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MAARTJE DE VISSER*

**A Critical Assessment of the Role of the Venice
Commission in Processes of Domestic
Constitutional Reform†**

Since its inception in 1990, the services of the European Commission for Democracy Through Law—more commonly known as the Venice Commission—to advise and assist on constitutional reform projects have been engaged with a growing frequency, by both European and non-European states. This development means that the Venice Commission is rapidly becoming an actor of significance in constitutional engineering and, further, that its involvement in processes of constitutional change across different jurisdictions may generate convergence in national constitutional designs and approaches. This Article offers an analysis of the Venice Commission's performance of this role, using its recent participation in constitutional reform projects in Iceland, Tunisia, Belgium, and Hungary as case studies. More particularly, it questions whether the current approach of the Venice Commission—characterized by virtually unbridled flexibility and pragmatism—is still appropriate given its evolution into an internationally recognized, independent authority on constitutional matters. The Article argues that safeguarding, and ideally enhancing, the quality and acceptability of the opinions prepared by the Venice Commission for the benefit of national constitution makers calls for a more elaborate set of procedural rules governing its working methods and a greater degree of sophistication in identifying the shared constitutional standards used to evaluate constitutional changes contemplated by its member states. The Commission should further be more attentive to the implications of having a growing number of non-European states among its members and take measures to ensure that all its members are treated in a consistent fashion and with due regard for their equality in status as democratic nations.

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INTRODUCTION

On January 26, 2014, an overwhelming majority of the National Constituent Assembly of Tunisia approved the country's new constitution. Drafted in the aftermath of the Tunisian revolution, the constitution received considerable international critical acclaim, regarding the manner in which the text had been drafted and adopted as well as its content, notably the entrenchment of a host of fundamental rights and liberties.¹ Comparisons have inevitably been drawn with Egypt's new constitution and those of other Arab nations,² with the Tunisian text hailed as one of the most progressive in the region, providing the foundations for a modern and credible democracy.³ In accomplishing this feat, the constitution's drafters were assisted by the European Commission for Democracy Through Law, better known as the Venice Commission⁴—something that has, however, not been widely recognized. And the Tunisians are not alone. Since the Venice Commission's inception in 1990, its services to advise and assist on constitutional reform projects have been engaged with a growing frequency, by both European and non-European states. This development means that the Venice Commission is rapidly becoming an actor of significance in constitutional engineering and, further, that its involvement in processes of constitutional change across different jurisdictions may generate convergence in national constitutional designs and approaches. Somewhat surprisingly, however, the work of the Commission appears to have largely escaped academic notice.⁵ This neglect is all the more stark

1. See, e.g., Carlotta Gall, *Tunisian Constitution, Praised for Balance, Nears Passage*, N.Y. TIMES, Jan. 14, 2014, <http://www.nytimes.com/2014/01/15/world/africa/tunisian-constitution-praised-for-balance-nears-passage.html>; *Foreign Leaders Hail Tunisia's Constitution*, AL JAZEERA, Feb. 7, 2014, <http://www.aljazeera.com/news/africa/2014/02/foreign-leaders-hail-tunisia-constitution-201427144047687702.html>; *EU Hails Tunisia Political Process, Expresses Concern over Egypt*, EURACTIV, Feb. 11, 2014, <http://www.euractiv.com/east-mediterranean/eu-hails-tunisia-political-process-news-533413>.

2. On the political transformations in the Middle East, see, e.g., Sujit Choudhry, *Constitutional Transitions in the Middle East: Introduction*, 11 INT'L J. CONST. L. 611 (2013); John Liolos, *Erecting New Constitutional Cultures: The Problems and Promise of Constitutionalism Post-Arab Spring*, 36 B.C. INT'L & COMP. L. REV. 219 (2013).

3. See, e.g., U.N. Secretary-General, Statement on the Adoption of Tunisia's New Constitution (Jan. 26, 2014); Editorial, *Tunisia's Remarkable Achievement*, N.Y. TIMES, Jan. 28, 2014, <http://www.nytimes.com/2014/01/29/opinion/tunisias-remarkable-achievement.html>.

4. *The Venice Commission of the Council of Europe*, COUNCIL OF EUROPE/VENICE COMMISSION, http://www.venice.coe.int/WebForms/pages?p=01_Presentation.

5. Those articles and book chapters that do deal with the Venice Commission have typically been written by its individual members and tend to be descriptive rather than evaluative in nature; see, e.g., Giorgio Malinverni, *La reconciliation à travers l'assistance constitutionnelle aux pays de l'Europe de l'est : le rôle de la Commission de Venise*, 10 LES CAHIERS DE LA PAIX 207 (2004) (Fr.); Jacques Robert, *La Commission européenne pour la démocratie par le droit dite « Commission de Venise »*, in LA C.S.C.E. : DIMENSION HUMAINE ET RÈGLEMENT DES DIFFÉRENDS 255 (Emmanuel Decaux & Linos-Alexandre Sicilianos eds., 1993); Gianni Buquicchio & Pierre Gar-

given that formal changes to constitutional arrangements are generally on the rise.⁶

This Article highlights the responsibilities of the Venice Commission and the manner in which it pursues its principal objective of providing advice in constitution making. Part I traces the origins of this body and discusses how it has slowly but surely become a “genuine body providing internationally recognized and independent opinion” (*véritable instance de réflexion indépendante reconnue internationalement*).⁷ Part of the explanation can be found in the activism with which the Venice Commission has interpreted its mandate, while the possibility for non-European states to accede to its Statute has enabled its evolution into a truly transnational consultative body on constitutional matters. In Part II, I offer an in-depth exploration of the approach adopted by the Venice Commission when assisting countries contemplating changes to their constitutional arrangements. Focusing on its involvement in recent constitutional reform projects in Iceland, Tunisia, Belgium, and Hungary, the Article illustrates the flexibility that is currently characteristic of the Commission’s working methods, and demonstrates how this approach may inadvertently undermine the quality and usefulness of its assistance to national constitution makers. In Part III, I suggest ways in which this situation can be ameliorated. Subpart A focuses on changes to the Venice Commission’s Rules of Procedure, while Subpart B advocates moderation in identifying and articulating the yardsticks that it uses when evaluating proposed constitutional reforms. Finally, Subpart C considers how the Commission can deal with the ramifications of its geographical expansion.

I. UNDERSTANDING THE VENICE COMMISSION’S RISE TO PROMINENCE AS AN EXPERT CONSULTATIVE BODY ON CONSTITUTIONAL MATTERS

The Venice Commission can be said to have been the brainchild of Antonio La Pergola, who in the late 1980s, as Italy’s Minister for

rone, *L’harmonisation du droit constitutionnel européen : La contribution de la Commission européenne pour la démocratie par le droit*, 3 UNIFORM L. REV. / REVUE DE DROIT UNIFORME 323 (1998); Rudolf “Schnutz” Dürr, *The Venice Commission*, in INTERNATIONAL ENCYCLOPAEDIA OF LAWS: INTERGOVERNMENTAL ORGANISATIONS 151 (Jan Wouters ed., 2010).

6. See, e.g., the data on the promulgation of new constitutions collected in the context of the *Comparative Constitutions Project* of Zachary Elkins, Tom Ginsburg, and James Melton, available at <http://comparativeconstitutionsproject.org/ccp-visualizations/>; Justin Blount, *Participation in Constitutional Design*, in COMPARATIVE CONSTITUTIONAL LAW 38 (Tom Ginsburg & Rosalind Dixon eds., 2011) (noting that “[o]urs is an era of constitution-making”).

7. Jean-Charles Engel, *La Commission européenne pour la démocratie par le droit, dite « Commission de Venise »: cadre et acteur privilégiés de coopération en matière de justice constitutionnelle*, in MÉLANGES EN L’HONNEUR DU PROFESSEUR JEAN TOUSCOZ 867, 869 (2007).

European Affairs, mooted the setting up of a body devoted to cultivating respect for democracy and the rule of law.⁸ At his instigation, a conference was held in Venice in January 1990 in which all of the parties to the Council of Europe participated, with several countries from Central and Eastern Europe in attendance as observers. The outcome of the conference was an agreement to establish the Commission for Democracy through Law—referred to as the Venice Commission, after the Italian city where its meetings take place—under the aegis of the Council of Europe.⁹ This decision was largely inspired by the iconic fall of the Berlin Wall and the end of Communism in Central and Eastern Europe. Expecting, and also desiring, a regime change, the then-members of the Council of Europe were keen to facilitate democratic transition in those countries by setting up an institution devoted to providing assistance in restructuring constitutional arrangements.¹⁰

The Venice Commission's official nomenclature indicates the focus that this body is to adopt in its work.¹¹ In the words of one of its members:

[O]ne cannot have a true democracy without a suitable legal framework providing rules for the correct functioning of democratic institutions. It should also be noted that democracy is only true if the will of the people is properly expressed in the form of law. The adoption of legal form provides a guarantee against the arbitrariness of the exercise of power.¹²

More precisely, the Statute of the Venice Commission instructs it to enhance the mutual understanding of domestic legal systems in order to bring these systems closer, promote the rule of law and democracy,

8. Jeffrey Jowell, *The Venice Commission: Disseminating Democracy Through Law*, 24 PUB. L. 675, 675 (2001).

9. The initial agreement created the Venice Commission for a transitional two-year period, with the Council of Europe being invited to explore possibilities to include this body within its fold. The Council of Europe's Committee of Ministers officially established the Venice Commission with Resolution 90(6), adopted May 10, 1990.

10. This belief is clearly reflected in the original text of the Venice Commission Statute, with the first sentence of its first article declaring that the Commission was to cooperate with members and non-members of the Council of Europe, "in particular those of Central and Eastern Europe." Statute of the European Commission for Democracy Through Law, *being the Appendix to Council of Europe [CE], Comm. of Ministers [CM]/Res(90)6E, On a Partial Agreement Establishing the European Commission for Democracy Through Law*, 86th Sess., art. 1 (May 10, 1990) [hereinafter Venice Comm'n Statute (original)].

11. Cf. Revised Statute of the European Commission for Democracy Through Law, *adopted by CE, CM/Res(2002)3E, 784th Mtg. of the Ministers' Deputies*, art. 1 (Feb. 21, 2002) [hereinafter Venice Comm'n Statute].

12. Sergio Bartole, *Final Remarks: The Role of the Venice Commission*, 26 REV. CENT. & E. EUR. L. 351, 351 (2000).

and identify ways to improve the functioning of democratic institutions.

While the activities undertaken by the Venice Commission in pursuit of its objectives are multifaceted and diverse, three main planks may be identified. It should at the same time, however, be acknowledged that the different activities are mutually reinforcing and best conceived as situated along a continuum.

First, the Commission acts as a constitutional “helpdesk” providing assistance to individual countries as regards constitutional questions pertaining specifically to them. In line with the impetus for its establishment, it prepares opinions on (draft) constitutions and amendments as well as on legislation within the constitutional domain.¹³ The Venice Commission can furthermore provide guidance as to the correct interpretation of national constitutional provisions in force. Constitutional courts may request *amicus curiae* opinions, in which the Commission analyzes the constitutional issue at stake from a comparative and/or international perspective, while leaving it to the requesting court to determine whether the statute under review comports with the constitution. Besides constitutional courts, the Commission also makes itself available to national ombudsmen through *amicus ombud* opinions.

Secondly, the Venice Commission also deals with what it calls “transnational issues,” that is to say, constitutional matters whose relevance extends beyond any one state. On the one hand, the Commission organizes scientific seminars and conferences under the aegis of its University for Democracy (UniDem) program and the reports presented and discussed during these events are subsequently published as part of the Council of Europe’s *Science and Technique of Democracy* series. On the other hand, the Venice Commission draws up studies and reports on a wide range of salient constitutional matters. These reports can form the basis for the preparation of guidelines or codes of good practice, as has happened for instance with regard to the banning of political parties¹⁴ or holding of referendums,¹⁵ or they can serve as a springboard for the drafting of international conventions, with the framework convention for the protection of national minorities being the paradigmatic example.

The final type of activity targets the actual application of constitutional principles and values, and consists of cooperation with national constitutional courts and increasingly also with associations

13. This latter category covers laws governing the functioning of state institutions, dealing *inter alia* with constitutional courts, ombudsmen, and the exercise of human rights.

14. CE, Venice Comm’n, Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures, Doc. CDL-INF(2000)I (Dec. 10–11, 1999).

15. CE, Venice Comm’n, Code of Good Practice on Referendums, Doc. CDL-AD(2007)008rev (Mar. 16–17, 2007).

bringing together these judicial bodies on a regional or linguistic basis.¹⁶

Over the course of the past three decades, the Venice Commission has acquired a reputation as an authoritative consultative body on constitutionalism and democracy¹⁷ due to the interplay of a variety of factors. One of these pertains to its institutional design. The Venice Commission is charged with performing its mandate independently:¹⁸ while the governments of its member states each appoint two individuals to the Commission to actually carry out its various activities, these persons are explicitly required to “serve in their personal capacity” and they “shall not receive or accept any instructions.”¹⁹ This makes the Venice Commission a more palatable choice as an external participant in domestic constitution-making processes than foreign states or international financial institutions, who may be suspected of unwanted partisanship and placing their own interests before those of the constitution makers in question.²⁰ What is more, these individual Commission members should be persons of high standing as a result of their involvement with democratic institutions or through their contribution to the fields of law or political science, and may be assisted by external experts when such is considered necessary.²¹ With many leading professors of law and (former) constitutional court justices as members, the Venice Commission can readily tap into a wealth of constitutional knowledge and experience, which further enhances its attractiveness for constitutional framers seeking advice on, or international approbation of, their efforts.²²

There is next the issue of fortuitous timing: as we have seen, the Venice Commission was established just prior to the “burst of consti-

16. Cf. Venice Comm'n Statute, *supra* note 11, art. 3(4).

17. See, e.g., Wolfgang Hoffmann-Riem, *The Venice Commission of the Council of Europe—Standards and Impact*, 25 EUR. J. INT'L L. 579, 584 (2014); Eric Maulin, *Foreword* to ALAIN DE BENOIST, *BEYOND HUMAN RIGHTS: DEFENDING FREEDOMS* 9, 17 (2011). Other Council of Europe bodies—such as the Parliamentary Assembly, the Committee of Ministers, and the European Court of Human Rights (ECtHR)—also regularly express their appreciation for the work of the Venice Commission. See, e.g., Dean Spielmann, President of the ECtHR, Address at the Venice Commission's 100th Plenary Session (Oct. 10, 2014), available at http://echr.coe.int/Documents/Speech_20141010_OV_Spielmann_FRA.pdf (in French).

