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Intersecting Views on National and International Human Rights Protection

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Linos-Alexandre Sicilianos
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The Interaction between the Venice Commission and the European Court of Human Rights: Anticipation, Consolidation, Coordination of Human Rights Protection in Europe

*Gianni Buquicchio**
*Simona Granata-Menghini***

Human Rights protection through the global action of the Council of Europe

The cornerstone of the Council of Europe system of human rights protection is the European Convention on Human Rights (hereinafter: ECHR, "the Convention"), and the European Court of Human Rights (hereinafter ECtHR, "the Court") is the body designed not only to monitor its respect but also to define and develop the standards, as the Convention itself makes the Court competent and responsible for all matters concerning not only the application, but also the interpretation of the Convention by the States Parties.[1]

But the Court is not an island. Several Council of Europe specialised mechanisms co-operate with it and participate in the work of standard setting and monitoring in the area of human rights: the Committee of Ministers, especially in its mission of overseeing the execution of Court's judgments, the Parliamentary Assembly, the European Commissioner for Human Rights, the European Committee of Social Rights, the European Committee for the Prevention of Torture, the European Commission against Racism and Intolerance, the Advisory Committee of the Convention for the Protection of National Minorities, the Group of States against Corruption (GRECO), the

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* President of the European Commission for Democracy through Law ("Venice Commission").
** Deputy Secretary of the Venice Commission.
1 Article 32 ECHR. Article 46 ECHR contains a mandatory obligation on contracting states to comply with judgments of the ECtHR.

Committee of Experts on the Evaluation of Anti-Money Laundering Measures (MONEYVAL), the Committee of Experts of the Charter of Regional and Minority Languages, the Group of Experts against Trafficking in Human Beings, the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) and the Lanzarote Committee on protecting refugee and migrant children against sexual exploitation and sexual abuse.[2]

Other Council of Europe bodies participate in this endeavor, without being classic "monitoring bodies"; amongst these is the European Commission for Democracy through Law, the "Venice Commission".

1. The Venice Commission: independent non-binding but influential advice

This independent advisory body, [3] the product of the visionary idea of the Italian Antonio La Pergola, had a complex genesis, as at the end of the Eighties the idea of an independent forum of constitutional experts met with suspicion of potential unwarranted interference with national sovereignty. Only after the fall of the Berlin wall did the vision materialize: new countries aspiring to democracy needed profoundly different constitutional and legal frameworks. And if the Commission's creation had been troubled, its role and use were clear: it would be filling a gap, as nothing of the kind existed, no international

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2 https://www.coe.int/en/web/human-rights-rule-of-law/monitoring-mechanism; https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806d22c8.

3 The Commission is a so-called "enlarged agreement", where all the Council of Europe member states and, currently, 14 non-Council of European member states (Algeria, Morocco, Tunisia, Israel, Kirghizstan, Kazakhstan, the Republic of Korea, the United States, Mexico, Brazil, Chile, Costa Rica, Peru and Kosovo), sit as peers. The situation of the Council of Europe members states, however, is not identical to that of non-member states, in that members appointed by non-member states are not entitled to vote on questions raised by the statutory bodies of the Council of Europe (Article 2.5 of the Commission's statute) and, more importantly, the statutory bodies of the Council of Europe cannot request opinions on the legislation of non-member states and, in addition, they cannot ordinarily use the Commission's opinions within the framework of their monitoring procedures. For general information on the Venice Commission, see: G. Buquicchio, "Vingt ans avec Antonio La Pergola pour le développement de la démocratie", in : P. van Dijk/S. Granata-Menghini, eds. « Liber amicorum Antonio La Pergola", Juristförlaget i Lund 2009, p. 29; G. Buquicchio, S. Granata-Menghini, "The Venice Commission Twenty Years on. Challenge met but Challenges ahead", in M. van Roosmalen, / B. Vermeulen / F. van Hoof/ M. Oostling, eds., Fundamental Rights and Principles – Liber amicorum Pieter van Dijk, Cambridge, Antwerp, Portland (Intersentia 2013), p. 241; G. Buquicchio, S. Granata-Menghini " Conseil de l'Europe - Commission de Venise", Rép. eur. Dalloz, avril 2017.

collective body to provide advice on constitutional matters. No other such body exists as of today.

