

VENICE COMMISSION: COOPERATION WITH CONSTITUTIONAL COURTS



Venice Commission



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Venice Commission: Cooperation with Constitutional Courts

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Cover and layout: Documents and
Publications Production Department
(SPDP), Council of Europe

© Council of Europe, August 2017

Printed at the Council of Europe

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Introduction

The European Commission for Democracy through Law – more commonly known as the Venice Commission as it meets in Venice, Italy – is an advisory body of Council of Europe in the field of constitutional law. The Venice Commission is composed of independent experts, who are nominated by its 61 Member States and it provides opinions on constitutional matters in the large sense (including electoral law, human rights, institutional legislation – on the judiciary, ombudspersons, etc.). These opinions are provided upon request by its Member States, the organs of the Council of Europe or international organisations participating in its work (OSCE/ODIHR, EU).

■ Since its establishment in 1990, the Venice Commission saw cooperation with constitutional courts as essential in promoting constitutionalism, understood as the idea that all action by the state should be confined to the limits set by the constitution. Constitutional courts and equivalent bodies (constitutional councils and supreme courts exercising such jurisdiction) are pivotal in ensuring that all branches of power respect the constitution.

■ The Venice Commission tries to strengthen constitutional courts and equivalent bodies by providing various services for the courts and by directly supporting them when they come under undue pressure. This cooperation is steered by the Venice Commission's Joint Council on Constitutional Justice, which shapes the tools provided by the Commission that enable the exchange of information and cross-fertilisation between courts. These tools are the *Bulletin on Constitutional Case-Law*, the CODICES database and the Venice Forum. Upon request by the courts, the Venice Commission provides *amicus curiae* briefs.

■ While the Venice Commission is a European institution, it also extends some of these services – notably the CODICES database and the Venice Forum – to constitutional courts beyond its member states. The Venice Commission cooperates closely with regional and language-based groups of constitutional courts (European, African, Southern African, Asian, Ibero-American, New Democracies, Arab, French-speaking, Portuguese-speaking, Commonwealth/Common Law). Cooperation with these groups grew into the World Conference on Constitutional Justice, for which the Venice Commission acts as the Secretariat.



Joint Council on Constitutional Justice

In order to steer cooperation between the constitutional courts and the Venice Commission, the Venice Commission established the Joint Council on Constitutional Justice (JCCJ), which is composed of members of the Venice Commission and the liaison officers, appointed by the constitutional courts. The JCCJ has a double presidency, which means that its meetings are co-chaired. One of the chairs is a member of the Venice Commission, elected by the Commission at a plenary session and the other is a liaison officer, elected by the liaison officers during the meetings of the JCCJ. The mandates of the two co-chairs run for two years each.

The constitutional courts and councils and supreme courts with constitutional jurisdiction participating in the Joint Council thus have a very strong role in determining the Venice Commission's activities in the field of constitutional justice.

■ The geographical scope of the Joint Council covers the Venice Commission member states, associate member states, observer states and states or entities with a special cooperation status equivalent to that of an observer state (South Africa, Palestinian National Authority). Within the JCCJ, all participating courts – whether from member or observer states – benefit from the same type of cooperation. The European Court of Human Rights, the Court of Justice of the European Union and the Inter-American Court of Human Rights participate in the JCCJ as well.

■ The meetings of the JCCJ usually focus on the publication of the *Bulletin on Constitutional Case-Law*, the production of the CODICES database, the Venice Forum (Classic, Newsgroup, Observatory) and on the cooperation with regional and linguistic groups of constitutional courts as well as the World Conference on Constitutional Justice.

■ The meetings of the JCCJ are generally followed by a “mini-conference” on a topic in the field of constitutional justice, chosen by the liaison officers during which they present the relevant case-law of their courts (e.g. “Courageous Courts: Security, Xenophobia and Fundamental Rights” in 2017).

■ The JCCJ meets once a year, at the invitation of one of the participating courts (May 2017: Karlsruhe, Germany). Every third year, the JCCJ meets in Venice, either before or after a plenary session of the Venice Commission.



Bulletin on Constitutional Case-Law

The *Bulletin on Constitutional Case-Law*, first published in January 1993, contains summaries (*précis*) of the most important decisions sent by the constitutional courts or equivalent bodies that participate in the JCCJ. It is published three times a year in English and French and each issue contains important judgments handed down by the courts. The contributions to the *Bulletin* are supplied by liaison officers appointed by the courts themselves.

