal Affairs Committee, were appointed Commission members in respect of Estonia and Latvia respectively.

Ms Maria de Jesus Serra Lopez, Former Chairman of the Bar Association and Mr Armando Marques Guedes, Former President of the Constitutional Tribunal of Portugal, were appointed members in respect of Portugal, Mr Jose Meneres Pimentel having resigned from his functions.

Associate members

The Committee of Ministers authorised Belarus and Armenia to co-operate with the Commission. Mr Anton Matoucewitch, Director of the Institute of Legislation and Public Administration, was appointed associate member of the Commission in respect of Belarus. Armenia appointed Mr Khakhig Soukiassian, Director of the Legal Affairs Department of the Ministry of Foreign Affairs, as associate member.

Mr Serhiy Holovaty, Minister of Justice of Ukraine, was appointed associate member of the Commission.

Observers

Argentina obtained observer status and appointed Mr Hector Masnatta, Ambassador, Director of the Centre for Constitutional and Political Studies, as its observer on the Commission.

The Committee of Ministers also authorised Uruguay to take part in the Commission's work. Mr Hector Gros Espiell, Ambassador, was appointed as observer for that country.

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The Commission would like to pay its respects to Mr Leonid Yuzkov, President of the Constitutional Court of Ukraine and associate member of the Commission in respect of Ukraine, who died suddenly on 2 March 1995.

During its 22nd and 23rd Plenary meetings, the Commission re-elected Mr La Pergola President, Messrs. Malinverni, Economides and Ms Suchocka, Vice-Presidents and Messrs Helgesen, Zlinszky, Maas Geesteranus and Jambrek, members of the Bureau for a term of two years.

The Commission also nominated:

.a Pergola and Mr zbudun respectively as Chairman and Vice-Chairman of the UniDem Governing Board;

Suviranta and Mr Batliner respectively as Chairman and Vice-Chairman of the Sub-Commission on Constitutional Reform;

Matscher as Chairman of the Sub-Commission on the Protection of Minorities;

Russell as Chairman of the Sub-Commission on Constitutional Justice;

Triantafyllides as Chairman of the Sub-Commission on International Law;

Scholsem as Chairman of the Sub-Commission on the Federal and Regional State;

Steinberger as Chairman of the Sub-Commission on Democratic Institutions;

budun as Chairman of the Sub-Commission on Emergency Powers of the Government;

Aguiar de Luque as Chairman of the Sub-Commission on Latin America;

.a Pergola and Mr Helgesen respectively as Chairman and Vice- Chairman of the Sub-Commission on South Africa;

Robert as Chairman of the Sub-Commission on the Mediterranean Basin.

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

ACTIVITIES

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

During 1995, the Commission continued to co-operate with several countries, especially in Central and Eastern Europe on matters principally related to constitutional reform. The Commission was consulted both on draft Constitutions as such and on the establishment of constitutional courts, the adoption of laws on the status of minorities and citizenship, the organisation of the judiciary and the exercise of individual freedoms. At the same time, the Commission closely monitored constitutional developments inside and outside Europe.

A large part of the Commission's work in this area was, naturally, centred on the constitutional process in those countries undertaking democratic reforms. Reforms in Albania, Georgia and Ukraine were therefore at the forefront of the Commission's activities.

Nevertheless, the implementation of Constitutions in the countries of Central and Europe has not been neglected. The Commission closely followed certain aspects of the legislative process and the activities of the constitutional courts in Russia, Belarus, Latvia, Moldova and, more recently, in Armenia.

The Commission also welcomes the fact that as its co-operation with Greece and Hungary particularly bears witness, its meetings are becoming more and more **the** most appropriate forum for the exchange of information, experience, ideas and projects in the constitutional field. In the Commission's opinion, this presents a vital process for the promotion of a European legal culture based on democratic heritage, the principle of the rule of law and respect for human rights.

Strengthened by five years experience of work in the field of democratic reforms, the Commission is ready to continue its co-operation, within the framework of its competencies, with all European States. Several of its activities will continue into 1996; this will no doubt be the cases of Ukraine and Albania, where the constitutional process is continuing, as well as for Georgia, Bulgaria, Belarus, Armenia, Russia and other States with which co-operation on specific projects in train at the end of 1995.

The constitutional situation in Bosnia-Herzegovina following the Dayton Agreements could also become one of the Commission's fields of activity.

Furthermore, having regard to its growing impact on the daily life of all Europeans, the process of European construction can only be at the core of the Commission's interest. It therefore decided, with the backing of President Santer of the European Commission, to forward to the 1996 Intergovernmental Conference a series of proposals on European citizenship.

Finally, courtesy of a grant from the European Community, the co-operation with countries outside the European continent which has continued throughout 1995, particularly South Africa, could be strengthened in 1996.

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

A. Description of the Activities of the Commission

1. Co-operation with Ukraine

During the whole of 1995 there was intense co-operation between the Venice Commission and Ukraine. The Commission closely followed

constitutional developments in exchanges of views held with the Ukrainian authorities and representatives of the Constitutional Commission, both during Plenary Meetings in Venice and during meetings held in Kyiv between Commission Rapporteurs and the authors of the new Constitution.

During the Commission's 22nd Plenary meeting, the then Minister of Justice Mr Onopenko and Mr Holovaty, then Member of Parliament and President of the Ukrainian Legal Foundation, presented an overview of the constitutional situation in that country. The Commission declared its willingness to assist Ukraine in the process of the drafting of the new Constitution and related laws. In addition, following the adoption by the Ukrainian Parliament on 18 May 1995 of **the draft Law on State Power and Local Government**, Mr Holovaty formally requested the Commission to give an opinion on this law and on the difficulties which could result from a conflict between this law and the provisions of the 1978 Constitution still in force. During the meeting it was suggested that this conflict could be resolved by a **Constitutional Accord between the President and Parliament**, and the Commission's opinion was sought on this point.

During the 24th Plenary Meeting, the Commission adopted the **"Opinion on the present constitutional situation in Ukraine following the adoption of the constitutional agreement between the Supreme Rada of Ukraine and the President of Ukraine"** (see infra). Mr Nemeth, Rapporteur on Ukraine of the Committee on Human Rights and Legal Affairs of the Parliamentary Assembly, attended the meeting and recalled the Assembly's interest in this question with a view to Ukraine's accession to the Council of Europe. The Commission forwarded its opinion to the Parliamentary Assembly.

The Commission also took note of the **Draft Preliminary Constitution of Ukraine**. Mrs Milenkova and Messrs Aguiar de Luque, Batliner and Bartole attended two meetings in Kyiv on 28-29 September 1995 and 27-28 October 1995, when they met representatives of the Constitutional Commission of Ukraine.

During the last Plenary meeting of 1995, Mr Holovaty, Associate member of the Commission and newly appointed Minister of Justice, recalled that Ukraine has undertaken to adopt a new Constitution within a year of its accession to the Council of Europe and that the Constitutional Commission wished to establish an even closer co-operation with the Commission in 1996. The Commission's contributions to date to the drafting process had been greatly valued.

The Commission considers that its co-operation with the Ukrainian authorities has been outstanding during 1995. It has declared itself ready, at the request of the Ukrainian authorities, to assist in the next stages of the process of constitutional reform in Ukraine.

2. Co-operation with Moldova

Co-operation between the Commission and the Moldovan authorities, in particular with the Parliament, continued during 1995.

Following a request from the Moldovan authorities, Messrs Malinverni, zbudun and Scholsem were appointed Rapporteurs on the draft **Moldovan law on the status of minorities**. The Rapporteurs' comments were forwarded to the Moldovan authorities at the beginning of 1995.

During the 22nd Plenary Meeting, Mr Solonari, Chairman of the Committee on Human Rights and National Minorities of the Parliament of Moldova, held an exchange of views on this draft law with the Commission and in particular with the Rapporteurs. The Commission's Rapporteurs raised a number of issues concerning, in particular, the absence of a definition of the term "minority", the privileged status of the Russian language, the potential consequences of the guarantee of education in one's mother tongue, and the lack of precision of certain provisions. Mr Solonari stated that the comments from the Members of the Commission had been carefully studied and that many changes had been made in the draft law to take them into account.

In addition, at the request of the Moldovan authorities, the Commission examined a **draft Moldovan law on the organisation and holding of meetings**. Messrs Zlinszky, Nicolas, Svoboda and Klucka introduced their comments on this draft. They emphasised in particular that the administrative approach of the law was too restrictive; that the efforts to regulate all aspects exhaustively became an obstacle to freedom of assembly; that the draft made spontaneous demonstrations impossible; that the administration had too much discretionary power; and that the extent of judicial review was unclear, which could cause problems for respecting international legal instruments. During its 24th meeting, Mr Negru, Associate member in respect of Moldova, thanked the Commission for their comments designed to improve the draft law.

operation with Latvia

During 1995, co-operation with the Latvian authorities on the slow progress towards the adoption of the Latvian law on Citizenship was completed by the adoption in March 1995 of amendments to the 1994 **Latvian law on Citizenship** and, in April 1995, by the adoption of the **Law on the Status of Former USSR Citizens who do not have the Citizenship of the Republic of Latvia or any other State**.

style='font-size:12.0pt;font-family:"Times New Roman";letter-spacing:-.15pt; font-style:normal'>With regard to the **Latvian Law on citizenship**, the Commission had particularly concerned itself with the question of the establishment of yearly quotas for naturalisation. Having closely followed the debates concerning this draft law and its revisions and amendments, the Commission welcomes that fact that the final draft and those amendments made in March 1995 largely take into account the analysis and proposals drawn up by experts from the Council of Europe and the Commission, and that certain amendments ensure that a large part of the population will be able to automatically acquire Latvian nationality.

Owing to concern over the fate of stateless persons in Latvia, the Commission took note with interest of **the law on the status of former USSR** citizens who do not have the citizenship of the **Republic of Latvia** or any other State. In this respect, it noted the declaration made during its 22nd Plenary Meeting by Mr Endzins, member of the Commission in respect of Latvia and Vice-Chairman of the Saeima Legal Affairs Committee, that this law was destined to give all non-citizens residing in Latvia a status fully compatible with the European Convention on Human Rights. It was however not possible in the specific situation of Latvia to give citizenship to all residents.

The Commission, while it welcomes the progress made in this matter since the independence of Latvia, considers that care should be taken in implementing the laws in force concerning nationality and statelessness and in future legislative activities in order to avoid in practice any discrimination contrary to the fundamental rights of the individual.

4. Co-operation with Albania

Constitutional developments encouraged the Commission to reiterate its willingness to assist Albania in the process of drawing up the Constitution, which is of great importance both on the domestic and international level.

Furthermore, at the request of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly, the Commission examined the **Albanian law on the organisation of the Judiciary (Chapter VI of the transitional Constitution of Albania**). The Commission instructed a Working Group chaired by Mr Malinverni to examine the provisions of the Albanian law on the organisation of the judiciary.

During its 25th Plenary Meeting, in the presence of Mr Frasheri, Minister of Justice of Albania, Messrs Malinverni, Russell and Said Pullicino presented a draft opinion on the Albanian Law on the Organisation of the Judiciary, drawn up on the basis of written opinions by some members and following a visit to Tirana on 9-11 November 1995. During the discussion, attention was drawn to the need to take into account the historical and political background to constitutional reform in Albania. The Commission adopted the **Opinion on the Law on the Organisation of the Judiciary** and decided to transmit it to the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly, along with Mr Frasheri's written observations (see below).

5. Co-operation with Georgia

Close co-operation between the Commission and the Georgian authorities responsible for drawing up the new Constitution continued throughout 1995.

At the Commission's March 1995 meeting, Mr Demetrashvili, Associate member in respect of Georgia and Secretary of the State Constitutional Commission, gave information about the draft **Constitution of Georgia**, assuring members that the comments made by the Commission on the draft Constitution of Georgia and forwarded to the Constitutional Commission at the beginning of 1995 had been taken into account for the final modifications.

An outline of the new Constitution, adopted on 24 August 1995, was presented to the Commission during its 25th Plenary Meeting. During the ensuing exchange of views with Commission members, Mr Demetrashvili stressed that the legislative elections together with the inauguration of the re-elected President had stabilised the constitutional situation in Georgia. He also outlined the safeguards which existed in the new Constitution to safeguard against the risks of an "authoritarian drift" in the strong presidential system and in particular the creation of institutions such as the Constitutional Court and the Ombudsman. There are still some difficult problems to be resolved however, in particular territorial questions.

The Commission particularly welcomes the fruitful co-operation with Georgia which has led to the adoption in the new Constitution of provisions which take into account to a large extent the observations of members (see below). It will continue during 1996 to co-operate with the Georgian authorities in their legislative programme for the implementation of the Constitution, in particular concerning the establishment of the Constitutional Court of Georgia.

6. Co-operation with Hungary

During the 23rd Plenary Meeting, Mme Desz, from the Hungarian Ministry of Justice, held an exchange of views with Commission on the process of constitutional reform in Hungary. Both politicians and lawyers have felt the need to restructure and reformulate the Hungarian Constitution, which had already been substantially amended in 1989 and 1990. A preliminary working document, entitled **"Regulatory Concept of the Constitution of the Hungarian Republic**", had been drawn up by the Ministry of Justice. It set out the basic approaches which could be followed in the elaboration of the new Constitution. The Commission was requested to give an opinion on this text. Messrs. Bartole, Helgesen, Malinverni, Marques Guedes, zbudun, Reuter, Russell, Suviranta and Zlinszky were appointed by the Commission as Rapporteurs on constitutional reform in Hungary.

During the 24th Plenary Meeting, Mr Vastagh, Minister of Justice of Hungary, informed the Commission on the process of constitutional reform in his country and held an exchange of views with the Commission's Rapporteurs. Since 1989 Hungary has embarked on an ambitious project to bring its internal legislation into line with European standards. International human rights standards have been incorporated into domestic law. The role and importance of judicial control of the public administration have been considerably increased. Under these circumstances, the present patchwork Constitution has been criticised not only from a technical point of view, but also because some of its provisions no longer correspond to the new realities of Hungary. According to Mr Vastagh, a new coherent Constitution could close the period of transition. It should take into account the experience of such institutions as the President, the Constitutional Court, the bodies of local government and the State Audit Office. The "Regulatory Concept" has already been discussed by various public and private institutions in Hungary. Mr Vastagh underlined that the Commission's expertise will be a very important guideline for the Hungarian authorities.

During its 25th meeting, the Commission adopted a consolidated opinion on **"the Regulatory Concept of the Constitution of the Hungarian Republic"** (see below) and decided to forward it to the Hungarian Minister of Justice.

The Commission is entirely convinced that mutual consultation and the sharing of experiences of other European States in the field of constitutional law are factors which contribute not only to the improvement of technical aspects of fundamental laws but also to the realisation of one of the objectives of the Council of Europe: the promotion of a European Legal culture based on democratic heritage, the principle of the rule of law and respect for human rights. The Commission is of the view that the Hungarian government, in bringing the question of constitutional reform in Hungary to the forefront of its discussions, has shown the importance it attaches to the sharing of experience in the field of constitutional development.

7. Co-operation with Russia

During the 24th Meeting, Mr Vitruk, Judge at the Constitutional Court and Associate member of the Commission in respect of Russia, informed the Commission about the latest constitutional and legislative developments in Russia.

In particular, he indicated that the process of adoption of constitutional laws had been less speedy than expected. Two constitutional laws had so far been adopted, concerning the constitutional court and the arbitration tribunals. At the same time, new constitutional organs have been set up, e.g. the Court of Accounts. Mr Vitruk reported on the activity of the Constitutional Court on the basis of the new Law on the Constitutional Court, focusing in particular on the judgment of the Court on the Presidential Decrees concerning events in Chechnya.

During the 25th Meeting, Mr Vitruk informed the Commission about the different elections in Russia, drawing attention to problems which may arise: the

legislative elections had been the object of several petitions of the Constitutional Court; the Federation Council's mandate was about to expire, but its re-election had not yet been provided for by law.

The Commission reaffirmed its willingness to assist the Russian authorities within its field of competence.

8. Co-operation with Belarus

During the 23rd Meeting, Mr Matoucewitch, Associate member of the Commission in respect of Belarus, presented the results of the first round of legislative elections and the four republic-wide referendums held on 14 May 1995. The results of the referendums must now be translated into legislative action, and the Commission reiterated its willingness to assist the Belarus authorities in the forthcoming process of constitutional reforms.

During its 24th Meeting, the Commission also agreed to examine the **"Law on the Supreme Soviet of the Republic" of 21 December 1994 and the "Law on the President of the Republic"** of 21 February 1995. The Commission appointed Ms Milenkova and Mr Lapinskas as Rapporteurs on the Laws on the Supreme Soviet and on the President. Their comments and conclusions on these laws were presented during the 25th Meeting (For a summary of these opinions, see below).

The Commission confirmed its willingness to assist Belarus in the process of constitutional reforms.

9. Co-operation with Armenia

During its 24th Meeting, the Commission held an exchange of views with the Deputy Minister of Foreign Affairs of Armenia, Mr Oskanian. Democracy, the rule of law and protection of human rights are matters, according to Mr Oskanian, in which the Armenian authorities lack expertise and on which co-operation with the Venice Commission would be useful.

During the 25th Meeting, the Commission was presented with an overview of the constitutional situation in Armenia, in particular of the new Constitution which had been adopted in July 1995.

10. Co-operation with Kyrgyzstan

During the 22nd Plenary Meeting, Mr Kosakov observer in respect of Kyrgyzstan informed the Commission that a referendum involving important changes to the 1993 Constitution had been organised at the end of 1994 and that proposals to amend a large part of the Constitution in force were being studied. The Commission confirmed its willingness to co-operate with the Kyrgyz authorities.

11. Developments in Bosnia and Herzegovina

During its 25th Meeting, Mr Steinberger informed the Commission about the conduct of the negotiations in Dayton, Ohio, USA, leading to the conclusion of the **General Framework Agreement for Peace in Bosnia and Herzegovina**, signed at Paris on 21 November 1995. Mr Steinberger had assisted in these negotiations as a special legal adviser to the government of the Republic of Bosnia-Herzegovina.

The Commission was also informed about the various elements of the Framework Agreement and particularly the principal elements of the agreed Constitution of Bosnia-Herzegovina.

The Commission, which had closely followed the development of certain aspects of the situation in Bosnia-Herzegovina, welcomes the Framework Agreement. Sight should not however be lost of the difficulties which might arise in the implementation of this Agreement on the ground it welcomes the

Council of Europe's initiative to take all necessary measures to put its technical and practical experience at the disposal of the authorities of Bosnia-Herzegovina in order to establish appropriate and efficient mechanisms to resolve constitutional differences and to ensure the protection of fundamental rights of individuals and minorities.

For its part, the Commission has declared itself ready to assist the national and international institutions who may wish to call upon its experience and competencies.

12. Constitutional reforms in Greece

During the 23rd Meeting, Ms Livada informed the Commission that the first steps amending the 1975 Constitution had been taken. Three proposals for amendment by the main parties in the Greek Parliament had been submitted to a Constitutional Commission composed of 50 members of Parliament. These proposals cover a very large spectrum of constitutional issues: separation of Church and State, the reinforcement of Human Rights guarantees, strengthening of the powers of the President of the Republic, creation of a Constitutional Court, introducing electoral law provisions in the Constitution, parliamentary immunity, and the reinforcement of local government institutions and competencies.

The Constitutional Commission will examine the proposal and report to Parliament.

The Venice Commission will be duly informed of developments.

13. Co-operation with South Africa

The Commission has closely followed the development of constitutional reforms in South Africa. At the invitation of the South African authorities, a delegation from the Commission composed of Mr La Pergola, President of the Commission, together with Messrs. Malinverni (Switzerland), Scholsem (Belgium), Ms Suchocka (Poland) and Mr Lopez Guerra (Spain) attended the Seminar on "Democratic Constitutional Development" which took place in South Africa on 17-20 July 1995.

During the 25th Meeting, Ambassador Van Heerden informed the Commission about the local elections which had taken place in South Africa. He emphasised the main problems being encountered in the drawing up of the final Constitution with a view to its adoption in May 1996. He stressed that these questions went to the heart of the activities and competencies of the Venice Commission and expressed South Africa's willingness to continue the fruitful co-operation which has been on-going for a number of years.