The Commission provides non-binding legal advice on (draft) constitutional texts or issues, and on (draft) legislative texts or issues of constitutional relevance; it does so upon request, of either the institutions of the State concerned or of a Council of Europe body or a body participating in the work of the Commission (as of today, similar requests were received from the OSCE and the European Commission). To maintain its political neutrality, the Commission cannot prepare country-specific opinions on its own initiative, although it can of course offer its assistance. When requests come from political bodies such as the Parliamentary Assembly of the Council of Europe, the procedure of preparation in constant dialogue with the authorities is the same, but the nature of the opinion is different: the relevant state might be reluctant to receive the Commission's advice but is faced with political pressure to carry out its recommendations. In fact, as the Venice Commission has acquired a high reputation of independence and competence, it is often difficult for a government to ignore the Commission's opinions: pressure will come from both inside – the opposition, the civil society, the press – and outside the country – the Council of Europe, the European Union, foreign governments but also in some cases other influential international players such as the International Monetary Fund[4] or the World Bank. Though the Commission's advice is non-binding, a recalcitrant state might therefore face significant political and financial consequences. This is particularly evident in the case of opinion requests made in the framework of stabilization and accession procedures, often with an explicit encouragement by the European Commission itself. If the Venice Commission does not carry out monitoring functions, its legal opinions are often used by other actors in the context of monitoring procedures.

4 In December 2017, the Managing Director of the International Monetary Fund issued the following statement: "We urge the Ukrainian authorities and parliament to safeguard the independence of NABU and SAPO. We also urge the authorities to move quickly with legislation to operationalize an independent anticorruption court consistent with the recommendations of the Venice Commission of the Council of Europe, which is essential to credibly adjudicate high-level corruption cases." The IMF conditioned the payment of a very substantive sum on compliance with the recommendations of the Venice Commission in its October 2017 opinion on the Draft Law on Anticorruption Courts and on the Draft Law on Amendments to the Law on the Judicial System and the Status of Judges (concerning the introduction of mandatory specialisation of judges on the consideration of corruption and corruption-related offences) (CDL-AD(2017)020). https://www.imf.org/en/News/Articles/2017/12/07/pr17473-ukraine-imf-statement-on-the-efforts-to-fight-corruption.

But if the Commission's opinions are so often followed, at least in part,[5] it is also because the advice they provide is at the same time objectively based on general international standards, and tailor-made for the specific political and legal context of the country in question. It takes into account both the applicable standards and the reality of the issues.

The standards the Commission applies are first of all the Council of Europe standards in the field of democracy, human rights and the rule of law.[6] The extent and force of these standards varies significantly. In the field of human rights, the vast case-law of the European Court of Human rights provides extensive and detailed hard law standards, which are supplemented by recommendations by the Committee of Ministers, the Parliamentary Assembly and the Council of Europe Monitoring bodies, as well as the OSCE/ODIHR. In the field of the rule of law, there exist fewer hard law standards, and there are no specific conventions and relevant monitoring bodies. For the Venice Commission, however, European hard law functions merely as a base-line: the Commission has often felt free to require stricter protection and to apply more rigorous standards than the Strasbourg court. It should be emphasized in this respect that the Venice Commission is not only a consumer but also a producer of soft law. The Commission has adopted guidelines, either on its own or together with the OSCE-ODIHR, especially in the fields of political rights, elections and referendums, and in March 2016 it adopted a comprehensive rule of law check-list.[7] The Commission has also published summaries – so-called "compilations" – of its country-specific opinions and general reports on particular issues, and in this manner, too, it has contributed to the growing body of European soft law. In the area of democracy, both soft law and Venice Commission own materials abound as benchmarks for the Commission's assessments, and the Commission substantially relies on comparative constitutional experience of European and increasingly non-European States.

The Commission's opinions analyse and process the views and the arguments not only of the authorities, but also of the opposition, the civil society, and other independent state institutions. The opinions often channel these claims

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5 Information on follow-up given to Venice Commission opinions adopted since 2017 can now be found on the Commission's website: https://www.venice.coe.int/WebForms/followup/default.aspx?lang=EN.

6 A. Schimke, "Arbeit und Einfluss der Venedig-Kommission des Europarats", HRN, 1/2013, p. 12-19; W. Hoffmann-Riem, "The Venice Commission of the Council of Europe – Standards and Impact", The European Journal of International Law (2014) Vol. 25 no. 2, p. 579–597.

7 Rule of Law Checklist, CDL-AD(2016)007.

to the authorities, and establish a form of dialogue which is sometimes the only existing one in situations of high tension. As a result, the Commission's recommendations are legally and, mostly, politically viable.