18. See also Venice Comm'n Statute, *supra* note 11, art. 1.

19. *Id.* Their term of office is four years, and this term may be renewed indefinitely.

20. See, e.g., Zaid Al-Ali, *Constitutional Drafting and External Influence*, in *COMPARATIVE CONSTITUTIONAL LAW*, *supra* note 6, at 77.

21. Venice Comm'n Statute, *supra* note 11, arts. 2, 5.

22. For example, in 1998 Albania's Constitutional Committee purposely sought (and obtained) the Venice Commission's imprimatur of the final draft of the country's new constitution “to lend the draft legitimacy and to neutralize [former president] Berisha's attempts to discredit it” (reported in *Constitutional Watch: Albania*, 7 E. EUR. CONST. REV. no. 2, 1998, at 2, 2).

tutionalization"²³ in Central and Eastern Europe.²⁴ Not only was it the first—and for a long time the only—international body dedicated exclusively to accumulating and dispensing constitutional thinking in that part of the world, it was immediately able to get to work and demonstrate its usefulness in practice. The manner in which it did so when its assistance was initially solicited—recall also the quality of its individual members—enabled the Venice Commission to establish a solid track record as a competent advisor on constitutional matters. This, in turn, has had an impact on the inclination of other nations to seek the Commission's opinion in appropriate cases or at least be associated with its work.

Another relevant factor in this context is the broad understanding that the Venice Commission has accorded to its mandate since its inception. It appreciated the need for a comprehensive approach to the provision of constitutional assistance, whereby attention should also be devoted to the practical implementation and operation of new constitutional arrangements to ensure that these are actually able to deliver the anticipated results. This entailed the Commission engaging in activities that were not envisaged by its founders and for which its Statute accordingly provided no clear legal basis, notably in the field of constitutional justice. Crucially, this overt display of activism has not attracted criticism; instead, the Commission has been commended for its prescience in recognizing the importance of "aftercare" services. This, in turn, has shaped the perception among stakeholders of the Commission as a valuable institution. What is more, proceeding in this manner has yielded strategic benefits: the perceived importance of quasi-constitutional legislation and constitutional practice ensures the Venice Commission's continued relevance even when formal constitutional changes are few and far between.

Finally, the geographical expansion of the Venice Commission both exemplifies and advances its reputation. Although the Commission was established by eighteen Western European member states, the 1990s were a decade of great eastward enlargement, with the accession of post-Communist states. A radical change was brought about in 2002, when the Committee of Ministers of the Council of Europe amended the Statute to allow non-European states to become

23. Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707, 715 (2001).

24. The body of literature on the democratic transitions in Central and Eastern Europe is vast. See, e.g., ADAM CZARNOTA ET AL., *RETHINKING THE RULE OF LAW AFTER COMMUNISM* (2005); *THE RULE OF LAW AFTER COMMUNISM: PROBLEMS AND PROSPECTS IN EAST-CENTRAL EUROPE* (Martin Krygier & Adam Czarnota eds., 1999); RUDOLF L. TÖKÉS, *HUNGARY'S NEGOTIATED REVOLUTION: ECONOMIC REFORM, SOCIAL CHANGE AND POLITICAL SUCCESSION* (1996); Lloyd Cutler & Herman Schwartz, *Constitutional Reform in Czechoslovakia: A Duobus Unum?*, 58 U. CHI. L. REV. 511 (1991).

full members of the Venice Commission.²⁵ Their decision was principally inspired by the interest expressed by many such countries in the latter's work, and clearly showcases the esteem in which the Venice Commission and its activities are held.²⁶ In part thanks to this change, the Commission's membership today stands at sixty.²⁷ The relaxation of the admission criteria has enabled the accession of countries in Africa (Morocco and Algeria joined in 2007, Tunisia followed suit in 2010); the Americas (Chile became a member in 2005, Peru and Brazil in 2009, and Mexico in 2010, with the United States being granted full membership in 2013); Central Asia (Kyrgyzstan was the first non-European country to accede in 2004, with Kazakhstan joining in 2012); East Asia (Korea became a member in 2006); and the Middle East (with Israel having acceded in 2008).²⁸ By the same token, as its membership grows, so too does the impetus for other countries to consider the prospect of partaking in the work of the Venice Commission. It will be interesting to see in particular whether the recent accession of the United States will have a knock-on effect.

The Commission's geographical expansion has important consequences. For one, it means that today it is no longer merely a pan-European institution. While not yet a fully-fledged global player, it can now be considered as properly international or transnational in stature. For another, the spate of accessions made possible by the 2002 amendment may eventually be the catalyst for reflections on the continued appropriateness of the Venice Commission's "European-ness," currently evident both in its official nomenclature and, to a considerable extent, also in its work, as will be elaborated below.

II. AN ANALYSIS OF THE INVOLVEMENT OF THE VENICE COMMISSION IN PROCESSES OF FORMAL CONSTITUTIONAL CHANGE WITH REFERENCE TO FOUR RECENT CASE STUDIES

The focus in this Part and the next will be on what can be considered the Venice Commission's archetypal activity, namely the provision of guidance at times when its member countries decide to

25. Article 4 of the Statute of the Council of Europe states that only "European" states are eligible to join this organization. Statute of the Council of Europe art. 4, *opened for signature* May 5, 1949, 87 U.N.T.S. 103, E.T.S. No. 001 (entered into force Aug. 3, 1949), *as amended* by E.T.S. Nos. 6, 7, 8, 11.

26. It has always been possible for non-member states to "benefit from the activities of the Commission." Venice Comm'n Statute, *supra* note 11, art. 3(3); Venice Comm'n Statute (original), *supra* note 10, art. 2(3).

27. During its 1202nd meeting (June 10–11, 2014), the Committee of Ministers of the Council of Europe accepted Kosovo's request to become the Commission's newest member.

28. In addition, Belarus holds the status of associate member and Argentina, Canada, the Holy See, Japan, and Uruguay are involved in the Commission's work as observers.

overhaul, revise, or introduce their constitution or quasi-constitutional statutes. To capture how the Commission goes about the performance of this core task demands an analysis that is informed by its recent practical experiences. To this end, this Article examines four case studies in considerable detail: Iceland, Tunisia, Belgium, and Hungary. These countries are all full members of the Venice Commission; and since the Commission's involvement in their respective domestic constitutional reform processes took place within the last five years, a contemporary account can thus be provided. The sampling of the countries further represents established (Belgium, Iceland), maturing (Hungary), and young democracies (Tunisia), which are moreover located in different corners of the Venice Commission's geographical sphere.

A. *The Provision of Constitutional Assistance: A Primer*

It is expedient to begin by briefly introducing the Venice Commission's working method, as this will serve as a useful reference point for the discussion of the four case studies to follow.

The Commission's Statute, drawn up by the Committee of Ministers of the Council of Europe, is virtually silent on the procedure that governs the preparation of opinions on draft constitutions and quasi-constitutional legislation. It only specifies which entities can engage the services of the Venice Commission.²⁹ The member states themselves have the possibility of doing so and are, unsurprisingly, responsible for the bulk of requests for guidance.³⁰ In addition, the other organs of the Council of Europe³¹ and international organizations³² may ask the Venice Commission to evaluate its members' (quasi-) constitutional documents. For countries deciding whether to join the Commission, they thus ought to be aware that the Venice Commission can—and sometimes does—pronounce on the merits of constitutional changes unasked or even against the wishes of the states in question. The Rules of Procedure formulated by the Venice Commission itself³³ are otherwise scant regarding its working method. Article 14 stipulates that “as a general rule,” one or more rapporteurs—chosen from the individual members appointed by the state governments—will be tasked with preparing a draft opinion on the constitutional arrangements under review, and that outside ex-

29. Venice Comm'n Statute, *supra* note 11, art. 3(2).

30. Each state decides for itself which domestic institutions are empowered to solicit the Commission's assistance. These normally include governments, individual ministries, and parliaments.

31. In practice, the Parliamentary Assembly and Secretary General regularly engage the services of the Venice Commission.

32. This notably includes the European Union, as provided by the Venice Comm'n Statute, *supra* note 11, art. 2(6).

33. *See id.* art. 4(4).

perts may be invited to join as advisors. Article 14a allows for the release of draft opinions to the requesting body in urgent cases so that it may take cognizance of the Venice Commission's views at a point in time when its recommendations can still be taken into account. Finally, the Rules of Procedure contain provisions governing the voting on and formal adoption of opinions as Venice Commission texts during one of the body's quarterly Plenary Sessions.³⁴

Somewhat curiously, neither the Statute nor the Rules of Procedure explicitly specify the standards that the Venice Commission—and initially its rapporteurs—should use when examining the quality of national (quasi-) constitutional texts. It would, however, be incorrect to conclude that the Venice Commission is unfettered in deciding on the yardsticks to be applied. The Statute of the Council of Europe proclaims one of its principal aims to be “safeguarding and realising the ideals and principles which are [the members'] common heritage,”³⁵ and as the Council's official advisor on constitutional affairs, this goal also informs the work of the Venice Commission. Indeed, the relevance of this concept for the Venice Commission is acknowledged in writings by a number of its (former) individual members and in several of its reports and studies.³⁶

The “common heritage” comprises three broad principles: respect for fundamental rights, democracy, and the rule of law. For these principles to be meaningful yardsticks, further concretization is necessary. This is accomplished in part through international conventions concluded under the aegis of the Council of Europe. For fundamental rights, the European Convention on Human Rights (ECHR) and the interpretation of its provisions by the Strasbourg Court are typically accorded pride of place; for democracy, reference is made *inter alia* to the organization of regular and free elections as guaranteed under the first Protocol to the ECHR. Another fruitful source of inspiration in fleshing out the common heritage is the national constitutions of the member states. These foundational texts

34. CE, Venice Comm'n, Revised Rules of Procedure arts. 12–13, Doc. CDL-AD(2013)031, *adopted at* 50th Plenary Sess. (Mar. 8–9, 2002), *as amended* 53rd Plenary Sess. (Dec. 13–14, 2002), 61st Plenary Sess. (Dec. 2–3, 2004), 96th Plenary Sess. (Oct. 11–12, 2013). Opinions are adopted by simple majority and require a quorum of a majority of Commission members.

35. See Statute of the Council of Europe, *supra* note 25, pmbl. ¶ 3, art. 1 (“the spiritual and moral values which are the common heritage of [its members'] peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy”).

36. See, e.g., Gianni Buquicchio & Pierre Garrone, *Vers un espace constitutionnel commun? Le rôle de la Commission de Venise*, in *LAW IN GREATER EUROPE: TOWARDS A COMMON LEGAL AREA; STUDIES IN HONOUR OF HEINRICH KLEBES 3* (Bruno Haller et al. eds., 2000); Bartole, *supra* note 12; Christos Giakoumopoulos, *La contribution du Conseil d'Europe aux réformes constitutionnelles : l'action de la Commission de Venise*, in *THE CONSTITUTIONAL REVISION IN TODAY'S EUROPE 695* (Giuliano Amato et al. eds., 2002); *THE CONSTITUTIONAL HERITAGE OF EUROPE* (SCIENCE AND TECHNIQUE OF DEMOCRACY, No. 18) (Venice Commission ed., 1996).

have been relied on by the Venice Commission to identify the right of enterprise, the separation of powers,³⁷ and the supremacy of the law as more specific review standards among other features.³⁸

The analysis of four case studies below demonstrates the considerable discretion that the Venice Commission possesses at present to organize its work, while also illustrating the existence of commonalities in the procedural steps usually taken. At the same time, it reveals that there are gratuitous inconsistencies in the manner in which the substantive evaluation of domestic constitutional texts is carried out and, in a related vein, highlights missed opportunities to give optimal guidance to national constitutional drafters.

B. Iceland: Overhauling the Postwar Constitution

One of the early European casualties of the recent global financial crisis was Iceland, which in late 2008 saw the complete meltdown of its banking system and the threat of national bankruptcy, necessitating a bailout by the International Monetary Fund.³⁹ The collapse of the country's economic and financial system precipitated the fall of the government in January of the following year, amidst public unrest and mass demonstrations. These events were the catalysts for a revision of the country's hastily drafted postwar constitution. As could be expected, any new text was expected to lay the foundations for restoring citizens' trust in state institutions and their functioning, as well as for safeguards that should reduce the likelihood of a repetition of calamities of this nature.

The preparation of a proposal for a new Icelandic Constitution was entrusted to a specially established twenty-five-member constitutional council.⁴⁰ In a move that has attracted considerable

37. Understood as the possibility of a democratic alteration of power. See Dominique Rousseau, *The Concept of European Constitutional Heritage*, in *THE CONSTITUTIONAL HERITAGE OF EUROPE* (SCIENCE AND TECHNIQUE OF DEMOCRACY, No. 18), *supra* note 36, at 16, 23–24.

38. The examination of national constitutional orders to identify elements of the common heritage is usually entrusted by the Commission's Plenary to a small working group, which draws up a study or report on a matter of general interest to this end. UniDem seminars provide an additional avenue for such work.

39. See, e.g., Simon Bowers, *Iceland Banking Collapse: Diary of a Death Spiral*, *GUARDIAN*, June 26, 2012, <http://www.theguardian.com/business/2012/jun/26/iceland-banking-collapse-diary-death-spiral>; Eric Pfanner, *Iceland Is All But Officially Bankrupt*, *N.Y. TIMES*, Oct. 9, 2008, <http://www.nytimes.com/2008/10/09/business/worldbusiness/09iht-icebank.4.16827672.html>.