It is envisaged that the Commission will continue and intensify its co-operation with South Africa during 1996, courtesy of a programme of activities which is currently being drawn up and which could be partially financed by the Swiss authorities.

14. Venice Commission's contribution to the 1996 Intergovernmental Conference of the European Union

Aware of the growing impact on the daily life of all Europeans of the process of European construction, the Commission, in accordance with the decision taken at its 22nd Meeting, instructed a Working Group chaired by the President to draw up a Memorandum as a Venice Commission contribution to the preparation of the Intergovernmental Conference.

During the Working Group meeting held in Luxembourg on 8 November 1995, the members held an exchange of views on the main issues of the Conference and examined the fields in which the Commission could make a useful contribution. The rights of European citizens were then chosen as the general topic. The Commission, with the backing of President Santer of the European Commission, adopted the Working Group proposal to draw up a text on an **Act of European Citizenship**.

B. Opinions of the Commission

There follows the full text or summaries of some of the opinions given by the Commission during 1995.

1. OPINION ON THE CONSTITUTIONAL SITUATION IN UKRAINE FOLLOWING THE ADOPTION OF THE CONSTITUTIONAL AGREEMENT BETWEEN THE SUPREME COUNCIL AND THE PRESIDENT OF UKRAINE

This opinion concerns the current constitutional situation in Ukraine following the adoption of the constitutional agreement between the Supreme Rada of Ukraine and the President of Ukraine on the basic principles of the organisation and functioning of the State power and local self-government pending the adoption of the new Constitution in Ukraine. It was adopted by the European Commission for Democracy through Law at its 24th Meeting, on 8 and 9 September 1995, on the basis of contributions from Ms Anna Milenkova (Bulgaria), Mr Sergio Bartole (Italy), Mr Godert W. Maas Geesteranus (Netherlands), Mr Cyril Svoboda (Czech Republic), Mr Nicolay V. Vitruk (Russia) with a Memorandum by Mr Oleksander Lavrynovych (Ukraine).

I. The adoption of the Constitutional Agreement

1. The Ukrainian authorities have taken the unusual step of concluding a Constitutional Agreement between the President and Parliament which for most purposes serves as an interim Constitution. This is to be explained in the light of the recent history of Ukraine and the present political situation.

2. After having declared the State sovereignty of Ukraine and the primacy of its laws over those of the URSS in July 1990, the Ukrainian Parliament adopted the Declaration of Independence of Ukraine on 24 August 1991: this Declaration was confirmed by referendum on 1 December 1991.

Notwithstanding that the Declaration of July 1990 had provided for some principles which were in conflict with principles in the Ukrainian Constitution of 20 April 1978, that Constitution remained in force and was only partially amended for the particular purpose of ensuring the transition of Ukraine from the communist regime to freedom, democracy and the rule of law. Some further amendments, in respect of which the required majority of two thirds of the total number of the People's Deputies of Ukraine was obtained, were subsequently approved, but the necessary consent has not been achieved for a completely new draft Constitution. Ukraine therefore still maintains in force the old amended socialist Constitution.

3. The Supreme Rada of Ukraine and the President of Ukraine, which are the only two directly elected national bodies of Ukraine, decided to settle their differences by adopting a constitutional agreement on the basic principles of the organisation and functioning of the State power and local self-government in Ukraine pending the procedure aimed at adopting the new Constitution of Ukraine. After difficulties and discussions, the agreement was approved by a law of the Supreme Rada and - later - a compromise was adopted by law for its enforcement and for the approval in the future of the new Constitution. But neither the first Act nor the second one obtained the required majority of two thirds of the members of the Supreme Rada.

4. On the basis of the preamble of the Agreement, and according to the dispatches of the RIA news agency, both the majority of the Supreme Rada and the President recognise that the content of the 1978 Constitution (even in its amended text) and that of the new law conflict in some parts. Nevertheless they apply the rules that, on the one hand, "the legislation of Ukraine shall be effective in the part which is not contrary to the rules" of the new law and, on the other hand, that "the provisions of the applicable constitution of Ukraine shall be effective only in the part which complies with the present constitutional agreement" (Article 61 I and II of the Agreement).

5. As the Agreement has been adopted by law, it cannot be treated as a mere constitutional convention, that is a political agreement between the supreme elected bodies of the country on the ways of implementing the Constitution in force. But the failure to approve the law by the required majority has the consequence that the old Constitution cannot be superseded by the new law. Nevertheless this was and is the objective of Parliament and of the President: pending the procedure aimed at the approval of the new Constitution, they agreed to apply the new principles set forth in the law "On State power and local self-government in Ukraine" on the basis of their good will, and having regard to their mutual concessions and compromises.

The present position, then, is a transitory solution which does not imply the abrogation of the old Constitution but -instead - implies the suspension of its rules concerning the State power and local self-government in Ukraine, or rather those rules which do not comply with the new principles. This solution is obviously based on a political agreement, but the content of this agreement is not the new principles, but rather the decision of the governing bodies of Ukraine to settle their differences and to abide by principles which are generally accepted and have been adopted by a parliamentary law. It is not a solution respectful of the constitutional hierarchy of the sources of law provided for by the Ukrainian Constitution of April 1978. Nevertheless, it is a solution which complies with the principle of legality insofar as it binds the Ukrainian governing bodies to adhere to an identified and stable statute

approved by Parliament and not to an informal, political, agreement only which might be susceptible to constant change. Frankly speaking we have to acknowledge that there has been a rupture in Ukrainian constitutional continuity, but it is a transitory rupture only until such time as the full legality of the normative order is restored through the adoption of the new Constitution.

II. Assessment of the present constitutional situation

A. The 1978 Constitution

6. The force of only a part of the old Constitution is suspended. For instance, its chapters 5 and 6 are still in force and shall be enforced to the extent that they do not contradict the constitutional Agreement, or rather comply with it. This is an important feature of the present constitutional order in Ukraine because the Supreme Rada has not been able to adopt a new bill of rights since the Declarations of Ukrainian sovereignty and independence.

7. In effect, the constitutional provisions on the fundamental rights, freedoms and duties of the citizens of Ukraine are drafted in a very old fashioned way, respectful of the principles of socialist law and - especially - of the theory of the material guarantee of rights and freedoms. Their main purpose is to entrust the State authorities with the obligation to create the material conditions for ensuring the enjoyment by citizens of their rights and freedoms. This arrangement implied, on the one hand, that the State authorities should focus on the material protection more than the legal and judicial guarantees of rights and freedoms and, on the other hand, that their enjoyment and the enjoyment of the material guarantees of these rights and freedoms were restricted to those who complied with the political obligations of the socialist regime. An example of a wording of a fundamental freedom not compatible with international standards is Article 48 which makes it possible to severely restrict freedom of expression and assembly.

8. Nevertheless the maintenance in force of these provisions, which are unaffected by the constitutional Agreement, can offer ground for interventions by the Constitutional Court when the law establishing this body is adopted in due course. Even if they are drafted according to the socialist theory of law, the constitutional provisions concerning fundamental rights and freedoms can constitute a basis for the judicial review of legislation in the field. They could be corrected and integrated by some of the principles received in the Ukrainian legal order through the Declaration of sovereignty adopted in July 1990 and the partial amendments of the Constitution. Obviously in this way fundamental rights and freedoms could benefit from only a weak and transitory entrenchment in the constitutional system, but such an entrenchment would be a bridge to the adoption of new statutes on the implementation of rights and freedoms and on their reception in the Ukrainian legal order through the signature and ratification of international instruments in the field.

B. The General Provisions of the Constitutional Agreement

Preamble

9. The preamble only defines the purpose of the law as being "desirous to reform State power on the principles of strict delimitation of functions between its legislative and executive branches as a necessary prerequisite for overcoming of economy, social and constitutional crisis". The preamble is silent in relation to the judicial power. Nonetheless it is clear that judicial reform is the fundamental prerequisite for the economic, political and social transition. This anomaly must be rectified in the preamble because the constitutional Agreement contains numerous sections dealing with judicial power, including section V.

Article 2

10. The beginning of Article 2, which provides that power belongs to the people and that the people are the sole source of power, corresponds to classical constitutional law doctrine. The article continues by stating that the people exercise this power both directly, i.e. by referendum, and through the system of public and local self-government authorities. The accent is thus put on direct democracy, following the doctrine of self-government prevailing during the perestroika period.

This may threaten the constitutional character of the system of government and endanger political stability. It is recommended that the structures of a representative political system be clearly established, and that at the same time various forms of direct participation by the people be foreseen.

Article 5

11. Paragraph 1 of this article sets out the principle of the supremacy of human rights. It is to be regretted that this is not taken up again, e.g. in Articles 24, 31 and 43 (with the exception of Article 37). The Russian experience shows that this paragraph can have practical importance for the work of the Constitutional Court of Ukraine, in particular when applying Article 17, paragraph 27.

C. The Supreme Rada

12. The Agreement contains a mixture of various forms of government. While some parts retain certain features of the Soviet system, other parts introduce certain principles and constitutional arrangements typical for countries like France and the United States. There is no clear decision in favour of a parliamentary or a presidential form of government. Even if the elements of presidentialism prevail, presidential government is far from being realised in its pure form. When establishing a new constitutional system, particular attention has to be given to the form of government. Clarifying this question would have enabled certain contradictions to be avoided.

Article 6

13. It is not clear how the elections are to be conducted under a mixed majoritarian-proportional system. The essence is that in fact every electoral system is majoritarian-proportional or proportional-majoritarian. Generally, each system bears some elements of the other one, but one prevails over the other. This paragraph must clarify which of the two systems will be adopted or whether in fact both elements will be adopted e.g. by introducing a second chamber/senate.

Article 7

14. This article provides that the Supreme Rada carries out its work in sessions of 2 types, ordinary and extraordinary, without defining the length of the sessions. This opens the door to the old Soviet practice of limiting the sessions of representative bodies to short periods destined simply to rubberstamp decisions already taken.

Experience shows that the legislative agenda of parliament tends to be overburdened during periods of transition, and it is therefore appropriate to provide for long-lasting sessions enabling the legislature to become an effective forum for public discussion of the fundamental questions of society.

Political practice in Bulgaria is instructive in this respect. The Constitution provides that the National Assembly acts continuously, and the Assembly is therefore in session during the whole year with the exception of brief Christmas and Easter holidays as well as one month in the summer.

Articles 9 et seq.

15. The text provides for two kinds of organs at the top of the Supreme Rada:

Bureau of the Supreme Rada, composed of the Chairman and Vice-Chairman of the Supreme Rada of Ukraine, the chairmen of standing commissions, and the heads of parliamentary groups and factions in the Supreme Rada of Ukraine.

President/Chairman assisted by Vice Chairmen with more extensive competencies.

This seems to be too much. It would be preferable to make a choice between the two classical systems of chairing a Parliament: collective bureau or speaker. In the former case, the Bureau would have to be made smaller to become more effective. In the latter case, a consultative body composed of the heads of parliamentary groups and standing committees should be set up.

The text also gives the Chairman powers not proper for the holder of such an office, in particular to submit together with the President of the Republic proposals for the appointment of the Chairman of the Constitutional Court as well as of half the judges. This confers too much power on the chairman, and may induce him to enter into competition with the President of the Republic. It is preferable that the Chairman acts only as an intermediary and that the initiative in these cases lies with deputies of parliamentary groups.

Articles 13 and 14

16. The rules on the legal status of the Deputies will be contained in a separate law. Certain questions like parliamentary immunity and the character of the mandate of the Deputies should however be settled by the Constitution itself.

Article 15

17. The right to initiate legislation in the Supreme Rada of Ukraine is given to people's deputies, the standing commissions of the Supreme Rada, the President of Ukraine, the Cabinet of Ministers, the Supreme Court and the Highest Arbitration Court of Ukraine.

The Deputies certainly need to have this right. It is questionable whether it should be given to the Supreme Court and the Highest Arbitration Court. Law-making is political by its nature and the judiciary should remain outside politics, concentrating on applying the laws.

Nor does it appear to be the best solution to give the right to initiate legislation both to the President and to the Cabinet of Ministers. This can lead to divergencies within the executive power as to the policies to be pursued. In general, the principle of harmony of the executive requires that only one organ submit draft laws to Parliament. Preferably this would be the government since it is politically responsible before the Supreme Rada. As a compromise, draft laws might be prepared by the government but submitted to the Supreme Rada following presidential approval.

The procedure for urgent consideration of certain bills provided for in Article 15, paragraph 2, appears to be a good solution, enabling the executive to determine priorities and to pursue a steady and effective policy.

Article 17, paragraph 1

18. This paragraph does not make a distinction between Constitution-making and legislative powers, and thereby gives one State organ the possibility to unilaterally change the rules of the game. At least there should be provision for different procedures and majorities for the adoption of the Constitution.

The Supreme Rada is empowered, following a rule already established by Article 97, paragraph 19, of the old Constitution, to provide official interpretation of the Constitution, laws, codes and other codified acts. On the other hand, the courts are independent (Article 37, paragraph 2) and they obey only the law (Article 37, paragraph 3). The question is whether courts are bound to follow the official interpretation of the Supreme Rada, and more generally whether this represents the beginning and end of judicial independence. It does not seem rational to give the Supreme Rada such a competence of interpretation if one sets up a Constitutional Court.

Article 17, paragraph 17

19. The power of the Rada to announce the election of the President and accept his resignation is questionable. The Head of State derives his power directly from the nation as a whole and should therefore not depend on the legislature. The first function could be entrusted to the Central Electoral Commission and the second to the Constitutional Court.

Article 17, paragraph 10

20. While Article 6 provides for a 4 year mandate, this paragraph gives the Supreme Rada the possibility to dissolve itself and hold early elections. This may lead to the possibility of exercising pressure on Parliament, including pressure from non-constitutional bodies. If it is contentious whether the separation of powers requires a fixed mandate or allows early dissolution, dissolution should at least be limited to conflicts between the institutions. If one wishes to retain the possibility of early dissolutions, the possible grounds for such a step should at least be enumerated.

Article 17, paragraph 15 Article 24, paragraph 9

21. The functions of the Defense Council should be clarified to avoid conflicts with the Council of National Security chaired by the President (see Article 24, paragraph 9).

Article 17, paragraph 17

22. It is questionable to have the Chairman of the Constitutional Court elected by the Supreme Rada. Experience in post-totalitarian States shows that this may politicise (and delay) not only the establishment but also the work of the Court, and that it places the Chairman in a difficult position, incompatible with the status and object of the Court.

Article 17, paragraphs 18 and 20

23. The appointment of the highest judges is of particular importance. A question arises when we see that, under paragraphs 18 and 20, the appointing authority (Parliament) is also competent to dismiss. Paragraph 20 adds to this: "according to the procedure established by the law", but this addition is missing from paragraph 18 with respect to the chairman of the supreme court.

As is well-known, it is of the utmost importance in any democratic State that judges can perform their duties in absolute independence, i.e. independent in particular of government and Parliament. The mere possibility of dismissal for no other reason than that executive or legislative authorities are displeased at a judicial sentence would impair the independence of judges.

Further examination of the dismissal procedures is therefore necessary.

Article 17, paragraph 24

24. To give the Supreme Rada the right to initiate referendums does not make much political sense. In using this power the legislature would abandon its own proper function. It would be better to give this possibility to the Head of State, who could use it in exercising his functions as an arbitrator. This is the practice of the French Fifth Republic.

Article 17, paragraph 27

25. This veto power is not justified. The assessment of the constitutionality of decrees should be reserved to the Constitutional Court. One could foresee that the entry into force of decrees is suspended until the decision of the Constitutional Court.

Article 17, paragraph 4

26. The Russian experience shows the usefulness of this provision.

Relations between the Supreme Rada and the Government

- Article 17, paragraph 23, Article 22, Article 33

27. The accent should be put on the collective responsibility of the government, including the possibility of a vote of no-confidence in some members. Such a vote should require an absolute majority and not an ordinary majority. Parliamentary control mechanisms, like questions and interpellations, should be foreseen, and these should be distinguished from sanction mechanisms, like a vote of no-confidence.

Consideration might be given to enabling the government to ask the Supreme Rada for a vote of confidence on certain occasions, e.g. when submitting a bill proposed by the government. This would allow the executive to put pressure on the Deputies and to pursue a continuous and effective policy.

The question whether the President should have the power to dissolve the Rada when it passes a vote of no-confidence in the government is obviously very controversial. From press reports, it appears that the non-existence of such a possibility was a precondition of the Rada's acceptance of the constitutional Agreement.

There is also an ambiguity concerning the relationship between Articles 22 and 33. On the one hand, after the Programme of its Activity of the Government of Ukraine has been approved by the Supreme Rada of Ukraine, the latter may express its distrust of the Government of Ukraine no earlier than after one year of governmental activities but, on the other hand, Article 33 determines that whenever the draft State Budget of Ukraine has not been submitted in good time, the Supreme Rada of Ukraine may take a vote of non-confidence in all or particular members of the Cabinet of Ministers of Ukraine. Accordingly, the Supreme Rada of Ukraine could take a vote of no-confidence (i.e. distrust) within the one year "safe period" of governmental activities. It must be clarified as to whether Article 33 is an exception to Article 22, or whether it should be amended to be subject to Article 22.

D. The President

Article 23

28. The 2/3 majority of members of the Supreme Rada required to override a presidential veto on draft legislation is extremely high in the difficult period of transition of Ukraine. It may lead to a blocking of legislative activity and to conflicts between the institutions of the State. Consideration might be given to foreseeing that the veto can be overridden by an absolute majority of the members of the Supreme Rada.

Article 24, paragraph 2 Article 27, paragraph 2

29. According to Article 24, paragraph 2, the President addresses messages to the people of Ukraine. According to Article 27, paragraph 2, he may address messages on pressing issues to the people and to the Supreme Rada. Are these the same or different kinds of messages?

Article 24, paragraph 6

30. The President of Ukraine is empowered to repeal acts by central and local public executive authorities including acts by executive authorities of the Autonomous Republic of Crimea whenever they are incompatible with the Constitution and laws of Ukraine, or with decrees and orders of the President of Ukraine. This means that the President is exercising a similar role to a court of the highest instance that deals only with questions of law and not of fact. The problem is that there is no judicial control over the President of Ukraine (i.e. executive). Traditional democratic constitutions grant this power to the judiciary, i.e. to constitutional or ordinary courts.

Article 24, paragraph 2

31. This provision merits approval, but it should be qualified "except cases provided for by the Constitution of the Ukraine and the present law" (see Article 17, paragraph 4).

Article 25

32. The President of Ukraine is empowered to interpret decrees and orders which are binding on the whole territory of Ukraine. This could be acceptable if the interpretation only bound the executive. The right to bind the private sector (namely the citizens of Ukraine) properly belongs only to the judiciary. See also above the remarks on Article 17, paragraph 1.

The power given to the President in paragraph 2 to enact decrees on economic reform not governed by the applicable legislation seems necessary in view of the Russian experience.

E. The Judiciary

Article 38 - The Constitutional Court

33. In envisaging the future role of the Ukrainian Constitutional Court one has to be very prudent. From a strictly legal point of view, the Court cannot be entrusted with the task of checking the implementation of the constitutional Agreement. This would put the Court in the difficult position of dealing with a statute which contradicts the Constitution in force without having been approved by the majority required for the amendment of the Constitution. Moreover, as far as the matter of the organisation and functioning of the State power and local self-government in Ukraine is concerned, an intervention of the Constitutional Court is apparently unthinkable. The provisions of the Agreement establish a constitutional equilibrium between the supreme bodies of the State which is based only on the search for political compromises and is aimed at avoiding the danger of a showdown between them. This construction is confirmed by the RIA news agency which has emphasised that Parliament, or rather the Supreme Rada, approved the agreement without adopting "Articles giving the president the right to disband Parliament and setting out a procedure for the impeachment of the President".

The interpretation of the Ukrainian situation would have been certainly different if we had accepted the idea that because of the difficulties of a quick approval of the new Constitution, the constitutional Agreement was approved with the purpose of completely substituting it for the old Constitution. In this case the implementation of the Agreement would not have depended on a political compromise between the supreme bodies of the State, but the interested authorities would have pretended to vest it with a legal force which it does not have. The Agreement should have been read as the new Ukrainian Constitution, and the Constitutional Court should not have been obliged to stick to the old hierarchy of the sources of law and to recognise the primary role of the old Constitution.