The Venice Commission is not a mediator, but its involvement often facilitates discussion among opposing groups. It is a catalyst, and its involvement compels important issues onto the government agenda.[8]

2. The interaction between the Venice Commission and the Court

The Venice Commission is very different from the Court, in many respects: it is not a tribunal, it has not been established by an international treaty, it is not a monitoring body, its jurisdiction is not defined, nor limited by a single treaty and is not limited to the 47 member states of the Council of Europe, and it does not produce binding norms. The Commission does not deal with individual applications and is not bound by the rule of the previous exhaustion of domestic remedies: to the contrary, very often it examines constitutional and legal texts prior to their enactment. Yet, these macroscopic differences notwithstanding, the Commission and the Court have established a specific and effective kind of synergy.

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8 One very recent example suffices to illustrate this process. It concerns Malta. In November 2017, in a resolution, adopted by an overwhelming majority, the European Parliament had asked the European Commission to "start a dialogue with the Maltese government on the functioning of the rule of law in Malta". Following a fact finding mission to Malta, the EP delegation submitted its report to the Venice Commission President (https://www.anagomes.eu/PublicDocs/58060227-8670-40f6-a5a7-acf5c343fc1e.pdf). In September 2018, the European Parliament's Rule of Law Monitoring group proposed "to invite the Venice Commission to Malta to assess the systems in place as well as the application in practice" in relation to the investigation into the murder of Daphne Caruana Galizia. On 10 October 2018, the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe (PACE) requested an opinion of the Venice Commission on Malta's constitutional arrangements and separation of powers and the independence of the judiciary and law enforcement bodies. Finally, on 13 October 2017, the Maltese Minister for Justice, Culture and Local Government requested itself an opinion on "Malta's legal and institutional structures of law enforcement, investigation and prosecution in the light of the need to secure proper checks and balances, and the independence and neutrality of those institutions and their staff whilst also securing their effectiveness and democratic accountability". The Commission adopted its opinion in December 2018 (https://www.venice.coe.int/webforms/documents/?country=46&year=all). The Maltese government publicly welcomed the Venice Commission's opinion and stated that it was "in general agreement with the bulk of the Venice Commission's proposals and intends to implement them in the main" (https://www.gov.mt/en/Government/DOI/Press%20Releases/Pages/2018/December/17/pr182734en.aspx).

Their interaction takes three main forms: the systemic use by the Commission of the Court's case-law; third party interventions by the Commission in procedures pending before the Court; the reference by the Court, in its judgments and decisions, to Venice Commission opinions and studies.

A. Reference by the Commission to the case-law of the Court

As regards the first form of interaction, the Commission's statute identifies its specific field of action as "the guarantees offered by law in the service of democracy" and the work concerning "fundamental rights and freedoms, notably those that involve the participation of citizens in public life" as a priority (Article 1.2.b of the Statute). The Commission assesses the compatibility of draft constitutions and laws with European standards, which, insofar as the Council of Europe member-states are concerned, are essentially constituted by the case-law of the Court. Its opinions therefore naturally contain numerous references to it with relevant interpretations. The Commission's involvement has been sought by some States in the context of procedures of execution pending before the Committee of Ministers, in relation to the adoption of the

so-called general measures:[9] in these cases, the Commission assists the relevant State not only in abiding by the specific judgment in which it has been found to be in breach of the Convention, but also in meeting the other requirements which the Court's case-law has identified in the field in question. The Commission has also addressed general issues related to the interpretation of the obligations stemming from the ECHR and to the execution of the Court's judgments.[10]