40. Initially, it was envisaged that this work would be carried out by a popularly elected constitutional assembly, for which ordinary Icelanders could stand as candidates. See Proposition 90/2010 *Lög um stjórnlagaping* [Act on a Constitutional Assembly], June 25, 2010, arts. 1–5 (Ice.). Following the invalidation of the election by the *Hæstaréttar Islands* (Supreme Court of Iceland), the Icelandic parliament decided to appoint a constitutional council instead and offered the twenty-five candidates that had received the highest number of votes in the elections for the constitutional assembly a seat on this council.

attention,⁴¹ the council elicited the input of the public at large throughout its work,⁴² including through the extensive use of crowd-sourcing techniques via social media channels. The draft constitutional text produced by the council was submitted to the Icelandic parliament (the *Althingi*) and was subsequently presented to the population in a consultative referendum in October 2012, with two thirds of voters indicating that this draft should form the basis of a legislative bill for a new Icelandic Constitution. Following legal-technical revision and a few substantive changes to the council's proposal,⁴³ the Althingi's Constitutional and Supervisory Committee contacted the Venice Commission a month later, requesting its opinion on the bill setting out the proposed constitutional arrangements.⁴⁴ A working group was formed for this purpose comprising five rapporteurs: two professors of law (Jan Helgesen from Norway and Jean-Claude Scholsem from Belgium), two former constitutional court justices (Jacqueline de Guillenchmidt from France and Wolfgang Hoffmann-Riem from Germany), and the Danish Ombudsman (Jorgen Sørensen), all of whom were serving as members of the Venice Commission at that time. To enable an informed examination, the requesting parliamentary committee organized a two-day country visit in January 2013, during which the rapporteurs were able to discuss the constitutional text with the relevant Icelandic stakeholders. The rapporteurs finished their work the following month, and the Plenary of the Venice Commission debated and formally adopted its opinion on the draft Icelandic Constitution in March 2013.⁴⁵

41. See, e.g., Anne Meuwese, *Popular Constitution-Making: The Case of Iceland*, in THE SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 469 (Denis J. Galligan & Mila Versteeg eds., 2013); BALDVIN THOR BERGSSON & PAUL BLOKKER, *The Constitutional Experiment in Iceland*, in VERFASSUNGSGEBUNG IN KONSOLIDIERTEN DEMOKRATIEN: NEUBEGINN ODER VERFALL EINES POLITISCHEN SYSTEMS? 154 (Ellen Bos & Kálmán Pócza eds., 2013); H  lene Landemore, *Inclusive Constitution-Making: The Icelandic Experiment*, 22 J. POL. PHIL. 1 (2014).

42. Proposition 90/2010 L  g um stj  rnlagaping art. 20 (Ice.).

43. For instance, the constitutional council's draft did not define the Evangelical Lutheran Church as the national church, leaving this to be regulated by law, but the final text of the constitutional bill continues to guarantee it this status.

44. While some might speculate that there was a connection between this request and Iceland's application for European Union (EU) membership in July 2009, the parliamentary committee appeared motivated by purely domestic political factors. See CE, Venice Comm'n, Opinion 702/2013 on the Draft New Constitution of Iceland, Doc. CDL-AD(2013)010 (Mar. 8–9, 2013) ¶ 16; Sm  ri McCarthy, *Utopia Lost: Lessons from Iceland*, CONSTITUTIONUK (Jan. 21, 2014), <http://blogs.lse.ac.uk/constitutionuk/2014/01/21/utopia-lost-lessons-from-iceland/>. Secondly, the European Commission (which advises the other EU institutions on whether accession negotiations should be opened) had, by the time of the Venice Commission's opinion, already concluded that the preexisting political arrangements did not preclude Iceland's application for EU membership. *Commission Opinion on Iceland's Application for Membership of the European Union*, at 5, 7, COM(2010)62 (Feb. 24, 2010).

45. CE, Venice Comm'n, Opinion 702/2013 on the Draft New Constitution of Iceland, *supra* note 44.

While the Venice Commission applauded various elements of the proposal and the participatory character of the drafting process, there was also criticism. It expressed concern about the generality of the terms in which numerous provisions, including those guaranteeing fundamental rights, were cast, cautioning that a lack of precision “may lead to serious difficulties of interpretation and application.”⁴⁶ The Commission was furthermore apprehensive about the complexity of the institutional arrangements governing the relationship between parliament, the government, and the president, as well as about the modalities for public participation both during elections and through referendums. This, it feared, could bring with it “the risk of political blockage and instability, which may seriously undermine the country’s good governance.”⁴⁷ In view of upcoming parliamentary elections in Iceland, the Venice Commission finally suggested that the national authorities contemplate the possibility of just simplifying the procedure for constitutional revision at this juncture and deferring to the newly elected parliament the task of deliberating on the improvements to be made to the text of the new constitution. This is more or less what happened.⁴⁸ At the time of writing, the postwar Constitution of Iceland remains in force.

Reflecting upon the quality of the analysis of the bill for a new Icelandic Constitution, attention must first be drawn to the caveats formulated by the Venice Commission in the introduction to its opinion: we are told not to expect an in-depth analysis of the entire text submitted for scrutiny, but only “a technical-legal analysis . . . on the basis of the material provided,” while at the same time bearing in mind that “certain comments and omissions might be affected by problems of the translation.” The reasons for these provisos are two-fold. The rapporteurs felt considerable time pressure, as they knew that parliamentary elections were scheduled to take place in the spring of 2013. This meant that if the current Althingi was to benefit from their advice, the opinion had to be prepared expeditiously. In addition, since none of the rapporteurs could read or speak Icelandic, they had to rely on whatever documents were available in English; and while the requesting parliamentary committee had produced a

46. *Id.* ¶ 181.

47. *Id.* ¶ 183.

48. The Althingi was dissolved in late March without the constitutional bill having been put to a vote. It was instead agreed to alter the existing constitutional amendment procedure, without necessarily making it easier to revise the constitution. This move has been strongly criticized as a betrayal of the public will by Thorvaldur Gylfason, *Putsch: Iceland’s Crowd-Sourced Constitution Killed by Parliament*, VERFASSUNGSBLOG (Mar. 30, 2013), <http://www.verfassungsblog.de/en/putsch-icelands-crowd-sourced-constitution-killed-by-parliament-2>; Thorvaldur Gylfason, *Democracy on Ice: A Post-mortem of the Icelandic Constitution*, OPENDEMOCRACY (June 19, 2013), <https://www.opendemocracy.net/can-europe-make-it/thorvaldur-gylfason/democracy-on-ice-post-mortem-of-icelandic-constitution>.

translation of the text of the constitutional bill, only excerpts of the explanatory notes were translated.⁴⁹ While it was accordingly sensible for the Venice Commission to include the caveats just mentioned, we should also realize that these negatively affect the value and arguably also to some degree the legitimacy of the resulting opinion.

Notwithstanding the shortage of time, the Icelandic opinion relied on a wide range of sources from which the rapporteurs derived benchmarks for their substantive evaluation. As was to be expected, the discussion of the proposed human rights provisions was in part informed by the European Convention on Human Rights and related case law. The approach adopted seems rather peculiar, however. The case law of the Strasbourg Court is only mentioned concerning the issue of when human life begins, even though the relevant judgments do not identify the existence of common standards that must be followed by all parties to the Convention.⁵⁰ At the same time, when examining provisions on privacy protection and the media, the opinion contents itself with merely raising several questions that the Icelandic authorities may wish to reflect upon, thus ignoring—deliberately or otherwise—the rich jurisprudence of the Strasbourg Court, which provides useful indicia in relation to at least some of those questions.⁵¹

In analyzing other aspects of the proposed Icelandic Constitution, the opinion draws on the Venice Commission's studies and occasionally also on earlier opinions examining constitutional texts adopted by other countries. For example, the prerequisites formulated for the holding of referendums were endorsed for being in line with the guidelines set out in the Code of Good Practice on Referendums⁵² and, in a similar vein, the rapporteurs encouraged the Icelandic authorities to consider this Code "as a source of inspiration" when drafting the necessary implementing legislation. In contrast, relying on a 2010 report on judicial independence,⁵³ the Venice Commission concluded that prosecutors require legal provisions drafted

49. As regards the proposed human rights provisions, this defect was partially remedied through a memorandum prepared by a former member of Iceland's constitutional council, which added to the range of translated excerpts and corrected several translation errors in the initial sample.

50. See *Vo v. France*, 2004-VIII Eur. Ct. H.R. 67, 107 ¶ 82; *Tysiāc v. Poland*, 2007-I Eur. Ct. H.R. 219, 247 ¶ 107.

51. There is a wealth of case law on the protection of privacy and the role and responsibilities of the media under the Convention for the Protection of Human Rights and Fundamental Freedoms arts. 8, 10, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR]; see, e.g., DAVID HARRIS ET AL., HARRIS, O'BOYLE AND WARBRICK: LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS chs. 12, 14 (3d ed. 2014); ALASTAIR MOWBRAY, CASES, MATERIALS, AND COMMENTARY ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS chs. 10, 12 (3d ed. 2012).

52. CE, Venice Comm'n, Code of Good Practice on Referendums, *supra* note 15.

53. CE, Venice Comm'n, Report on the Independence of the Judicial System—Part 1: The Independence of Judges, Doc. CDL-AD(2010)004 (Mar. 12–13, 2010).

with specific reference to their profession and that the draft Icelandic articles premised on a unitary approach to safeguarding the independence of both judges and prosecutors needed to be reconceived accordingly. To illustrate the precedential value that the Commission accords to its own opinions, we can point to a reference to the 2008 opinion on Finland's new constitution in support of the finding that it is incongruous to have popular elections for the office of the president while simultaneously granting the holder of this post only marginal powers;⁵⁴ as another example, when discussing the Althingi's proposed competence to approve changes "in the church organization," the rapporteurs cited the Commission's earlier opinion on the new Hungarian law on freedom of religion and the status of churches⁵⁵ to caution the Icelandic authorities that this phrase should not be read as authorizing government interference in the internal organization of churches.

Lastly, scattered throughout the opinion we also encounter citations of constitutional practices adopted in other countries extraneous to the Venice Commission's previous opinions and reports that are held up to the Icelandic authorities as worthy of emulation. This occurs for instance in the recommendation to distinguish between the principle of equal treatment and the prohibition of discrimination, where the Finnish Constitution is praised as an example of a modern text that does just that;⁵⁶ likewise, there is mention of the German, Italian, and French pre-1962 regimes for presidential elections as a more suitable choice than direct popular election in view of the envisaged role for the Icelandic president.⁵⁷ At the same time, there are instances where the position adopted by the Venice Commission could have been helpfully substantiated by such comparative references but was not. To give just one example, the opinion is critical of the mechanism whereby the president's refusal to confirm a law adopted by the Althingi triggers a plebiscite on that legislation, because it considers that pitting parliament and the president against one another may damage either of these institutions. On two separate occasions, the opinion instead moots as preferable alternatives the idea of giving the president the right to refer legislation to a judicial body for scrutiny or creating a presidential veto that can be overridden by a qualified majority of parliamentarians. It fails, however, to make any reference to Poland, France, Portugal, or

54. CE, Venice Comm'n, Opinion 420/2007 on the Constitution of Finland, Doc. CDL-AD(2008)010 (Mar. 14–15, 2008) ¶¶ 40–43.

55. CE, Venice Comm'n, Opinion 664/2012 on Act CCVI of 2011 on the Right to Freedom of Conscience and Religion and the Legal Status of Churches, Denominations and Religious Communities of Hungary, Doc. CDL-AD(2012)004 (Mar. 16–17, 2012).

56. CE, Venice Comm'n, Opinion 702/2013 on the Draft New Constitution of Iceland, *supra* note 44, ¶ 9.

57. *Id.* ¶ 83.

Hungary, where the president may refer legislation presented to him for signature to the constitutional court for review⁵⁸—or, for that matter, to the constitutional systems in place in the Czech Republic, Italy, Estonia, or Finland, to name but a few, where the head of state has the right to return legislation to parliament for reconsideration.⁵⁹ Including such direct references to foreign constitutional models would have made it easier for the domestic authorities to understand and heed the Venice Commission's counsel in refining their new constitutional framework.

C. *Tunisia: Establishing a Constitutional Democracy*

In the wake of the Jasmine Revolution, which triggered the fall of President Zine el-Abidine Ben Ali in January 2011, Tunisia embarked on the journey to radically overhaul its political system to transition from repressive dictatorship to constitutional democracy. As a first step, elections were held in 2011 to determine the composition of the Tunisian National Constituent Assembly. This body, which comprised Islamists, leftists, and liberals, was mandated to draft a new constitution and appoint an interim government. Following a complex and lengthy constitution-making process—with the drafters conducting their work in a period of ongoing political and social upheaval⁶⁰—the members of the Constituent Assembly agreed on a final draft for a new Tunisian Constitution in the summer of 2013. The Assembly's speaker thereupon requested the Venice Commission to provide its legal assessment of this text at the earliest possibility, given the understandable urgency on the part of the Tunisian authorities to bring what had been an arduous drafting process to a successful conclusion.⁶¹

The task of drawing up the opinion was given to an unusually large working group of rapporteurs, made up of four professors of law (Guido Neppi Modona from Italy, Jean-Claude Scholsem from Belgium, Ben Vermeulen from the Netherlands, and Sergio Bartole from Italy), two sitting and two former judges (Slavica Banić from

58. KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [CONSTITUTION OF THE POLISH REPUBLIC] art. 122(3) (1997); 1958 CONST. art. 61 (Fr.); CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA [CONSTITUTION OF THE PORTUGUESE REPUBLIC] art. 278 (1976); MAGYARORSZÁG ALAPTÖRVÉNYE [FUNDAMENTAL LAW OF HUNGARY] art. 6(5) (2011).

59. Ústavní zákon č. 1/1993 Sb., Ústava České Republiky [Constitution of the Czech Republic] art. 50 (1992); Art. 74 Costituzione (It.); EESTI VABARIIGI PÕHISEADUS [CONSTITUTION OF THE REPUBLIC OF ESTONIA] art. 107 (1992); SUOMEN PERUSTUSLAKI [FINNISH CONSTITUTION], 731/1999, art. 77 (1999).

60. See, e.g., Zaid Al-Ali & Donia Ben Romdhane, *Tunisia's New Constitution: Progress and Challenges to Come*, ICONNECT BLOG (Feb. 20, 2014), <http://www.iconnectblog.com/2014/02/tunisias-new-constitution-progress-and-challenges-to-come/>.

61. In addition, the advisor to the Minister of Human Rights and Transitional Justice asked the Venice Commission in April 2013 to analyze the country's pre-revolutionary law concerning the Higher Committee for Human Rights and Fundamental Freedoms.