But even in this hypothesis the Constitutional Court should have been entrusted with the task of the judicial review of legislation on the basis of the old constitutional provisions concerning fundamental rights and freedoms. In any case, the content of the constitutional Agreement does not allow for an interpretation which implies the abrogation of the Articles of the old Constitution in the matter.

Article 42

34. This article determines the appointment of judges. One clear constitutional principle of judicial independence is the term for which judges are appointed. The term should be of sufficient length so as to promote and protect the independence of judges. The constitutional Agreement does not provide such protection. See also the remarks on Article 17 paragraphs 18-20 above.

Article 43

35. Within the norms of a democracy, the Prosecutor General's office is only empowered to act on behalf of the State.

The Office does not play any legal role in private law. Accordingly, Article 43 (7) is inconsistent with this principle. The prosecutor's powers should be confined to protecting material and other interests of the State. Usually only the courts are empowered to protect rights of citizens and legal persons (including the State).

Article 43 (2) is unclear as to the extent of the Prosecutor General's power: is his power confined to breaches of the legislation before the courts or does it extend to control of court decisions.

Article 43 is proof that the legal position and power of the Prosecutor General's Office is substantially the same as it was under the totalitarian regime.

Article 45

36. This article is inconsistent with Article 43, in relation to the independence of prosecutors. They could not be independent on the one hand and be subordinated to the Prosecutor General's Office on the other.

F. Local self-government

Article 47 et seq.

37. There is no clear consecration of the principle of local self-government. These provisions give the impression that local authorities remain in a similar position to that obtaining during the Soviet period, as part of the executive. It has to be admitted that questions of local self-government in post-Soviet States have not been clarified in constitutional law theory, and that the implementation of local self-government is difficult in these States due to a lack of experience.

G. Conclusion

The present constitutional situation in Ukraine is ambiguous, and this ambiguity is reflected in some of the remarks made. The only possible solution was indeed the establishment of a transitory order with the partial suspension of the old constitutional bodies and the political commitment of the supreme constitutional bodies to stick to the provisional rules adopted by the Parliament without a qualified majority. The conclusion of the Agreement and continued respect for its provisions under the conditions of political struggle during a period of transition marked by confrontation between the executive and the legislative is an example of an attempt to reach a civilised legal solution to problems, in the interest of the aims set out in the preamble. If the present situation does not meet all the standards of the Council of Europe, the signature and the ratification (with internal implementation) of international instruments in the field of human rights and fundamental freedoms by Ukraine would help the establishment of a constitutional order in Ukraine coherent with the obligation of implementing democracy, fundamental rights and freedoms and the rule of law.

The text of the constitutional Agreement bears the marks of a period of transition, in many respects it represents admirable progress, but the future content of the constitutional law of Ukraine will have to provide for more stable and principled solutions, in particular:

uman rights chapter will have to be in conformity with international standards;

ndependence of the judiciary will have to be fully safeguarded, and judicial functions reserved to the courts;

owers of prosecutors will have to be reduced to a level found in Western Europe;

will have to be stable rules which cannot be changed unilaterally by the participants in the political process.

[NION ON THE LAW ON THE ORGANISATION OF THE JUDICIARY IN ALBANIA style='font-size:12.0pt;font-family:"Times New Roman"'> (CHAPTER VI OF THE PROVISIONAL CONSTITUTIONAL)

INTRODUCTION

On 26 June 1995, prior to Albania's accession to the Council of Europe, and with a view to facilitating the future monitoring of obligations in accordance with Resolution 508 of the Parliamentary Assembly, the Legal Affairs and Human Rights Committee of the Parliamentary Assembly asked the Venice Commission to consider the constitutional provisions governing the independence of the courts in Albania, and to furnish it with an opinion thereon.

In the course of July and August 1995, the relevant laws and regulations were the subject of a first examination by the Working Group on Albania, and were also discussed in general terms by the Commission as a whole at its 24th plenary meeting on 8-9 September 1995.

On 9-11 November 1995, a Commission delegation, consisting of Messrs Malinverni, Russell and Said Pullicino, travelled to Albania to discuss the relevant law and practice with Albanian officials, judges and lawyers. During its visit, the delegation met with the Minister of Justice, as well as with Ministry officials concerned with the training, appointment, transfer and dismissal of judges; the Presidents and members of the Appeal, Cassation and Constitutional Courts; the President of the District Court of Tirana; the Prosecutor General; the Presidents of the District Prosecutor's Office, the Appeal Prosecutor's Office and the Military Court Prosecutor's Office; the Head of the Judicial Department of the Prosecutor General's Office; the President of the Judges Association; and the President of the Bar Association of Tirana.

The present report was drawn up on the basis of written observations by some members of the Commission, having regard also to the several discussions entered into by the Working Group's delegation in Tirana. It was adopted by the Commission at its 25th plenary meeting on 24-25 November 1995, for transmission to the Assembly in due course.

A. CONSTITUTIONAL AND REGULATORY OVERVIEW

The Albanian Law on the Organisation of the Judiciary is part of a series of laws adopted by a two thirds majority of the Albanian Parliament to progressively abrogate and replace the former Constitution. Adopted by law No. 7561 of 29 April 1992, it is set out, with its original numbering, in Chapter VI of the transitional Constitution (the Law on Major Constitutional Provisions). Chapter VI is divided into three sections, dealing respectively with the ordinary judicial system, the Constitutional Court, and certain miscellaneous provisions.

One of the effects of the adoption of the Law on the Organisation of the Judiciary in April 1992 was to abrogate a prior ordinary Law on the Status of Magistrates, applicable to both judges and prosecutors. That law contained detailed provisions on the rights and duties of magistrates, including extensive procedural and substantive safeguards against arbitrary removal from office. At the same time, however, it was clearly the intention of the statutory scheme established by Chapter VI that similar implementing legislation be introduced - Article 5 provides that the organisation of the courts is to be regulated by law; Article 10 provides that the circumstances and procedures for the removal of judges from office should be provided for by law; furthermore, it is not consistent with international standards for legal guarantees of judicial independence, which Article 10 also pledges to respect, that questions of judicial qualification, appointment, transfer and discipline be left unregulated by either the Constitution or an Act of Parliament.

Notwithstanding this intention, only some legislative action has since been taken, with the result that there is at present only piecemeal provision in the ordinary laws (adopted by Parliament) in force in Albania for rights and duties of judges in the exercise of their judicial functions, or for their qualification for office, or the grounds and manner in which they may be appointed, transferred or dismissed. These are set out in law No. 7574 of 7 July 1992, "On the Organisation of Justice and some changes to the Criminal Procedure Code and Civil Procedure Code". In addition, a number of important matters are provided for in the "statute defining the function and administration of the High Council of Justice", a regulation adopted by the High Council of Justice itself.

The Commission has been informed that the Secretary General of the Council of Europe has received a request from the Albanian government for legislative assistance in drafting new legislation in this area, and understands that such an exercise may proceed in the coming months. In consequence, the present opinion includes, at section B.2 below, a brief examination of the various provisions of the above law and "statute" which will need to be replaced by appropriate legislation.

B. THE ORDINARY JUDICIAL SYSTEM

1. Constitutional provisions

Chapter VI of the provisional Constitution contains a number of governing principles designed to be applied to the country's judicial branch: the separation and independence of the judicial power from other State powers (Article 1); its exclusive authority to exercise judicial functions in civil and criminal matters (Articles 1 and 2); the democratic origin and character of the administration of justice (Article 3); the obligation of the courts to uphold the principles of legality and equality before the law (Article 4); the personal independence of judges in the exercise of their functions; the obligation on all State bodies and public authorities to enforce judicial decisions and orders (Article 9); and the obligation on courts to provide reasoned decisions (Article 9) and generally to administer justice in public (Article 12).

These principles conform to the fundamental principles supporting the administration of justice in a State governed by the rule of law, and reflect European standards in the matter.

In the light of these principles, the Commission has formulated the following observations on the more specific provisions in Chapter VI:

a) Military jurisdiction

Under Article 5, military courts are part of the judiciary. However, unlike the other courts which are the subject of further constitutional attention in Articles 6-7 and 10, no other mention is made of military courts. It would be at the least desirable that the Constitution or the law include a description of the general features of military jurisdiction, that is to say its structure and composition, the scope of its jurisdiction and its powers of sentencing (e.g, do these extend to the death penalty?). The Commission notes in this connection that Article 5 of law No. 7574 of 7 July 1992 is not sufficiently detailed on these matters.

b) Administrative jurisdiction

Article 2, which sets out the various justiciable disputes falling within the jurisdiction of the courts, makes no mention of administrative jurisdiction. From a reading of Chapter VI as a whole, it is unclear how and before whom public law disputes between individuals and the State are to be resolved. At present, the Constitution, far from providing for judicial review of administrative action, appears to vest the exclusive power to abrogate unlawful acts and decisions (other than those violating the Constitution) in Ministers and in the Council of Ministers (Articles 37 and 40 of Chapter IV of the transitional Constitution). However, the Commission has been informed that, in practice, such disputes are assimilated to civil jurisdiction in Albania. In addition, the Commission has noted that the draft Code of Civil Procedure currently being prepared by the Albanian government will include a special chapter on administrative jurisdiction.

Having regard to the specificity of public law remedies against the administration, to the need for particular procedures to be tailored to this end, and to the importance of this jurisdiction for the rule of law in general, the Commission believes it would be preferable that administrative tribunals or specialised administrative chambers be established. In addition, the details of administrative jurisdiction should be provided for by law, in accordance with the third paragraph of Article 5 of Chapter VI, which provides that the organisation and powers of courts are to be regulated by law.

c) Specialised tribunals

Although paragraph 2 of Article 5 quite rightly prohibits the establishment of extraordinary courts, it would be useful to foresee in Chapter VI that specialised tribunals might be established to supplement the jurisdiction of the ordinary courts in specific areas, either ratione materiae (e.g, labour disputes, social security matters) or ratione personae (e.g, minors).

d) Appointment of judges and term of office

Under paragraph 2 of Article 6, the President and the Vice President of the Court of Cassation are elected by Parliament at the proposal of the President, whereas the other members of the Court are elected by the Assembly without any such intervention by the President. This difference of

treatment between members of the same court does not appear to be justified, and it is in any case ill advised that the President should participate in the nomination of judges.

In the view of the Commission, future constitutional reform in Albania should require that the above inconsistencies be remedied and that a common procedure for the appointment of judges for defined or indefinite terms of office, be provided for in the Constitution. In the immediate term, legislative intervention is imperative, in accordance with the third paragraph of Article 5 of Chapter VI. The number of judges on the Court of Cassation should also be fixed by law.

e) Immunities and guarantees against dismissal

Section I of Chapter VI provides for two distinct procedures for the removal of judges from office, one applicable to members of the Court of Cassation, the other to members of District and Appeal Courts.

Court of Cassation judges may be removed, under paragraph 4 of Article 6, only on the grounds of conviction of a serious criminal offence established by law or on grounds of mental disability by a vote of Parliament which expressly invokes such reasons. While such grounds for removal cannot be criticised, it is precisely because they are and should be so narrowly defined that the power to make such a finding should rather be entrusted to a judicial body such as the Constitutional Court. Care should be taken to ensure that procedures for the discipline and removal of judges are free from any suggestion of political influence.

As regards District and Appeal Court judges, Chapter VI does not specify the grounds or the manner in which they may be removed. Paragraph 2 of Article 10 provides that their immunity may be withdrawn and that they may be removed from office only by a competent body, consistent with circumstances and procedures provided for by law. Furthermore, paragraph 3 provides that any such law must respect constitutional and international guarantees of judicial independence. The only other relevant provision is Article 15, which makes it clear that the sole "competent body" for disciplining and dismissing judges is the High Council of Justice, the composition of which is considered below.

In the Commission's view, there is no justification in principle for treating judges differently in matters of discipline and removal according to whether they are members of superior or inferior courts. All judges should enjoy equal guarantees of independence and equal immunities in the exercise of their judicial functions. In this last connection, it may be observed that whereas members of District and Appeal Courts benefit from an express constitutional guarantee of immunity in the exercise of their functions in Article 10, no similar guarantee is extended to members of the Court of Cassation. This contrasts also with the express guarantees in Article 22 for members of the Constitutional Court.

In the view of the Commission, future constitutional reform in Albania should require that the above inconsistencies be remedied and that a common procedure for the removal of immunity, on the basis of common and strictly defined grounds, be provided for in the Constitution. In the immediate term, as indicated at point B.2 below, legislative reform is required.

f) Qualification and incompatibilities

There is no provision in Chapter VI either for the minimum qualifications for office or the incompatibilities of function of District and Appeal Court judges. Although Article 6 provides for the minimum qualifications of members of the Court of Cassation, no provision is made for incompatibilities. This contrasts with Article 21, applying to members of the Constitutional Court.

These are matters which, although they need not feature in a constitutional text, might sensibly be so included as important elements circumscribing the authority and independence of the judiciary. Again, the Commission would recommend that these matters be considered in the context of future constitutional reform in Albania. In the immediate term, they must be regulated in detail for each level of jurisdiction by appropriate legislation.

g) Prosecutors

As a matter of practice, the Commission understands that the following position applies to prosecutors in Albania:

prosecution system in Albania has undergone significant reform in recent years, shifting towards an accusatory system in which prosecutors appear as equal parties before the courts. Prosecutors are said to be independent from the Ministry of Justice or any other executive power, having the formal status of magistrates within the judicial branch of government (although not performing any functions of adjudication). In particular, they are not subject to inspections or otherwise to the authority of the Ministry of Justice. Rather, the head of each prosecution office, at State, District, Appeal and military levels, supervises his or her own staff;

ough the Prosecutor General has a general duty to ensure that prosecutors apply the law correctly, and can issue general instructions to this effect, the decision of a prosecutor not to prosecute a particular case can be disputed only by the alleged victim of an offence, by challenging the decision before the courts. In such an event, the court cannot order the prosecutor to prosecute, but only to reconsider the matter;

t from representing the State in criminal proceedings, prosecutors in Albania are charged with the investigation of crimes and for this purpose instruct the judicial police who are attached to each of the prosecution offices and who are answerable solely to such offices.

This structure of this system complies with Council of Europe standards in this field. However, although it is confirmed and largely regulated by the recently adopted Code of Criminal Procedure, the Commission notes that, as with judges, many provisions of law No. 7574 of 7 July 1992, as indicated at point B.2 below, need to be amended and supplemented in certain important respects. In the view of the Commission, such reforms, applicable to both judges and prosecutors, can be so addressed in the context of a general law on the status of magistrates.

As regards constitutional provisions, Chapter VI calls for the following observations:

Under Article 13 of Chapter VI, the Office of the Public Prosecutor "is the only authority which conducts criminal prosecutions during investigation and trial". Although it appears from the English translation of the text that it is indeed the intention of Article 13 as a whole to position the prosecution firmly within the judicial branch of government, there are certain inconsistencies which nonetheless give rise to doubt: in the second paragraph, reference is made to the judicial activities of prosecutors, which might imply that they have other non-judicial functions.

Concerning the obligation on prosecutors to obey the orders of their hierarchical superiors in the exercise of their functions, as provided for in the same paragraph, the Commission has been informed that they are under no such obligation as a matter of law in connection with pre-trial and trial decisions in concrete cases.

h) The High Council of Justice

The composition of the High Council of Justice, which under Article 15 is vested with important powers to appoint, transfer and dismiss District Court and Appeal Court judges as well as prosecutors, is problematic. Although the Commission is aware that other countries, with a longer democratic experience than Albania, may provide for analogous specialised bodies for judicial appointments and discipline, the Commission is of the view that the Albanian model creates an undue imbalance in favour of the executive branch of government, for the following reasons, taken together:

ıct that the Council is chaired by the President of the Republic, who participates in its deliberations and has a vote;

articipation by the Minister of Justice in its deliberations, his right to vote, and the fact that proposals are made exclusively by him in matters concerning judges (under Article 7 of the "statute", the President can also make proposals, although in practice it is always the Minister of Justice who performs this function);

ıct that proposals are made exclusively by the Prosecutor General in matters concerning prosecutors;

ıct that there is no guarantee that the "nine lawyers distinguished by their capabilities" will themselves be members of the judiciary;

ıct that the Council is not required to decide matters unanimously or at least by a weighted majority;

nclear manner (at least in the English version) in which the nine lawyers distinguished by their capabilities are elected.

It is imperative that a more appropriate balance to the Council's composition be provided for and guaranteed by law, with provision for at least a majority of its members to be members of the judiciary elected by members of the judiciary. In addition, as detailed at point B.2 below, the law must provide for a number of procedural and substantive safeguards affecting the exercise of the Council's various powers.

i) Court budgets and judicial salaries

Articles 29 and 30 together make up the sole two provisions in the third section of Chapter VI. Each, in dealing with the questions of court budgets and judicial salaries respectively, and having regard to the absence of implementing legislation providing for governing principles in this area, may be said to be insufficiently detailed on important points of principle affecting the independence of judges:

le 29, while stating the general principle that the judiciary has its own budget which is fixed in order to be sufficient for its normal functioning, does not specify the extent to which the Ministry of Justice, which has overall responsibility for the administration of justice, intervenes in the administration of that budget. In practice, it appears that the Ministry in fact controls every detail of the courts' operational budgets, a practice which contains obvious dangers of undue interference in the independent exercise of their functions.

le 30 does not state that the salaries of judges cannot be reduced during their term of office, which is a common and desirable guarantee of judicial independence.

These questions can and should also be addressed by ordinary legislation. In principle, there is no reason why they could not be so addressed in the context of a law on the status of magistrates.

The Commission notes, for the purposes of this Report, that each of the Presidents of the various courts which exchanged views with the Commission's delegation to Tirana emphasised that they had insufficient administrative autonomy from the Ministry of Justice. In addition, the low level of salaries of judges in Albania, relative to other professions and activities though not to comparable positions in the civil service, was repeatedly identified as an objective factor contributing to corruption among judges and to the consequent reduction of public confidence in the courts.

2. Regulatory and penal provisions governing discipline and dismissal

i) Law No. 7574 of 7 July 1992 and the statute of the High Council of Justice

Having regard to the request of the Albanian government for assistance from the Council of Europe in drafting new legislation in this area, the Commission avails of this opportunity to make certain brief remarks on the contents of the various provisions of law No. 7574 of 7 July 1992 and the existing "statute" of the High Council of Justice which will need to be addressed by appropriate legislative reform.

The Commission notes, first, that law No. 7574 of 7 July 1992 is concerned primarily with jurisdictional matters, and provides only for certain basic provisions on qualification for judicial office, incompatibilities, immunities and discipline. The only other **relevant** legal instrument is the "statute defining the function and administration of the High Council of Justice", a regulation adopted by the High Council of Justice itself in purported reliance on the third paragraph of Article 15 of Chapter VI, which provides as follows:

ıanner in which the Supreme Council of Justice functions and acts is defined by a statute approved by the Supreme Council of Justice."

In the Commission's view, this provision enables the High Council of Justice to determine its own rules of procedure by adopting an appropriate "statute", but does not allow for important matters governing its powers and affecting the rights and duties of magistrates to be so regulated. These matters should rather be regulated by a law adopted by Parliament.

At present, however, the statute contains many provisions granting extensive powers to the High Council of Justice, powers which by their nature should be regulated by law. Indeed, Article 10 of Chapter VI provides inter alia that First Instance and Appeal Court judges can be removed only in circumstances and in accordance with procedures provided for by law, a guarantee which is not in the Commission's view satisfied by the above regulation. This observation applies equally to prosecutors, having regard to Articles 13 and 14 of Chapter VI.

In consequence, the Commission points to the necessity of revising the statute of the High Council of Justice so as to confine it to matters properly affecting "the manner in which it functions and acts".

a) In Article 1 of the statute, the High Council of Justice is stated to have powers over military judges. The Council cannot, however, unilaterally extend its powers in this way - neither Article 15 of Chapter VI nor any provision of law No. 7574 provides for such a competence.