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9 Joint Opinion of the Venice Commission, the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe and the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on two Draft Laws on Guarantees for Freedom of Peaceful Assembly of Ukraine (CDL-AD(2016)030)/Vyerentsov v. Ukraine judgment (application no. 20372/11, 14 April 2013); Preliminary Opinion on the Draft Law on amending the Law on the Judicial System and the Status of Judges of Ukraine (CDL-AD(2015)008)/ Oleksandr Volkov v. Ukraine (application no. 21722/11, judgment of 9 January 2013); Opinion on the Draft Law on making changes and additions to the Civil Code (introducing compensation for non-pecuniary damage) of the Republic of Armenia (CDL-AD(2013)037)/ Poghosyan and Baghdasaryan v. Armenia (application no. 22999/06, Judgment of 12 June 2012) and Khachatryan and Others v. Armenia (application no. 23978/06, Judgment of 27 November 2012); Opinion on the legislation pertaining to the protection against defamation of the Republic of Azerbaijan (CDL-AD (2013)024)/ Mahmudov and Agazade v. Azerbaijan, application no. 35877/04, Judgment of 18 December 2008, and Fatullayev v. Azerbaijan, application no. 40984/07, Judgment of 22 April 2010; Opinion on the Draft Law on Amendments and Additions to the Law on Alternative Service of Armenia (CDL-AD(2011)051)/ Bayatyan v. Armenia of 7 July 2011 (Application no. 23459/03). The Amicus Curiae Brief for the Constitutional Court of Albania on the restitution of property (CDL-AD(2016)023) aimed to resolve the administrative problems concerning the effective restitution of property and concerned, at the time of writing the amicus curiae brief, around 230 cases pending before the ECtHR and over 15 cases under the supervision of the Committee of Ministers. In its Opinion on the legislation on defamation of Italy (CDL-AD(2013)038), requested by the Parliamentary Assembly, the Commission assessed the legislative amendments aimed at limiting the use of criminal sanctions for defamation and at introducing the abolishment of imprisonment as a sanction for defamation, against the background of the relevant ECtHR judgments against Italy. In its Final Opinion on the Amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation (CDL-AD(2016)016), the Venice Commission assessed the compatibility with the ECHR of legislative amendments related to the power of the Russian Constitutional Court on declaring the decisions of international courts, notably of the ECtHR, as "unenforceable" when their execution raises issues of constitutionality. For a complete overview, see https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)017-e.

10 Among others: Implementation of international human rights treaties in domestic law; The reopening of Judicial Procedures following the finding of a breach of the right to a fair trial; European Union accession to the European Court of Human Rights; European Union accession to the European Court of Human Rights; Opinion on video surveillance by private operators in the public and private spheres and by public authorities in the private sphere and human rights protection; Report on the relationship between Freedom of Expression and Freedom of Religion: the issue of regulation and prosecution of Blasphemy, Religious Insult and Incitement to Religious Hatred (https://www.venice.coe.int/webforms/documents/?opinion=404&year=all).

B. Third party interventions before the Court

As is known, third party interventions are authorized by the President of the Court or of the Chamber "in the interest of the proper administration of justice".[11] Participation of third parties has a particular significance, as the Court disposes of limited investigation powers and normally relies only on the information and evidence provided by the applicant or by the respondent national authorities (in addition, naturally, to the research carried out by the Registry). Interveners must not comment upon the facts of the case (with the exception of States entitled to intervene pursuant to Article 36§1 ECHR). Third party interventions may be useful when they bring to the Court objective information on the legal system or about the case-law of the high courts of the country concerned, or elements of comparative law.[12]

Since 2001, the Venice Commission has made six third party interventions.[13] What did the Court expect from the Commission's interventions? And what did they actually bring to the Court?

In December 2005, the Commission was granted leave to intervene in the case of *Parti Nationaliste Basque – Organisation Régionale d'Iparralde v. France* (Application no. 71251/01), which raised the question of the legitimacy of the prohibition for a political party to receive funds from a foreign political party. The Commission had recently adopted three relevant sets of guidelines on political parties;[14] none of these, however, had dealt specifically with the issue raised by this application: the legitimacy of the prohibition of financing of political parties not by foreign *States*, but rather by foreign *political parties*, moreover within the European Union. In its amicus curiae brief,[15] replying to two specific questions put by the Court, on the basis of a comparative research of the legislation of 44 European countries and of an analysis of the legislation of the European Union, the Commission found that the prohibition of contributions from

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11 Article 36§2 ECHR.

12 See P. HARVEY, Third Party Interventions before the ECtHR: A Rough Guide, https://strasbourgobservers.com/2015/02/24/third-party-interventions-before-the-ecthr-a-rough-guide/

13 In one case, instead of granting a third party intervention according to Article 36§2, the president of the Chamber asked the Commission to intervene as an expert pursuant to Article 44§3(a) of the Court's Rules of procedure.

14 "Guidelines on the prohibition and dissolution of political parties and analogous measures"; "Guidelines and Report on the Financing of Political Parties"; "Guidelines and Explanatory Report on Legislation on Political Parties: some specific issues", CDL-INF(2000)001, CDL-INF(2001)008 and CDL-AD(2004)007rev respectively.

