

The Venice Commission and its impact on the justice system

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Abstract

A number of organizations have set up structures and bodies for the purpose of creating a state in accordance with democratic principles and the rule of law. The European Commission for Democracy through Law known as the Venice Commission is one of the bodies that serves as a guide for the implementation of legal systems based on democratic standards, as well as shows his name. Legal advice and legal assistance to its member states have been part of the Venice Commission's activity since its creation. Therefore this study tries to figure out who's Venice Commission, which is its impact and how it works. The study attempts to identify the principles and objectives that guide its activity, its composition, its organization, the entities eligible to submit the request and competencies of this Commission. Consideration is given to the decision-making process and its implementation along with the stages through which the adoption of an Opinion goes through. Another issue to be addressed concerns the non-binding nature of the Opinions adopted by this Commission. The study aims to understand the role of this body as a provider of first aid, the adaptation and consolidation of legal systems to each other in the international arena, despite the non-binding character of the acts adopted by it.

Keywords: decision making; functions; opinions; organization; standard

1. Introduction

The Venice Commission is a body of the Venice Council which aims to build Opinions on matters pertaining to constitutional law and the legal systems as a whole. Since its creation the Venice Commission has been required to be present to support and advise liberal and democratic constitutions (Bartole, 2018). This paper attempts to understand the Venice Commission, *who this Commission is?* and *how it works?* The first issue deals with the historical framework that led to the creation of the Venice Commission and participating countries. Members and representatives of States, the character of the experts and the manner in which the Commission is engaged. The paper focuses on dealing with the structure and general data for its regulation, together with the main principles and objectives that form the basis of the Commission's work.

The second issue deals with the institutional set-up and identification of key bodies assisting the Commission. In accordance with the Statute and the Rules of Procedure of the Commission, attention is drawn to bodies such as the President, Vice-Presidents, Secretariat,

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Bureau and Enlarge Bureau, Sub-committee and Councils. Among them are the field of activity and the issues dealt with by the Commission bodies.

Another important issue to address is the decision-making procedure, the entities that are eligible to submit a request to the Commission, and the stages through which the adoption of an Opinion goes through until its promulgation. The nature of the Commission's opinions is also addressed, referring to the character, conceptualization of soft law and hard law, and their advisory and non-binding character. In the latter cases, the impact of the Commission Opinions on states seeking its advice in implementing democratic institutions, adapting legislation in line with widely accepted democratic standards, constitutional reform and judicial matters is addressed. Albania's case is briefly taken up.

2. Who is the Venice Commission?

The Venice Commission, whose name is the European Commission for Democracy through Law, is an advisory body that cooperates with the member states of the Council of Europe on constitutional issues and is composed of independent experts in the field of constitutional law (Article 1/1 of Venice Commission Statute). In the Council of Europe, the Venice Commission is the main advisory body on constitutional matters (Vopel, 2017). Its name also expresses the essence of its activity by identifying two key concepts, that of 'democracy' and 'law'. According to the doctrine, *this name was put in place to express the conviction that sustainable democracy can only be built on a sound constitutional framework* (Buquicchio & Dürr, 2018).

The need for such a body came just after the fall of the Berlin Wall in 1990, when post-communist states needed to cope with political, institutional, and constitutional transitions, as well as to establish political systems on a democratic and rule of law. The idea of creating a body of independent lawyers capable of providing the necessary legal and constitutional support to these fragile countries came from Italian lawyer and former Italian Minister Antonio La Pergola. His proposal was welcomed at the Venice Conference of 19-20 January 1990, which also led to the adoption of Resolution 90/6, which provided for the establishment of a European Commission for Democracy through Law for a transitional period of two years. Thus the Committee of Ministers of the Council of Europe officially sanctioned the birth of the "European Commission for Democracy through Law" through the adoption of a partial agreement on the Venice Commission on 10 May 1990.¹

