

ODIHR Human Dimension Seminar
on Constitutional Justice,
Warsaw, 14-16 May 2008

**“The co-operation of the Venice Commission
with Constitutional courts”**

Speech by Mr Gianni BUQUICCHIO
Director, Secretary of the European Commission
for Democracy through Law (Venice Commission)
Council of Europe

Dear Ambassador Strohal,
Your Excellencies,
Ladies and gentlemen,

I would like to thank the organisers, in particular Ambassador Strohal, for having invited the Venice Commission to take part in this important event, which enables me to share with you the Commission's achievements in the field of Constitutional Justice. This topic is indeed at the heart of the Commission's activities.

[Venice Commission]

As many of you are aware, the Venice Commission is a consultative body of the Council of Europe in the field of constitutional law. Its real name - European Commission for Democracy through Law – reveals its purpose. However, as it meets in Venice, it is generally referred to as the “Venice Commission”.

The Commission is composed of members who give advice on draft constitutions and para-constitutional texts such as laws on the constitutional court, minority laws or electoral legislation. This advice is given on request by the member states and the organs of the Council of Europe. We have a fruitful history of co-operation with ODIHR, especially in the electoral field.

The Venice Commission was created in May 1990, immediately after the fall of the Berlin wall. Its first task was to help the countries that had just been liberated from the yoke of dictatorship draft new democratic constitutions.

[Living constitutions]

It is important that a constitution does not remain written on paper, nicely bound in leather and forgotten under the dust of time. We have all seen constitutions which are merely declaratory in nature and have no effect in real life.

The example that comes to mind is the Constitution of the Soviet Union, which set out an impressive list of human rights, few of which, if any, were ever applied.

We therefore seek another type of constitution – not merely a declaratory one, but a normative constitution, which is respected and which shapes the life of a country on a daily basis.

In other words, we seek constitutions that are alive, known to the people, respected by every policeman, respected by every judge and, of course, respected by the Parliament and the executive.

The Venice Commission continues to assist in the drafting of such constitutions, living documents which become the centrepiece of public life.

Mr Ambassador,

[Legitimacy of constitutional review]

How can we ensure that our constitutions, once adopted, remain relevant every day? A key answer is constitutional control. Such control is necessary to uphold the constitution against unconstitutional ordinary laws, which are of a lower rank. But who should exercise this control? It cannot, realistically, be exercised by Parliament, which – in any country - is unlikely to identify its own errors and which is even more unlikely to correct them. This control needs to be attributed to a court, which is independent from the legislative and executive powers.

But how can a court annul laws adopted by Parliament, which represents the sovereign people? As an answer, Kelsen proposed the establishment of specialised constitutional courts. By virtue of their

constitutionally guaranteed function, they provide the necessary legitimacy for constitutional review.

The trend in Europe, therefore, is to follow Kelsen's idea, to establish specialised courts with the function of constitutional control, which draw their legitimacy directly from the constitution, thus from the constituent power.

As a result, constitutional courts are composed in a different manner from ordinary courts. The concurrence of various powers in appointment procedure and a balanced composition ensures that the necessary equilibrium for constitutional control is reached.

[Venice Commission's co-operation with Constitutional Courts]

Consequently, it was only natural that the Commission turned to constitutional courts as the institutions where the implementation of constitutions can best be supported.

However, constitutional courts are often wary of co-operating with the executive in their own country as well as with intergovernmental organisations. The Commission faced reluctance to commit from some courts and at the beginning it was difficult to convince them that the Venice Commission is a reliable, independent partner.

Certainly, what mostly helped win this confidence was that the Venice Commission is itself composed of independent members, highly regarded as experts in constitutional law.

Many of them are in fact presidents or judges of constitutional courts. They saw from the inside how the Commission works and were able to inform others that there was certainly no danger for judicial independence from the Commission.

Over the years, the Venice Commission has thus proven that it fully respects the independence of constitutional courts fostering co-operation between them rather than advising how things should be done.

In practice, the co-operation of the Commission with the courts is steered by the Joint Council on Constitutional Justice, which is a mixed organ composed of liaison officers appointed by the courts and members of the Commission. Again, the direct implication of the courts in the work of the Commission was decisive for gaining and maintaining the confidence of the Courts.

[Venice Commission services]

The Joint Council has devised a number of services for the courts, which allow them to exchange information and to keep abreast of the

case law on critical questions of law which often arise simultaneously in different countries.

Since 1993, the liaison officers appointed by the constitutional courts contribute to the Commission's *Bulletin on Constitutional Case-Law* and the database CODICES, which inform about the important case-law of about 90 constitutional courts and equivalent bodies. CODICES already contains more than 5,000 judgments.

The regular issues of the Bulletin are supplemented by a series of special bulletins containing leading cases on specific topics usually prepared upon request by the Conference of European Constitutional Courts.

As a source of rapid information on recent case-law, we offer the so-called *Interim Bulletin* site, which presents the contributions of all courts from the day of their submission. For the same purpose - a quick information exchange between the courts - we provide the confidential on-line Venice Forum, which is often used by the liaison officers.