15 Opinion on the Prohibition of Financial Contributions to Political Parties from Foreign Sources

foreign political parties may be considered necessary in a democratic society if such funding is used to pursue aims not compatible with the Constitution and the laws of the country; if it undermines the fairness or integrity of political competition or leads to distortions of the electoral process or poses a threat to national territorial integrity; if it inhibits responsive democratic development and if the prohibition is part of the international obligations of the State. In order to establish whether Article 11 ECHR has been violated, each case calls for specific consideration in the context of the general legislation on financing of parties as well as of the international obligations of the State and among these the obligations emanating from membership of the European Union. In its judgment of 7 June 2007, the Court noted that while the Venice Commission's guidelines considered that the prohibition of foreign funding by foreign States was necessary to protect national sovereignty, a conclusion which the Court shared, the amicus curiae brief, including the comparative research contained therein, showed that the conclusion was less straightforward as concerns financing from foreign sources. Also, the Committee of Ministers had recommended to member states to "limit, prohibit or regulate specifically donations from foreign sources". Limiting the foreign funding of political parties was therefore not in itself contrary to Article 11 ECHR, but an in-depth analysis of the context in which the specific political party operates was necessary. As the impact of the prohibition for the applicant political party to receive funds from the Spanish Basque party was not such as to impede the exercise of its political activities, the Court concluded that the interference could be regarded as necessary in a democratic society for the protection of order.

By granting the Commission leave to intervene in the next three cases, the Court instead showed interest in the direct and in-depth knowledge of the legal and political context of the Balkans which the Venice Commission has developed over numerous years of co-operation and assistance.

The case *Bjelić v. Serbia and Montenegro* (application no. 11890/05) raised the question of whether the Republic of Montenegro and/or the Republic of Serbia could be considered responsible for human rights violations allegedly committed between the entry into force of the ECHR for the State Union of Serbia and Montenegro on 3 March 2004 and the declaration of independence of Montenegro on 5 June 2006. The Venice Commission had previously issued three opinions on the process which had led to the independence of Monte-

negro and on its new Constitution.[16] In its amicus curiae brief, the Commission considered that there were no hurdles in international law for the Court to hold Montenegro responsible for possible breaches of the applicants' Convention rights that might have been caused by the authorities of the Republic of Montenegro in the period from 3 March 2004 until 5 June 2006. The Commission further considered it unnecessary to await possible "separately regulations" between the states of Serbia and Montenegro as envisaged by the Constitutional Charter of the State Union, Article 60(5). Nor was it necessary for the Committee of Ministers of the Council of Europe to be requested to vary the decision that was taken in May 2007 that the Republic of Montenegro should be considered as a party to the ECHR and its Protocols as of 6 June 2006. In its judgment of 28 April 2009, the Court held like the Commission that that the ECHR and its Protocols had remained in force with regard of Montenegro with no interruption as of 3 March 2004, and therefore declared the application compatible *ratione personae* in respect of Montenegro and incompatible *ratione personae* in respect of Serbia.

In May 2008, the Court granted the Venice Commission leave to intervene in the case of *Sejdić and Finci v. Bosnia and Herzegovina* (Applications nos. 27996/06 and 34836/06) which raised the issue of the allegedly discriminatory exclusion of "Others", that is those who are not affiliated to one of the three constituent peoples (Bosniaks, Serbs and Croats), from election to the House of Peoples and the Presidency of the State by application of the relevant constitutional and electoral provisions. In its amicus curiae brief of 22 October 2008, the Venice Commission concluded that such provisions were incompatible with Article 14 ECHR taken together with Article 3 of Protocol no. 1 (as regards the House of Peoples) and with Protocol 12 (as regards the House of Peoples and the Presidency). The Commission stressed in particular that a deep change had occurred in the prevailing mentality since the Dayton Peace Accords. In addition, the constitutional structure of the Entities, which did not deprive the "Others" of passive electoral rights, was proof of a possible alternative, non-discriminatory setup. Finally, in the Commission's view, the country's accession to the Council of Europe and its aspirations to join the European Union could be taken as a possible willingness to overcome the Dayton setup. In its judgment of 22 December 2009, the Court did not only rely on the amicus curiae

16 CDL-AD(2005)041, Opinion on the Compatibility of the Existing Legislation in Montenegro concerning the Organisation of Referendums with Applicable International Standards; CDL-AD(2007)017, Interim Opinion on the Draft Constitution of Montenegro; CDL-AD(2007)047, Opinion on the constitution of Montenegro.