More generally, the exact status of "deputy judges" requires to be clarified (see Section D below).

b) In Article 5 of the statute, the provision for adoption of decisions by simple majority of those present should be revised.

c) Articles 8,9,10,11 and 12 of the statute, which require revision, should not be retained in the statute, but provided for by law.

The power to transfer, demote and reduce the salaries of judges for disciplinary reasons, variously provided for in Article 20 of law No. 7574 and Article 8 of the statute, is contrary to accepted standards of judicial independence. It is worth repeating in this connection that the President and Minister of Justice should not participate in such decisions.

In Article 19 of the law and Article 9 of the statute, the system of having professional tests following appointment is obviously open to abuses in connection with the confirmation of a magistrate in his or her post. In addition, periodical breaches of discipline, professional incompetence and immoral acts are categories of conduct which are imprecise as legal concepts and capable of giving rise to abuse.

Any legislative provision replacing Article 10 of the statute should be reworded to comply fully with the presumption of innocence until conviction.

Article 11 of the statute provides for secret deliberations and a discretionary power to summons and interrogate affected persons quite contrary to the right to be heard and other procedural rights. The Commission notes in this connection that the practice of the High Council of Justice confirms that affected persons are frequently notified of decisions affecting them only after such decisions have been taken.

Decisions on the transfer of judges, in Article 10 of the law and Article 12 of the statute, also require to be circumscribed by appropriate procedural safeguards.

Finally, on a point of general importance, the Commission has learned that the Constitutional Court has jurisdiction to hear complaints against decisions of the High Council of Justice which allegedly violate the independence of judges, guaranteed by Article 10 of Chapter VI, and that it has struck down a decision to transfer a judge in at least one case.

While this is to be welcomed, a future law on the status of magistrates should provide for judicial review of decisions affecting judges and prosecutors more generally, prior to the review exercised by the Constitutional Court.

ii) Application of certain Penal Code provisions to judges and prosecutors

Article 315 of the Penal Code of Albania, contained in Chapter VIII, Section II - "Penal acts against State activity committed by the State administration or Public Service employees" - provides for an offence of "unjust verdict imposition", in the following terms:

sing a final judicial verdict, recognised and known to be unjust, is punishable by a fine or a sentence varying from three to ten years' imprisonment."

The Commission has been informed that this provision has been used to arrest, to threaten with arrest, and in some cases to prosecute judges for acquitting or convicting defendants in criminal cases. This offence is so clearly open to abuse that it should be repealed as a matter of urgency.

The offence established under Article 313 of the Penal Code, "illegitimate prosecution initiation", is equally questionable, and should be abolished forthwith. This offence is framed in the following terms:

legitimate institution of legal proceedings on the part of the prosecutor against a person recognised and known not to be guilty is punishable by a fine or by a sentence of up to five years' imprisonment."

C. THE CONSTITUTIONAL COURT

The provisions of Chapter VI governing the Constitutional Court are set out in the second section, comprising Articles 17 to 28.

In general, it can be said that the guarantees provided for the independence of the Constitutional Court are far more satisfactory than those applying to the ordinary courts.

a) Power of Court to review legality of measures generally

In Articles 17 and 28, there is a suggestion that the Court, in addition to having the power to review laws and other measures having regard to the Constitution, has the power to review the legality of measures more generally. The Commission has noted in this connection that the Court itself appears to exercise this dual role in practice when seized of a particular case.

The review of the legality of decisions and measures is, however, properly the task of the ordinary courts, and this should be clarified accordingly.

b) Manner of appointment

Article 17 provides that five members of the Court are elected by Parliament and four by the President of the Republic. This should be interpreted, if not amended, so as to ensure that Parliament adopts its own procedures for selecting and nominating candidates rather than being confined to voting on a proposition from the President or other member of the executive. In addition, in order to avoid an undue influence on the Court by the executive, consideration should be given to requiring a weighted majority of Parliament rather than a simple majority for the election of the Parliament's five candidates to the Constitutional Court.

c) Non-renewable term of office

As appears to be the intention of Article 18, the term of office of members of the Court should be expressly stated to be non-renewable.

d) Incompatibilities

The prohibition on members, in Article 21, from being members of political parties or political organisations appears unwarranted and, possibly, contrary to the rights of freedom of opinion and freedom of association.

e) Jurisdiction

Articles 24 and 25 provide in detail for the various types of jurisdiction exercised by the Constitutional Court. Some of these require clarification:

t is the difference between paragraphs 1 and 2 of Article 24?

; the Court's jurisdiction under paragraph 4 extend only to international human rights treaties, or to all treaties? Whereas the former competence is entirely justified having regard to the similarity of protection afforded by constitutional guarantees in the domestic legal order, the power to examine domestic law for compliance with international obligations more generally falls outside the usual competence of Constitutional Courts.

ticle 25, it should be stipulated whether the Court proceeds by way of abstract review only or concrete review only, or whether it can undertake both such types of review in any or all of the cases before it.

D. SOME RELATED PROBLEMS IN THE JUDICIAL SYSTEM

In considering Chapter VI of the transitional Constitution, the Commission has identified a number of systematic features of the administration of justice in Albania which have a bearing on the general independence of judges and prosecutors and which call for additional comment. Although these are not questions which call for constitutional resolution, in the Commission's view they are sufficiently important to the overall independence and effectiveness of the Albanian judicial system to warrant inclusion in the present Report. These are listed here for convenience:

a) "Deputy judges"

The Commission has been informed that approximately 30% of District Court judges in Albania, and many prosecutors, do not have formal legal training, but have rather attended a six month course and subsequently passed an accelerated series of law exams. At the same time, although the Commission has been unable to clarify whether such persons have been appointed as full judges, there is a system in operation whereby a number of "deputy judges" participate fully in panels of three judges at District Court level, and can outvote the presiding judge. In addition, it appears that "non-permanent" deputy judges are appointed in practice for short periods of time, thus giving rise to ad hoc panels of judges which have every appearance of extraordinary courts.

Whereas the Commission has taken note of Albania's difficulties in establishing a fully trained corps of practising judges, it stresses that guarantees of judicial independence and impartiality must apply to all members of the judiciary.

In certain legal systems, lay assessors may participate in deciding questions of fact; in addition, non-lawyers sometimes participate in specialised tribunals, such as industrial tribunals. However, the present situation in Albania far exceeds such precedents, and requires to be addressed as a matter of priority.

b) Execution of judgments

The system for executing judgments should be reviewed so as to provide that bailiffs are subject only to the authority of judges in the exercise of their functions. The question of the suspensory effect of appeals should also be examined.

c) The legal profession

Article 16 of Chapter VI of the transitional Constitution provides for the free exercise of the legal profession, subject to regulation by law. Pursuant to this provision, a licensing system for lawyers was introduced by the 1994 Law for the Legal Profession. The constitutionality of this law, which vests substantial supervisory and regulatory powers over the profession in the Minister of Justice, has since been upheld by the Constitutional Court.

The Commission wishes to stress, nonetheless, that the guarantee of the free exercise of the legal profession in most democracies is supported and encouraged by a system of supervision and regulation which is exercised largely by the profession itself and by the superior courts of the country, with only a much more limited role being reserved to the executive than is presently the case in Albania.

Because the question was raised as a point of particular concern to practising criminal lawyers in Albania, the Commission points out in passing that Article 7 of the 1994 law confers on a lawyer the right to converse in private and to meet, without limit, his or her client held in custodial arrest, under arrest, or in jail. Authorised persons have the right to observe, but not to listen to, the discussions in such meetings. This provision conforms to international standards for defence rights in pre-trial proceedings.

E. GENERAL AND CONCLUDING REMARKS

As is usual with constitutional provisions governing the administration of justice, a true appreciation of the constitutional position requires a consideration of the existence and content of relevant implementing laws and regulations. Whether Council of Europe standards in this field are met cannot be ascertained from an examination of the Constitution alone.

At present, Chapter VI of the transitional Constitution of Albania provides in general for a reasonable constitutional basis for the significant reforms to the judicial system which have been established over the past four years. Evidently, as outlined above, there are a number of provisions in Chapter VI which could usefully be amended and supplemented in the context of future constitutional reform, but the overall regulation of the legal system requires, first and foremost, legislative action.

In particular, it follows from the above examination of Albanian law and practice that, quite apart from the adjustments which might be made to Chapter VI of the transitional Constitution in the adoption of a definitive Constitution, the absence in existing Albanian laws of detailed guarantees for the proper exercise of judicial functions represents a significant lacuna in the Albanian legal system. Similarly, although the newly adopted Code of Criminal Procedure consolidates many of the reforms in the prosecution system, the law is silent on many important guarantees and safeguards for the independent and proper exercise of prosecution functions. In the Commission's view, these matters can be addressed in a single law on the status of magistrates.

In this last connection, it is to be noted that, with some exceptions, the existing constitutional text does not prevent the Commission's various recommendations for legislative action from being taken up. One such important exception relates to the participation of the President of the Republic and the Minister of Justice in the deliberations of the High Council of Justice: on this matter, nonetheless, it should be noted that Article 15 of Chapter VI does not provide that these members should propose matters to the High Council, nor that they should participate in its votes, and that legislative modification of these aspects of the present system might therefore be possible.

The Commission also stresses the importance of repealing Articles 313 and 315 of the Penal Code.

Other legislative reforms, as indicated above, might address the questions of military jurisdiction, administrative jurisdiction, court budgets and operational autonomy, the execution of judgments, the number of Appeal Courts and the regulation of the legal profession.

As a final remark of central importance to the Commission's task in reporting to the Assembly on Albanian law and practice in this field, the Commission wishes to record that it has been unable to satisfy itself that judges in Albania feel themselves free to arrive at their decisions without fear of negative consequences for their professional life.

3. OPINION ON "THE REGULATORY CONCEPT OF THE CONSTITUTION OF HUNGARY", ADOPTED AT THE COMMISSION'S 25TH PLENARY MEETING (VENICE, 24-25 NOVEMBER 1995)

'RODUCTION

In May 1995, the Hungarian Ministry of Justice requested the Venice Commission to give an opinion on a document containing some fundamental elements on the on-going Hungarian Constitution making process, the "Regulatory Concept of the Hungarian Constitution".

The present opinion was adopted by the Venice Commission at its 25th meeting in Venice, on 24-25 November 1995 on the basis of individual opinions given by Prof. Giorgio Malinverni (Principles relevant to a new Constitution, General Provisions, International Agreements, Constitutional Court); Prof. Jan Helgesen (Fundamental Rights, Administration of Justice, Parliamentary Commissioner of Citizens' Rights); Mr A. Marques Guedes (Parliament and Legislative Process); Mr A. Suviranta (Government and Public Administration, Armed Forces, Protection of Public Order); Prof. E. zbudun (Parliament and Legislative Process, Emergency Situations); Mr G. Reuter (State Finances, Public Societies, Economic and Social Council); Mr M. Russell (Public Prosecution); Prof. S. Bartole (Municipalities, Amending of the Constitution) and Mr J. Zlinszky.

At its 24th meeting (Venice, 8-9 September 1995), the Commission held an exchange of views with Mr Pal Vastagh, Hungarian Minister of Justice on the constitutional developments in Hungary.

The Commission took note of the fact that there is no absolute need for a change in the Hungarian Constitution. The Constitution was substantially amended in 1989 allowing the creation of a modern pluralist democracy in Hungary. Nevertheless, the Commission understands that the competent Hungarian authorities may wish to complement the process of transformation and obtain a large consensus of all significant political forces on the basic rules of the State.

The "Regulatory Concept" is the result of a thorough treatment of the subject matter with expert knowledge. As a whole, it is an excellent basis for the drafting of the text for the new Constitution.

The Commission is convinced that mutual consultation and sharing of experiences of all European States in the field of constitutional law are factors which possibly contribute to the improvement of the technical and structural aspects of fundamental laws but also necessarily contribute to the realisation of one of the Council of Europe's aims: promoting a mature European legal culture based on the democratic heritage, the respect for the rule of law and the protection of human rights.

The Commission is satisfied that by bringing the "Regulatory Concept of the Hungarian Constitution" to the centre of the Commission's discussions, the Hungarian Government has shown the importance of this sharing of experience.

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ciples relevant to a new Constitution - Introductory and General Provisions

In order to relieve Parliament of some of its legislative duties, the authors of the "Regulatory Concept of the Hungarian Constitution" (hereafter the "Concept"), call for a corresponding increase in the government's regulatory power. In view of the problems which this transfer of power will inevitably raise with regard to the separation of powers, the two areas of (a) law, which is the prerogative of Parliament, and (b) decree, which pertains to the government, should be clearly defined in the Constitution, which should clearly state under what conditions and on what matters the executive authority can legislate through decrees or regulations. A distinction should also be made here between legislative decrees, which have their own content, and ordinary decrees for the application or implementation of Parliament's laws, which merely refer to these laws and explain them in detail or clarify them. The first category of decree raises far more problems than the second from the point of view of the separation of powers.

The Constitution should also define the conditions under which delegation of legislative power (from Parliament to the government) can take place. The salient provisions should be set out in a formal law (ie of the Parliament).

Moreover, acts which authorise serious interference in the fundamental rights of the individual should be parliamentary laws. The legal basis for any major curtailment of freedom should be a law in the formal sense. This should apply to criminal and tax law in particular.

The Concept distinguishes between first and second generation rights, the former being subject to the jurisdiction of the courts, whereas the latter are not. Although this is a perfectly valid distinction, it nonetheless needs to be qualified and revitalised to some extent. Some rights referred to as second category rights (economic and social rights) can be regarded as subject to the jurisdiction of the courts and can be directly invoked before the courts. A distinction could therefore be made within social rights between simple social objectives, programmes to be carried out and mandates given to the State (right to housing, education, etc), on the one hand, and genuine social rights which confer subjective rights on individuals (the right to minimum subsistence, the right to decent housing etc), on the other. Unlike the former, the latter would be subject to the jurisdiction of the courts, in the same way as first category rights, ie rights and freedoms.

The Concept (Point 2 (k) also refers to the distinction between traditional freedoms and economic, social and cultural rights. In the Commission's opinion, these last-mentioned rights are genuine fundamental human rights in the same way as the former and are of equal importance (indivisibility of human rights). They should therefore unquestionably be included in the chapter on fundamental rights to highlight the fact that they are indeed human rights. To refer to them only under the heading of general provisions would devalue these rights. At the same time, in view of the different character of these rights both as regards their enforceability and the obligations which devolve on the State (simple abstention or provision of positive benefits), these two categories of fundamental rights should be placed in different sections of the same chapter.

2. Fundamental Rights

It is a sound point of departure when it is stated in the "Regulatory Concept of the Hungarian Constitution" that "the Hungarian Constitution may not contradict international agreements obligatory to Hungary or its international obligations". It is certainly not necessary for any state to reproduce the international conventions in the Constitution itself. As a matter of principle, it suffices "that the Constitution provides that the rules of international law must be applied in Hungary". The text correctly emphasises, however, that "the fundamental rights included in the Constitution illustrate which values the legislator considers important".

This symbolic role of a catalogue of specific human rights should certainly not be disregarded, in particular when consolidating a democratic government, guided by the principle of rule of law. As the Venice Commission has had the opportunity to state on a number of occasions, there exists, at least in principle, a possibility for discrepancies between the set of human rights norms spelled out in the Constitution, as applied by the domestic courts on the one hand and the human rights spelled out in the international instruments, as applied by the international supervisory bodies, on the other. Whether this is more than a theoretical possibility only, depends on the general techniques established in the Constitution in order to solve conflicts between international and domestic law.

The Commission finds it very convincing when the text declares the authors' scepticism towards the quite many different possible ways in which to categorise human rights. Such efforts are basically carried out in legal theory; one might like or dislike the categories established. Nevertheless, the Commission would recommend not to waste time - and political energy - on such an exercise. It is inconceivable that a political body would be able to establish consensus as how to establish the categories. It is definitely a constructive approach, the one which is advocated in the Concept, simply to list a number of rights, without separating them into chapters.

The Commission is further convinced that the drafters are seriously concerned with the problem of restricting or suspending human rights, and feels that they have tried to effectively eliminate the danger of undermining the basic human rights. In particular, the Commission welcomes the emphasis on the importance of regulating restrictions by acts of Parliament itself. This is instrumental, seen from a democratic perspective.

3. International Agreements

The Concept refers to the dualist and monist theories of the relationship between domestic law and international law and express a preference for the latter. This is a good choice, as monism is the more modern, simpler and faster method for incorporating international law. However, it is not quite correct to state that, according to the monist theory, international law prevails over all domestic law with the exception of the Constitution. There is a confusion here between two theoretically quite distinct questions, namely the way international agreements are incorporated - or find their way - into domestic law (through transformation, ie dualism, or without transformation, ie, monism) and how they rank with respect to standard-setting derived from domestic legislation. The first problem to be solved concerns the validity under domestic law of international treaties. It is here that the distinction between monist and dualist theories applies. Once this problem has been resolved, the further problem of how treaties are to be ranked in the domestic legal system has to be considered. It is perfectly possible to regard treaties as superior to all domestic standard-setting instruments, including the Constitution. This is in fact the only solution compatible with the Vienna Convention on the Law of Treaties. A third problem, not mentioned in the document, concerns the direct applicability or the direct effect (self-executing character) of international treaties.

International law rules which are binding on states, whether or not they have been incorporated, are part of customary law or the general principles of international law and are not, as the report states, "the generally binding international treaties concluded under the auspices of the United Nations". Some of these conventions may contain general customary principles of this sort, but that is not necessarily the case. In any event, these general principles are binding on all states, independently of ratification (and not, as the document incorrectly states, of their incorporation) precisely by virtue of their customary universal character.

The primacy of international law over domestic law and the direct effect of its provisions are characteristics of supra-national organisations such as the European Union, but not of all international organisations (ILO, IMF, etc) as the report incorrectly suggests.

Again, in the event of a conflict between international law and domestic law, international law must prevail, even if it conflicts with a domestic constitutional rule. By its very nature, international law is intended to take precedence over domestic law as a whole. The rule of the primacy of international law over constitutional law should in any event at least apply in the case of international treaties which protect human rights and contain several jus cogens rules.

The harmonisation of international rules and constitutional rules should normally take place before the treaty is ratified, either by way of a reservation under the former or by means of an amendment to the Constitution. However, if harmonisation has not taken place before ratification and it is discovered that there is a discrepancy between the domestic rule and the international rule after the treaty has entered into force, the international rule must prevail.

4. Parliament - Legislative process

These chapters of the Regulatory Concept display a high degree of legal scholarship and of common sense. It is a praiseworthy effort to combine strict adherence to the rule of law, the supremacy of the Constitution, and the essentials of parliamentary system with a concern for making the government more efficient and effective.

The Hungarian Parliament is set up according to the model of classical parliamentary government, where the government is politically responsible to Parliament and remain in office only as long as it enjoys Parliament's confidence. While remaining a triangular system (legislative power, executive power and, standing above them in an arbitrating capacity, the Head of State), the parliamentary system nevertheless allows for two variations: the cabinet system and the assembly system. The former is practised in Great Britain; the latter is the traditional French version. Under the cabinet system, the ascendancy of the Prime Minister and the Cabinet over parliament ensures the stability of the executive, which remains in office until a new parliament is elected, while the assembly system gives pride of place to parliament and thus leaves the door wide open to the instability of the executive, which must resign immediately while parliament (whether one or two chambers) pursues its mandate. In the Constitution of the Vth Republic (1958) De Gaulle had to resort to a mixture of the parliamentary system and a barely disguised presidential system to try to remedy the major shortcoming of this variant: the lack of stability of the executive. That is why, since the 1930s, efforts have been made throughout much of Europe to establish what Mirkin-Getsevich called the "rationalised parliamentary system", ie auxiliary devices to safeguard government stability in relation to assemblies. The French Constitution of the IVth Republic (1946) sought to introduce a few of these devices, although without success - quite the reverse. It was the Bonn Constitution that succeeded, with the so-called "constructive vote of no confidence" arrangement (Article 67); the possibility open to the Chancellor to ask the President to dissolve parliament if it passes a vote of no confidence but does not succeed in electing a new chancellor within 48 hours (Article 68); or provision for the President, if he so prefers, to declare a state of legislative emergency and promulgate the bill(s) that the Chancellor needs to pursue his policies, even if this runs counter to the will expressed by parliament (Article 81). All this would be worth bearing in mind because political stability is essential to social harmony and progress.