■ The regular issues of the *Bulletin* are supplemented by a series of special bulletins containing descriptions of the courts and important case-law on specific topics, often upon request by the Conference of European Constitutional Courts (2017: Constitutional Principles). A series on leading cases presents the basic decisions of the participating courts before the *Bulletin*'s inception in 1993.

■ The *Bulletin*'s main purpose is to encourage exchange of information between courts and help judges settle sensitive legal issues, which often arise simultaneously in several countries. It is also a useful tool for academics and all those with an interest in the field of constitutional justice. The dialogue between the courts via the *Bulletin on Constitutional Case-Law* benefits both longer established courts and courts which have been established more recently.

Database CODICES

The CODICES database contains summaries (*précis*) and full texts of around 9,000 decisions, mainly in English and French, but also in more than 40 other languages. All the special bulletins (see above) are also included in the CODICES database, as are the constitutions and the laws on the courts. CODICES is available at www.CODICES.coe.int. It is regularly updated to show recent case-law.

■ The case-law and the constitutions are indexed according to the Systematic Thesaurus. The JCCJ updates the Thesaurus to take account of new developments in constitutional case-law. The Thesaurus makes it possible to search the database under specific topics, such as freedom of expression, the powers of the Head of State or the rule of law.

■ The CODICES database greatly facilitates comparative research carried out by the courts, which can draw on approaches already adopted by other countries, particularly in the field of fundamental rights. The circulation of information is therefore a powerful cross-fertilisation tool that enables courts to draw inspiration from the constitutional practice of their counterparts in other countries. While the courts do not always refer to these foreign sources, the arguments they obtain through their comparative research in CODICES enriches national judgments.





Venice Forum

The Venice Forum is a widely used tool that allows liaison officers appointed by participating courts to quickly seek information from other courts. When a court has a case pending for which it requires comparative research, it will first carry out a search in the CODICES database. In addition to this search, the liaison officer of the requesting court may send a request to all other courts via the Venice Commission's Classic Venice Forum.

■ The Venice Forum site contains the archive of all such requests made since 1997, when the Classic Venice forum was established.

■ The restricted Venice Forum site also presents information on news agency dispatches and press articles relating to constitutional courts (Constitutional Justice Observatory).

■ The Venice Forum Newsgroup allows each court to inform the other courts about changes in their courts (e.g. appointments of presidents, introduction of new procedures) and important events (international conferences, etc).

Amicus curiae briefs

Upon request by the executive or the legislative powers in its member states, the Venice Commission provides legal advice on draft legislation or on legislation that is already in force.

■ The subject matter of these opinions can also be (draft) constitutional or legal provisions governing the work of the constitutional courts or equivalent bodies. In such cases, the Venice Commission's opinions usually advise that the courts' independence be strengthened and to introduce individual access to the courts. Sometimes, the constitutional courts themselves request opinions on draft legislation on the courts.

■ However, constitutional courts (or the European Court of Human Rights), may also request opinions on cases pending before them, which are then referred to as "*amicus curiae* briefs".

■ An *amicus curiae* brief by the Venice Commission provides information on comparative constitutional and international law issues. An *amicus curiae* brief therefore does not address the constitutionality of the act or law concerned in a given case before the requesting court.

■ The Venice Commission's role is therefore neither to address the specific cases pending before the requesting court nor to assess the constitutionality of domestic provisions. This is the national court's role.

■ For this reason, the Venice Commission asks courts in their request for an *amicus curiae* brief to formulate specific questions they would like the Venice Commission to answer.

■ A typical example of an *amicus curiae* brief is the one for the Constitutional Court of the Republic of Moldova on the Right of Recourse by the State against Judges (CDL-AD(2016)015). The case before the Constitutional Court of the Republic of Moldova concerned the constitutionality of Article 27 of the Moldovan Law no. 151 on Government Agent, which gives the State the right to recourse action against individuals (including judges) whose actions or inactions have caused or greatly contributed to violations of the European Convention on Human Rights found by a judgment of the European Court of Human Rights, by a friendly settlement imposed on the Republic of Moldova for a case pending before that Court or by a unilateral declaration of the Government of the Republic of Moldova.

■ The Constitutional Court of the Republic of Moldova had rendered a judgment in this case on 25 July 2016 taking into account most of the recommendations made by the Venice Commission in its *amicus curiae* brief. Notably, the Constitutional Court held that recourse action in itself was not contrary to the Constitution, as long as the independence of judges was guaranteed, since judicial independence is a prerequisite for the rule of law and a fundamental guarantee of a fair trial.