brief, but also and extensively on the Commission's previous opinions on the constitutional situation of Bosnia and Herzegovina, especially on the opinion of 2005 which devoted a whole chapter to the discriminatory character of the rules for the election to the House of Peoples and the Presidency of the State.[17] To the respondent Government's claims that the ECHR does not require that the whole mechanism of power sharing of the country be abandoned and that the time was not ripe for a political system which is the simple expression of the majority rule, the Court opposed the Venice Commission's analysis and opinions "*that clearly demonstrate that there exist mechanisms of power-sharing which do not automatically lead to the total exclusion of representatives of the other communities*"[18]. The Court thus found a violation of Article 14 of the Convention taken in conjunction with Article 3 of Protocol No. 1 as regards the applicants' ineligibility to stand for election to the House of Peoples and of Article 1 of Protocol No. 12 as regards their ineligibility to stand for election to the Presidency of Bosnia and Herzegovina.

The case *Ruza Jelićić v. Bosnia and Herzegovina* (Application no. 41183/02) concerned the question of whether the procedure before the Human Rights Chamber of Bosnia and Herzegovina represented "another procedure of international investigation or settlement" within the meaning of Article 36§2b ECHR). A possible positive conclusion would have entailed the inadmissibility of all the cases dealt with by the Chamber. The Venice Commission argued that, even though Annex VI to the Dayton Peace Agreement which established the Human Rights Chamber is an international treaty, the procedure before it is not an international one, because the Chamber exercised jurisdiction only within the national borders and in relation to obligations of the State towards its own citizens.[19] In its decision of 15 November 2015, the Court reached the same conclusions as the Venice Commission.[20]

In the following two cases, it was not the Venice Commission that applied for leave to intervene as a third party, but it was the Court itself that, referring to the Commission's "competence in constitutional matters", invited it to present observations if it so wished. The case *Rywin v. Poland* concerned the guaran-

17 CDL-AD (2005) 004, Opinion on the constitutional situation in Bosnia and Herzegovina and the powers of the High Representative.

18 ECtHR, *Sejdić and Finci* judgment of 22 December 2009, § 48.

19 *Amicus Curiae* Opinion (Proceedings before the European Court of Human Rights) on the nature of proceedings before the Human Rights Chamber and the Constitutional Court of Bosnia and Herzegovina, CDL-AD(2005)020.

20 ECtHR, *Jeličić v. BiH*, decision of 15 November 2005.

tees afforded in the procedure before parliamentary committees of inquiry. The Commission provided very detailed information and elaborated extensively on the relations between this procedure and the possibly related criminal proceedings.[21] In line with the brief, the Court subsequently reached the conclusion that there had been no breach of the right to presumption of innocence and of the right to an independent and impartial tribunal.[22]

In the most recent case, *Berlusconi v. Italy* (Application No. 58428/13), the President of the Court asked the Venice Commission to elaborate on what are the minimum procedural guarantees which a State must provide in the framework of a procedure of disqualification from holding an elective office. The Commission, having carried out a comparative research of the legislation of 62 states, distinguished between legal orders in which disqualification from office is decided only by a judge, and legal orders where it may stem from the law, like in Italy, on the basis of criteria relating to the nature and seriousness of the offence, and the applicant's conduct. When disqualification *ex lege* requires a specific ratification decision by parliament, in the Commission's view, such ratification decision does not represent in itself an interference with the right to be elected, because it may only confirm the disqualification ex lege (the interference then stems from the law itself) or reject it, in which case the applicant is not a victim anymore; parliament may not decide to impose disqualification if the legal conditions are absent. Accordingly, the procedure before the relevant parliamentary committee does not require full-fletched guarantees like a judicial procedure.[23] Whether the Court would agree with this conclusion will remain unknown, as by a decision notified on 27 November 2018 the Court struck the application off its case list, upon request by the applicant who had in the meantime been rehabilitated.

C. Reference by the Court to Venice Commission material

If there have been no third party interventions between 2009 and 2017, this does not mean that the interaction between the Court and the Commission has slowed down or has stopped, quite the contrary. Between 2001 and 2018 there have been references to Venice Commission opinions and studies in more than

21 Amicus Curiae brief in the case of *Rywin v. Poland* pending before the European Court of Human Rights (on Parliamentary Committees of inquiry), CDL-AD(2014)013.