As to the method of election of deputies, the Commission would express some doubts as to the idea of inserting the election system in the Constitution. The Constitution should limit itself to stating such general principles as universal and equal vote, direct and secret ballot, etc. However, the legislature should retain some flexibility to change the electoral system by way of ordinary legislation if such need arises. Consistently with other constitutional provisions on "organic laws", the adoption and amendment of electoral laws may require a qualified majority (but not one as strict as in the process of constitutional amendment). The proposed provision to the effect that a new act on elections passed in the year of general elections or the preceding year would take effect only after elections is a very useful one to prevent the manipulation of electoral laws in order to give an undue advantage to the present majority party (or parties). The present Hungarian electoral system, somewhat inspired by the German model, seems to function quite satisfactorily. It is a good compromise between the needs of proportionality and of governability. The 4% national threshold should be maintained.

The proposed provision that parliamentary immunity should extend to the right to refuse to give evidence regarding facts which the deputy has learned in connection with his office is a positive novelty. So is the proposal that absence from parliamentary duties would entail a loss of salary but not the loss of office.

The right of the Parliament to dissolve itself should be retained. There is no incompatibility between this and genuine parliamentarism. Moreover, the right of the President or the executive to dissolve the Parliament should be somewhat broadened. The suggested solution on the mechanism of dissolution seems reasonable. Finally, the provision that no dissolution should take place during a state of emergency is a useful and reasonable one.

The Commission sees no reason to disagree with the views expressed in the Concept that in the case of Hungary, there is no need for a second chamber. However the following remarks might be helpful for the final choice: Besides a federal structure or a high degree of regionalisation, there may be many reasons for having more than one chamber. Examples include the Conseil des Anciens (Council of Elders) set up by the French Constitution of the year III (1795). On the other hand, there will always be those who, like Abb Siys, say that if the second chamber agrees with the first it is unnecessary (since hearing it is a waste of time) and, if it disagrees, it is a nuisance (since it may ultimately block even the best decisions). Nowadays, the programming nature of constitutions and the welfare-securing function which is the distinctive feature of the modern state nevertheless demand that the parliamentary assembly in which political parties and forces are represented should be not only coupled with, but also supplemented by another assembly (or a council) enabling the real interests of civil society and its institutions to be represented and to make themselves heard. That is the case of the "Conseil Economique et Social" (Economic and Social Council), which indisputably performs a political function under the present French Constitution; it is also the case of many similar bodies provided for by a growing number of other constitutions. In the United States in 1946 consideration was even given to the idea of setting up a Third House of Congress for the purpose. The idea was dropped, but provision was made instead for lobbies, which subsequently assumed greater importance in the actual conduct of American politics than the parties themselves. This experience should be borne in mind and the discussion on whether to opt for a second chamber should be linked to the functioning of the Economic and social council provided in Chapter XVI of the Concept (see below p. 20, paragraph 14).

The Commission finds it a commendable idea to state the hierarchy of legal rules in the Constitution.

The Commission understands that the law-making powers of Parliament and the executive should be made more balanced. The solution suggested by the Regulatory Concept seems quite reasonable. The Commission further agrees that it is absolutely essential to specifically define in the Constitution not only the distinct areas of legislative competence of parliament and the government, but also parliament's inalienable right to legislate on matters exclusively reserved for it and the right it may have to authorise the government to legislate in matters exclusively reserved for parliament. Observance of the hierarchy of legal rules also requires the Constitution to give an equally strict and precise definition of the prescriptive powers conferred at different levels on sovereign bodies and purely administrative bodies (whether central or local).

The introduction of "act-substituting decrees" within the limits foreseen in the Concept would be a positive innovation for the more efficient functioning of the system. Alternatively, a system can be envisaged whereby such decrees become immediately effective in urgent cases, subject of course to rejection or amendment by Parliament.

The Commission agrees that the President or the parliamentary commissions should not have the right to initiate acts. To broaden this right to include other bodies could be against the principles of parliamentary government. On the other hand, the introduction of popular initiative in law-making is in conformity with the modern trends in constitutionalism.

With regard to the rights of the parliamentary minority in the legislative process, the Constitution may state that all parliamentary groups represented in parliament shall participate in all kinds of legislative activities in proportion to their percentage of seats (eg in parliamentary commissions and the chairmanship council).

The essentials of referenda should be regulated in the Constitution along the lines suggested by the Concept. The institution of the referendum tallies with all other measures designed to ensure greater and more effective participation by civil society in government, from the perspective of the forms of semi-direct democracy that are possible in contemporary societies. As such, however, the practice of the referendum must not be allowed when it can be used as a means of destabilising the established government and, in particular, against each of the established powers arising from it. In other words, it must not be used as a substitute for the specific mechanisms of the exercise of constituent power, the revision of the basic law, the exercise of legislative power, appraisal of the government's political responsibility and, generally speaking, budgetary, fiscal and financial acts. That would be tantamount to rejecting the authority of the established powers or even of the state itself. In a democracy other channels must be used, not those that would be formally allowed by the undue demagogical use of the referendum (one could benefit in this respect from the experience of the restrictions placed on Article 118 of the 1976 Portuguese Constitution by the 1989 constitutional revision). For these reasons, the Commission finds that the role envisaged for the Constitutional Court is an important guarantee for maintaining the supremacy of the Constitution. Likewise, the suggested validity threshold should be maintained.

President of the Republic

The President of the Republic may exercise a limited activity because of his/her special status in the Hungarian political structure as a balancing power. The alternative according to which the President is not allowed to accept fees for his/her activity under the protection of the law of intellectual property should be accepted.

Government and Public Administration

As the President of the Republic is intended to be an individual branch of power with a balancing function, the Government and Public Administration form the Executive Branch. The provisions on the Government are mainly intended merely to update the corresponding provisions in the existing Constitution on the basis of practical experience. There is no reason to criticise this solution or the grounds given for it.

Public Administration, on the other hand, is not regulated in the present Constitution. The proposal of the Concept now to include provisions covering the most important organs and principles of public administration as well as the basic rules of public service is fully motivated.

Forming of Government

Due to the separation of powers between the Parliament and the government and the role of the President as a balancing power but not as the head of the Executive Branch, the proposed procedures relating to the forming of Government are necessarily fairly complicated. The model chosen in the Concept (based on current provisions but redeveloping them) seems to be commended.

In regard to the presentation of the programme of the Government to the Parliament, the alternative postponing the presentation until the new Government has been formed might be worthy of some reconsideration. Despite the Prime Minister's dominant position - which in itself is apt to support a steady governance of the country - it would be useful if a sufficient amount of time could be devoted to the drafting of the programme and the programme could then be approved by the whole Government before it is presented to the Parliament. Especially in the case of a coalition Government, the programme is a basis for the co-operation in the Government of the coalition parties. Of course, the vote on the programme may - in rare cases, one could hope - lead to a vote of no confidence and thus to a new round in the cabinet building.

Public Administration

The Concept has found a good balance in choosing the matters concerning public administration which shall be regulated in the Constitution.

Administrative procedure

To include basic principles of administrative procedure in the Constitution, as proposed in the Concept, is to be commended warmly.

According to the Concept, one of the principles would, however, be that the discretionary rights of public administration bodies must be minimised (p. 74). This principle should be seen in connection with the proposal (p. 62 et seq.) to abolish the general right of the Government under the current Constitution (Article 40) to review acts of inferior bodies and to deprive any body of its competence to act in any issue of public administration. Together these proposals can be seen as a realisation of the principle "Government by laws and not by men" in the manner that public administration is entrusted to independent bodies whose main task is to apply rules of law to concrete situations.

It would be useful to weigh the pros and cons of this view against the idea of "Administration by objectives", where the ends of administrative action are defined in law while the means to achieve these ends are more or less open to administrative discretion - and even the ends may be expressed as flexible standards. Administrative decisions made under this system are quite open to judicial review: is the decision a suitable means to achieve the ends given in the law, has the decision in fact been made with another purpose in mind (dtournement de pouvoir), etc? And while a power of the Government or another superior authority to review acts of inferior bodies or even to deprive any organ of its competence is not necessary in this system, either, it would be possible to retain such a power in order to use it eg when the superior organ is of another meaning as to the most expedient means to reach the given ends. But the Commission admits readily that such a power should not be available against self-governing authorities (p. 63).

It is important to include the possibility of judicial review among the principles of public administration. The principle is, however, expressed in the Concept in a very extensive way, enabling any citizen to contest an administrative decision if he is of the view that the decision contravenes the law (p. 74). It is essential that anyone is entitled to contest a decision on the ground that it violates his rights; but whether someone not immediately touched by a decision should have a standing to contest it (actio popularis, etc) could well depend on ordinary legislation.

Public service

It is a good choice to have only the most basic rules on public service recorded in the Constitution. The choice of the principles to be included is also sound. As to the contents of the different principles, it might be a too rigorous rule to require an advertisement for the vacancy in every case, without regard to the nature of the post to be filled. And one might ask whether all the other principles will stand the harsh proof of the realities of life.

ıed Forces

The armed forces, the border guards, the police and the state security services are to be regulated in the same chapter of the new Constitution. The Commission does not question this solution.

Qualified majorities

More detailed rules in regard to these branches of State structure are to be given by Acts of Parliament adopted by a qualified majority (pp. 78 et seq.). This is a continuation of the system of "organic acts" in the present Constitution, which requires qualified majorities in very many cases. The Concept proposes a substantial reduction of the number of acts requiring a qualified majority (pp. 5, 33); but it might be asked if the number should not be reduced still more. An organic act, once adopted with the needed majority, gives a good support and a certain security to the branches in question, but the system might also be a brake to much needed development.

Limitations to military conscription

The Concept would limit the conscription for armed and unarmed military service to "male Hungarian citizens resident in Hungary". The Commission wonders whether it is expedient to limit the conscription already in the Constitution on the basis of sex and residence. Should these limitations not have their place in the (organic) act on armed forces (which will anyway include other limitations based on age, etc), while the Constitution would not forbid the extension of the conscription by legislative amendment to women and citizens residing abroad?

8. Emergency situations

The Concept devotes an entire section (section X) to the exceptional situations. In line with the trend in many modern constitutions, the Concept adopts a graduated approach and distinguishes among four types of exceptional situations (defence situations, emergency situations, state of disaster, and situations of economic emergency) depending upon the nature of the threat and commensurate to its gravity. It appears that the Concept does not envisage a "state of siege" or "martial law".

The Concept envisages a number of constitutional guarantees presumably covering all exceptional situations, including the gravest one (ie defence situations):

a. Deviations from the normal rules should be proportional to the gravity of the threat (the principle of proportionality).

b. The act regulating the exceptional situations is to be adopted by a qualified majority (ie it must be an organic act). Likewise, the parliamentary resolution declaring a state of armed defence or a state of emergency requires a two-thirds majority. It is not clear whether such majority is required only in the declaration of a state of armed defence (ie in case of foreign threat), or in emergency situations arising out of domestic threats to constitutional and public order as well. In any case, while it is desirable that the response to such grave threats be based on as broad a consensus as possible, the requirement of a two-thirds majority may conceivably impede or delay decision-making precisely at a time when quick action is indispensable. Nor is it clear whether the parliament takes such resolutions upon its own initiative or upon the proposal of the government or the president.

c. The application of the Constitution may not be suspended, and the functioning of the Constitutional Court may not be restricted. Does this mean that the emergency decrees may contain no provisions against the Constitution or may not suspend any of the constitutional guarantees? If so, the government may not have sufficient powers to deal with the emergency. It could seem more reasonable either to state in the Constitution which constitutional rights and guarantees can be restricted or suspended during an emergency, or alternatively to delineate a "core area" of constitutional rights that cannot be restricted or suspended even in an emergency (parallel to Article 15 of the European Convention on Human Rights) thereby implying that the rest may be subject to restriction or suspension, observing of course the principle of proportionality.

d. In a state of emergency Parliament may not dissolve itself or may not be dissolved by the executive.

Although these safeguards are highly commendable to maintain the supremacy of the Constitution and the functioning of the democratic state, it would be useful to state explicitly that emergency decrees and other acts and actions of the emergency authorities shall remain subject to judicial review. Also, while it is stated in the Concept that Parliament has the power to declare or terminate a state of defence or a state of emergency, the Constitutions should provide a parliamentary review process at regular intervals (eg every two or three months) whereby the Parliament may decide to prolong or terminate the state of emergency.

Emergency rules may sometimes involve changes in the distribution of powers among organs of the state or shifts in the competencies of such organs. A typical and quite ingenious example is provided by the present Hungarian Constitution, and it is maintained, with some modifications, by the Concept. The system involves the transfer of the powers of the Parliament, the government, and the President of the Republic to the "Defence Commission". The Commission would be composed of the Speaker of Parliament, the Prime Minister, the leaders of the party groups in Parliament, the Ministers of Interior, Defence, and Finance, the Minister in charge of the intelligence services, and the commander of the Hungarian Armed Forces, under the chairmanship of the President of the Republic. Thus, the system ensures an effective concentration of governmental authority to deal with the crisis, while at the same time providing for a kind of constitutionally designed national unity government. A national unity government may well be the most suitable model of government in times of grave crises, provided that there are no profound differences among political parties on matters of defence policy. The Concept envisages two relatively minor changes with regard to the Defence Commission. One is to reduce its membership; the other is that the Commission would work in peace time too, without however having any decision-making powers. Both proposals are quite reasonable.

e finances

State finances nowadays play a key role in the activities of the governments of modern states. The volume of its financial resources often makes the state one of the principal economic players. Its action (major works programmes, intervention in the areas of social policy, national defence etc) has a major impact on the economic situation of a country.

It is therefore essential to ensure the sound management of public finances by establishing clear and precise rules. These rules must be fairly rigidly applied to ensure that they are observed and that they direct the medium to long-term management of public funds at national level.

For this reason it is important to lay down the principal rules governing the management of public funds in the basic law of the state.

The state's financial revenues

Where financial resources are concerned, the Constitution must stipulate that taxes, duties and loans can only be raised on the basis of legislation, that is to say with the authorization of the legislative authority. This stipulation is essential to enable Parliament to exercise proper political control over government action.

Likewise, it is desirable to lay down in the Constitution the legal basis for taxes and duties levied by authorities below central government level and to stipulate that bodies subordinate to these bodies may be empowered to levy such taxes.

It is advisable to leave the definition of classes of persons subject to taxation to ordinary legislation, and for the Constitution merely to state the principle of the obligation to pay taxes.

The details set out in the section on "the revenues of state finances", which adopts the basic principles of most modern Constitutions, call for no special comment except to insist on the importance of specifying that apart from taxes, duties and other financial resources, state loans can only be raised with the authorization of the legislative authority.

The administration of public funds

The basic principles underlying the management of all public funds are transparency and parliamentary control. It is therefore essential that all expenditure on behalf of the State should receive prior authorization from Parliament. This is ensured through the annual vote on the budget. The basic principles governing the establishment and implementation of the budget (annual nature, universality, unity, specificity and non-allocation of resources) must be enshrined in the Constitution. It is true that in most states there is a trend towards debudgetisation, which means that not all state expenditure is entered in the budget. The arguments usually put forward to justify this practice are the volume and complexity of the state's transactions. However, debudgetisation cannot be justified by its undoubted convenience. It can enable the government to spend ever larger amounts of money without any genuine parliamentary control. It is therefore advisable for the Constitution to state clearly that, in conformity with the principle of budgetary universality, all state revenue and expenditure should be included in the budget. Moreover, it would also be advisable to include the principle of provisional twelfths, described in the document, in the Constitution. It is also recommended that the Constitution should stipulate that legislation is required for transfers of appropriations between different budgetary lines, as Parliament would otherwise be unable to control the implementation of the budget once it had been voted.

The state must have recourse to private sector undertakings to ensure the functioning of its services. When public funds are involved, state procurement of goods and services must take place under conditions of transparency and free competition and on the best market terms. It is recommended that the Constitution should stipulate that special conditions (public tender), to be determined by the legislature, should apply to public contracts entered into by the state or local authorities (to be specified). Most modern Constitutions provide that the state's accounts must be approved by Parliament.

The State Audit Office

The status, composition and tasks of the State Audit Office, as set out in the document under discussion, are comparable to those enjoyed by similar control bodies in other modern democracies. The primary task of the Office is to ensure the correct execution of the state budget. The Office's annual report enables Parliament to exercise political control over the government. It is important to stress the importance of the consultative function of the State Audit Office. The Office should be able to provide Parliament with opinions, on both the execution and the preparation of the budget, whenever the latter requires them. It would also be advisable to stipulate in the Constitution that the general accounts of the state must be accompanied by the opinion of the State Audit Office. The independence of the Office appears to be adequately guaranteed by the procedure for appointing members and by the fact that the Office has its own budget for operating expenses.

Guarantees of public property

Public property transfers must be attended by a series of guarantees.

Moreover, the state property to which these guarantees should apply must be defined. The guarantees should primarily apply to the transfer of immovable property allocated for direct public use (roads, bridges, rivers). As long as these properties are allocated for direct public use, they must remain inalienable. The transfer of these properties out of the public domain must not take place except through legislation.

The disposal of other movable and immovable property belonging to the State but not part of the public domain (state forests, mining sites, furniture allocated to the public service) should be governed by ordinary law. An exception to this rule should be made for the acquisition and disposal of property of a certain value which should only be authorised by special legislation.

It would therefore be advisable for the Constitution to stipulate that the acquisition and disposal of immovable property belonging to the state and major financial commitments by the state require prior legislative authorization.

The Hungarian National Bank

Since the Hungarian National Bank functions as a central bank it plays an important role in the economic and financial role. Its independence must therefore be guaranteed both as regards the recruitment of its directors and the functioning of its agencies.

Administration of justice

According to the Concept: "It is necessary to lay down the basic principle arising from the principle of the division of the branches of state power, according to which jurisdiction in Hungary is performed by courts". Moreover, in civil law cases "judgment may be made by non-state arbitration courts, but the state court may, upon request, perform control over their decisions". This statement is of great interest, both seen from a perspective of principle as well as of practice. It is a fact that alternative machineries for resolving conflicts are developing in many European states. The relationship between the ordinary courts and these alternative institutions certainly needs to be analyzed and even regulated through legal norms. The Constitution is perhaps not the appropriate place to settle such problems, beyond a mere reference to the existence of the problem as such.

It is not necessarily correct that "the Constitution must define the individual elements of the court organisational structure". The disagreement between the authors of the Concept is, however, probably reduced to a question of the degree of specificity. Only the general framework of the organisation of the court system deserves to be reflected in the Constitution itself. The wisdom of such a position is to be seen in the future, when amendments - unavoidably - will have to be made in the court system.

The structure - or restructure - of the court system is on the agenda in Hungary. The Concept points to a question, which is crucial in the present discussions: whether one should opt for a unified system or for specialised courts. Different states in Europe (and elsewhere) have based themselves on different models for the organisation of the court system. The respective states will have different experiences in this area. The answer to these questions cannot be adequately offered until one is more familiar with the socio-political conditions (including the structure and composition of the legal profession) in the present and future Hungarian society.

The independence of the judges and the court is - correctly - emphasised. The idea that the competence of the Minister of Justice within this area is transferred to a new institution, the National Jurisdiction Council, seems interesting. The practical importance of such a new body will probably depend on the detailed regulations which are to be established (i.a. on the composition and the functioning of the Council).

The individual freedom of judges is an item for permanent discussions. The Concept seems to set high standards when it states that "judges ... may not perform political activities, may not be party members ...". Based on past experience, it is easy to understand the concern expressed. It should be added that in some other European states the private life of judges is not restricted in such a way.

One should address the question to what degree should the details of civil and criminal procedures be covered in the Constitution at all. On the other hand, one might well argue that the norms spelled out under 3.a.-e of Chapter XII of the Concept (Constitutionality of laws being controlled by the Constitutional Court; principle of hearing both parties (audiatur et altera pars); principle of publicity of court proceedings; principle of free evidence and free evaluation of evidence; obligation to give reasons for judicial decisions) are of such a fundamental and general nature that they do deserve to be spelled out in constitutional provisions, rather than at the statutory level.