The member states of the Council of Europe are also members of the Venice Commission. In addition, the Commission may cooperate with non-member states, especially those of Central and Eastern Europe according with article 1/1 of Venice Commission Statute. However, at the beginning of the establishment, not all the member states of the Council of Europe were members of the Venice Commission, but only 18 of them. Later on, due to the successful engagement and great achievements evidenced by the recommendations in 2002, the statute turned into an "extended agreement", allowing even non-member states of the Council of Europe to join it (Volpi, 2017). For a specification, the Venice Commission today

¹ Resolution (90) 6. On a Partial Agreement Establishing the European Commission for Democracy Through Law. (Adopted by the Committee of Ministers on 10 May 1990 at its 86th Session)

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consists of 62 member states, of which 47 of the Council of Europe and 15 other countries, 1 associate member, 4 observers and 3 members having a special status including here also the European Union.²

The composition of the Commission is organized in such a way that only independent experts from each Member State will serve on the Commission in their individual capacity and not as representatives of the State which has elected them. In doing so, they are not subject to any instructions or orders from other persons or from the countries they represent, indicating the independence or impartiality on which the Venice Commission's activity is based. In addition to demonstrating the independence of the Commission and its composition, experts are never part of the opinions drafted for the countries from which they come. Also, they do not participate in Opinion vote for their country (Buquicchio & Dürr, 2018).

The statute stipulates that experts are prominent individuals who through their experience in democratic institutions have contributed to the strengthening of law and political science (Article 2/1 of Venice Commission Statute). Their contributions come from professional areas as professors of law, mainly constitutional law and international public law, judges, political representatives or even senior government officials. Each Member State of the Commission shall choose from one representative and its alternate in accordance with the criteria laid down for their election. This election shall be for a term of four years with the right to vote (Article 2/1,2,3 of Venice Commission Statute).

By its designation, the Venice Commission presents itself merely as a regional body, as a body within a European organization, yet it has exceeded all expectations and has become a global consultant on constitutional law and juridical system. This committee has the Permanent Secretariat in Strasbourg, France, at the Council of Europe headquarters. The plenary sessions according with article 4/3 of Venice Commission Statute are held in Venice, Italy, four times a year (March, June, October and December). Of the participating countries, 5 are supervisory, as well as one associate member country. The EU and the OSCE participate in the work of this Commission.

The Venice Commission operates in accordance with the three main principles, also referred to as the three pillars of the Council of Europe, namely: democracy, the rule of law and human rights.³ The role of this body consists of two main activities in, legal advice, and distribution or consolidation of a common constitutional heritage. So, the Venice Commission, provides for member states legal advice, in order to create a legal and institutional framework, in line with European standards and offers first aid or constitutional emergency assistance to countries in transition. According to the objectives set forth in Article 1/1 of the Statute, the aim is to: *approximate and strengthen the legal systems between the participating States, promote the rule of law, democracy and, finally, examine the problems raised by the work of democratic institutions, their development and*

² For more information see the Venice Commission's official website: Council of Europe, Venice Commission <https://www.venice.coe.int/WebForms/members/countries.aspx>.

³ Study No. 512, 2009, European Commission For Democracy Through Law (Venice Commission), Report On The Rule Of Law, Venice, 25-26 March 2011.

consolidation. Thus, the aim is to solve these identified institutional problems and to strengthen the guarantees offered by the principle of democracy.

3. Organization of the Venice Commission

The Venice Commission is assisted by a number of bodies in its day-to-day operations. Some of its governing bodies are set out in the Rules of Procedure revised (2018) and Article 4/4 of the Statute, which regulate the composition of the Venice Commission. The Venice Commission is made up of the President, the First Vice-President, the two Honorary Presidents, and two Vice-Presidents (three Vice-Presidents). The mandate of the President, Vice-Presidents and other members of the Bureau is for two years with the right to be re-elected (Article 4 of the Statute) and by majority vote, according to Article 6 of the Rules of Procedure revised, 2018). The President has the power to direct the affairs of the Commission, make decisions on his behalf, and represent the Commission in foreign affairs. The President together with the office and the enlarged office make strategic decisions and formulate proposals that are subject to plenary sessions (Buquicchio & Granata-Menghini, 2014).