■ Other recent *amicus curiae* briefs include:

- ▶ *Amicus curiae* brief for the Constitutional Court of **Albania** on the Law for the temporary re-evaluation of Judges and Prosecutors (Vetting Law), adopted by the Venice Commission in December 2016:

[http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)036-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)036-e);

- ▶ *Amicus curiae* brief for the Constitutional Court of **Bosnia and Herzegovina** on the mode of election of delegates in the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina, adopted by the Venice Commission in October 2016:

[http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)024-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)024-e);

- ▶ *Amicus curiae* brief in the case of **Rywin v. Poland** (Applications Nos 6091/06, 4047/07, 4070/07) **before the European Court of Human Rights** (on Parliamentary Committees of inquiry), adopted by the Venice Commission in March 2014:

[http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2014\)013-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2014)013-e).



Seminars and conferences with the courts

In response to requests from a number of constitutional courts, the Commission has established a series of activities with these courts that include conferences and seminars (CoCoSem). Since 1990, these have been held *inter alia* in Armenia, Azerbaijan, Belarus, Bolivia, Bosnia and Herzegovina, Brazil, Croatia, Cyprus, the Czech Republic, Estonia, France, Germany, Georgia, Hungary, Italy, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Malawi, Mexico, Moldova, Montenegro, Peru, Poland, Romania, Russia, Slovakia, South Africa, Switzerland, Tajikistan, Ukraine and Uzbekistan. Topics have covered not only practical issues, such as case management or the budget of the courts and their relations with the public, but also topics relating to basic democratic principles, such as the separation of powers or the independence of the judiciary.

■ The purpose of conferences and seminars is to enable a direct dialogue between judges and staff of constitutional courts on topics of common concern. The exchange of information during these events not only leads to the cross-fertilisation of ideas and experiences between courts, but also empowers them as they learn about how other courts have overcome difficult situations.



Cooperation with regional and linguistic groups

Since 1996, the Venice Commission has established cooperation with a number of regional or language based groups of constitutional courts, in particular the Conference of European Constitutional Courts, the Association of Constitutional Courts using the French Language, the Southern African Chief Justices Forum, the Conference of Constitutional Control Organs of Countries of New Democracy, the Association of Asian Constitutional Courts and Equivalent Institutions, the Union of Arab Constitutional Courts and Councils, the Ibero-American Conference of Constitutional Justice, the Conference of Constitutional Jurisdictions of Africa and the Conference of Constitutional Jurisdiction of the Portuguese Speaking Countries. The purpose of this cooperation is to strengthen the court members of the groups in their task of safeguarding the supremacy of their constitutions.

By virtue of cooperation agreements with the Venice Commission, courts members of these groups are able to contribute their case-law to the COCICES database and the groups are represented in the JCCJ. Membership in these groups as well as direct participation in the work of the JCCJ entitles the courts to become members of the World Conference on Constitutional Justice (see below). In this context, the Venice Commission also cooperates with apex courts in the Commonwealth / Common Law countries.

World Conference on Constitutional Justice (WCCJ)

The World Conference on Constitutional Justice unites 109 constitutional courts and councils and supreme courts in Africa, the Americas, Asia, Australia/Oceania and Europe. It promotes constitutional justice – understood as constitutional review including human rights case-law – as a key element for democracy, the protection of human rights and the rule of law (Article 1.2 of the Statute).

■ Upon invitation by the Constitutional Court of the Republic of Lithuania, the 4th Congress of the World Conference on “*the Rule of Law and Constitutional Justice in the Modern World*” will be held in Vilnius, Republic of Lithuania, on 11-14 September 2017.

■ According to its Statute, the World Conference has three organs: the General Assembly, the Bureau and the Secretariat. The General Assembly is chaired by the Host Court of the Congress. The next host is the Constitutional Court of the Republic of Lithuania (September 2017). The presidency of the Bureau is ensured for one year by rotation between the groups. The Presidency of the Bureau is therefore not that of an individual court, but of a group of courts. According to the Statute of the World Conference on Constitutional Justice, the Venice Commission acts as its Secretariat.





■ The World Conference pursues its objectives through the organisation of regular congresses, by participating in regional conferences and seminars, by sharing experiences and case-law and by offering its good services to members, on their request (Article 1.2 of the Statute).

■ The main purpose of the World Conference is to facilitate judicial dialogue between constitutional court judges on a global scale. Due to the obligation of judicial restraint, constitutional court judges sometimes have little occasion to conduct a constructive dialogue on constitutional principles in their countries. The exchange of information and practice, which takes place between judges from various parts of the world in the World Conference, further reflection on arguments and promote the basic goals inherent to national constitutions. Even if these texts often differ substantially, discussion on the underlying constitutional concepts unites constitutional court judges from various parts of the world, committed to promoting constitutionality in their own country. Therefore, the global exchange of information and practice among courts in the World Conference enriches the judgments of participating courts.