Prosecution

The fundamental principle which should govern the system of public prosecution in a state is the complete independence of the system, no administrative or other consideration is as important as that principle. Only where the independence of the system is guaranteed and protected by law will the public have confidence in the system which is essential in any healthy society.

While provision for that independence could be made by a legislative act of parliament, it could equally easily be removed by a subsequent act of parliament. Consequently it would be preferable that the guarantee and protection of independence should be contained in the Constitution of the Hungarian Republic.

It would not be essential to set out in the Constitution detailed provisions regarding public prosecution. All that would be required would be:

ırantee of the independence of the general prosecutor of the Republic in the performance of his functions;

ıethod of his appointment;

ıethod of his removal from office.

Provisions that the general prosecutor shall not be a member of the government or of parliament or hold any position of emolument and that his remuneration as general prosecutor shall not be reduced during his continuance in office might also be included in the Constitution if desired. Less fundamental matters can be fixed by laws passed by the Parliament such as the term of office, age of retirement, remuneration and pension of the general prosecutor, and the organisation of the prosecution service and the conditions of employment of its staff. This would be preferable to fixing these matters by regulations or decrees of the government, if public confidence in the independence of the system from the government is to be maintained. The general prosecutor's period of office should not be co-terminus with that of the government since this would tend to lead to the assumption in the public mind of his political allegiance.

It is important that the method of selection of the general prosecutor should be such as to gain the confidence of the public and the respect of the judiciary and the legal profession. Therefore professional, non-political expertise should be involved in the selection process. However it is reasonable for a government to wish to have some control over the appointment, because of the importance of the prosecution of crime in the orderly and efficient functioning of the state, and to be unwilling to give some other body, however distinguished, carte blanche in the selection process. It is suggested, therefore, that consideration might be given to the creation of a commission of appointment comprised of persons who would be respected by the public and trusted by the government. It might consist of the occupants for the time being of some or all of the following positions:

President of each of the courts or of each of the superior courts.

Attorney General of the Republic.

President of the Faculty of Advocates.

ːivil service head of the state legal service.

ːivil service Secretary to the Government.

Deans of the University Law Schools.

A public announcement would be made inviting written applications for the position of general prosecutor and stating the qualifications required for the position; it is suggested that these should be not less than those required for appointment to high judicial office. The Commission would examine the applications and submit to the government (or to Parliament if that is preferred) not more than, say, three names all of whom the Commission considered to be suitable for appointment. The government (or Parliament, as the case might be) would be free to make the selection from those names. In order to emphasise the importance of the position of general prosecutor he might be appointed by the President of the Republic on the nomination of the government (or Parliament) although the President would have no power to reject the nomination. A possible variation of the above proposal is that the selection of nominee that is made by the government should be approved by Parliament before submission to the President. Not all the matters set out need to be stated in the Constitution which might merely say "the general prosecutor of the Republic shall be appointed by the President of the Republic on the nomination of the (government) (with the approval of Parliament) (Parliament)". The other matters would be set out in a law of Parliament.

An important element in the independence of the general prosecutor is his protection from arbitrary or politically motivated dismissal. If the government were to have the power to dismiss him at will then he could not discharge his function with the absolute independence which is essential. On the other

hand to involve Parliament in the decision to dismiss might draw him into the arena of party politics which would be undesirable. The grounds for dismissal should be stated in the Constitution, eg stated misbehaviour or incapacity. A body whose membership would command public trust should investigate allegations of misbehaviour or incapacity and, if it finds the allegation proved, make a recommendation of dismissal if it considers that dismissal is justified. The body, for example, might be of similar composition to the nominating body described in paragraph 5 above or consist of the remaining members of the National Jurisdiction Council. Alternatively the body might consist of three judges appointed by the presidents of their courts. It would be advisable not to involve the Constitutional Court in the investigation or the dismissal procedure because it is not unlikely that there might subsequently be a legal challenge in that court to the affair, whatever its outcome. Whatever body is selected it is probably better that it be comprised of ex officio members rather than be appointed ad hoc, in order to avoid suggestions that its members have been chosen so as to obtain a particular result. An alternative (though less desirable) approach would be to confine the function of the body to establishing the facts, leaving to the government or Parliament the decision whether those facts amount to misconduct and deserve dismissal. Whether the body conducts its investigation in public or in private its report would be published. It is probably better that any citizen should have the right to make a complaint to the body. However, in order to guard against frivolous or vexatious complaints it should have the power to reject complaints without investigation or report. All the matters suggested above could be provided for in a law of Parliament except the removing authority ("The President of the Republic at the request of the Government/Parliament"), which should be in the Constitution.

The above observations are based on the assumption that the system of public prosecution that is envisaged under the new Constitution is that the general prosecutor will have overall responsibility in law for the prosecution of all crime throughout the Hungarian Republic, that he will have the function of appointing salaried lawyers to be local prosecutors, and that they will be members of his staff. The extent of their autonomy in individual cases will be a matter for him, but if they are legally answerable to him then they will share in his independence. If, by contrast, it is envisaged that there will be regional prosecutors who will not be legally answerable to the general prosecutor but will have, in their own region, autonomous prosecutorial functions, then their independence requires to be specially protected also.

As regards the basic models referred to in the Concept, one could suggest that the function of the general prosecutor and the other public prosecutors should be confined to the prosecution of crime, through the criminal courts, and should not be extended to the protection of the public interest in civil matters and administrative causes. These functions would appear to be more appropriate to another organ such as the Parliamentary Commissioner of Citizens' Rights.

It is not necessary for much organisational detail to be included in the Constitution; an ordinary law of Parliament should be sufficient and would be more flexible. While the Constitution should confer independence on the system as well as on the general prosecutor care will have to be taken to maintain a balance between, on the one hand, the protection of subordinate prosecutors from interference by the Government, Parliament, the police or the public and, on the other hand the authority and responsibility of the general prosecutor for ensuring that they carry out their functions properly.

The independent status of the general prosecutor and the public prosecution service does not necessarily preclude the possibility of an annual report to Parliament describing in general terms his work but without commenting on individual cases. However, it does mean that a decision by him to prosecute in a particular case, or not to prosecute, cannot be appealed against, or overturned by any executive or parliamentary authority. Whether or not the courts will have the authority to review such a decision will be a matter for the Constitutional Court in due course; it may perhaps take the view that it will not seek to substitute its own opinion of the merits of the case for the decision of the prosecutor and will only interfere if the litigant can show that the decision had been taken mala fide.

unicipalities

A useful starting point could be a comparison between the preliminary working paper and what the Concept calls "the effective Constitution". According to the new proposal a lot of the principles which are provided for by the Constitution which is now in force, shall be kept:

ivision of the territory into villages, towns, capital city and its districts is kept. Counties are not explicitly listed but are mentioned (Chapter XIV, 1), and - in any case - would deserve some detailed provisions about their role in the system of the local self-government;

ommunities of the electors are entrusted with the powers of the local government (independent, democratic management of local public issues);

quality of the powers is guaranteed. Their content shall be the municipality administration which has to be separated from the state administration;

ocal self-government powers will be exercised by the elected representative bodies or through local referenda;

st of the basic rights of the municipalities;

the mayors are allowed to exercise local government functions and can be entrusted with state administrative tasks;

unicipalities have normative powers to issue municipality decrees which "should not be contradictory to legal regulations of a higher level";

'arliament is entrusted with the power of dissolving the representative bodies of the municipalities.

Some new provisions should be added to those of the "effective Constitution" which the Concept would like to keep in force.

This is the case of the rules concerning the principles of the local elections: not only the members of the representative bodies but also the mayors shall be directly elected by the people for the term of four years. Nevertheless the Concept does not deal with the electoral system leaving the decision to the law on the election of the governing bodies of the municipalities. It is a wise choice which leaves a free hand to the legislator in shaping the functioning of the electoral machinery which can have a strong impact on the system of the political parties.

More space is given to the provisions concerning the local referenda in the view of the exigence of guaranteeing the position of the minorities against the majorities. The body of the representatives has to call a referendum if a proposal is submitted signed "by 10% of the electors".

Drafting this part of the Constitution requires an attentive balancing between the reasons of the constitutional guarantee which suggest the adoption of some rules in a rigid Constitution, the uniformity exigences requiring the approval of an implementing parliamentary statute on the matter and the rights of municipalities to some degree of organisational autonomy. For instance, detailed constitutional provisions concerning the internal organisation of the municipalities are proposed (the role of the chief clerk, the executive offices, the system of the committees), and the addition of statutory rules to them could limit the freedom of choice of the municipalities. The law on the organisation of the municipalities should restrict its content to principles and avoid too much detailed provisions (sticking to the model of the so-called loi cadre).

On the other hand, provisions on the functions of the municipalities have to be drafted in view of the task entrusted to the constitutional court of protecting the rights of the municipalities: therefore it would be advisable giving the court clear and unambiguous criteria of judgment with regard to the distinction between "mandatory and elective" functions, the creation of "forced associations" of municipalities and the transfer of local functions from the municipalities to the state administration in presence of special exigences. If the constitutional court is a judge, it cannot have a free hand on the matter but it has to judge on the basis of previous constitutional provisions. Also the provisions concerning the dissolution of the representative bodies have to offer to the constitutional court sufficient ground for judgment.

Article 44/A 1 d of the "effective Constitution" entrusts the local representative body with the task of determining - "subject to the laws" - "the classes and rates of local taxes".

The German Constitution can offer useful suggestions about the implementation of the principle of regional equilibrium, even if the Hungarian Constitution does not adopt a federal order in dealing with the local government. The Constitution has to provide for some rules in the matter also in connection with the new statements concerning the relations between the revenues of the municipalities and the functions which the municipalities have to discharge.

In view of these developments the design envisaged at the end of the chapter on responsibilities of municipalities has some merits: perhaps the proposed detailed suggestions about mutual information, proposals and initiatives should be completed by a clear enunciation of the principle of loyal co-operation between the state administration and the municipalities.

The newly submitted proposals about properties and enterprises of the municipalities and about the "legality" and "financial" controls of the activities of the governing bodies of the municipalities deserve full consent too.

13. Public Societies

The decision to define the status and nature of public companies in the Constitution is justified. These bodies play an important role in the constitutional organisation of the state. The principal guidelines for their operations and activities should therefore be laid down in the basic law. The provisions governing the detailed operation of individual public companies should be determined by ordinary legislation.

Finally, responsibility for the financial supervision of public companies should be defined in the Constitution. One possibility would be to assign this task to the State Audit Office. Another possibility would be to entrust it to an independent private sector audit firm whose report would be subject to parliamentary approval.

14. Economic and Social Council

This institution exists in most modern states. The role of the Economic and Social Council is essentially consultative. The opinion of the Economic and Social Council should be required whenever the government intends to adopt legislation involving general measures affecting either the national economy as a whole or areas of concern to several occupational groups. The composition of the Economic and Social Council should be such as to give its opinion moral authority, without its being binding on Parliament and thus liable to block legislative action. The possibility of allowing professional institutes composed of representatives of the principal economic sectors (trade, crafts, manual workers, private and public employees, agriculture) to operate alongside the Economic and Social Council should not be excluded. Professional institutes can guide legislative action by delivering opinions which, although they are not binding, can serve to highlight the relevant corporative interests whenever draft legislation is being prepared. In this way the Economic and Social Council would have a more general role covering several sectors of the economy and the field of activity of several occupational groups. At the same time, the consultative role of professional institutes would be confined to the specific interests of their own areas.

The composition and organisation of the Economic and Social Council should be regulated by law. The modus operandi of the Council might even be determined by rules of procedure approved by the plenary assembly of the Council.

15. The Constitutional Court

It would be more correct to say that the Constitutional Court examines the constitutionality (not the legality) of laws, decrees etc.

The procedure envisaged for the organisation of constitutionality of international agreements conflicts with the international undertakings which Hungary might assume. The examination of the conformity of an international treaty with the Constitution should take place before ratification. However, if it is discovered that a conflict exists between the Constitution and an international treaty which is already in force, the Constitutional Court must in no circumstances be empowered to suspend the execution of the treaty on the territory of Hungary. At most the treaty could be denounced; but this is a matter for the government. Moreover, it makes no sense to state that a treaty can be unconstitutional, since the Constitution must conform to international law and not vice versa. In other words, the treaty cannot be unconstitutional, although the Constitution may fail to conform to the treaty.

Consequently, the power here vested in the Constitutional Court is clearly contrary to the principle "pacta sunt servanda". A treaty which is in force cannot be suspended unilaterally. Where a contradiction is found to exist between a treaty already in force and the Constitution, the Constitution must where appropriate be amended to bring it into line with the treaty. The treaty can, of course, always be re-negotiated, but pending re-negotiation it remains in force. Contrary to what the authors seem to believe, the clause of the Vienna Convention on the Law of Treaties referred to on page 124 of the Concept covers domestic law as a whole, including constitutional law.

The Concept distinguishes between direct constitutional review and constitutional review of last instance. It is difficult to decide which is the better system. The choice between them is ultimately a political decision.

The Concept fails to mention the length of the term of office of constitutional judges, and above all whether or not it is renewable. To ensure that judges are completely independent of the bodies which elect them, it would be preferable if their term of office - provided it is sufficiently long - were not renewable. This solution has in fact been adopted in several countries (Italy, Germany, etc).

16. Parliamentary Commissioner of Citizens' Rights

The Concept states that the Constitution should specify "that parliamentary commissioners serve the protection of citizens' rights". If the functions of the parliamentary commissioner are to be described in the Constitution itself, the Constitution should obviously describe the organisation of the institution of the parliamentary commissioners. It is a purely political problem - and a problem of practicability and convenience - whether a state should establish more than one commissioner or whether one commissioner with general competence would suffice. If one looks to neighbours in Western Europe, the picture is highly different in this respect.

Another question deserves to be commented upon. The Concept refers to the "commissioner and his deputy". There is a question, both of principle and of practicability, what formal position the deputy commissioner is envisaged to play. If one establishes a system in which the commissioner himself shall have to make the formal decision in any complaint, one will risk overburdening the commissioner and creating a backlog. On the other hand, it is certainly complicated to distinguish, in the legislation establishing the system of parliamentary commissioners, which complaints shall have to be decided upon by the commissioner himself and which complaints are to be delegated to the deputy commissioner.

The task of the commissioner is described as being to "eliminate constitutional irregularities". It is not clear whether this is an intentional restriction on his competence, or whether the commissioner shall be entitled to look also into the legislation and its application by the executive branch.

17. Amending the Constitution

The Concept sticks to the idea that the adoption of a new Constitution or of a constitutional law amending the Constitution in force shall require the consent of two-thirds of the members of the legislative Assembly. The preference is evident for an amending procedure which does not imply an excessive rigidity of the Constitution and guarantees its stability. However, the document recognises that the constitutional rules in force could "allow for the governmental majority to be the same as the constitutional power", and this makes the Hungarian Constitution "one of the most easily amendable Constitutions". The proposal submitted aims at strengthening the rigidity of the Constitution through a possible direct participation of the people in the procedure.

If a new Constitution is adopted, a referendum shall be called to approve or reject it. For the adoption of a constitutional law amending the Constitution three possible alternatives are envisaged. The possible alternatives shall be stated in the Constitution, and not only in the Standing Orders of the Parliament. The presence of a constitutional rule would allow a judgment of the constitutional court on the constitutionality of the procedure adopted to amend the Constitution and, therefore, the court would be entrusted with the task of checking the compliance with the limits of the majority power. Sometimes the constitutional courts refrain from dealing with the observance of the Standing Orders of the parliaments and avoid interfering in the internal decisions of the parliaments. If there is a constitutional rule, the question no longer has a strict internal parliamentary relevance and can be dealt with by a court.

The preliminary working paper itself has a preference for the first alternative (of the three of them it lists), "because it considers the creation of the Constitution by the direct participation of the people as the strongest form of legislation". Actually the division of the procedure into two stages (a preliminary general discussion and a subsequent vote of the provisions of the bill) and the provision for intervals of time between the initiative, its general discussion and its detailed approval allow a more considerate adoption of the amendments of the Constitution. But when the possibility of calling a referendum is provided for, pending the delay of the promulgation of the act approved by the Parliament, the people are offered the chance of expressing their will in the matter and of giving the act the strongest legitimacy. There is some resemblance between this proposal and Article 138 of the Italian Constitution, but the proposal allows the calling of a referendum not only when the act is approved by a not qualified majority (as in Italy). Therefore the Hungarian proposal leaves more space open to the expression of the will of the people.

The second alternative, if adopted, could be dangerous because it confronts the will of the people expressed through the parliamentary decision-making process with the will of the representatives of society as expressed by the structures - the local government, the interest groups and the national communities, and gives the last word to this organic expression of society in contradiction with a modern idea of democracy.

The third alternative provides for a stronger qualified majority (four-fifths of the members of the Parliament) which would be very difficult to get, therefore it limits the possibility of amending the Constitution.

The solution of keeping the requirement of the two-thirds looks thus more practical than the other two alternatives: the required majority can be easily obtained if there is a general agreement on the proposed amendment, while some procedural and substantive limitations can control the exercise of the amending power by a strong governmental majority.

4. SUMMARY OF THE OPINION ON THE NEW CONSTITUTION OF GEORGIA

The Venice Commission has closely followed the recent constitutional developments in Georgia including the successive drafts of the Constitution leading up to its adoption on 24 August 1995. Following a request by the Georgian authorities for an opinion on the new draft Constitution Messrs Bartole, Batliner, Economides, Helgesen, Klucka, Nicolas, Niemivuo, zbudun, Scholsem, Steinberger, Svoboda, Vitruk and Zlinszky were chosen as Rapporteurs.

The Commission is satisfied that several of the propositions put forward by its rapporteurs were taken up by the Constitutional Commission of Georgia.

There follows a summary of the main points raised by the rapporteurs and of the follow-up to their observations and comments in the text of the Constitution adopted on 24 August 1995:

General provisions of the Constitution

The Commission noted with satisfaction that the Constitution provides for a normative system which establishes the supremacy of the Constitution over other legal rules and in which the State powers are exercised in conformity with the principles of the rule of law.

The establishment of the supremacy of international treaties and agreements over domestic law is positive; in this respect the Constitution of the Republic of Georgia conforms to the principle of the rule of law existing in European countries. However, the rapporteurs stressed that not only international treaties and agreements but also other norms of international law should benefit from this supremacy.

Provisions relating to Georgian citizenship and the rights and freedoms of individuals

The Commission's experts made several comments on this chapter, the title of which has also evolved, and which concerns relations between the individual and the State.

The rapporteurs noted first that the list of rights and freedoms contained in the drafts and included in the final Constitution was impressive. However they stressed that it is often necessary to supplement declarations of inviolability of certain rights with positive guarantees. The Commission welcomes the fact that certain provisions of the text finally adopted were redrafted to take this requirement into account.

Moreover, the rapporteurs considered that it would have been preferable to distinguish clearly between those norms which have no legal restrictions and those which are subject to legal restrictions. They therefore regretted that this chapter contained norms of a very different nature, bringing together the rights and freedoms of individuals and citizens, social rights, certain obligations of the State which are sometimes subject to legislative implementation, as well as the obligations of citizens and other individuals to the State.

The Commission noted with satisfaction that, as proposed by the experts, the Constitution recognises the constitutional right of access to a tribunal (Article 42.1) and contains a series of rules governing judicial procedures.

Furthermore, the experts were satisfied that their comments in particular concerning the principles of "nullum crimen, nulla poena sine lege" led to improvements in the final text. Thus, as proposed by the rapporteurs the final text of the Constitution, provides that until its abrogation the death penalty can only be foreseen by law for serious crimes threatening the life of an individual.

Provisions related to the Parliament

Several of the rapporteurs' comments were taken into account in the final text:

- provision in the draft Constitution concerning the election of the President, the Vice President and the Secretary of the Parliament had been questioned by the Commission's experts, on the ground that it was unclear whether the Secretary was a deputy or a civil servant, as is the case in most countries. In the final text all reference to the election of a Secretary has been removed.

- provisions in the draft Constitution according to which Parliamentary Commissions have to act in conformity with criminal procedure were also criticised by the rapporteurs since it seemed to assimilate these Commissions to judicial bodies. As suggested, this article was redrafted and there is no longer any reference to criminal procedures in the final text;

- rapporteurs also criticised the provision according to which a minimum number of deputies is required for the creation of a Parliamentary Group. They noted that similar conditions do not exist in other countries. In the final text the number of deputies required has fallen from 12 to 10.