Pursuant to Articles 7 and 8 of the Rules of Procedure revised, the Secretariat prepares the draft agenda, with possible members, proposals and Bureau guidelines, under the authority of the Commission. The Secretariat is also responsible for the preparation and circulation of all documents intended to be examined by the Commission (section 9 of the Regulation, 2018). Another important body is the Bureau, which consists of the President, first Vice-President, two Vice-Presidents, and four other members of the Bureau. Alongside the Bureau is the enlarged Bureau which consists of its members and the chairmen of the Sub-Committees.

The Venice Commission has a Subcommittee on every issue of its activity. Thirteen Subcommittees continue to operate within the Commission, headed by representatives from different countries. The distribution of professions and nationalities is another value for equality in the Venice Commission. The Subcommittees are on: fundamental rights; the federal state and the regional state; international law; protection of minorities; judicial; democratic institutions; working methods; Latin America; Mediterranean basin; rule of law; gender equality; Co-chair of the Joint Council on Constitutional Justice and President of the Council on Democratic Elections.

While operating the Joint Council on Constitutional Justice, the Council for Democratic Elections and the Scientific Council. The Commission's activities in the field of constitutional law are directed by the Joint Council on Constitutional Justice, which is a body composed of one representative for each of the Member State Courts but not only the courts with which the Commission cooperates. Pursuant to Articles 18 of the Rules of Procedure for the Election of Members of the Council, such a procedure is followed, where the Joint Council elects its Chairman, two Vice-Presidents and two other members of the Bureau.

The Council for Democratic Elections, established in 2002, is the body responsible for ensuring co-operation in the electoral field with the Venice Commission. This body is made up of nine members, in addition to representatives of the Venice Commission, members of both the Parliamentary Assembly and the Congress of Local and Regional Authorities who

play an important role in electoral matters at the Council of Europe (Buquicchio & Granata-Menghini, 2014). Present are also ODIHR and OSCE representatives who participate as observers in the work of the Council for Democratic Elections. In accordance with Articles 17a of the Rules of Procedures revised, the Scientific Council contributes to the high quality and consistency of the Commission's studies and opinions, it is a body which includes the scientific engagement of the Commission's activity.

4. Decision-making of the Venice Commission

The main areas of activity of the Commission are: democratic institutions and fundamental rights; constitutional justice and ordinary justice; and finally, elections, referendums, and political parties. The Commission drafts Opinions in a wide variety of law, where, in addition to constitutional draft laws that are the main area of its activity, it addresses other legal acts on the basis and application of the constitution. The Commission advises on the adopted legislation, including laws on the judicial system, the Constitutional Court, the Ombudsman, laws on constitutional bodies, as well as electoral laws, and laws on religious freedom.