22 ECtHR, *Rywin v. Poland* judgment of 18 February 2016.

23 Amicus curiae brief for the European Court of Human Rights in the case of *Berlusconi v. Italy*, CDL-AD(2017)025.

150 judgments, of which 34 were Grand Chamber judgments.[24] Roughly 120 of these references have been made after 2009. Over the years, the material produced by the Venice Commission – opinions, studies, standard-setting documents such as guidelines or codes of good practice – have piled up and diversified, thus offering the Court a wealth of references and analyses from which it can draw inspiration and information at will.

The references to the Commission's work may be divided into two categories: 1) the citations, under the section "Relevant international material or law", of codifications of standards and of reports of general nature, *in primis* in the field of electoral law and political parties, two areas in which hard law standards are rather rare, but also in other areas including freedom of religion, secret services, video-surveillance; 2) the references to country-specific opinions; the Court has used the Commission's analysis of the constitutional situation of a country (see for example the aforementioned *Sejdić and Finci* judgment and the *Volkov v. Ukraine* judgment of 2013, in which the Court used the Joint opinion[25] by the Commission and DGI to conclude that the procedure before the Council of the Judiciary was incompatible with the requirements of independence and impartiality of Article 6 § 1 ECHR). But the Court has also relied on the assessment made by the Venice Commission of the compatibility of a given constitution or law with European standards, notably the ECHR. This is the cornerstone of the Commission's work. The Commission examines the compatibility of (draft) constitutions and laws with ECHR standards developed by the Court, but unlike the latter it does not look into individual cases. The Commission focuses on the requirement that an interference should be "in accordance with the law", notably on the quality of the law, that is the need for the specific legal basis to be accessible so that an individual may reasonably anticipate the conse-

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24 https://hudoc.echr.coe.int/eng#{%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22,%22DECISIONS%22],%22organisations%22:[%22Venice%20Commission%22]}. The first reference is contained in the admissibility decision in the case of *BankoviD and others v. Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom* of 2001, and relates to the Venice Commission's Report on the Preferential treatment of national minorities by their kin State (CDL-INF(2001)019); the latest, besides the aforementioned Berlusconi and another strike off decision, is the judgment of 20 November 2018 in the case *Selahattin Demirtaş v. Turkey* (n° 2) in which the Court referred to the Commission's Opinion on the suspension of the second paragraph of Article 83 of the Constitution of Turkey (parliamentary inviolability) (CDL-AD(2016)027).

25 Joint Opinion on the Law Amending Certain Legislative Acts of Ukraine in Relation to the Prevention of Abuse of the Right to Appeal by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe, CDL-AD(2010)029.

quences of his or her conduct. The Commission is also interested in the clarity of the legal provision of the modalities of exercise of the discretion which the law confers on the executive authorities or on the courts. The Venetian think tank effectively carries out a prediction against the background of the ECHR standards of the legality and proportionality of the interferences which the legal text under examination produces or will produce. The Court appears to be increasingly interested in such predictions.

There are many examples of this interest, including very recent ones.[26] In the 2016 judgment *Baka v. Hungary*, the Court referred to the Commission's opinions relating the judiciary of Poland,[27] and also to the Commission's opinions relating to the independence of the judiciary in Armenia and Georgia. The Court endorsed the Commission's position that the impugned legislation was directed against one specific person.[28] In the judgment *Mariya Alekhina and others v. Russia*, which concerns the conviction of the applicants (Pussy Riots) on account of an artistic performance carried out in the Cathedral of Moscow and the classification of the videos of this performance as "extremist", the Court used both the Commission's 2006 Report on the relation between freedom of expression and freedom of religion (quoted under the sources of international standards) and its 2012 Opinion on the Russian Federal law on the repression of extremist activities. From the first, the Court extracted and shared the consideration that restrictions on the right to freedom of expression in the form of criminal sanctions are only admissible in cases of incitement to hatred. The Court used the second to determine whether the interference with the applicants' rights under Article 10 was in accordance with the law. On the basis of the Commission's reservations about the inclusion of certain activities in the list of extremist ones and about the lack of requirement of violence as a constitutive element of the definition of extremism, the Court raised the question of the legality of the interference, although it finally found a breach of Article 10 ECHR on account of the lack of necessity in a democratic society.[29] In the judgment *Bektashi community and others v. "the former Yugoslav Republic of Macedonia"* concerning the refusal to allow the applicant association to main-

26 https://www.venice.coe.int/WebForms/pages/?p=02_references&lang=EN

27 Opinion on the Fundamental Law of Hungary, CDL-AD(2011)016; Opinion on the Legal Status and Remuneration of Judges Act (Act CLXII of 2011) and the Organisation and Administration of the Courts Act (Act CLXI of 2011), CDL-AD(2012)001; Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of the above-mentioned Opinion CDL-AD(2012)001 on Hungary,CDL-AD(2012)020.