Moreover, the rapporteurs drew the Georgian authorities' attention to the condition - already in the draft Constitution -according to which a political group should obtain a certain percentage of the vote in order to be represented in Parliament. They considered that this condition was not indispensable, even though it existed in other countries. This condition has been retained in the final text, and the threshold fixed at 5% of the vote.

Provisions relating to the President of the Republic

The Commission noted that a number of ambiguous and imprecise points identified in the draft had not been excluded in the final text. For instance, it is still unclear in the Constitution which civil servants can be nominated and dismissed by the President (Article 73.b). Furthermore, the experts observed that it was unclear whether Parliament had to give its consent to such actions. The final text remains ambiguous since it provides that the President submits to Parliament requests for the appointment and dismissal of civil servants in accordance with the Constitution and the law.

In contrast, the Commission noted that the draft provision by which the President has the power to declare war and to conclude peace with Parliament's agreement has been removed. This departure from the initial draft follows observations from some rapporteurs to the effect that a declaration of war and the conclusion of peace is an expression of the country's sovereignty which normally, in a democratic State, belongs to Parliament.

Provisions relating to the Council of Ministers.

In the draft Constitution submitted to the Commission, the executive power was established in a "Diarchy" (i.e two equal pillars of power). On the one hand stood the Council of Ministers determining national and international State policy, and on the other hand, the President - directly elected by universal suffrage - who guarantees the constitutionality of State activities and who represents the State in national and international relations. This "Diarchy" was a cause of concern to the Commission's rapporteurs insofar as it threatened to cause tension and controversy in the determination of the respective competencies of the President and the Council of Ministers. In the final text, this "Diarchy" disappears. The President becomes the Head of State and the Executive Power (Article 69). He also directs and implements the national and foreign policy of the country (Article 69.2) and is the supreme representative of the State in its international relations (Article 69.3).

Finally the rapporteurs identified the complicated nature of provisions concerning relations between the executive and the legislative power - these provisions have now been adopted in a simplified form.

Provisions relating to the Judiciary.

Several of the rapporteurs' comments were taken into account for the drawing up the provisions of the Constitution relating to the Constitutional Court. Thus,

uggestion that the Court be composed of nine members was retained in the final text (Article 88.2 of the Constitution);

rincipal of personal immunity of Constitutional judges has been enshrined in the Constitution (Article 88.5);

le 88.5 states that the Constitutional Court, which has the power to authorise the detention or arrest of one of its members, must be notified in the event of one of its members being caught "in flagrante delicto". Such regulation is necessary to ensure that the procedure is not politically motivated, a risk previously pointed out by the rapporteurs.

Moreover, several points concerning the judiciary and the independence of judges which were regarded as unclear by the rapporteurs have been clarified in the text finally adopted. Thus,

ving the rapporteurs' remark that the distinction between ordinary courts and special courts could be problematic when determining the competence of each court, the final text states that justice is administered by ordinary courts (Article 83.2). Article 83.4, further states that the creation of special or emergency courts is prohibited;

le 87 of the Constitution provides that judges cannot be prosecuted before a criminal court nor be arrested or detained without the prior authorization of the President of the Supreme Court.

Provisions related to revision of the Constitution

The system originally proposed for the amendment of the Constitution was considered by the rapporteurs to be rather heavy and complicated, insofar as a referendum was always required to amend the Constitution. The rapporteurs proposed that Parliament should be entitled to amend the Constitution by a qualified majority. Chapter VIII of the Constitution no longer contains any reference to amendment of the Constitution by referendum but provides that amendments can be adopted by a two-thirds majority of Parliament. The rapporteurs' suggestion concerning revision of the Constitution was thus accepted.

5. SUMMARY OF THE OPINIONS ON THE CONSTITUTIONAL LAWS OF BELARUS

At its 24th meeting the Commission was requested to give an opinion on the "Law concerning the Supreme Soviet of the Republic" of 21 December 1994 and on the "Law concerning the President of the Republic" of 21 February 1995. Mr Kestutis Lapinskas and Mrs Anna Milenkova submitted comments in their capacity of rapporteurs. There follows a summary of these opinions outlining the main points covered.

the law concerning the Supreme Soviet of the Republic of Belarus

This law contains provisions on the powers of the Supreme Soviet, on the organisation of its activities, on the procedure for adopting legislation and on the rights and powers of parliamentary representatives.

In the rapporteurs' opinion, study of the law shows the existence of an imbalance between the different powers of the Republic of Belarus, to the advantage of the Supreme Soviet.

In Article 9 of the law, for example, **an excessively expanding definition of the competence of the Supreme Soviet** is chosen. The wording of Article 9 ("the competence of the Supreme Soviet shall be determined by the Constitution, this law and other legislation") is much broader than that used in Articles 7 and 83 of the Constitution, which lay down that the Supreme Soviet shall exercise its activities within the limits of the Constitution and the laws adopted in accordance therewith.

In addition, contrary to Article 6 of the Constitution, which establishes the principle of the separation of powers, the law contains certain provisions that might in the opinion of the rapporteurs be interpreted as **interference by the Supreme Soviet in the sphere of the executive power**. Such is the

case of Article 12, paragraph 4, which provides that "for the exercise of its administrative and supervisory powers the Supreme Soviet shall adopt decrees and supervise their execution". This is a field that usually belongs to the executive power. Similarly, Article 10, paragraph 1, of the law, which provides that "the Supreme Soviet shall exercise the full powers of ownership in regard to the property of the Republic of Belarus", seems to deviate from the principle accepted in a large number of States according to which it is the State as a legal entity which possesses this right of ownership. This power, moreover, is usually exercised by the executive, with the legislative authority being simply responsible for establishing the legal framework for the exercise of that power. There also exists a potential risk of interference by the legislative power in the sphere of the executive owing to the very extensive powers of control granted to the Supreme Soviet by Article 56 of the law. This is so in particular with regard to the implementation of general directives relating to the Republic's domestic and foreign policy and the execution of its budget or military doctrine.

Lastly, the Commission's Rapporteurs expressed their concern regarding Article 12, paragraph 3, of the law which gives the Supreme Soviet the power of interpreting the Articles of the Constitution. In their opinion this provision might lead to an **interference by the Supreme Soviet in the sphere of the judicial power**.

The Commission's rapporteurs expressed their reservations with regard to Article 52 of the law, which provides for **special consent procedures aimed at achieving a conciliation of views** proposed by the President in cases when he refers an adopted law back to the Supreme Soviet for a second reading. The Supreme Soviet should be able to organise its discussion of these objections in complete freedom.

The rapporteurs also wish to draw attention to the **need to safeguard the impartiality and objectivity of the Constitutional Court**. The fact that, under Article 39, paragraph 2, the Court may submit to the Supreme Soviet proposals for the amendment of the Constitution has some political significance and is a power not usually granted to a judicial body, even to one which, like the Constitutional Court, acts as arbitrator in national political life.

the constitutional law concerning the President of the Republic of Belarus

This law was adopted on 21 February 1995 with the intention of implementing the provisions of the Constitution regarding the legal status of the President and the President's relationship with the other branches of State power.

The rapporteurs expressed their concern regarding Article 18, paragraph 4 of the law, which gives the President the right to propose to the Supreme Soviet the removal from office of the Chairman of the Constitutional Court and the Chairman of the Higher Economic Court. This right has no basis in the Constitution and could be regarded as a violation of the independence of the judicial power.

Moreover, Article 28 of the law, which grants the President the right to submit for the consideration of the Constitutional Court the acts of "any state body", seems to exceed the structure laid down by Article 127, paragraph 2, of the Constitution which limits more narrowly the bodies whose acts may be submitted by the President of the Republic for consideration by the Constitutional Court.

The rapporteurs also stressed that Article 18, paragraph 5, which grants the President the power to abrogate the decisions of local authorities, threatens the autonomy of those bodies.

In addition, Article 29, paragraph 2, which provides that the President shall ensure the efficient activity of the legislative authorities should be interpreted restrictively to avoid any breach of the principle of separation of powers.

Lastly, the rapporteurs stressed that the possibility granted to the Supreme Soviet to decide that the functions of the President should cease from the moment a judgment is delivered by a Supreme Soviet Commission, gravely affects the legal and political position of the President, who is Head of State elected by vote.

It should be noted that the Constitutional Court of Belarus, in a decision dated 15 December 1995 in an appeal brought by President A. Lukashenka, declared several provisions of the law on the Supreme Soviet contrary to the Constitution.

Furthermore, by decision of 21 December 1995, the Constitutional Court declared nine Articles of the law on the President of the Republic contrary to

the Constitution.

II. Co-operation between the Commission and the statutory organs and certain Committees of the Council of Europe, and International Organisations

1. Co-operation with the statutory organs and the Secretary General of the Council of Europe

peration with the Committee of Ministers

The Commission was informed of the decisions taken and the procedures adopted by the Committee of Ministers regarding respect of commitments entered into by member States of the Council of Europe. The Commission declared itself ready to assist the Committee of Ministers and the Secretary General, within its field of competence, in connection with these monitoring procedures.

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

1995 intensified the fruitful co-operation between the Parliamentary Assembly and the Venice Commission.

The Commission was thus able to benefit from the active participation of Assembly representatives both in its work and at meetings. Moreover, on several occasions, the Parliamentary Assembly requested the Commission's opinion.

More particularly, at the request of the Legal Affairs Committee of the Parliamentary Assembly, the Commission gave an **Opinion on the present constitutional situation in Ukraine** (see above) which was adopted during its 24th meeting in the presence of representatives of Ukraine and of Mr Nemeth, the Assembly's Rapporteur for the accession of that country. The opinion was forwarded to the Parliamentary Assembly before its debate of the accession of Ukraine to the Council of Europe took place.

The Commission, also at the request of the Legal Affairs Committee of Parliamentary Assembly, drew up an opinion on the **Law on the Organisation of the Judiciary (Chapter VI of the transitional Constitution**) (see above). Mrs Err, Chairperson of the Committee on Legal Affairs and Human Rights, stressed that this opinion complemented the work being carried out by the Committee on Legal Affairs and Human Rights and demonstrated the utility of this type of co-operation between the two institutions.

In addition, the Commission continued its work on the study on **Parliamentary Immunity** requested by the Assembly in 1994.

Finally, the Committee on Legal Affairs and Human Rights of the Assembly asked the Commission to give opinions on two questions relating to **the protection of minorities**.

The first question concerns the possibility of **identifying the provisions of the European Charter for Regional and Minority Languages which should be accepted by all contracting States**.

The second concerns the interpretation of the Draft Protocol on the rights of national minorities to the European Convention on Human Rights guaranteeing rights in the cultural field, in particular for persons belonging to national minorities (**Recommendation 1201 (1993) of the Parliamentary Assembly**) and in particular **Article 11** of this draft.

The Sub-Commission on the protection of minorities was instructed to draw up draft opinions on these questions.

ıange of views with the Secretary General of the Council of Europe

During its 25th meeting, the Secretary General provided the Commission with an overview of the Council of Europe's approach to intensifying, strengthening and deepening democratic structures in Europe. During his statement, the Secretary General emphasised, in particular, the Venice Commission's critical contribution to the central objectives of the Council of Europe.

mission contributions which could be used in the framework of the respect of commitments entered into by member States of the Council of Europe

The Commission took note of mechanisms for monitoring the compliance with commitments accepted by member States of the Council of Europe established by the Parliamentary Assembly (Orders 488(1993) and 508(1995)) and the Committee of Ministers (Declaration of 10 November 1994 and Rules of Procedure for implementing this Declaration). It confirmed its willingness to provide any assistance necessary within its field of competence in connection with these monitoring procedures.

The development by the statutory organs of the Council of Europe of mechanisms for monitoring the compliance with commitments accepted by member States highlights a phenomenon to which the Commission had already drawn the Committee of Ministers' attention, viz the need for emphasis not only on the adoption procedure for new constitutions establishing the principles of pluralist democracy, the rule of law and respect for the fundamental rights but also on the effective application of these principles, as enshrined in constitutional documents and norms. The Commission has acquired considerable experience in the field of legal guarantees of democracy. Apart from the assistance offered in the drafting of fundamental legal instruments in the new democracies, its studies on important legal questions and the conclusions drawn from these studies can be useful to the Secretary General and to the statutory organs entrusted with the task of monitoring compliance with commitments accepted by member States. According to its Statute, one of the aims of the Commission's activities is to examine the problems raised by the working of democratic institutions and their reinforcement and development.

Within the framework of its activities concerning the functioning of democratic institutions, the Commission decided to continue its studies on the consequences of State succession for citizenship and on parliamentary immunity. Furthermore, it was agreed to study the question of the establishment and the composition of constitutional courts taking into account not only relevant legislation but also national practice and the relevant debates at national level. Finally, the participation of persons belonging to minorities in public affairs was regarded as a subject matter of major importance. The Commission's reports on the above subjects could set out possible weaknesses or dysfunctions in the law, as well as the Commission's proposals for the reinforcement of the efficiency of democratic institutions. Once adopted, these reports will be forwarded to the Committee of Ministers, to the Parliamentary Assembly and to the Secretary General.

Progress on the work concerning the above reports is set out below (see Chapter III, Studies of the Commission).

Of course, apart from the above-mentioned reports, the Commission is at all times ready to assist the Committee of Ministers, the Parliamentary Assembly and the Secretary General in examining specific situations. In this respect the Commission welcomes the co-operation already started in this field with the Parliamentary Assembly on the law on the organisation of the judiciary in Albania, co-operation which it considers fruitful and efficient.

2. Co-operation with certain Council of Europe Committees

The Commission was represented at the meetings of the **CAHMIN**, whose work on the drawing up of a draft additional Protocol to the European Convention on Human Rights it has actively followed. During the CAHMIN's 11th meeting (15-19 May 1995), Mr Matscher, in his capacity as Chair of the Sub-Commission on the Protection of Minorities, presented a note setting out those rights which should at all costs be included in the Protocol.

The Committee of experts on nationality (CJ-NA), which is drafting the Convention, has appointed two of its senior members, Mr Schaerer (Switzerland) and Mr Kojanec (Italy), as representatives to co-operate with the Commission in its study on the consequences of State succession for nationality. The representatives of the CJ-NA participated actively in the meetings of the Sub-Commission on International Law, which has been charged with the preparation of the draft report on this question.

The Commission also took part in the work of the Project Group "Human Rights and Genuine Democracy" (**CAHDD**).

3. Co-operation with other International Organisations

The **European Commission** actively participated in the Venice Commission's work and lent its support to several of its activities. In particular, the European Commission made a financial contribution for several Commission events and activities concerning the development and consolidation of democracy and human rights in Central and Eastern Europe and in South Africa. A request for funding for similar activities in 1996 has been addressed to the European Commission's competent department.

Moreover, during the whole year, fruitful co-operation has existed between the Venice Commission and the **OSCE Office of Democratic Institutions and Human Rights (ODIHR)**. The ODIHR participated in several of the Commission's plenary meetings and several of its events. It also contributed to the financing of the Brioni UniDem Seminar (see below). Moreover, Mr Maas Geesteranus participated, on behalf of the Commission, in the OSCE Seminar on "the rule of law" (Warsaw, 28-31 November 1995), and presented within the framework of the Seminar a report on the concept of the "rule of law".

During the 22nd Plenary Meeting, Mr Rnquist, representative of the **High Commissioner for National Minorities of the OSCE**, gave information about the High Commissioner's activities. Mr Rnquist expressed the wish for closer co-operation between the High Commissioner and the Commission.

Mr Kedzia, representative of the **United Nations High Commissioner for Human Rights**, also participated in the 22nd Plenary Meeting and gave the Commission background information as well as details of the High Commissioner's current activities. The High Commissioner was very interested in co-operating with the Venice Commission.

Having received an invitation to participate in **the Conference of the Presidents of European Constitutional Courts** which will take place from 5 to 10 May 1996 in Budapest, the Commission instructed Mr Russell, Chairman of the Sub-Commission on Constitutional Justice, to present its activities to the Conference in the field of constitutional case-law and in particular the Bulletin on Constitutional Case-Law and the database project CODICES.

III. Studies of the European Commission for Democracy through Law

1. Consequences of State succession for nationality

In 1995 the Sub-Commission on International Law continued the work it had already started the previous year concerning the consequences of State succession for nationality.

During its 23rd Plenary meeting the Commission appointed Messrs Economides, Klucka and Malinverni as rapporteurs and requested them to prepare, with the Secretariat's assistance, a draft report.

The Committee of experts on nationality (CJ-NA), which is drafting the Convention, has appointed two of its members, Mr Schaerer (Switzerland) and Mr Kojanec (Italy), as representatives to participate in the work of the Commission. The Sub-Commission had also taken note of the work of the International Law Commission of the United Nations on the topic "State succession and its impact on the nationality of natural and legal persons".

Essentially based upon replies to a questionnaire from more than 30 European States as well as other non-European States participating in the Venice Commission's work, and on other relevant comments, the report has as its object and purpose to show the diversity of legal models of regulation which have been adopted to deal with the effects of territorial transfers on nationality. At the same time, aware that the question of nationality in cases of State succession raises questions with which several member States of the Council of Europe have been confronted, and convinced that the sharing of experience in the matter could lead to the most efficient solutions being adopted, the Commission is proposing to establish to go beyond a mere repertoire of legislative practice in several European and non-European States and to formulate some general guidelines to be followed in future cases of State succession. The above-mentioned report and guidelines, which will probably be adopted at the beginning of 1996, will be forwarded to the relevant organs of the Council of Europe.

2. Parliamentary Immunity

At its 22nd Plenary Meeting, the Commission requested Mr Maas Geesteranus to prepare a report on Parliamentary Immunity. This study, which had been requested by the Parliamentary Assembly, will be integrated into the work of the Sub-Commission on Democratic Institutions. By the end of 1995, the Secretariat had received more than 30 replies to the questionnaire on Parliamentary Immunity.

The Commission will probably adopt a report on this subject during the first half of 1996.

During its 25th Meeting the Commission also decided to examine the modalities of possible co-operation with the Multidisciplinary Group on Corruption of the Council of Europe, which had expressed interest in working with the Venice Commission on the subject of Parliamentary Immunity.

3. Constitutional foundations of foreign policy

During its 22nd Plenary Meeting the Commission decided to study the constitutional foundations of foreign policy. This study will form part of the work of the Sub-Commission on International Law. A questionnaire has been sent to members, associate members and observers of the Commission.

4. Participation of persons belonging to minorities in public life

Since its creation, the protection of minorities has played an important role in the Commission's activities (see inter alia the publication on the rights of minorities in the series "Science and Technique of Democracy"). During its 22nd meeting the Commission decided to undertake a study on the participation of persons belonging to minorities in public life. The Sub-Commission on the Protection of Minorities, together with the Sub-Commission on Democratic Institutions, were instructed to examine this subject.

5. Composition and establishment of Constitutional Courts

During its 23rd meeting the Venice Commission decided to undertake a study on the composition of Constitutional Courts. The Sub-Commission on Democratic Institutions, with the assistance of the Sub-Commission on Constitutional Justice, was instructed to draw up a draft report on this subject. The purpose of this study if to identify, beyond a simple description of rules governing composition, the techniques employed by constitutional laws to ensure and maintain the representation and balance of different political and legal tendencies in constitutional courts.

During its 25th meeting the Venice Commission adopted a questionnaire mainly concerning nomination procedure and practice. A Working Group made up of Messrs. Robert, Zlinszky and Vandernoot was instructed to analyze the results and to report to the Sub-Commission.

IV. Documentation Centre on Constitutional Case-law

The work of the Commission and the Secretariat gave a new dimension to the Documentation Centre on Constitutional Case-Law.

The **Bulletin on Constitutional Case-Law** has in fact seen numerous improvements in both its presentation and also in the nature and content of the contributions, which allow it to attain its principle aim i.e. to supply rapidly information on the most up-to-date constitutional case-law. The Bulletin is a highly practical tool for anyone interested in the evolution of constitutional law. The most important judgments of the European Court of Human Rights, the Court of Justice of the European Communities, and of about forty constitutional and equivalent courts are regularly reported in the Bulletin.