Croatia, Jean-Claude Colliard and Jacqueline de Guillenchmidt from France, and Wilhelmina Thomassen from the Netherlands), an Irish law reform commissioner (Finola Flanagan), and the former speaker of the Maltese House of Representatives (Michael Frendo).⁶² The rapporteurs completed their assessment of the proposed Tunisian Constitution in just over a month, and their draft opinion was endorsed by the Plenary of the Venice Commission in the middle of October 2013.⁶³

The opinion was generally positive about the compatibility of the draft Tunisian Constitution with democratic and fundamental rights standards, although it did identify certain topics that the constitution makers ought to attend to more closely. These included perceived inconsistencies in the organization of the state/religion relationship and the position of Islam and concerns about the scope of access to a new constitutional court. A perusal of the final text reveals that the Tunisian constitution makers heeded several, though not all, of the Venice Commission's suggestions before approving their country's new constitution in late January 2014.⁶⁴

As could be expected, the fact that the Tunisian opinion was drafted in a particularly short timeframe left its mark, in various ways, on both the legal advice itself and the procedure that preceded its adoption. For one, no country visit was scheduled and the Tunisian authorities failed to make observations in response to the rapporteurs' draft opinion. The significance of these departures from Venice Commission procedural "normalcy" for a meaningful exchange of views is, however, mitigated by the fact that the Venice Commission had been assisting the members of the National Constituent Assembly in various ways since the outset of the Tunisian constitution-making process.⁶⁵ For instance, four exchanges of views on drafts of the constitution and related quasi-constitutional legislation took place in 2012 and in that same year, several deputies of the Con-

62. The working group further comprised an external expert from the Congress of Local and Regional Authorities to assist with the analysis of the constitutional provisions concerning decentralization.

63. CE, Venice Comm'n, Opinion 733/2013 on the Final Draft Constitution of the Republic of Tunisia, Doc. CDL-AD(2013)032 (Oct. 11–12, 2013).

64. For instance, the initial text allowed only the president to refer legislative bills to the constitutional court for scrutiny. The Venice Commission considered this too restrictive, favoring extending access to the opposition (*id.* ¶¶ 175–76)—which is today provided for in Article 120 of the Tunisian Constitution (2014). Similarly, restrictions of fundamental rights must comply with the principle of proportionality according to Article 49, a requirement that was inserted following a recommendation to that effect by the Venice Commission (CE, Venice Comm'n, Opinion 733/2013 on the Final Draft Constitution of the Republic of Tunisia, *supra* note 63, ¶ 42).

65. To be clear, the Venice Commission was not the only organization providing constitutional assistance. Consider, e.g., WILBERFORCE SOC'Y, PROPOSED CONSTITUTIONAL FRAMEWORK FOR THE REPUBLIC OF TUNISIA (Riddhi Dasgupta & George Bangham chief eds., 2012), http://thewilberforcesociety.co.uk/wp-content/uploads/2012/09/Proposed_Constitutional_Framework_for_the_Republic_of_Tunisia5.pdf.

stituent Assembly took part in a study mission to the European Court of Human Rights in Strasbourg and to two of Germany's highest courts.⁶⁶ It stands to reason that this continuous engagement over the course of the drafting process reduced the need for extensive information gathering and feedback at the culmination of that process.

Time concerns also account for another deviation from routine Venice Commission practice: the size of the group of rapporteurs and their approach of dividing the work, with each rapporteur being responsible for evaluating only one or two chapters of the draft Tunisian Constitution instead of the text in its entirety. This is not the approach typically adopted—and for good reason, one might add, as the risk of inconsistencies in the substantive analysis and of missed opportunities for cross-reference looms large. In the specific case of the Tunisian opinion, there is an apparent lack of homogeneity concerning the reliance placed on the various types of legal text that supply the criteria for evaluating the merits of the draft constitution. To illustrate, we can contrast the analysis of the provisions governing constitutional revision with the discussion of the position of the office of the president. The part of the opinion dealing with the former topic is explicitly informed by a 2010 report on constitutional amendment,⁶⁷ the Venice Commission's earlier opinion on amendments to the Azerbaijan Constitution,⁶⁸ and an exhaustive list of countries whose foundational texts identify certain provisions and principles as "unamendable." In contrast, in the section devoted to the role of the president, not a single mention is made of previous opinions, foreign constitutional models or practices, or international texts. This is unsatisfactory, since the powers given to this office are rightly characterized as "far from negligible" and there are several European countries whose experience with the political difficulties associated with a bifurcated executive would have been illuminating for the Tunisian authorities (think for instance of France or the Czech Republic).

More generally, when comparing the Tunisian opinion with those examined in the other case studies, one is struck by the general dearth of references to Venice Commission texts and foreign constitutional models. This is problematic. As a rule, a solid empirical grounding enhances the objectivity and authority of the resultant opinion, and indirectly that of the authoring institution. In the case of Tunisia, the opinion unfortunately fails to make optimal use of available Commission documents to do just that. To give an example, on

66. CE, Venice Comm'n, Annual Report of Activities 2012, Doc. CDL-RA(2012)001, at 19, 46 (Aug. 2013).

67. CE, Venice Comm'n, Report on Constitutional Amendment, Doc. CDL-AD(2010)001 (Dec. 11–12, 2009).

68. CE, Venice Comm'n, Opinion 518/2008 on the Draft Amendments to the Constitution of the Republic of Azerbaijan, Doc. CDL-AD(2009)010 (Mar. 13–14, 2009).

several occasions the role and powers of the opposition are singled out as significant in establishing a well-functioning democracy without, however, drawing attention to a 2010 Venice Commission report that identifies several best practices as regards this topic.⁶⁹

In addition, we are here dealing with a country desiring to leave behind its authoritarian past to become a modern constitutional democracy, so more guidance and an indication of sources that can provide further inspiration to the drafters would have been apposite. To illustrate: the opinion welcomes as “clear democratic progress” the possibility for individuals to request that the court hearing their dispute refer questions concerning the constitutionality of the applicable legislation to a newly established constitutional court, but it recommends the introduction of a filter mechanism for fear that the court may otherwise be inundated by applications.⁷⁰ At this juncture, a succinct discussion of the different regimes governing the admissibility of preliminary references in jurisdictions such as France, Belgium, Italy, or Germany would have given lawmakers a better idea of the various ways in which such a filter can be designed.⁷¹ It is similarly curious that the opinion here makes no mention of the 2010 Venice Commission report on individual access to constitutional justice, which contains a wealth of information regarding the approaches taken by other member states concerning the ways in which individuals have access to court to obtain constitutional redress.⁷²

Following on from what has been said so far, the substantive analysis presented in the Tunisian opinion is comparatively shallow. Although almost every provision of the proposed constitution is covered, the opinion often limits itself to merely summarizing the content of the various articles—presumably because the rapporteurs felt these did not raise any questions from a democratic, fundamental rights, or rule-of-law perspective. It would have been better, and undoubtedly more useful for the Tunisian drafters, if the rapporteurs had opted for a more selective approach and devoted what limited time they had to providing a thorough legal analysis of those issues needing improvement in some form.

69. CE, Venice Comm’n, Report on the Role of the Opposition in a Democratic Parliament, Doc. CDL-AD(2010)025-e (Oct. 15–16, 2010).

70. CE, Venice Comm’n, Opinion 733/2013 on the Final Draft Constitution of the Republic of Tunisia, *supra* note 63, ¶¶ 178–80.

71. For discussion, see, e.g., MAARTJE DE VISSER, CONSTITUTIONAL REVIEW IN EUROPE: A COMPARATIVE ANALYSIS 132–40, 383–84 (2014).

72. CE, Venice Comm’n, Study 538/2009 on Individual Access to Constitutional Justice, Doc. CDL-AD(2010)039rev (Oct. 17–18, 2010).

D. Belgium: Amending the Rules for Constitutional Amendment

In 2012, the Venice Commission adopted for the first time an opinion in relation to the Belgian Constitution.⁷³ Unlike the previous two case studies, the Commission was in this instance not asked to provide an analysis of the entire text; instead, its involvement was confined to reviewing proposed changes to the provision setting out the constitutional revision procedure. These changes were intended to overcome the political gridlock over reforms to bring about a further federalization of the Belgian state⁷⁴ that had resulted *inter alia* in an extremely protracted coalition-building effort in the wake of the 2010 parliamentary elections. Relatedly, the amendment sought to respond to a constitutional court decision holding that the rules governing the arrangements for federal elections in two of the country's electoral districts breached the non-discrimination principle and upset the constitutional balance struck as regards political representation.⁷⁵ A political agreement was finally reached in late 2011 that proved acceptable to the various political parties, including two opposition parties. The implementation of this agreement, known as the Sixth State Reform,⁷⁶ required changes to various constitutional provisions, including those pertaining to the organization of federal and European Parliament elections, the bicameral system, and the range of competencies granted to the lower echelons of government. Amending the Belgian Constitution is no easy matter, however. The relevant provision, Article 195, envisages a three-stage process. First, both Houses of Parliament must initiate the revision procedure by adopting a declaration specifying which articles are eligible for amendment. This automatically triggers the second stage, which consists of the dissolution of parliament and elections. It is for the newly constituted Houses to, in the third stage, debate and adopt

73. CE, Venice Comm'n, Opinion 679/2012 on the Revision of the Constitution of Belgium, Doc. CDL-AD(2010)010 (June 15–16, 2012).

74. From its independence in 1830 until 1970, Belgium was a unitary, centralized state. In the 1970s, a process of state reform was initiated—prompted *inter alia* by a demand by Flemish-speaking Flanders for cultural autonomy and insistence by French-speaking Wallonia on autonomy in matters of economic governance—under which state powers have been allocated among three levels of government in an ongoing process of progressive federalization. See, e.g., 23 REGIONAL & FED. STUD. (SPECIAL ISSUE: THE FUTURE OF BELGIAN FEDERALISM) (2013).

75. Cour Constitutionnelle [CC] [Constitutional Court] decision no 73/2003, May 26, 2003, <http://www.const-court.be> (Belg.).

76. Accord institutionnel pour la sixième réforme de l'État, intitulé "Un État fédéral plus efficace et des entités plus autonomes [Institutional Agreement on the 6th State Reform, Entitled "A More Efficient Federal State and More Autonomous Entities"] (Brussels, Oct. 11, 2011). See, e.g., Min Reuchamps, *The Current Challenges on the Belgium Federalism and the Sixth Reform of the State*, in *THE WAYS OF FEDERALISM IN WESTERN COUNTRIES AND THE HORIZONS OF TERRITORIAL AUTONOMY IN SPAIN* 375 (Alberto López-Basaguren & Leire Escajedo San Epifanio eds., 2013).

the proposed changes by qualified majority.⁷⁷ The arduous nature of this procedure would ordinarily have meant that the enactment of the Sixth State Reform would be quite some time in the making, with concomitant risks that future political sensibilities might throw a spanner in the works. A creative solution was found: instead of applying the three-stage amendment process to the various constitutional provisions that would need to be changed to give effect to the political agreement, it was decided to amend the provision that outlines the constitutional revision procedure itself. More concretely, a transitional provision was to be inserted into Article 195 waiving the requirement to dissolve parliament as regarded an exhaustive list of changes to various constitutional articles that would together realize the implementation of the Sixth State Reform. The appeal of this solution stemmed from the fact that parliament in 2010 had adopted a declaration listing, amongst others, Article 195 as open for amendment—but not any of the articles that would be susceptible to alteration under the newly proposed transitional provision—and this declaration had been adopted prior to the elections held later that year. This meant that the first two hurdles of the ordinary revision process had already been cleared and that the current parliament would be able to effect the necessary changes to Article 195 immediately, acting by qualified majority.

Members of one of the opposition parties, however, considered that the envisaged amendment of Article 195 was not in conformity with the letter and spirit of the Belgian Constitution and furthermore was contrary to the rule of law.⁷⁸ They decided to lodge a complaint to this effect with the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe. The Assembly thereupon unanimously decided to forward the matter to the Venice Commission for evaluation.

We are thus dealing with an instance where, unlike in the Icelandic and Tunisian case studies, the government in question did not engage the Venice Commission. What is more, the Belgian government actively sought to prevent the Commission from taking up the matter: the Prime Minister sent a letter to the Parliamentary Assembly's Bureau asking it not to transmit the complaint to the Venice Commission and, when this did not yield the desired result, the government prepared a memorandum for the latter requesting it to

77. Both Houses of Parliament must adopt the amendment with a two-thirds majority, with the additional requirement that two-thirds of the members of parliament must be present at the vote.

78. They further considered that the amendment would bring about the unlawful suspension of the Belgian Constitution. See, e.g., *Kamer Past Grondwetsartikel 195 Aan en Zet Eerste Stap naar Staatshervorming*, KNACK.BE (Mar. 15, 2012), <http://www.knack.be/nieuws/belgie/kamer-past-grondwetsartikel-195-aan-en-zet-eerste-stap-naar-staatshervorming/article-normal-51705.html>.

"declare the complaint. . . with regard to Article 195 of the Belgian Constitution unfounded."⁷⁹ The government's eagerness to avoid external scrutiny of the suggested constitutional change can be explained by its apprehension that domestic political actors might seize upon any critical remarks made by outside observers as an opportunity to reopen the debate on the carefully wrought institutional agreement. Unsurprisingly, however, the Venice Commission did not accede to the government's request and appointed three rapporteurs to investigate the matter: Christoph Grabenwarter from Austria, Peter Paczolay from Hungary—both serving on their countries' respective constitutional courts—and Anne Peters from Germany, a professor of law. Their draft opinion was prepared without a country visit being conducted and, while the rapporteurs were admittedly apprised of the Belgian authorities' views through the unsolicited memorandum, they were accordingly deprived of exposure to the opinions of other stakeholders. This may have weakened their ability to provide as objective an assessment of the issue as possible.

As it happens, the final opinion was by no means unfavorable to the Belgian government. To start with, the Venice Commission was solicitous of the political predicament of the national authorities, clearly evident in several references to the rationale for the amendment under review.⁸⁰ The few critical notes that it sounds are moreover couched in decidedly mild language. While a greater degree of transparency as to the content and implications of the declaration initiating the constitutional revision process would have been "preferable" and "suitable,"⁸¹ it wrote, the severity of this shortcoming was considered to have been alleviated by the fact that "some indications were given about possible amendments . . . going beyond the list adopted [in the 2010 declaration]."⁸² Similarly, although a "longer formal procedure could have been envisaged in order to ensure proper debate"⁸³ on the amendment, the opinion quickly goes on to note that the pertinent substantive issues "had been discussed for a long time in other forums and outside the formal parliamentary procedure."⁸⁴

The reticence on the part of the Venice Commission to create problems for the Belgian authorities was furthermore aided by the

79. Belgian Gov't, Memorandum for the Attention of the Venice Commission, Doc. CDL-REF(2012)019 (May 16, 2012), at 4.

80. CE, Venice Comm'n, Opinion 679/2012 on the Revision of the Constitution of Belgium, *supra* note 73, e.g., ¶¶ 4, 72.

81. *Id.* ¶ 73.

82. *Id.* ¶ 54.

83. *Id.* ¶ 73. As the draft opinion recounts (CE, Venice Comm'n, Draft Opinion on the Revision of the Constitution of Belgium, Doc. CDL(2012)31* (June 1, 2012) ¶ 55), the procedure "lasted no longer than six days [with] a five hours long debate in the parliament before the final vote." This sentence does not appear in the final text of the opinion as adopted by the Plenary.