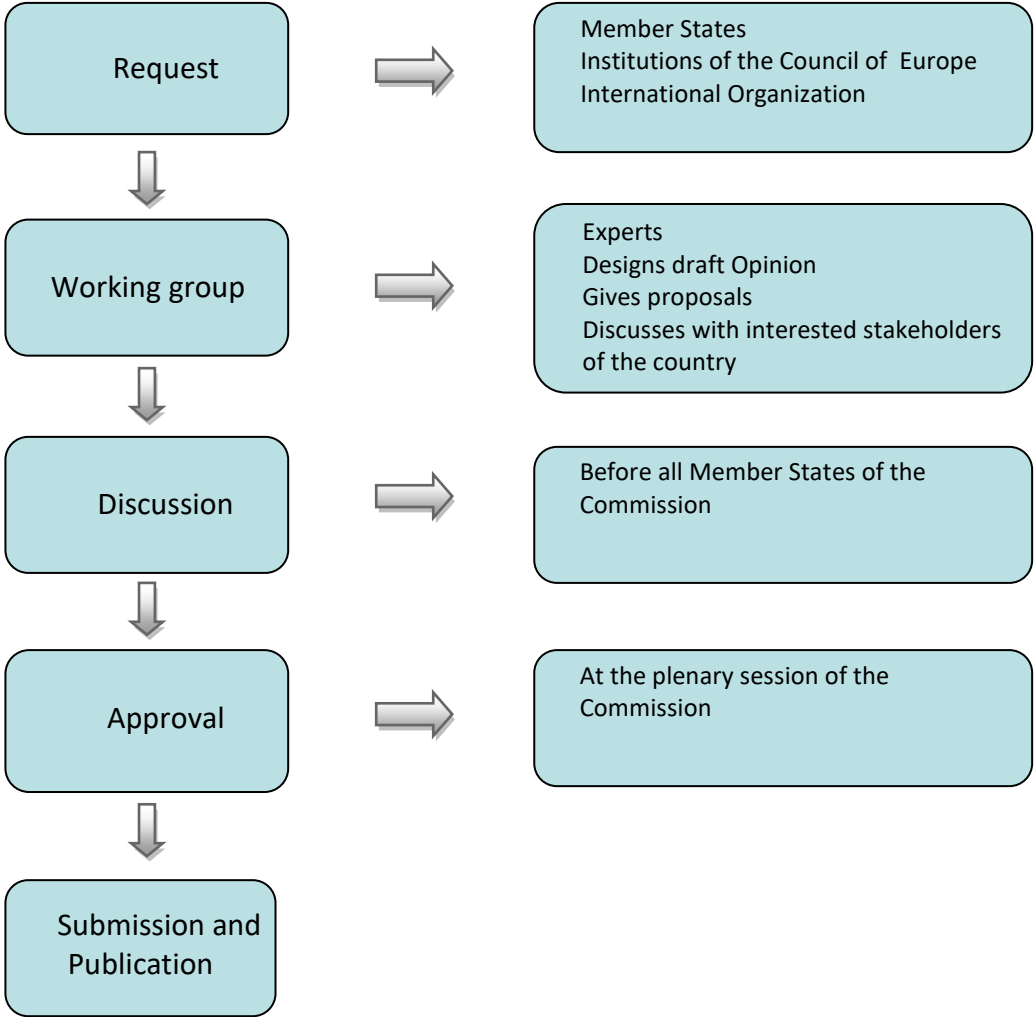
In line with the objectives cited above and provided for in Article 3 of the Statute, regarding the Commission's knowledge of the legal systems of States, it must understand their legal culture and interpret situations in accordance with their problems. (Article 1/1 of the Statute). The Commission in its activity produces Opinions, studies and reports on problematic matters requiring affirmation from its Member States. Moreover, in its field of research, the Commission may establish links with research institutes and centres, as well as compile documentation and carry out various studies in order to implement its main objectives (Article 3/5 of the Statute).

The Commission may not initiate a study or Opinion without the consent and request of other stakeholders. So the Commission can analyze general issues affecting democratic law and standards but cannot draft one for a particular state, it has no right to initiate an Opinion. But the question naturally arises, what are the entities that are eligible to seek a Venice Commission Opinion? In fact there are some, besides the member states of the Council of Europe, and the organs of the Council of Europe and international organizations are also entitled. Thus, the institutions of the Member States that may request an opinion before the Venice Commission are the Parliament, the Government and the Head of State. The Secretary General, the Committee of Ministers, the Parliamentary Assembly, and the Congress of Local and Regional Authorities may consult the organs of the Council of Europe in accordance with Article 3/2 of the Statute of the Commission. While the international organizations entitled to request an opinion by the Venice Commission are the European Union, the OSCE / ODIHR and other international organizations involved in the work of the Commission.

In cases where the request for an Opinion is requested by one State for another, then in order not to prejudice the sovereignty of the States, the Commission may draw up the Opinion and submit it to the Committee of Ministers only if there is an agreement between the two States.