The next special Bulletins will contain a collection of the constitutional and legislative provisions concerning constitutional and other high courts which participate in the Bulletin. This extensive project, started in 1995, will continue during the whole of 1996.

One of the main priorities of the Sub-Commission on constitutional justice was the establishment of a **computerised database on constitutional case-law**, as decided in 1994. The liaison officers from constitutional courts and the Secretariat have contributed greatly to this project by their ideas and

efforts. In fact, a first version of the database, called **CODICES** (=**DI**gest of **CO**nstitutional **C**as**ES**), has been set up by the Secretariat and was distributed to the liaison officers at the end of 1995. The database contains all the summaries of decisions published so far in the Bulletin. The final version will eventually consist of three parts: summaries of decisions, full texts of decisions, and the systematic thesaurus. CODICES has numerous functions which make extensive research at all levels possible. Once the database is complete, it will be distributed on diskette and CD-ROM to all courts participating in the Bulletin and other interested persons and institutions.

It is also envisaged to connect CODICES to the Internet network.

In 1995, a survey of needs was conducted through interviews and questionnaires on the types of information and documents requested from the Venice Commission, on the Centre's role, and on the services provided. It can be seen from the replies that the development of the Documentation Centre reflected the users' needs by becoming the unique panEuropean centre specialising in constitutional case-law. The Bulletin's electronic publication will increase its impact and allow for a wider dissemination of the information it contains.

The Commission is firmly convinced that constitutional courts have an important role to play in the consolidation of the rule of law and the protection of fundamental rights. It can only reiterate that in it view the exchange of information between new and old democracies in the field of judge made law is of paramount importance. In this respect, more than a simple information centre, the Documentation Centre on Constitutional Case-Law will be an essential means for the common constitutional development of the European continent.

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V. The UniDem (Universities for Democracy) Programme

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

1. Seminar on "Constitutional Justice and Democracy by Referendum" (Strasbourg, 23-24 June 1995)

The seminar on "Constitutional Justice and Democracy by Referendum", organised by the Commission in co-operation with the "Institut des Hautes Etudes Europennes" of Robert Schuman University, Strasbourg, and with the support of the European Commission, brought together in Strasbourg specialists from Europe, South Africa, North America and Japan.

Discussions focused on three main topics:

ol by the constitutional judge of the admissibility of a referendum;

titutional jurisdiction and review of the material validity of texts submitted for referendum;

titutional jurisdiction and review of the material validity of constitutional amendments by way of referendum.

Mr Flauss, Director of the "Institut des Hautes Etudes Europennes", who presented the introductory report, put the accent on the motives which justify, or are advanced against, judicial review of the various texts submitted to referendum.

Detailed national reports were presented by Messrs Robert (France), Hfelin (Switzerland), Bartole (Italy) and Eule (USA). They were supplemented by written statements on the situation in various European States and Canada.

Discussions showed the diversity of the legal situation in the various countries. The relative importance of constitutional justice and of democracy by

referendum, as well as their more or less recent introduction, contribute to this diversity. Different points of view were in particular expressed on the type of judicial review to which popular votes should be subject: if certain participants considered that the acts of the people as the sovereign should be exempt from judicial review, others on the contrary underlined the risks such votes may entail for fundamental rights.

Mr Auer (University of Geneva) centred his report around the positive and negative meeting points between constitutional justice and direct democracy, as well as on certain more specific questions of particular interest for direct democracy.

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

2. UniDem Seminar on the "Protection of Fundamental Rights by the Constitutional Court" (Brioni, 23-25 September 1995)

In co-operation with the Constitutional Court of Croatia and with the support of the Office of Democratic Institutions and Human Rights of the OSCE, a UniDem seminar was organised in Brioni (Croatia) on 23-25 September 1995 on the subject "The Protection of Fundamental Rights by the Constitutional Court". The seminar was mainly intended for the newly established constitutional courts in Central and Eastern Europe. Practically all these courts were represented, often at the level of the President or Vice-President. Constitutional judges and scholars from all over Europe and North America also attended the seminar, which was opened in the presence of the Prime Minister of Croatia, Mr Valentic.

On the basis of reports of Prof. Cascajo Castro from the University of Salamanca, Mr J. Crnic President of the Croatian Constitutional Court, and Mr H. Mominovic, Vice-President of this Court, the first topic examined at the seminar was which rights are suitable for protection by constitutional complaint procedures. Participants explored procedures other than constitutional complaints for protecting fundamental rights, following reports by Prof. Kommers from Notre Dame University (USA), who presented the system of judicial review in particular in the United States and Canada, and by Ms Carlassare, Professor at the University of Ferrara, who mainly described the system of incidental control in Italy and elsewhere.

The two following working sessions were devoted to procedural problems of constitutional complaints: Ms Seibert from the German Constitutional Court and Mr Belajec from the Croatian Constitutional Court treated admissibility requirements for constitutional complaints and mechanisms for avoiding an excessive case load. Ms Wagner from the Austrian Constitutional Court and Mr Bartovcak from the Croatian Constitutional Court examined remedies and effects of decisions in constitutional complaint procedures.

Mr Mavcic from the Slovenian Constitutional Court presented a written paper on the world-wide importance of constitutional complaint procedures and on practice in Slovenia, Senator Beaudoin on the Supreme Court of Canada and the protection of rights and freedoms, Justice Vitruk from the Russian Constitutional Court on the role of this Court for the protection of rights and freedoms of citizens, and Mr Milicevic from the Constitutional Court of the Federation of Bosnia-Herzegovina on the protection of fundamental rights by the Constitutional Court in time of war.

The proceedings of the seminar will be published in English and French, together with an abridged Russian version, in the series "Science and Technique of Democracy".

3. Preparation of forthcoming UniDem Seminars

A UniDem seminar on **"Local Autonomy, Territorial Integrity and Protection of Minorities" will be held in Lausanne Switzerland on 25-27 April 1996**. This seminar is being organised in co-operation with the Swiss Institute of Comparative Law. The following subjects will be debated:

torial autonomy in certain western countries;

torial autonomy in the countries of Central and Eastern Europe;

:h are the international guarantees for territorial autonomy?

A second seminar will be organised in **Wroclaw, Poland, on 3-5 October 1996** on **"Human Rights and the Functioning of the Democratic Institutions in Emergency Situations"**. On the first day, domestic law will be examined on the basis of two comparative studies on the rules applicable to emergency situations in Western Europe and in Central and Eastern Europe respectively. Reports and discussions on emergency situations in international legal instruments and on the practice of the organs of the European Convention on Human Rights will follow. The final session will be devoted to the protection of human rights in emergency situations under customary international law.

Finally, **the University of Montpellier** has expressed the wish to co-organise with the Commission a seminar on the **"Constitutional Heritage of Europe".**

A P P E N D I X I - LIST OF MEMBERS OF THE EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

Mr Antonio LA PERGOLA (Italian), President, Advocate General at the Court of Justice of the European Communities

(Substitute: Mr Sergio BARTOLE, Professor, University of Trieste)

Mr Constantin ECONOMIDES (Greek), Vice-President, Professor, Pantios University, Director of the Legal Department, Ministry of Foreign Affairs

(Substitute: Ms Fani DASKALOPOULOU-LIVADA, Assistant Legal Adviser, Legal Department, Ministry of Foreign Affairs)

Mr Giorgio MALINVERNI (Swiss), Vice-President, Professor, University of Geneva

Mrs Hanna SUCHOCKA (Polish), Vice-President, Member of Parliament

Mr Giovanni GUALANDI (San Marino), Vice President of the Council of Presidency of the Legal Institute of San Marino

Mr Franz MATSCHER (Austrian), Professor, University of Salzburg, Judge at the European Court of Human Rights

(Substitute: Mr Klaus BERCHTOLD, Bundeskanzleramt, Vienna)

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

Mr Hans RAGNEMALM (Swedish), Judge, Court of Justice of the European Communities

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

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

Mr Jean-Claude SCHOLSEM (Belgian), Dean of the Law Faculty, University of Lige

Mr Antti SUVIRANTA (Finnish), Former President of the Supreme Administrative Court

(Substitute: Mr Matti NIEMIVUO, Director at the Department of Legislation, Ministry of Justice)

Mr Michael TRIANTAFYLLIDES (Cypriot), Chairman of the Council of the University of Cyprus, Former President of the Supreme Court and former Attorney-General of the Republic

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

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

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

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

Mr Alexandre DJEROV (Bulgarian), Advocate, Member of the National Assembly

(Substitute: Mrs Ana MILENKOVA, Member of the National Assembly)

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

Mr Jnos ZLINSZKY (Hungarian), Judge, Constitutional Court

Mr Joseph SAID PULLICINO (Maltese), Chief Justice

Mr Jn KLU_KA (Slovakian), Judge, Constitutional Court

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

Mr Luis AGUIAR DE LUQUE (Spanish), Director of the Centro de Estudios Constitucionales

(Substitute: Mr Jaime NICOLAS MUNIZ, Deputy Director of the Centro de Estudios Constitucionales)

Mr Peter JAMBREK (Slovenian), Former President of the Constitutional Court, Judge at the European Court of Human Rights

(Substitute: Mr Anton PERENIC, Professor of Law, former Judge of the Constitutional court)

Mr Kestutis LAPINSKAS (Lithuanian), Judge, Constitutional Court

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

Mr Asbjrn JENSEN (Danish), Judge, Supreme Court

Mr Cyril SVOBODA (Czech), First Deputy Minister of Justice

Mrs Maria de Jsus SERRA LOPES (Portuguese), Former Chairman of the Bar Association

Mr Armando MARQUES GUEDES (Portuguese), Former President of the Constitutional Tribunal

Mr Peep PRUKS, (Estonian), Dean, Faculty of Law, University of Tartu

Mr Aivars ENDZINS (Latvian), Vice-Chairman of the Saeima Legal Affairs Committee

ASSOCIATE MEMBERS

Mr Aleks LUARASI (Albanian[1]), Professor, University of Tirana

Mr Nicolas VITRUK (Russian), Judge, Constitutional Court

Mr Stanko NICK (Croatian), Chief Legal Adviser, Ministry of Foreign Affairs

Mr Boris NEGRU (Moldovan[1]), Head of the Section of Legislative Affairs, Parliament of Moldova

(Substitute: Mr Eugen RUSU, Chairman of the Legal Affairs Committee, Parliament of Moldova)

Mr Avtandil DEMETRASHVILI (Georgian), Member of the Constitutional Court

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

Mr Serhyi HOLOVATY, (Ukrainian[2]), Minister of Justice, President of the Ukrainian Legal Foundation

(Substitute: Mr Petro MARTINENKO, Professor of Comparative Law)

Mr Khatchig SOUKIASSIAN (Armenian), Director of Legal Affairs, Ministry of Foreign Affairs

OBSERVERS

Mr Grald BEAUDOIN (Canadian), Professor, University of Ottawa, Senator

Mrs Nancy ELY-RAPHEL (American), Principal Deputy Assistant Secretary of State, Human Rights, Democracy and Labour

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

Mr Serikul KOSAKOV (Kyrgyz), President of the Supreme Economic Court

Mr Takeshi GOTO (Japanese) Consul, Consulate General of Japan, Strasbourg

Mr Hector MASNATTA (Argentinean), Ambassador, Director of the Centre for constitutional and political studies

Mr Hctor GROS ESPIELL (Uruguayan), Ambassador of Uruguay in Paris

A P P E N D I X II - OFFICES AND COMPOSITION OF THE SUB-COMMISSIONS

ident: Mr La Pergola

-Presidents: Mr Malinverni, Mr Economides, Ms Suchocka

au: Mr Helgesen, Mr Maas Geesteranus, Mr Zlinszky, Mr Jambrek

rmen of Sub-Commissions: Mr Aguiar de Luque, Mr Matscher, Mr zbudun,

bert, Mr Russell, Mr Scholsem, Mr Steinberger, Mr Suviranta,

antafyllides

stitutional Justice: Chairman Mr Russell - members: Mr Batliner, Mr Djerov,

vrilescu, Mr Jambrek, Mr Jensen, Mr La Pergola, Mr Lapinskas, Mr Marques Guedes, Ms Milenkova, Mr zbudun, Mr Ragnemalm, Mr Reuter, Mr Robert, Mr Said Pullicino, Ms Serra Lopes, Mr Steinberger, Ms Suchocka, Mr Suviranta,

antafyllides, Mr Zlinszky

ral State and Regional State: Chairman Mr Scholsem - members: Mr Aguiar de Luque, Mr Economides, Mr La Pergola, Mr Malinverni, Mr Matscher, Mr Nick,

einberger, Ms Suchocka, Mr Triantafyllides; Obs.: Canada, USA

national Law: Chairman Mr Triantafyllides - members: Mr Djerov,

onomides, Mr Helgesen, Mr Jambrek, Mr Klu_ka, Mr La Pergola,

alinverni, Ms Milenkova, Mr Steinberger, Mr Suviranta

ection of Minorities: Chairman Mr Matscher - members: Mr Economides,

vrilescu, Mr Gualandi, Mr Helgesen, Mr Maas Geesteranus, Mr Malinverni,

ck, Mr zbudun, Mr Scholsem, Mr Zlinszky

stitutional Reform: Chairman Mr Suviranta, Vice-Chairman Mr Batliner - members: Mr Aguiar de Luque, Mr Djerov, Mr Economides, Mr Helgesen, Mr La Pergola, Mr Maas Geesteranus, Mr Malinverni, Mr Marques Guedes, Ms Milenkova, Mr zbudun, Mr Ragnemalm, Mr Reuter, Mr Robert, Mr Scholsem, Ms Serra Lopes, Ms Suchocka, Mr Triantafyllides

ocratic Institutions: Chairman Mr Steinberger - members: Mr Aguiar de Luque, Mr Economides, Mr Helgesen, Mr Klu_ka, Mr Lapinskas, Mr Robert, Mr Suviranta, Mr Svoboda, Mr Triantafyllides

)em Governing Board: Chairman Mr La Pergola, Vice-Chairman Mr zbudun -members: Mr Aguiar de Luque, Mr Helgesen, Mr Maas Geesteranus, Mr Malinverni, Mr Marques Guedes, Mr Robert, Mr Scholsem, Ms Serra Lopes, Mr Steinberger, Ms Suchocka; Obs.: Holy See

)ted members: Prof. Evans (Johns Hopkins University, Bologna),

'ragnire (College of Europe, Bruges), Prof. Masterson (European University Institute, Florence), Mr Koller (Institute for Comparative Law, Lausanne), Mr Quinn (Federal Judicial Center, USA)

h Africa: Chairman Mr La Pergola, Vice-Chairman Mr Helgesen - members:

aas Geesteranus, Mr Malinverni, Mr Ragnemalm, Mr Scholsem, Ms Suchocka, Mr Triantafyllides Obs.: Canada, USA

iterranean Basin: Chairman Mr Robert - members: Mr Aguiar de Luque,

tliner, Mr Economides, Mr La Pergola, Mr Malinverni, Mr Said Pullicino,

antafyllides

:gency powers of the Government: Chairman Mr zbudun - members:

tliner, Mr Russell, Mr Suviranta

America: Chairman Mr Aguiar de Luque - members: Mr Helgesen, Mr La Pergola, Mr Marques Guedes, Mr Matscher, Ms Serra Lopes, Mr Steinberger

A P P E N D I X III - MEETINGS OF THE EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW IN 1995 [3]

Plenary Meetings

22nd meeting - 3-4 March

23rd meeting - 19-20 May

24th meeting - 8-9 September

25th meeting - 24-25 November

Bureau

9th meeting - Meeting enlarged to include the Chairmen of Sub-Commissions

23 November

Informal Administration Sessions

2 March

18 May

SUB-COMMISSIONS

Minorities

13th Meeting - Joint Meeting with the Sub-Commission on Democratic Institutions

7 September

14th Meeting - Joint Meeting with the Sub-Commission on Democratic Institutions

23 November

Constitutional Justice

Meeting of the Working Group on the Thesaurus

30 January (Brussels)

7th meeting - 3-4 July (Lausanne)

with Liaison officers from Constitutional Courts for the establishment of a Documentation Centre

22 November

Joint meeting with the Sub-Commission on Democratic Institutions

23 November

Constitutional Reform

Exchange of views with the Constitutional Commission of Ukraine on the Ukrainian draft Constitution

27-29 September (Kyiv)

26-29 October (Kyiv)

Exchange of views on the Law on the organisation of the Judiciary

10-11 November (Tirana)

Democratic Institutions

1st Meeting - Joint Meeting with the Sub-Commission on Minorities

7 September

2nd Meeting - Joint Meeting with the Sub-Commission on Constitutional Justice

Joint Meeting with the Sub-Commission on Minorities

23 November

International Law

5th Meeting - 18 May

6th Meeting - 7 September

7th Meeting - 23 November

Emergency Powers

6th meeting - Joint meeting with the UniDem Governing Board

2 March

UniDem Governing Board

12th meeting - Joint meeting with the Sub-Commission on Emergency Powers

2 March

13th meeting - 7 September

Working Group on the 1996 Intergovernmental Conference

1st meeting - 8 November (Luxembourg)

UNIDEM SEMINARS

UniDem Seminar on the Constitutional justice and democracy by referendum

23-24 June (Strasbourg)

UniDem Seminar on the protection of fundamental rights by the Constitutional Court

23-25 September (Brioni)

PARTICIPATION IN OTHER COUNCIL OF EUROPE COMMITTEES

Participation in the meetings of the Ad Hoc Committee for the Protection of National Minorities (CAHMIN)

Participation in the Project Group "Human Rights and Genuine Democracy"

Workshop 19-20 May (Abo, Finland)

PARTICIPATION IN OTHER SEMINARS AND CONFERENCES

Participation in the Round Table on "the will of the member States and of the Regions in the creation and dissolution of the federal and regional states" of the Fondazione Rosselli

6 March (Trieste)

Participation in the Conference "Constitution in service for Democracy"

10-12 March (Cracow)

Participation in the Seminar "The future of European Construction: perspectives of the implementation and the revision of the Maastricht Treaty"

23-24 June (Bruges)

Participation in the Seminar on Constitutional Development in South Africa

17-20 July (Pretoria)

Participation in the Symposium "Vienna International Encounter on some current issues regarding the situation of national minorities"

15-17 September (Vienna)

Participation in the Symposium "Rule of law as an element of pan-European constitutional law"

28 September-1 October (Graz)

Participation in the Seminar on the reform of the Constitution of Argentina

27-30 November (Madrid)

Participation in the OSCE Seminar on the Rule of Law

28 November-1 December (Warsaw)

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

Collection [4]

Science and technique of democracy

ıg with the presidents of constitutional courts and other equivalent bodies

'enta, 8 October 1990 [5]

s of constitutional jurisdiction

inberger [6]

tution making as an instrument of democratic transition

October 1992

ion to a new model of economy and its constitutional reflections

19 February 1993

lationship between international and domestic law

1 May 1993

lationship between international and domestic law

Economides [3]

f law and transition to a market economy

)ctober 1993

tutional aspects of the transition to a market economy

s of the European Commission for Democracy through Law

otection of Minorities

s of the European Commission for Democracy through Law

ole of the constitutional court in the consolidation of the rule of law

nodern concept of confederation

25 September 1994

gency powers [3]

un and Mehmet Turhan

mentation of constitutional provisions regarding mass media in a pluralist democracy

3 December 1994

itutional justice and democracy by referendum

3-24 June 1995

protection of fundamental rights by the Constitutional Court [7]

, 23-25 September 1995

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[1] *Associate member until its accession to the Council of Europe on 13 July 1995.*

[2] *Associate member until its accession to the Council of Europe on 9 November*

1995.

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

[4] *Also available in French.*

[5] *Speeches in the original language.*

[6] *Also available in Russian.*

class='MsoFootnoteReference'> ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ Strasbourg, 23-24 June 1995

›rotection of fundamental rights by the Constitutional Court [7]

ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ Brioni, Croatia, 23-25 September 1995

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[1] *Associate member until its accession to the Council of Europe on 13 July 1995.*

[2] *Associate member until its accession to the Council of Europe on 9 November 1995.*

[3]

All meetings took place in Venice unless otherwise indicated.

[4]

Also available in French.

[5]

Speeches in the original language.

[6]

Also available in Russian.

class='MsoFootnoteReference'>