84. *Id.*

absence of firm common standards in relation to constitutional amendments. In their draft opinion, the rapporteurs relied heavily on the findings of a 2009 Commission study, which provided an overview of the rules for constitutional revision in force in the Council of Europe's member states and several other jurisdictions.⁸⁵ While purposely including observations amenable to "future assessments of the existing or draft rules on constitutional amendment," the aim of the 2009 study had not been to articulate best practices, let alone identify shared standards governing formal constitutional change, as that was considered to be "neither possible nor desirable." In assessing the merits of the Belgian revision procedure, the rapporteurs could thus with little difficulty conclude that this procedure was comfortably "within the corridor of diverse European approaches to this balancing exercise and do[es] not overstep the limits of legitimate legal solutions."⁸⁶ The Plenary Session of the Venice Commission endorsed their findings in mid-June 2012.⁸⁷ There was accordingly no need for the Belgian authorities to take any remedial action, which was just as well, given that the amendment in question had already entered into force by that time.

E. Hungary: Replacing the Constitution of Communist Vintage

Following the fall of communism in Hungary at the end of the 1980s, the country's "negotiated revolution"⁸⁸ to democracy took the form of a series of comprehensive amendments to the country's preexisting 1949 Stalinist constitution.⁸⁹ While plans to adopt a new foundational text were mooted at several occasions during the decades that followed, these never came to fruition, given the absence of parliamentary consensus. This changed following the 2010 parliamentary elections, which saw the Fidesz Party's ascent to power.

85. CE, Venice Comm'n, Report on Constitutional Amendment, *supra* note 67.

86. CE, Venice Comm'n, Opinion 679/2012 on the Revision of the Constitution of Belgium, *supra* note 73, ¶ 51. In fact, the rapporteurs seemed more concerned with the stringency of the normal amendment procedure than with its temporary relaxation. Regarding the former, they noted that while parliamentary consent in two consecutive legislative periods may enhance the democratic legitimacy of constitutional amendments, "it may in many situations turn out to be a severe impediment to sometimes urgent reforms and/or necessary fundamental reforms of the state" (*id.* ¶ 19). Conversely, the temporary procedure is explicitly stated to be in line with the approach adopted by most other European constitutions, with a greater degree of entrenchment considered to be the exception, not the rule and certainly not "a European standard" (*id.* ¶ 58).

87. CE, Venice Comm'n, Opinion 679/2012 on the Revision of the Constitution of Belgium, *supra* note 73, ¶ 71.

88. László Bruszt, 1989: *The Negotiated Revolution in Hungary*, in POST-COMMUNIST TRANSITION: EMERGING PLURALISM IN HUNGARY 30 (András Bozóki et al. eds., 1992).

89. For fuller discussion, see Andrew Arato & Zoltán Miklósi, *Constitution Making and Transitional Politics in Hungary*, in FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING 350 (Laurel E. Miller ed., 2010).

After a flurry of constitutional amendments—including one that curbed the jurisdiction of the constitutional court to review budget and tax legislation—the Fidesz Party announced plans to replace the existing constitution with a completely new document. An ad-hoc parliamentary constitution-drafting committee and a body of national consultation were accordingly appointed in late 2010. In February of the following year, the Hungarian authorities turned to the Venice Commission for advice—not seeking its views on the merits of the draft text, but instead asking for guidance on three specific legal issues faced by the Hungarian drafters.⁹⁰ This task was entrusted to three law professors (Hanna Suchocka from Poland, Kaarlo Tuori from Finland, and Jan Velaers from Belgium), one sitting and one retired constitutional justice (Christoph Grabenwarter from Austria and Wolfgang Hoffmann-Riem from Germany, respectively). Shortly after receiving their mandate, the rapporteurs travelled to Hungary for an exchange of views with affected political actors and representatives of civil society. The opinion, which was eventually adopted by the Plenary in late March 2011,⁹¹ emphatically maintained that it should not be treated as providing an analysis of substantive constitutional provisions—not least because the Venice Commission received the proposed text of the new Hungarian Constitution only after the rapporteurs had concluded their work. That said, the Commission did not content itself with providing the domestic authorities the requested guidance. It also used the opportunity to make abundantly clear its concern about the amendment circumscribing the scope for constitutional adjudication as well as the manner in which the constitution-making process was being conducted, noting

the lack of transparency of the process and the distribution of a public draft of the new Constitution only on 14 March 2011, a few weeks before its planned adoption, shortcomings in the dialogue between the majority and the opposition, the insufficient opportunities for an adequate public debate on such a fundamental process, and its very limited timeframe.⁹²

90. Namely, whether to enshrine the provisions of the EU Charter of Fundamental Rights in the constitution; who should be able to request the constitutional court to conduct *a priori* reviews of bills and the effects of constitutional rulings in this context; and finally, whether the European constitutional heritage would permit the introduction of conditions restricting individuals' direct access to the constitutional court.

91. CE, Venice Comm'n, Opinion 614/2011 on Three Legal Questions Arising in the Process of Drafting the New Constitution of Hungary, Doc. CDL-AD(2011)001 (Mar. 25–26, 2011).

92. *Id.* at 13.

On several occasions, the opinion accordingly exhorted the Hungarian authorities to ensure that so-called core democratic standards such as transparency and pluralistic debates were adhered to.

The Venice Commission's involvement in Hungary's constitutional transformation would not be confined to this episode, however. After the final draft of what is today officially known as Hungary's Fundamental Law⁹³ was placed before that country's parliament for adoption, it was the Parliamentary Assembly of the Council of Europe that—as it had done in the Belgian case study—asked the Venice Commission to review this text.⁹⁴ Moreover, when Hungary in later months adopted a string of laws fleshing out various constitutional provisions as well as several amendments to the new Fundamental Law, a number of these were also referred to the Venice Commission for assessment—sporadically at the request of the Hungarian government,⁹⁵ but more commonly by other organs of the Council of Europe.⁹⁶ Thus, differently from the Tunisian experience, we see that the promulgation of the new Hungarian Constitution was in effect the trigger for, rather than the culmination of, the Venice Commission's ongoing engagement with Hungary's reform process.

It should be mentioned that the developments in Hungary did not only attract the attention of Council of Europe bodies; several European Union (EU) institutions also expressed their disquiet about the perceived backsliding of one of their member states in upholding classic constitutional values. In 2011, the European Commission indicated that it would “closely monitor developments related to Hungary's new constitution following a number of concerns expressed by the Council of Europe, Members of the European Parliament and others.”⁹⁷ This gave rise, *inter alia*, to an ongoing dialogue between the Commission and the Hungarian authorities about the compatibil-

93. For a comprehensive analysis, see, e.g., CONSTITUTION FOR A DISUNITED NATION: ON HUNGARY'S 2011 FUNDAMENTAL LAW (Gábor Attila Tóth ed., 2012); Andras Jakab & Pal Sonnevend, *Continuity with Deficiencies: The New Basic Law of Hungary*, 9 EUR. CONST. L. REV. 102 (2013).

94. CE, Venice Comm'n, Opinion 621/2011 on the New Constitution of Hungary, Doc. CDL-AD(2011)016 (June 17–18, 2011).

95. E.g., CE, Venice Comm'n, Opinion 662/2012 on Act CCIII of 2011 on the Elections of Members of Parliament of Hungary, Doc. CDL-AD(2012)012 (June 15–16, 2012); CE, Venice Comm'n, Opinion 664/2012 on Act CCVI of 2011 on the Right to Freedom of Conscience and Religion and the Legal Status of Churches, Denominations and Religious Communities of Hungary, *supra* note 55.

96. E.g., CE, Venice Comm'n, Opinion 665/2012 on Act CLI of 2011 on the Constitutional Court of Hungary, Doc. CDL-AD(2012)009 (June 15–16, 2012); CE, Venice Comm'n, Opinion 668/2012 on Act CLXII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and Other Prosecution Employees and the Prosecution Career, Doc. CDL-AD(2012)008 (June 15–16, 2012); CE, Venice Comm'n, Opinion 671/2012 on the Act on the Rights of Nationalities of Hungary, Doc. CDL-AD(2012)011 (June 15–16, 2012).

97. Press Release, Eur. Comm'n, European Commission Launches Accelerated Infringement Proceedings Against Hungary over the Independence of Its Central Bank and Data Protection Authorities as well as over Measures Affecting the Judiciary

ity with EU law of several new laws and changes to existing legislation adopted pursuant to the implementation of the Fundamental Law.⁹⁸ The Commission eventually took Hungary to the Court of Justice of the European Union over the lack of independence of its data protection authority and the status of the judiciary.⁹⁹ For its part, the European Parliament contemplated activating the procedure laid down in Article 7 of the Treaty on European Union (TEU),¹⁰⁰ which can result in the suspension of a member state's rights under EU law in the event of (risks of) serious encroachments upon the Union's foundational values—including democracy, the rule of law, and respect for human rights. Such a move was, however, politically unpalatable for the Council, which comprises representatives of the member states and holds decision-making power in the context of Article 7. The "Hungarian problem" threw into sharp relief the inadequacy of the current EU framework to take action when there is a legitimate fear that changes to a member state's constitutional order may not sit comfortably with the Union's foundational values. This has prompted serious reflection on the part of the Union's political institutions to develop a more sophisticated set of legal tools to enforce the member states' commitment to these common values,¹⁰¹ with the European Commission in early 2014 proposing a new EU Rule of Law Framework to this end.¹⁰²

Returning to the Venice Commission's opinion on Hungary's Fundamental Law, the initial examination of this text was sensibly entrusted to the same rapporteurs who had prepared the earlier advice, and they partook in another two-day country visit to collect further observations from various stakeholders in the spring of 2011.

(Jan. 17, 2012) (IP/12/24), available at http://europa.eu/rapid/press-release_IP-12-24_en.htm.

98. See, e.g., Press Release, Eur. Comm'n, Statement of the European Commission on the Situation in Hungary on 11 January 2012 (Jan. 11, 2012) (MEMO/12/9), available at http://europa.eu/rapid/press-release_MEMO-12-9_en.htm.

99. Case C-286/12, Comm'n v. Hungary, ECLI:EU:C:2012:687. On this case, see Uladzislau Belavusau, *On Age Discrimination and Beating Dead Dogs*, 50 COMMON MKT. L. REV. 1145 (2013); Case C-288/12 Comm'n v. Hungary, ECLI:EU:C:2014:237. The European Commission lacks the authority to initiate infringement proceedings directed at (provisions in) a country's constitution if no clear link with the EU can be established.

100. Resolution of 16 February 2012 on the Recent Political Developments in Hungary, EUR. PARL. DOC. P7_TA(2012)0053 (2012) § 7; Treaty on European Union art. 100, 2012 O.J. (C 326) 13 (last consolidated Oct. 26, 2012) [hereinafter TEU].

101. See, e.g., José Manuel Barroso, President, European Comm'n, State of the Union 2012 Address (Sept. 12, 2012), available at http://europa.eu/rapid/press-release_SPEECH-12-596_en.htm; Press Release, Council of the European Union, 3244th Council Meeting, Justice and Home Affairs (June 6–7, 2013), Doc. 10461/13, at 14 (Fundamental Rights and the Rule of Law—Council Conclusions), available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/137407.pdf.

102. *Communication from the Commission to the European Parliament and the Council: A New EU Framework to Strengthen the Rule of Law*, COM (2014)158 final/2 (Mar. 19, 2014).

They rightly refrained from striving to be comprehensive in their examination, thus avoiding the trap that the Tunisian working group fell into. The rapporteurs' choice to provide "substantial insights with regard to some selected points" partially accounts for the overall critical tone of the opinion. While the Venice Commission welcomed Hungary's efforts to draft a constitution in line with the Council of Europe's bedrock values of democracy, the rule of law, and the protection of fundamental rights, it expressed unease about a range of constitutional issues. Prominent among these is the very extensive use of organic legislation to regulate a multitude of societal matters in considerable detail, requiring a two-thirds majority in parliament instead of the simple majority needed to pass ordinary legislation. The Venice Commission's concern here was twofold. In some domains, such as the functioning of the regular judiciary and the system for fundamental rights protection, the constitution itself ought to be more specific, instead of leaving it to organic laws (referred to as "cardinal laws" in the Hungarian Fundamental Law) to flesh out essential guarantees. Conversely, requiring relatively mundane matters such as family or social and taxation policy to be dealt with in organic legislation may detract from the future relevance of elections, as it will be more difficult for a new legislature to change policies put in place by its predecessors due to the high voting threshold, something that may ultimately jeopardize "the principle of democracy itself."¹⁰³ At the same time, in a valiant effort to keep open the channels of communication, the Venice Commission noted that some of its concerns could be addressed during the subsequent adoption of legislation enacted to give further effect to the Fundamental Law and said that it "[stood] ready to assist the Hungarian authorities in this process upon their request"—an offer that, as we have seen, has sporadically been accepted.¹⁰⁴

Given the opinion's critical tone, it is only proper that the rapporteurs made every effort to bolster their analysis with ample references to Council of Europe and Venice Commission texts (both reports and earlier opinions) and foreign constitutional models, thereby making it the most cogent and articulate of all the opinions canvassed in this article. Particularly noteworthy are the frequent citations of the ECHR and Strasbourg case law, including when the opinion acknowledges that this case law does not as yet lay down binding standards—for instance, as regards the legal recognition of same-sex relationships. While those references might therefore be considered premature, the better view is to appreciate that by including them, the Venice Commission alerts the Hungarian authorities to

103. CE, Venice Comm'n, Opinion 621/2011 on the New Constitution of Hungary, *supra* note 94, ¶ 24.

104. *Id.* ¶ 150.

the fact that the body of common standards is evolving and expanding; and that keeping abreast of ECHR developments when interpreting and applying their new Fundamental Law will be instrumental in avoiding possible future convictions in Strasbourg. Seen in this light and more generally, the Hungarian opinion clearly showcases the Venice Commission's broad understanding of its mandate: ensuring the conformity of both a country's constitution and its operationalization with transnational constitutional standards.