The process of adopting final opinions goes through several stages. Initially for a particular case one of the above subjects submits the request for consideration - this request may be a constitutional draft or adopted legislation. Second, a working group is set up, composed of experts assisted by the Secretariat. The working group prepares projects, opinions and studies, in line with international standards, and proposes improvements. Third, members of the working group go to the site in question and hold talks with authorities, civil society and other stakeholders and come back with clear ideas for drafting a final draft. Fourth, the final draft Opinion is submitted for consideration, discussion and approval to all Member States at the Commission's plenary sessions. This draft may also be discussed with local authorities if States deem it necessary. Following the adoption of the Opinion at the plenary session, this Opinion shall be submitted to the requested body and published on the official website of the Venice Commission. Let's look at the following figure, the Venice Commission's decision-making process.

Figure 1: Opinion approval stages⁴



⁴ For more information see: <https://www.venice.coe.int>.

5. Opinions character of the Venice Commission

The opinions of the Commission are not binding. In line with most of the doctrine and specifically referring to Hoffmann-Riem's opinion (2014), the fact that the opinions of the European Commission are not binding makes them identified as soft law norms. But what do we mean by the fact that these norms are soft, maybe they are not legal and as such should not be considered?

If we refer to the traditional approach, we will find that they are neither soft law nor binding norms, therefore they are not law at all. But on the other hand, all legal scholars would exclude the categorization of these norms as purely political. As we refer to international acts such as the Universal Declaration of Human Rights, the decisions of the International Court of Justice, the United Nations Committee on Human Rights, etc., we will see a quasi-legal character. According to Hoffmann-Riem (2014), the concept of soft law includes norms that are legally non-binding, or binding only to a very limited extent, and have no sovereign enforceability/sanction, but nevertheless provide other incentives for compliance and thus enable effectiveness.

The main task of the Venice Commission is to provide states with legal advice, not to force states to enforce their decision, as this is an attribute that belongs only to the political bodies of states. The Commission is not a monitoring body, but only an advisory body, monitoring is carried out by states and their governing bodies (Buquicchio & Durr, 2018). Another alternative to how the Commission can exert influence is through cooperation with other institutions, in particular the Council of Europe and the European Commission, but in any case, its opinions remain non-binding.

There is no perfect constitution that can apply to all countries, which is why the Commission's work is so important, because it serves as a guide that takes into account all the features of the requested state. The Commission strives in its analysis to take into account the specifics of each country, referring to culture, historical background, the legal system, the political class, and strives to find a tailor-made solution for each state. As well as make suggestions for the adaptation of legislation in line with the evolution of society and its prosperity. So, we said that the Commission is based on some common European democratic standards but each country has its own specifics and these are taken into account by experts in their work. As the authors of Buquicchio and Durr, (2018) put it, this attitude encourages states, and guarantees them that their desires in the proposals made are taken into account. The drafters are aware that the Commission's recommendations try to bring about a more coherent constitution for them.

This Commission also plays another important role. It assumes such competencies as the design of studies, reports and guidelines for *amicus curiae*. As an organization that is not a party to litigation but is allowed to give advice on various litigation with the consent of the court. Thus, at the request of the constitutional courts of the member states of the Venice Commission or other courts such as that of the Council of Europe, the European Court of Human Rights, it offers opinions *amicus curiae*. It is interesting in this case that this Commission does not examine the constitutionality of the act in question, but its work consists mainly of interpreting and advising on comparative constitutional and international issues.

6. Impact of the Venice Commission, the *case of Albania*

Although there is no control mechanism or 'enforcement mechanism' as the author Craig (2016) would suggest, the impact of the Commission's work on the countries which cooperates with, it is clear and evident. Its opinions are not binding but these opinions are reflected in the legislation of the State in which the Commission has adopted the Opinion. This is because it is the states themselves that seek the Commission's help. It is they who seek advice on resolving and clarifying a conflict between norms or other legal matters, and as long as States seek the assistance of the Commission then the resulting resolution, although not binding, is taken into account. Moreover, there are Commission bodies, such as the Secretariat, which control the implementation of their Opinions in the respective countries of opinion.