We also assist the rotating presidencies of the European Conference in keeping up-to-date information on the courts (lists of presidents, judges, secretaries general, liaison officers, court's addresses and web-sites).

In addition, the Commission updates in CODICES the constitutions and the laws on the courts as well as descriptions of the courts (setting out the composition, organisation, jurisdiction, nature and effects of decisions). This information allows the reader to put the different courts' case-law into context.

Upon request by the constitutional courts, the Venice Commission, also provides *amicus curiae* opinions which present aspects of comparative or international law relating to cases pending before a court.

Most importantly, from the viewpoint of the respect of the independence of the courts, the Commission does not give an answer to the question of the constitutionality of the challenged national act but limits its opinion to issues of comparative and international law. If need be, such *amicus curiae* opinions can also be given within a very short time, at least in a preliminary form.

Together with the courts, the Commission also runs a series of conferences, seminars and workshops, which cover both practical issues – such as case management, the budget of the courts or relations with the public – and topics relating to basic democratic principles, such as human rights, the separation of powers or the independence of the judiciary. Again, the requests for these events

and the topics dealt with always come from the courts. They are best placed to know their current needs.

[Regional co-operation]

I should mention that the Venice Commission's co-operation with constitutional courts and equivalent bodies is not limited to the European continent. The Commission not only co-operates with regional networks of constitutional courts abroad and supports their work but actively encourages their establishment. This exchange includes courts in the French speaking countries, in Southern Africa, in the Arab world, in Asia and in Latin America.

A key event will therefore be the First World Conference on Constitutional Justice on the topic "Influential Constitutional Justice – its Influence on society and on a Global Human Rights Jurisprudence", which we are organising in January 2009 in Cape Town in co-operation with the Constitutional Court of South Africa.

All these services, supporting the Courts and facilitating exchanges between them, contribute to the goal of strengthening them *vis à vis* other state powers.

Mr Ambassador,

Constitutional courts are sometimes criticised by Government or Parliament. In delicate cases, decisions which make reference to similar judgments given by courts in other countries or an *amicus curiae* opinion can reinforce a difficult judgement and may be a means to better resist such criticism.

[A living constitution and judicial activism]

An issue that is indeed often associated with the role of constitutional courts is how these courts are sometimes unfairly accused of what is known as “judicial activism”. This term is frequently used in a negative sense to describe the tendency of judges to go beyond Kelsen’s negative legislator. Constitutional courts repeatedly face such accusations and the oft-asked question of whether constitutional review by a constitutional court is really law or whether it should be considered politics.

As you well know, the relationship between the constitution and the constitutional court is what keeps the constitution alive. The constitutional court, in its role as the guarantor of the constitution, takes into account the historical context and bases itself on the wording of this document. In doing so, it develops the inherent values that are contained in the constitution by using the systematic or

teleological approach. This allows the constitution to remain a dynamic instrument that shapes the life of society and vice versa.

It is important to remember that the constitutional court's role in filling in legal gaps is legitimised by its constitutional obligation to ensure the functioning of the democratic institution. Its active role in fulfilling its mandate is crucial and this should not be confused with judicial activism, which would involve the court making its own legislative judgments.

['Punishment' of Constitutional Courts]

Notwithstanding this key role of constitutional courts for democracy, some of them have come under serious pressure with respect to decisions they have rendered. We have seen cases in the past, where for instance state powers have "punished" constitutional courts for delivering unwelcome decisions by not appointing new judges, thereby trying to "starve out" the court by pushing the number of remaining judges below the necessary quorum.

A recent example was that of Ukraine where Parliament had refused to appoint new judges to the Constitutional Court from its own quota and even to swear in those appointed by other state powers. The Court became inoperative. In a joint declaration, the Venice Commission and the Presidency of the Conference of European

Constitutional Courts, expressed their concern over the stalled process of the appointment.

This declaration pointed out that “in countries where it has been established [...] the constitutional court is an institution of crucial importance in ensuring the functioning of the various state bodies within constitutional limits. They have the key function of guaranteeing the respect for fundamental principles of democracy, the protection of human rights and the rule of law, which are also the basic standards of the Council of Europe [...].”

Following the formation of a new government in Ukraine a few months later, the political stalemate was resolved and Parliament took the necessary steps to ensure that all vacancies in the Court were filled.

Mr Ambassador,

[Conclusion]

We have seen that the Venice Commission has been able to establish a close co-operation with constitutional courts and equivalent bodies not only in Europe but also abroad. The basis for this co-operation is the respect for the independence of the courts by facilitating exchange and co-operation between them.

Over the years, the Commission has built up an impressive range of services at the disposal of the courts, which help them to uphold the constitution of their country and with it democracy, human rights and the rule of law.

The statutory independence of the Commission's own members and the fact that a number of them are constitutional judges was an indispensable asset in gaining the trust of the courts. We count on continuing and further developing this unique and fruitful co-operation.

Thank you very much for your attention.