The rapporteurs should also be commended for endeavoring to take due account of the local Hungarian context—in marked contrast to the purely “technical-legal analysis” provided in the Icelandic opinion and the rather superficial evaluation contained in the Tunisian advice. In its opening sections, the second Hungarian opinion notes that the Hungarian Constitution “contains a number of particular variations of European guarantees . . . [most of which] are linked to national traditions and identity.”¹⁰⁵ At the same time, the Venice Commission is reluctant to allow appeals to national identity to serve to immunize constitutional arrangements from its scrutiny: “while a number of these special guarantees may be seen as part of national constitutional autonomy, other guarantees must be analysed in the light of European standards.”¹⁰⁶ This is most apparent in its critical evaluation of the reliance on organic legislation to further flesh out the Hungarian Fundamental Law. While acknowledging that reliance on such legislation had long been a part of the Hungarian constitutional tradition and that several other countries also make use of organic laws, the Venice Commission nevertheless found—as we saw earlier—that the Fundamental Law envisages too extensive a use of organic legislation, which is liable to compromise the principle of democracy. It should be clear that the Venice Commission's approach to scrutinizing elements pertaining to a country's national identity is sound in principle; its role and influence would be compromised if it were to systematically exempt such features from a check for compatibility with common standards, when these exist. This holds in particular in situations where the request for an opinion does not emanate from the national authorities in question, who may have their own reasons for keeping domestic constitutional arrangements away from prying eyes. It does however bring to the fore a fundamental question relevant not only for the Venice Commission, but also for other non-national entities evaluating domestic constitutional reforms: how much scope should be allowed for national particularities? This issue will be explored in greater detail in Part III.B below, focusing specifically on the scope *ratione materiae* and

105. *Id.* ¶ 19.

106. *Id.*

detail of the transnational standards used by the Venice Commission in its opinions.

III. EVALUATING THE VENICE COMMISSION'S PERFORMANCE IN PROVIDING CONSTITUTIONAL ASSISTANCE

The above case studies illustrate the manner in which the Venice Commission goes about advising constitution-making societies. It is important to recognize that its opinions lack binding force. Yet, incentives other than legal enforceability buttress the *de facto* effectiveness of Commission opinions. These include the threat of moral disapprobation by other states or, formulated in more positive terms, the desire on the part of the country requesting constitutional guidance to be seen as a proper member of the international community of democracies committed to the rule of law and fundamental rights.¹⁰⁷ Furthermore, other organizations that do possess the power to compel state action may rely on the suggestions for improvement and criticisms of envisaged constitutional reforms identified by the Venice Commission in the exercise of that power. At present, this applies most notably to the European Union.¹⁰⁸ The European Commission regularly refers to Venice Commission opinions when assessing whether candidates for accession to the EU meet the political prerequisites for membership.¹⁰⁹ In addition, in the Hungarian saga discussed earlier, the Commission and the European Parliament relied on the Venice Commission's opinions concerning Hungary's new Fundamental Law, amendments thereto, and quasi-constitutional laws. A press release by the Commission states that there is an expectation that "the Hungarian authorities will take due account of [the Venice Commission's opinion on the fourth amendment to the Fundamental Law] and address it in full accordance with both European Union and Council of Europe principles, rules and values."¹¹⁰ Even more forceful is the Parliament's resolution, which "[u]rges the Hungarian authorities to . . . implement as swiftly as possible the following recommendations, in line with the recommendations of the Venice Commission, with a view to fully complying

107. Cf. Hoffmann-Riem, *supra* note 17, at 591.

108. Other Council of Europe bodies—such as the Parliamentary Assembly and the European Court of Human Rights—also take note of and use Venice Commission opinions in the course of their activities.

109. See, e.g., Eur. Comm'n, Commission Staff Working Document: Montenegro 2013 Progress Report, at 5, 36, SWD (2013) 411 final (Oct. 16, 2013). The conditions for membership are laid down in Articles 2 and 49 of the TEU, *supra* note 100.

110. Press Release, Eur. Comm'n, The European Commission Reiterates Its Serious Concerns over the Fourth Amendment to the Constitution of Hungary (Apr. 12, 2013) (IP/13/327), available at http://europa.eu/rapid/press-release_IP-13-327_en.htm.

with the rule of law and its key requirements.”¹¹¹ As the Venice Commission’s reputation continues to flourish and its membership and activities expand beyond Europe’s shores, it cannot be excluded that in the future other organizations that take an interest in national constitution-making processes will be similarly inclined to consider its opinions as a source of empirical or even normative guidance.¹¹²

As such, although the Venice Commission insists that its opinions are intended to be suggestive rather than prescriptive, this view may not always correspond to what happens in reality. This makes concerns about the manner in which it goes about providing constitutional advice salient. Amongst other things, there is at present no comprehensive procedural framework regulating the exercise of this task (Subpart A); the identification and articulation of the standards that the Venice Commission uses would benefit from a greater degree of sophistication (Subpart B); and it ought to seriously reflect on the implications of its rapid expansion in membership, especially the participation of non-European states, for its work (Subpart C).

A. *More Detail in Procedural Guarantees*

Some ten years ago, a former vice-president of the Venice Commission observed that there is “no formalism in the procedures” (*“aucun formalisme dans les procédures”*).¹¹³ His comment continues to ring true today: there is still a dearth of regulations addressing the Commission’s working method. This state of affairs has not come about by accident. At its inception in 1990, there was a keenly perceived need for procedural flexibility in order to mold the working method to suit the requirements of the particular country requesting advice. Some three decades on, however, a strong argument can be made that the merits of this initial attitude are outweighed by a combination of reasons that militate in favor of a comprehensive procedural framework to govern the Commission’s functioning. Put differently, the scarcity of procedural regulations is no longer properly considered as one of the strengths of the Commission’s working method, but better conceived as a weakness in want of remedial action. Normative as well as practical reasons can be advanced in support of this view.

111. Resolution on the Situation of Fundamental Rights: Standards and Practices in Hungary, EUR. PARL. DOC. A7-0229/2013 at 72 (2013).

112. This might for instance include the UN. See U.N. Secretary-General, Guidance Note on United Nations Assistance to Constitution-Making Processes (Apr. 2009) [hereinafter U.N. Secretary-General, Guidance Note].

113. Jacques Robert, *L'ingénierie constitutionnelle et l'Europe de l'est : Le rôle de la Commission européenne pour la démocratie par le droit*, in LA RÉINVENTION DE L'ÉTAT : DÉMOCRATIE POLITIQUE ET ORDRE JURIDIQUE EN EUROPE CENTRALE ET ORIENTALE 97 (Slobodan Milacic ed., 2003).

An ad hoc approach to procedural matters is no longer appropriate for an advisory institution that has matured from a fledging body seeking to demonstrate its value to post-Communist constitution-making societies to one that possesses a solid reputation in the constitutional domain and a not-insignificant degree of soft power. In this context, the reflections contained in the 2009 *Guidance Note by the Secretary General on UN Assistance to Constitution-Making Processes* apply with equal, if not more, force to the Venice Commission: "Often, the UN system has employed *ad hoc* approaches, leading to mixed results. A pressing need exists for the UN to develop strategic guidance on how to support national actors during the design and implementation of a constitution-making exercise."¹¹⁴

As a matter of fact, there already exists some kind of "strategic guidance" in the case of the Venice Commission, in the form of a relatively settled sequence of steps that are ordinarily taken prior to the Plenary's adoption of an opinion. That the Commission acknowledges as much can be deduced from the stylized account of these stages presented on its website and in its annual reports. It is thus eminently feasible to—at the very minimum—elevate what are currently conventions to the status of legal regulation. A codification of basic features of the procedure followed when dispensing constitutional advice is, moreover, tactically useful. We have seen that the Venice Commission has aspirations to expand its status and activities beyond European shores. Having a solid, easily accessible procedural framework enables both prospective members and international organizations with which the Commission collaborates or is eager to do so—such as the United Nations or the Organization for Security and Co-operation in Europe¹¹⁵—to become better acquainted with this body and how it goes about its work. From the perspective of its current members, finally, a change in approach would benefit the Commission's credibility. One of the principles valued as an important component of the rule of law is that of legal certainty.¹¹⁶ The Commission also attributes significance to transparency in its opinions, as we for instance saw in the Belgian and Hungarian case studies. A more elaborate and easily accessible set of procedural guarantees would accordingly signal to the countries requesting its assistance that the Commission practices what it preaches.

So what should be done? A more elaborate set of procedural guarantees is most urgently called for in relation to the participation of the country whose constitutional system is the subject of an opinion and the composition of the working group tasked with preparing the

114. U.N. Secretary General, *Guidance Note*, *supra* note 112, at 3.

115. See, e.g., CE, Venice Comm'n, Annual Report of Activities 2013, Doc. CDL-RA(2013)001-e, at 78–79.

116. See, e.g., CE, Venice Comm'n, Report on the Rule of Law, Doc. CDL-AD(2011)003 rev (Mar. 25–26, 2011).

draft opinion. These two issues have the potential to shape the emphasis and quality of the Commission's advice and, as will become clear, the relevant rules can be cast so as to facilitate the take-up of its suggestions for reform.

As to the first issue, the Venice Commission claims on its website and in its annual reports that it is ordinary practice for the rapporteurs to travel to the country concerned. Yet, this—non-binding—proclamation is not always heeded. We have seen in Part II that fact-finding missions do not always take place. Earlier, a Commission member conceded:

Perhaps the Venice Commission might have given the impression that sometimes its opinions were not really rooted in a complete knowledge of the actual situation of the country dealt with, but it is well known that the Commission is frequently called upon to give advice without having the chance of incorporating data from fact-finding missions.¹¹⁷

This, quite obviously, is undesirable. In order to provide a country with constitutional guidance that is tailored to its specific domestic conditions—and hence useful—a solid information base is imperative. This is all the more so given that the group of rapporteurs typically does not include persons with the nationality of the state concerned that may be presumed to possess "complete knowledge of the actual situation." The importance of acquiring sufficient factual knowledge about the situation at hand before proceeding to make recommendations or assess how a country has fared is more generally acknowledged under international law; think for instance of international treaty bodies tasked with monitoring compliance with core human rights conventions that make use of, *inter alia*, fact-finding missions and scrutinizing states' reports in the exercise of their mandate.¹¹⁸

As such, the Venice Commission's Rules of Procedure should be amended to explicitly provide that the domestic authorities are to be given the opportunity to explain their position and that a country visit normally should be organized precisely for this purpose. It can of course happen that a country's particular circumstances prevent a fact-finding mission from taking place, for example due to time constraints as in the Belgian case study. In such an event, the Venice Commission ought to be more discriminating than it has hitherto been in deciding whether it will nevertheless accept the request for constitutional assistance. While its zeal to support constitution-mak-

117. Bartole, *supra* note 12, at 363.

118. See, e.g., G.A. Res. 60/251, Human Rights Council, U.N. GAOR, 60th Sess., Supp. No. 49, U.N. Doc. A/60/49 at ¶ 5(e) (Mar. 15, 2006); Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW] and CEDAW R. P. 48, 50, 76–88.

ing societies is commendable, it should avoid situations where its opinion—which will necessarily contain a more superficial analysis in such cases—is sought and treated primarily as a sort of rubber-stamp, or where there is a concomitantly greater likelihood that the domestic authorities may not follow the Commission's recommendations. Either scenario might unnecessarily cause the Commission's reputation to be dented.

The new provision on participation should further stipulate that the national authorities are to be able to comment on the rapporteurs' draft opinion. At present, the Venice Commission decides whether an exchange of views at that juncture is "necessary."¹¹⁹ Clearly, even after a country visit (and particularly in the absence of such a visit), the rapporteurs may have formulated suggestions based on an inadvertent misunderstanding of the country's constitutional framework, or there may have been intervening events that, if known, would shape the nature and content of the Commission's recommendations. Again, granting the domestic authorities a right of response enhances the prospect that the final opinion will be received positively.¹²⁰ Doing so is, furthermore, in line with one of the classic rules of natural justice, viz. the principle of *audi alteram partem*. Ensuring respect for this maxim is unlikely to add to the resource-intensity of the Commission's work in the constitution-making domain and any risk of unduly lengthening the procedure can be accommodated by requiring states to exercise their right of reply within a specific time period.

The second issue that warrants explicit regulation in the Venice Commission's Rules of Procedure concerns the makeup of the group of rapporteurs in charge of preparing a draft opinion on the constitutional arrangements under review. The latest amendments to the Commission's Rules of Procedure have clarified that it is the President of the Commission who selects the rapporteurs.¹²¹ As a matter of law, he has complete discretion in the exercise of this power.¹²² A look at the current practice reveals the presence of several "repeat players," i.e., individual Commission members who are appointed as rapporteur on a semi-regular basis and who predominantly or even

119. For a presentation of the steps involved in preparing an opinion, see *The Commission's Activities*, COUNCIL OF EUROPE/VENICE COMMISSION, http://www.venice.coe.int/WebForms/pages/?p=01_activities.

120. Cf. the Venice Commission's self-description of engaging in a "non-directive dialogue" with the national authorities on the web page *The Commission's Activities*, *supra* note 119; see also Giorgio Malinverni, *The Contribution of the European Commission for Democracy Through Law (Venice Commission)*, in *THE PREVENTION OF HUMAN RIGHTS VIOLATIONS 128* (Christiane Bourloyannis-Vrillas & Linos-Alexander Sicilianos eds., 2001).

121. CE, Venice Comm'n, Revised Rules of Procedure, *supra* note 34, art. 14(1).

122. As a matter of fact, however, his choice will be constrained by the rapporteurs' availability on account of their principal professional commitments.

only have a legal background.¹²³ This carries with it certain risks. To be sure, a heavy reliance on certain persons as rapporteurs enables these individuals to develop knowledge and capability in providing constitutional guidance, which may benefit the quality of the resulting opinion. Yet, it also renders the system as a whole vulnerable whenever such Commission members retire; recall, as well, that it is for each state to decide whom to appoint and whether (and if so, how frequently) to renew existing appointments, without any possibility for other states, let alone the Commission itself, to influence these decisions.¹²⁴ To borrow organizational management patois, there is a need to guard against the loss of institutional knowledge. This can be done, for instance, by stipulating that the President should, to the extent possible, rotate rapporteur appointments among the entire individual membership of the Commission, and/or by putting in place tools to equip each Commission member with core knowledge regarding the provision of constitutional guidance.¹²⁵

More importantly, the sensibleness of having only rapporteurs with predominantly or exclusively legal qualifications can be questioned, given that constitutions are more than just a body of formal rules that occupy a privileged position within the domestic hierarchy of legal norms. It has been said that they are "likely to reflect and express distinct markers of national identity"¹²⁶ and that "[a] country's cultural and political traditions shape the nature and development of constitutionalism—the site where 'national history, custom, religion, social values and assumptions about government meet positive law.'"¹²⁷ We see this reflected in the composition of constitutional courts, several of which have individuals with prior political experience on the bench in recognition of the fact that interpreting and upholding the constitution requires more than only legal skills or knowledge.¹²⁸ Indeed, the Venice Commission itself has indicated that it aspires to situate opinions as much as possible in the

123. For instance, in the four case studies examined in Part II, four rapporteurs were involved in more than one opinion, i.e., Jean-Claude Scholsem, Jacqueline de Guillenchmidt, Wolfgang Hoffmann-Riem, and Christoph Grabenwarter.