It is not excluded that the Commission's Opinions will not always be implemented, because despite the fact that States require assistance, they prefer not to bear the costs of implementing such a decision. However, the Commission has proved to be relatively effective and this is particularly true because in many cases the Courts and mainly the European Court of Human Rights have taken into consideration the opinions of the Venice Commission's *amicus curiae* when considering judicial cases.

According to the doctrine (Clayton, 2019) the Commission does not impose its solutions but adopts a non-directive approach based on dialogue. It is precisely in line with the views of other authors that dialogue and the power to convince is the essence of the Commission's work. This is really an effective strategy if you refer to concrete issues, such as Albania (but not only). If we look at the case of Albania, which recently (2016) has undertaken a reform of justice, we will note that despite opposition from political groups, the Commission Opinions have been not only a guide, but necessary and decisive for the realization of the reform, the adoption of the legal package and the adoption of the Vetting law. The reform was adopted on July 21, 2016 and together with it 21 articles of the Constitution were changed from 26 articles that belonged to the justice system. Twelve new institutions were created and three institutions provided for in the Constitution were merged. A number of organic laws were adopted, including the provisional reassessment of judges and prosecutors of the Republic of Albania.

What was the role of the Venice Commission in undertaking such a great initiative? In fact, the Commission has been present since the early stages of reform. Commission Approves Interim Opinion on Draft Amendments to Albania (Opinion No. 824/2015 CDL-AD (2015) 045), Following Amendments to Opinion The *Ad Hoc* Committee Submitted the Final Opinion on Constitutional Revisions, (Opinion No. 824 / 2015. CDL-AD (2016) 009). The Venice Commission envisages three main groups in which the draft changes are divided: *first*, changes deemed necessary for Albania to become a member state of the European Union; *second*, changes aimed at bringing about a permanent reform of the justice system, and *third*, transitional provisions concerning extraordinary measures aimed at assessing the adequacy of existing judges and prosecutors and clearing the system of those incapable of corrupt or related to organized crime (Opinion No. 824 / 2015. CDL-AD (2016) 009).

Responding to the request of the Albanian state in cases of legal vacuum and failure to provide the proper legal answer, served to determine further directives. The problems of a

state in not finding the right democratic way are not the responsibility of other international actors, because the sovereign himself chooses the right path to follow. The Commission has completed its task when it offers the right path to all who seek it. Its responsibility is to ensure that the path it offers is in line with democratic standards and principles, and in this case the work of the Commission's experts has shown to be without shortcomings.

7. Conclusion

The Venice Commission, an advisory body of the Council of Europe, has shown that through the formulation of opinions, studies, research in the field of law and constitutional law provide an invaluable contribution to creating a legal environment according to European standards. Its creation after the 1990s and its composition not only by Council of Europe member states but also beyond, bring about a global approach guided through consultation and dialogue. The Venice Commission has a well-organized institutional framework with clearly defined competencies and a wide range of activities.

The adoption of Opinions shall be subject to a procedure in which an Opinion shall be drawn up only at the request of the Member States of the Commission, the institutions of the Council of Europe and international organizations. After submitting a request for an Opinion, a working group consisting of independent experts selected by member states but not represented, analyzes the case and attempts to construct a study taking into account European legal systems and cultures. Following a procedure based on discussion and dialogue between the stakeholders involved, approval is made at the plenary session.

The Venice Commission's opinions are not binding, opinions are categorized as soft law and cannot be subject to sanctions by states. It is the states themselves that choose to apply the Opinion in their legislation or not. Although despite the objections, the recommendations made by the experts have served to build a better legal framework and closer to democratic principles and the rule of law. The impact of the Commission's work through opinions and *amicus curiae* at various courts highlights the role of the Commission is increasingly contributing to the establishment of European standards.

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