■ As these judges sometimes find themselves in situations of conflict with other state powers due to decisions they had to hand down based on the constitution, being a part of the World Conference provides them with a forum that not only allows them to exchange information freely with their peers, but where judges from other countries can also offer moral support. This can be important in upholding constitutional principles, which the judges are called upon to defend in their line of work.

■ The Courts and Councils, members of and committed to the principles of the World Conference may see their membership suspended by the General Assembly of the World Conference in case of flagrant violation of these principles.

■ The following courts or councils have given written notification about their accession to the World Conference on Constitutional Justice to the Venice Commission, which acts as its Secretariat (status July 2017):



WCCJ members

- | | |
|---|--|
| <ol style="list-style-type: none"> 1. Albania, Constitutional Court 2. Algeria, Constitutional Council 3. Andorra, Constitutional Court 4. Angola, Constitutional Court 5. Armenia, Constitutional Court 6. Australia, High Court 7. Austria, Constitutional Court 8. Azerbaijan, Constitutional Court 9. Bahrain, Constitutional Court 10. Belarus, Constitutional Court 11. Belgium, Constitutional Court 12. Benin, Constitutional Court 13. Bosnia and Herzegovina, Constitutional Court 14. Brazil, Federal Supreme Court 15. Bulgaria, Constitutional Court 16. Burkina Faso, Constitutional Council 17. Burundi, Constitutional Court 18. Cambodia, Constitutional Council 19. Cameroun, Supreme Court 20. Canada, Supreme Court 21. Cape Verde, Constitutional Court | <ol style="list-style-type: none"> 22. Central African Republic, Constitutional Court 23. Chad, Constitutional Council 24. Chile, Constitutional Court 25. Colombia, Constitutional Court 26. Comoros, Constitutional Court 27. Congo (Brazzaville), Constitutional Court 28. Congo, Democratic Republic, Constitutional Court 29. Costa Rica, Constitutional Chamber of the Supreme Court 30. Côte d'Ivoire, Constitutional Council 31. Croatia, Constitutional Court 32. Cyprus, Supreme Court 33. Czech Republic, Constitutional Court 34. Denmark, Supreme Court 35. Djibouti, Constitutional Council 36. Dominican Republic, Constitutional Court 37. Ecuador, Constitutional Court |
|---|--|

38. Egypt, Supreme Constitutional Court
39. Estonia, Supreme Court
40. Ethiopia, Council of Constitutional Inquiry
41. Finland, Supreme Administrative Court
42. France, Constitutional Council
43. Gabon, Constitutional Court
44. Georgia, Constitutional Court
45. Germany, Federal Constitutional Court
46. Ghana, Supreme Court
47. Guinea, Constitutional Court
48. Guinea-Bissau, Supreme Court of Justice
49. Hungary, Constitutional Court
50. Indonesia, Constitutional Court
51. Israel, Supreme Court
52. Italy, Constitutional Court
53. Jordan, Constitutional Court
54. Kazakhstan, Constitutional Council
55. Korea, Republic, Constitutional Court
56. Kosovo, Constitutional Court
57. Kuwait, Constitutional Court
58. Kyrgyzstan, Constitutional Chamber of the Supreme Court
59. Latvia, Constitutional Court
60. Lithuania, Constitutional Court
61. Lebanon, Constitutional Council
62. Luxembourg, Constitutional Court
63. Macedonia, Constitutional Court
64. Madagascar, High Constitutional Court
65. Malaysia, Federal Court
66. Mali, Constitutional Court
67. Mauritania, Constitutional Council
68. Mauritius, Supreme Court
69. Mexico, Supreme Court
70. Mexico, Electoral Court of the Federal Judiciary
71. Moldova, Constitutional Court
72. Mongolia, Constitutional Court
73. Monaco, Supreme Court
74. Montenegro, Constitutional Court
75. Morocco, Constitutional Council
76. Mozambique, Constitutional Council
77. Namibia, Supreme Court
78. Netherlands, Council of State
79. Netherlands, Supreme Court
80. Nicaragua, Constitutional Chamber of the Supreme Court
81. Niger, Constitutional Court
82. Norway, Supreme Court
83. Pakistan, Supreme Court
84. Peru, Constitutional Court
85. Poland, Constitutional Tribunal
86. Portugal, Constitutional Court
87. Romania, Constitutional Court
88. Russia, Constitutional Court
89. Samoa, Supreme Court
90. São Tomé and Príncipe, Supreme Court / Constitutional Court
91. Senegal, Constitutional Council
92. Serbia, Constitutional Court
93. Seychelles, Supreme Court
94. Slovakia, Constitutional Court
95. Slovenia, Constitutional Court
96. South Africa, Constitutional Court
97. Spain, Constitutional Court
98. Swaziland, Supreme Court
99. Sweden, Supreme Administrative Court
100. Switzerland, Federal Court
101. Tajikistan, Constitutional Court
102. Tanzania, Court of Appeal
103. Thailand, Constitutional Court
104. Togo, Constitutional Court
105. Turkey, Constitutional Court
106. Uganda, Supreme Court
107. Ukraine, Constitutional Court
108. Uzbekistan, Constitutional Court
109. Zambia, Supreme