124. Venice Comm'n Statute, *supra* note 11, art. 2(3); CE, Venice Comm'n, Revised Rules of Procedure, *supra* note 34, art. 1.

125. This could for instance take the form of a handbook or the organization of training sessions led by experienced rapporteurs.

126. VICKI C. JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA 3 (2010).

127. WEN-CHEN CHANG, LI-ANN THIO, KEVIN Y.L. TAN & JIUNN-RONG YEH, CONSTITUTIONALISM IN ASIA: CASES AND MATERIALS 70 (2014) (citing Lawrence W. Beer, *Introduction to CONSTITUTIONAL SYSTEMS IN LATE TWENTIETH CENTURY ASIA* 2 (Lawrence W. Beer ed., 1992)).

128. See, e.g., Bijzondere wet op het Grondwettelijk Hof [Special Act on the Constitutional Court] of Jan. 6, 1989, BELGISCH STAATSBLED [B.S.] [Official Gazette of Belgium], Jan. 7, 1989, art. 34(2); DE VISSER, *supra* note 71, at 211–17.

wider constitutional context of the country in question.¹²⁹ More specifically, the Commission has been known to reject institutional arrangements in place in mature constitutional orders as being inappropriate for younger democracies, with the argument that the latter lack the legal tradition that would allow such designs to work in a satisfactory manner.¹³⁰ For such assessments to be accurately made, knowledge of the country's legal framework must be complemented by a good understanding of its constitutional and political culture.

To address this issue, article 14 of the Rules of Procedure (governing the appointment of rapporteurs) should be amended to include a sentence to the effect that each working group normally should comprise at least one member with a background in political science. To be fair, the implementation of such a provision is dependent on the choices made by states in deciding on appointments to the Commission. Although the Statute in its current version mentions "the contribution to the enhancement of law and political science" as one of the criteria to be considered in this respect,¹³¹ those last two words have had a minimal impact to date. Changing the status quo can be encouraged by a modification of the Statute's wording. As an example, Article 28(2) of the International Covenant on Civil and Political Rights (ICCPR) prescribes that the Committee responsible for monitoring states' compliance with the Convention "shall be composed of . . . persons . . . [with] recognized competence in the field of human rights, *consideration being given to the usefulness of the participation of some persons having legal experience.*"¹³² For the Venice Commission's Statute, a phrase akin to the italicized words—whereby "legal" would be replaced by "political science" or "non-legal"—could helpfully alert member states to the importance of having renowned experts with qualifications in domains other than law on this body. When, notwithstanding the implementation of the changes just outlined, it so happens that there is no Commission member with political science expertise available for appointment as rapporteur in a given case, the President should consider inviting an outside consultant to participate. In fact, this possibility has been countenanced by the Statute from the beginning¹³³—although it has been used only sporadically—and there is no good reason why it should not also be explicitly mentioned in the Rules of Procedure.

129. See, e.g., CE, Venice Comm'n, Annual Report of Activities 2013, *supra* note 115, at 86.

130. See Bartole, *supra* note 12, at 362; Dürr, *supra* note 5, at 158.

131. Venice Comm'n Statute, *supra* note 11, art. 2(1).

132. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR] (emphasis added). See also Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 17, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture].

133. Venice Comm'n Statute, *supra* note 11, art. 5.

Finally, the Rules of Procedure should also clarify whether the country on the receiving end of the Commission's opinion can give some input concerning the appointment of rapporteurs. One may readily imagine that a state may wish to request that a particular individual be selected as rapporteur; for instance, because of his or her experience with the constitutional structures contemplated for introduction or due to familiarity with the country's legal tradition.¹³⁴ Conversely, a country may have objections to a certain Commission member—given that states can appoint current political officeholders or civil servants to the Venice Commission,¹³⁵ a country going through a political transition may, for example, not be keen on such individuals serving as rapporteurs. The question whether states should be able to exert some influence on the composition of the panel tasked with advising them or judging their conduct has been faced by other international bodies, both judicial and extrajudicial in character. Some, such as the European Court of Human Rights—a fellow Council of Europe organ—provide that the member elected in respect of the state concerned shall sit on the bench *ex officio* in cases involving that state.¹³⁶ For others, the relevant rules stipulate in more generic terms that the members should be acceptable to the states concerned.¹³⁷ The decision to grant countries a limited power to shape the panel's configuration can be justified as making the outcome more palatable for the domestic authorities. It would accordingly seem opportune to include a similar possibility in the Venice Commission's Rules of Procedure. The relevant provision could give the state concerned the right to suggest or object to specific rapporteurs, with the President being under an obligation to take such observations into account when making his decision as to the choice of working group members. In a codification of standing practice, it would additionally be prudent to stipulate that Commission members appointed by the state concerned cannot serve as rapporteur when their country's constitutional arrangements are being examined. Drafting the provision along these lines will safeguard the Commission's cherished reputation as an objective expert body in constitutional matters and protect the independence of its individual members.¹³⁸

134. For instance, the Icelandic bill for a new constitution drew upon the Danish Constitution as regards the system for judicial appointments.

135. Countries that have done so as of the time of writing include Albania, Armenia, Croatia, Greece, Israel, Kazakhstan, Kyrgyzstan, Lithuania, Moldova, Romania, Switzerland, Tunisia, and Ukraine.

136. ECHR, *supra* note 51, art. 26(4); Eur. Ct. H.R. Rules of Court, Rule 24(2)(b) (last amended June 1, 2015). *See also* the Statute of the International Court of Justice art. 31, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 (giving the parties to the case the right to have a judge of their nationality sit on the bench).

137. *E.g.*, ICCPR, *supra* note 132, art. 42(10)(b).

138. As required under CE, Venice Comm'n, Revised Rules of Procedure, *supra* note 34, art. 3a.

*B. The Articulation of the “Common Constitutional Heritage”:
From Principles to Their Operationalization?*

We have seen that, when evaluating proposed constitutional reforms, the Venice Commission is guided by the notion of the “common constitutional heritage,” comprising the rule of law, fundamental rights, and democracy. Making these yardsticks fully operational requires the identification and articulation of their more specific constituent elements. In doing so, the Commission exhibits a growing tendency to move beyond the level of principles to their *mise en oeuvre*. To illustrate: in its Icelandic opinion, the Venice Commission did not only insist on the need to uphold the principle of judicial independence as a tenet of the common heritage. It went further, suggesting that this could primarily be done through a particular institutional arrangement, viz. the establishment of an independent judicial council with decisive influence on judicial appointment decisions.¹³⁹ Similarly, several Commission members have argued that the common heritage encompasses the notion of constitutional supremacy, which they consider to require that courts—as opposed to non-judicial bodies—be given the power to verify the constitutionality of legislation.¹⁴⁰ The creeping inclination to describe the facets of the common heritage in ever-greater detail can in all likelihood be attributed to the belief that this enhances the value of its services to constitution-making societies. Instead of limiting itself to bland statements about the importance of respecting abstract constitutional principles, the Venice Commission is seeking to explicitly address how such principles should be implemented in order to ensure their practical realization. Such good intentions and noble motives notwithstanding, this Subpart suggests, however, that subscribing to an overly broad catalogue of elements that together make up the common heritage is misconceived and could in the long run even become a cause for disenchantment with the Venice Commission’s constitutional guidance and its approach to providing it. A more diversified analytical framework is proposed as a possible remedy.

The most intuitively plausible claim in favor of some modicum of moderation in fleshing out the contents of the common heritage has to do with legitimacy. The prevalence of external actors participating

139. CE, Venice Comm’n, Opinion 702/2013 on the Draft New Constitution of Iceland, *supra* note 44, particularly ¶ 135.

140. See, e.g., Hanna Suchocka, *Europe’s Constitutional Heritage and Social Differences*, in *THE CONSTITUTIONAL HERITAGE OF EUROPE (SCIENCE AND TECHNIQUE OF DEMOCRACY*, No. 18), *supra* note 36, at 59. *Contra* Buquicchio & Garrone, *supra* note 36, at 11 (finding that at the time of their writing, judicial constitutionality control was not yet part of the common heritage, while noting that the dynamic character of the latter concept meant that this could very well happen in due course).

in domestic constitution writing or amendment processes today¹⁴¹ makes it easy to lose sight of the fact that this is not an uncontroversial practice as a matter of legal theory and international law. As observed in a recent handbook, “a constitution might be thought almost necessarily autochthonous.”¹⁴² Its drafting involves the exercise of a people’s right to internal self-determination and has been described in a 2009 UN policy note on the provision of assistance to constitution-making processes as “a sovereign national process, which, to be legitimate and successful, must be nationally owned and led.”¹⁴³ When the standards of the common heritage are expanded to cover both constitutional principles and their implementation, states may feel that their autonomy in fashioning constitutional arrangements is unduly circumscribed, notably bearing in mind the soft power that Venice Commission opinions typically enjoy. A further likely corollary would be more frequent findings that proposed constitutional arrangements are incompatible with the common heritage—an unwelcome conclusion for any constitutional framer—which may have the perverse effect of causing domestic authorities to be more resistant to taking up the recommendations contained in Commission opinions. From the perspective of the effectiveness and positive impact of Venice Commission opinions, and ultimately its reputation as a successful advisor on constitutional matters, either consequence is obviously undesirable.

The preceding argument dovetails with another that supports restraint in including institutional designs in the common heritage: keeping the focus on principles avoids the trap of undue optimism on the incidence and extent of constitutional convergence, let alone constitutional universalism.¹⁴⁴ A theme that is gaining considerable traction in the constitutional literature concerns the importance of respecting local ideas and approaches to matters of constitutional design, when this does not detract from the core tenets of constitutional law—such as democracy, fundamental rights, and the rule of law, i.e., the bedrock of the common heritage.¹⁴⁵ This principle is finding

141. On this phenomenon, see, e.g., Al-Ali, *supra* note 20.

142. Mark Tushnet, *Constitution*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 219 (Michel Rosenfeld & András Sajó eds., 2012).

143. U.N. Secretary General, Guidance Note, *supra* note 112, at 2.

144. See, e.g., Rosalind Dixon & Eric A. Posner, *The Limits of Constitutional Convergence*, 11 U. CHI. J. INT’L L. 399 (2011); Jeff Goldsworthy, *Questioning the Migration of Constitutional Ideas: Rights, Constitutionalism and the Limits of Convergence*, in THE MIGRATION OF CONSTITUTIONAL IDEAS 115 (Sujit Choudhry ed., 2011); Mark Tushnet, *The Inevitable Globalization of Constitutional Law*, 49 VA. J. INT’L L. 985 (2009).

145. Zaid Al-Ali & Arun K. Thiruvengadam, *The Competing Effect of National Uniqueness and Comparative Influences on Constitutional Practice*, in ROUTLEDGE HANDBOOK OF CONSTITUTIONAL LAW 427 (Mark Tushnet, Thomas Fleiner & Cheryl Saunders eds., 2013); Michel Rosenfeld, *Constitutional Identity*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW, *supra* note 142, at 756.

its way into legal texts. For instance, Article 4(2) TEU directs the European Union to “respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.”¹⁴⁶ In a comparable fashion, the 2009 UN Note cautions that “[t]he options and advice provided must be carefully tailored to the local context, recognizing that there is no ‘one size fits all’ constitutional model or process.”¹⁴⁷ This rings true in the context of the Venice Commission as well. Some of the institutional arrangements treated as apparently belonging to the common heritage in Commission opinions or writings by its individual members are not actually in place in all the (original) member states. Returning to our earlier examples, neither Germany nor Austria have delegated judicial appointment decisions to judicial councils, and the United Kingdom and the Netherlands continue to rely on their parliament to uphold the principle of constitutional supremacy instead of entrusting this task primarily to the courts. Treating institutional designs as generally endorsed requirements for democratic states may thus be misleading and may furthermore reduce the inclination of some countries to tap into the Venice Commission’s constitutional expertise or otherwise participate in its work. To be fair, the Commission’s recent opinion on the new Hungarian Fundamental Law for the first time referred to “variations of European guarantees [that] may be seen as part of national constitutional autonomy,”¹⁴⁸ but it has so far not elaborated the precise meaning or implications of this notion for the manner in which it discharges its mandate.

To ward off the risks just described does not require the Venice Commission to refrain from considering the implementation of constitutional principles altogether. Rather, it is suggested that the Commission should eschew conceiving of the operationalization of such principles as part of the common heritage as such. More specifically, it should maintain a clear distinction between common constitutional *standards* and constitutional *best practices* or *guidelines*. Only the former should be regarded as constituent elements of the shared heritage that the Venice Commission seeks to safeguard and realize among its member states. These constitutional standards should ordinarily be cast at the level of principles, for the reasons set out earlier. As for their enforcement, standards are properly seen as

146. TEU, *supra* note 100, art. 4(2) (emphasis added). On the relationship between the concept of national identity and core tenets of EU law such as supremacy and uniformity, see, e.g., NATIONAL CONSTITUTIONAL IDENTITY AND EUROPEAN INTEGRATION (Alejandro Saiz Arnaiz & Carina Alcobarro Llivina eds., 2013); Armin von Bogdandy & Stephan Schill, *Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty*, 48 COMMON MKT. L. REV. 1417 (2011).

147. U.N. Secretary General, Guidance Note, *supra* note 112, at 4.

148. CE, Venice Comm’n, Opinion 621/2011 on the New Constitution of Hungary, *supra* note 94, ¶ 19.

categorical in nature, meaning that the Venice Commission should continue to unequivocally insist on member states' compliance with these paradigms of constitutional law.¹⁴⁹ In contrast, the institutional arrangements, processes, and related approaches available to realize the common heritage are best seen as constitutional best practices or guidelines. As these terms imply, the Commission can, and probably should, encourage countries to emulate what it considers to be good benchmarks in this regard. At the same time, best practices and guidelines lack the absoluteness that characterizes constitutional standards; they admit of exceptions and room for national variation. States accordingly should have more latitude in deciding whether to follow recommendations to this effect, and if they do not—presumably because a certain mode of implementation of the common heritage does not fit within their particular historical, legal, and political context—this does not warrant disapprobation by the Venice Commission or other countries.

A good example that illustrates several of the points highlighted in the preceding paragraphs is that of a 2010 Commission report on judicial independence¹⁵⁰ and the use of that report in the subsequent opinion on Iceland's proposed new constitution, more particularly in assessing the regime governing judicial appointments. The aim of the report was to present an overview of existing "European standards" and identify areas for further development.¹⁵¹ It should be noted that in commenting on the appropriate approach to several issues pertaining to judicial independence, the report uses language that is more usually associated with best practices than genuine standards, such as the phrase that it "strongly recommends" a particular institutional arrangement. A similar approach can be discerned in relation to the topic of judicial appointments, with the report noting in its main body:

[I]t is the Venice Commission's view that it is an *appropriate* method for guaranteeing . . . the independence of the judiciary that an independent judicial council have decisive influence on decisions on the appointment and career of judges. Owing to the richness of legal culture in Europe, which is precious and should be safeguarded, there is *no single model* which applies to all countries. While respecting the variety of legal systems, the Venice Commission *recommends* that states which have not yet done so consider the

149. Cf. Dürr, *supra* note 5, at 158.

150. CE, Venice Comm'n, Report on the Independence of the Judicial System—Part 1: The Independence of Judges, *supra* note 53.

151. *Id.* ¶¶ 1, 10.

establishment of an independent judicial council or similar body.¹⁵²

In the report's conclusions, this first sentence is repeated as part of a paragraph the opening lines of which read: "The following *standards should be respected by states* in order to ensure internal and external judicial independence."¹⁵³ Cue the Icelandic opinion, where the rapporteurs glossed over the latter part of the section reproduced above and appeared more influenced by the use of the term "standards" in the 2010 report. The proposed Icelandic model of combined executive and parliamentary appointments was rejected as unacceptable "under the European standards" and the domestic authorities were instructed to give priority to "securing a strong judicial council model" instead.¹⁵⁴ This does not sit well with the Venice Commission's own admission that there is no single European approach when it comes to hiring decisions and that this, moreover, is not objectionable but rather a cherished reflection of national constitutional diversity. While the Venice Commission was right in insisting on respect for the principle of judicial independence as a crucial component of the common heritage in both the 2010 report and the Icelandic opinion, it would thus have been preferable had it consistently used the terminology of good practices when it came to its favored implementation of this constitutional standard.

There is one further aspect pertaining to the Commission's holding up of institutional or procedural designs as worthy of emulation by its constituent members to be considered. The case studies have demonstrated that the Venice Commission includes horizontal comparative references in its opinions, but that its practice in this regard is currently suboptimal. Several occasions were identified where a mention of foreign models or practices could have supported the Commission's viewpoint (e.g., the Icelandic opinion) or provided more guidance to domestic constitution makers (e.g., the Tunisian opinion), but where no such references were given. Addressing this weakness should not be the sole responsibility of the relevant rapporteurs; they cannot be presumed to possess the requisite detailed knowledge about constitutional arrangements and their functioning in each of the sixty member states. It is suggested that the Venice Commission's recently established Scientific Council can play a valuable role here. This body is expected to contribute to the "high quality and consistency" of the Commission's studies and opinions,¹⁵⁵ and *inter alia*,

152. *Id.* ¶ 32 (original emphasis omitted and new emphasis added).

153. *Id.* ¶ 82 (emphasis added).

154. CE, Venice Comm'n, Opinion 702/2013 on the Draft New Constitution of Iceland, *supra* note 44, ¶ 139.

155. CE, Venice Comm'n, Revised Rules of Procedure, *supra* note 34, art. 17a. This provision was added by the Plenary in late 2013. The decision to establish the Scientific Council was taken in late 2009.

it prepares "thematic compilations" of the Venice Commission's doctrine as reference guides for interested parties.¹⁵⁶ Requiring that all draft opinions on proposed constitutional reforms be submitted to the Scientific Council for recommendations on possible references to foreign models and designs would accordingly fit in with the tasks given to this body and may in the long run enhance the quality and usefulness of the thematic compilations.

C. Coping with the Venice Commission's Geographical Expansion

Since its establishment, the Venice Commission's membership has grown exponentially. Starting with eighteen constituent countries in 1990, all located in Western Europe, it today has sixty full members, from across Europe and beyond. This rapid enlargement has brought about more heterogeneity in the Commission's membership: aside from geographical variations, the constitutional systems and values that undergird them differ among the states. It has been rightly observed that the continuous broadening of the Venice Commission's circle of members "is an explosive issue . . . that still needs to be defused."¹⁵⁷ This Subpart focuses on one particular challenge in this regard, viz. ensuring respect for representativeness when dispensing constitutional advice and countering sentiments that the rights and obligations of membership may vary depending on the maturity of a state's constitutional order. To be clear, this challenge is not unique to the Venice Commission: other international bodies or organizations too have faced or are at present confronted with questions as to how to achieve equal treatment, or at least the perception thereof. Think for instance of the long-running debate about whether African and Arab states should be given a permanent seat on the UN Security Council, counterbalancing the current dominance of Western nations.¹⁵⁸ Consider also how the EU has been criticized for holding candidates for accession to higher standards than those applied to existing members and for requiring that new entrants meet standards of economic performance that the older states never had to contend with.¹⁵⁹ These examples confirm just how germane the challenge of expanding membership is to international bodies.

In the case of the Venice Commission, a first issue for reform pertains to the need for working groups to reflect its geographical reality. Here the concern is not with the appointment of non-legal experts, as in Subpart A above, but with the dominance of rap-

156. CE, Venice Comm'n, Annual Report of Activities 2013, *supra* note 115, at 7.

157. Hoffmann-Riem, *supra* note 17, at 584.

158. See, e.g., Press Release, General Assembly, Calling for Security Council Reform, General Assembly President Proposes Advisory Group to Move Process Forward, U.N. Press Release GA/11450 (Nov. 7, 2013).

159. See, e.g., ALISON DUXBURY, THE PARTICIPATION OF STATES IN INTERNATIONAL ORGANISATIONS: THE ROLE OF HUMAN RIGHTS AND DEMOCRACY 155-57 (2013).

porteurs hailing from Western Europe. In the case studies examined earlier, every working group chiefly (and in the case of Iceland even exclusively) comprised rapporteurs from these jurisdictions. Whether this is a matter of deliberate choice or unintended happenstance, the practice should be reviewed. On the one hand, there is anecdotal evidence suggesting that rapporteurs from newer democracies may be less sanguine about proposals for constitutional reform than their counterparts from the "old democracies."¹⁶⁰ Including representatives of the "younger democracies" may thus improve the rigor with which constitutional reforms are assessed. On the other hand, the current practice creates the impression that these Western countries primarily act as seasoned constitutional experts eager and willing to explain to their less knowledgeable and less experienced non-Western counterparts how the latter ought to fashion their constitutional systems. Such neocolonial or missionary thinking is pedantic and does little to foster an *esprit de corps* among the member states. Moreover, those states that are members of both the Venice Commission and the Council of Europe would have had to demonstrate compliance with the common heritage to be considered eligible to join the latter organization.¹⁶¹ The individual members appointed by these countries—well over half of the Commission's constituency—ought therefore to be presumed competent to act as assessors of envisaged constitutional reforms.

To enhance the representative character of working groups, it is suggested that the Commission's President ought to observe the principle of regional proportionality when appointing rapporteurs. This would entail making sure that rapporteurs are drawn from the various geographical "blocs" that make up the Commission's constituency in appropriate proportions. This principle should ideally find expression in the Rules of Procedure, mirroring the approach adopted by, for instance, the European Court of Human Rights¹⁶²—a fellow Council of Europe body—and the Human Rights Committee under the ICCPR.¹⁶³

Moving from the supply of to the demand for of constitutional guidance, another issue that warrants attention is the infrequency with which Western European countries are the subject of Venice Commission opinions. Of the eighteen original member states, only

160. Jowell, *supra* note 8, at 676–77.

161. Statute of the Council of Europe, *supra* note 25, arts. 3, 4.

162. Eur. Ct. H.R. Rules of Court, *supra* note 136, Rule 25(2) ("... The composition of the Sections shall be geographically and gender balanced and shall reflect the different legal systems among the Contracting Parties.").

163. ICCPR, *supra* note 132, art. 31(2) ("In the election of the [Human Rights Committee], consideration shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems.").

seven have made use of its services as of late 2015¹⁶⁴—with the Venice Commission evaluating the constitutional reforms of one other founding member at the request of the Council of Europe's Parliamentary Assembly rather than the respective domestic authorities.¹⁶⁵ One may venture that this reticence to tap into the Commission's expertise is due to a perception of the body as one whose purpose is to provide advice to younger or fledgling democracies; and which hence has no real role to play in relation to older constitutional systems. Such thinking is, however, misconceived. Mature constitutional arrangements are not immune to revision, as demonstrated *inter alia* by the Belgian case study and the comprehensive reform of the French Constitution in 2008, which sought to recalibrate the relationship between parliament and the executive and grant the judiciary more power to protect individuals' fundamental rights from encroachment.¹⁶⁶ There is no good reason for states with established constitutional orders—and it would arguably even be hubristic—not to consider seeking the input of an independent advisor on constitutional matters with a solid track record in this domain. In addition, novel constitutional dilemmas—for instance those pertaining to privacy and new technologies or growing multiculturalism in our societies—are faced by “old” and “new(er)” democracies alike and should provide incentives for all constitution makers to look beyond their borders for possible guidance. Aside from considerations pertaining to the quality of constitutional reforms, if the Venice Commission were to increase its involvement with the older members, it could also forestall domestic criticism to the effect that the latter contribute heavily to the Commission without receiving much, if anything, in return.

The need to make itself more visible and politically relevant to its longer-standing members has not entirely escaped the Commission's attention. In a 2004 opinion, it observed that promoting and strengthening democracy could be done *inter alia* by “making fuller use of [its] expertise also with regard to the functioning of the democratic institutions in the older [Council of Europe's] member states.”¹⁶⁷ A decade on, this statement has, however, failed to generate any concrete initiatives. To be fair, the Venice Commission lacks the competence to examine envisaged domestic constitutional re-

164. Namely Finland, Italy, Luxembourg, Malta, Norway, Switzerland, and Turkey.

165. Namely Belgium.

166. Loi constitutionnelle n° 2008-724 du 23 juillet 2008 de modernisation des institutions de la V^e République [Constitutional Law 2008-724 of July 23, 2008 on the Modernization of the Institutions of the Fifth Republic], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 24, 2008, p. 11890.

167. CE, Venice Comm'n, Opinion 282/2004 on the Possible Follow-up to Parliamentary Assembly Recommendation 1629(2003) on “Future of Democracy: Strengthening Democratic Institutions”, Doc. CDL(2004)015 (Mar. 22, 2004).

forms *sua sponte*. Still, this does not mean that there is nothing to be done. The Commission ought to be much more explicit in signaling to those that do have the competence to request its opinions—including the member states in question—that it welcomes the opportunity to participate in constitutional reform processes in Western European countries. It can do so in its annual reports and on its website, to complement the present emphasis on its endeavors in Central and Eastern Europe and its eagerness for deepening collaboration with non-European countries. In addition, the Venice Commission should look into organizing more conferences, seminars, and the like in the older member states. Such activities can perform a useful “outreach” function, given that “in some Western European countries the [Venice Commission] is hardly known among journalists and politicians.”¹⁶⁸ By actively seeking to increase familiarity with its existence and work and to correct any misperceptions that its role is confined to young and adolescent democracies, the Commission will enhance the likelihood of its assistance also being solicited by its founding members.

The Commission’s geographical expansion, finally, has important ramifications for the substantive yardsticks and guidelines used in assessing proposed reforms that presently remain undervalued. We have seen that rapporteurs regularly rely on such standards or best practices contained in Commission reports and studies to buttress their analysis and recommendations. The propriety of doing so is premised on such documents accurately reflecting the state of the law. This does not always appear to be the case. Thus, in the case studies canvassed earlier, the rapporteurs and later the Plenary relied on Commission documents prepared as early as 2007 without discussing the manner in which the eight—mainly non-European—states that had joined in the interim deal with the relevant constitutional topic. The corollary is that the standards or best practices enunciated in country-specific opinions drawn up in 2014 or later may be based on documents that are no longer fully representative and respectful of the classic notion of equality among the member states. This is an unattractive prospect. In response, rapporteurs should be required to verify whether the reports they intend to use for empirical support accurately capture the state of the law for the Commission’s entire membership. If not, the findings contained therein should be supplemented with information concerning countries that have in the meantime acceded to the Commission. In carrying out this task, the rapporteurs should be assisted by the Scientific Council mentioned earlier and, where necessary, should engage the individual Commission members for the state in question,

168. Hoffmann-Riem, *supra* note 17, at 585.

as they will undoubtedly possess the necessary knowledge about the functioning of their state's constitutional system.

In sum, addressing the three issues highlighted in this section is imperative for safeguarding a sense of cohesion and equality of treatment among Commission member states, and will be instrumental for ensuring the continuous legitimacy of this transnational body, while its geographical expansion continues unabated.

CONCLUSION

The Venice Commission is today no longer an institutional structure devoted to bringing the countries of Central and Eastern Europe (back) into the liberal democratic fold. Rather, with a membership now comprising non-European states and a marked increase in its activities in African and Central Asian countries, there are prospects and aspirations for its further evolution into a body with a genuinely universal dimension to its activities. Such a development can be heralded as being in keeping with the times. Recent decades have seen countries around the world embarking upon processes of democratization and redesigning their constitutional frameworks. In implementing these constitutional projects, constitution makers are increasingly influenced by foreign models and ideas and receptive to guidance from external actors. The Venice Commission can perform a useful function as a repository and dispensary of liberal democratic constitutional principles and values. While we can acknowledge that the flexible and pragmatic approach adopted by the Commission in preparing opinions has served it well to date, several changes should however be considered to enable this body to optimize its role as an external constitutional advisor. The analysis presented in this Article provides support for a more precise and elaborate set of procedural rules, while also cautioning against an overly ambitious approach when articulating the components that make up the shared constitutional heritage. It further shows that the Commission should take care to maintain sufficient *esprit de corps* among its members as it becomes more geographically heterogeneous and to proactively develop policies to this end. Addressing these matters along the lines suggested in this Article will give the work of the Venice Commission a sounder normative footing, enhance the quality and consistency of its opinions, and bolster its legitimacy. This, in turn, should allow the Commission to stand in good stead as guardian of the common constitutional heritage for many years to come.