Support for Constitutional Courts under undue pressure

The main task of constitutional courts is to remove from the body of laws legislation that contradicts the constitution. In many countries, they also control action by the executive power and even review the constitutionality of final ordinary court judgments. These powers can bring about conflict with the political bodies, which adopted the measures that were found unconstitutional and removed by the constitutional courts.

— Therefore, constitutional courts are sometimes not only criticised for their judgments – which is legitimate – but also threatened by these powers, which employ various means against the courts: reduction of the court’s budget, adoption of legislation blocking the court’s work, refusal to appoint judges or purely political nominations to ‘capture’ the court. In a few cases, constitutional courts were even abolished outright.

— In such cases, the Venice Commission – or in urgent cases its President – adopt declarations or statements denouncing these practices. Upon request, the Venice Commission also provides opinions on legislation that allegedly threatens to block a court.

— Courts will request *amicus curiae* briefs from the Venice Commission when they fear that their judgments could bring about such pressure against them.



The Venice Commission

The Venice Commission – the full name of which is the European Commission for Democracy through Law – is an advisory body of the Council of Europe on constitutional matters. Its primary role is to provide legal advice to its member states and, in particular, to help states wishing to bring their legal and institutional structures into line with European standards and international experience in the fields of democracy, human rights and the rule of law. It also contributes to the dissemination and consolidation of a common constitutional heritage and provides “emergency constitutional aid” to states in transition.

MEMBERS STATES:

Albania (1996), **Algeria (2007)**, Andorra (2000), Armenia (2001), Austria (1990), Azerbaijan (2001), Belgium (1990), Bosnia and Herzegovina (2002), **Brazil (2009)**, Bulgaria (1992), **Chile (2005)**, **Costa Rica (2016)**, Croatia (1997), Cyprus (1990), Czech Republic (1994), Denmark (1990), Estonia (1995), Finland (1990), France (1990), Georgia (1999), Germany (1990), Greece (1990), Hungary (1990), Iceland (1993), Ireland (1990), **Israel (2008)**, Italy (1990), **Kazakhstan (2011)**, **Kosovo (2014)**, **Kyrgyzstan (2004)**, Latvia (1995), Liechtenstein (1991), Lithuania (1994), Luxembourg (1990), Malta (1990), **Mexico (2010)**, Republic of Moldova (1996), Monaco (2004), Montenegro (2006), **Morocco (2007)**, Netherlands (1992), Norway (1990), **Peru (2009)**, Poland (1992), Portugal (1990), **Republic of Korea (2006)**, Romania (1994), Russian Federation (2002), Serbia (2003), Spain (1990), Slovakia (1993), Slovenia (1994), San Marino (1990), Sweden (1990), Switzerland (1990), “The former Yugoslav Republic of Macedonia” (1996), **Tunisia (2010)**, Turkey (1990), Ukraine (1997), United Kingdom (1999), **USA (2013)**.

ASSOCIATE MEMBER:

Belarus (1994)

OBSERVER STATES:

Argentina (1995), Canada (1991), Holy See (1992), Japan (1993), Uruguay (1995)

PARTICIPATING INTERNATIONAL ORGANISATIONS:

European Union, OSCE/ODIHR

STATES WITH SPECIAL CO-OPERATION STATUS:

Palestinian National Authority (2008), South Africa (1993)

www.coe.int

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www.venice.coe.int/WCCJ

www.codices.coe.int

The Council of Europe is the continent's leading human rights organisation. It comprises 47 member states, 28 of which are members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. The European Court of Human Rights oversees the implementation of the Convention in the member states.



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