28 ECtHR, *Baka v. Hungary* judgment of 23 June 2016.

29 ECtHR, *Mariya Alekhina and Others v. Russia* judgment of 17 July 2018.

tain its status of religious organisation, the Court referred to the Commission's opinion of 2007[30] expressing doubts on the fact that a similar dènomination could be sufficient to create confusion and warning the authorities that they should remain neutral vis-à-vis the registration of religious organisations. The Court found a breach of Article 11 ECHR on both accounts.[31] In the case *Bakir and other v. Turkey* about freedom of expression, the Court used the Commission's opinion of 2016 on Articles 216, 229, 301 and 314 of the Turkish criminal code[32] in which the Commission had questioned the legality of interferences under these articles.[33] In the 2018 judgments *Centrum for Rattvisa v. Sweden*[34] and *Big Brother Watch v. UK*[35], the Court relied on the Commission's conclusions on the democratic control of signals intelligence agencies.[36] In the decision *Aumatell I Arnau v. Spain*, relating to the fairness of the procedure before the Spanish Constitutional Tribunal, the Court referred to the Commission's 2017 opinion on amendments to the law on the Constitutional Tribunal.[37] The Court noted that, contrary to that Tribunal, the Venice Commission had concluded that the procedure could be considered as "criminal" on account in particular of the severity of the sanctions. The Court finally agreed with the Venice Commission.

3. Conclusions

From the interaction, or better the cross-fertilization, between the European Court of Human Rights and the Venice Commission, the latter gains authority, prestige and visibility. The soft law standards elaborated by the Venice Commission acquire force of hard law when the Court endorses them.[38] When the Court explicitly shares the predictions of compatibility of draft legislation

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30 Opinion on the Draft Law on the Legal Status of a Church, a Religious Community and a Religious Group of "the former Yugoslav Republic of Macedonia", CDL-AD(2007)005.

31 ECtHR, *Bektashi Community and others v. "the former Yugoslav republic of Macedonia"* judgment of 12 April 2018.

32 Opinion on articles 216, 299, 301 and 314 of the Penal Code of Turkey, CDL-AD(2016)002.

33 ECtHR, *Bakir and others v. Turkey*, judgment 10 July 2018.

34 ECtHR, *Centrum for Rattvisa v. Sweden* judgment of 19 June 2018.

35 ECtHR, *Big Brother Watch v. UK* judgment, 13 September 2018.

36 Report on the Democratic Oversight of Signals Intelligence Agencies, CDL-AD(2015)011.

37 Opinion on the law of 16 October 2015 amending the Organic Law No. 2/1979 on the Constitutional Court of Spain, CDL-AD(2017)003.

38 For example, in its judgment in the case *Parti Nationaliste Basque – Organisation Régionale d'Iparralde v. France*, the Court stated that it had *"no difficulty in accepting that the prohibition on the funding of political parties by foreign States is necessary for the preservation of national sovereignty; indeed, the "Guidelines and Report on the financing of political parties" adopted by the Venice Commission state that financial contributions from foreign States should be prohibited*".

with ECHR standards made by the Commission, it strengthens the latter's authority, thus motivating and prompting states to seek its assistance when they draft human rights-related laws in order to prevent applications to the Court, and possibly findings of violations, when these laws enter into force. Considering the often considerable time gap which the rule of the previous exhaustion of domestic remedies causes between the concrete application of a law and its examination by the Court, the Venice Commission's assistance work prior to any actual interference in a sense anticipates the effects of the Court's judgments: thus, the Commission's recommendations pre-empt the general measures of execution which a possible finding of a violation by the Court would require. It should be remembered in this context that the Commission exercises considerable influence over the national legislators.

In turn, the Court benefits from the work of the Venice Commission because it may dispose of precious analyses, both in terms of comparative researches of constitutional and legislative contexts of given states, and also of objective and independent predictions on the impact which certain laws may have on the exercise of fundamental rights and freedoms. The Court may also show to be responsive to the work of other Council of Europe bodies, not only the Venice Commission but also, through it, to the Parliamentary Assembly, the Committee of Ministers, the Commissioner, the Monitoring Bodies, and to be a part of a coherent, global system of human rights protection in Europe.

It must also be stressed that national oppositions, civil society, judges and independent state institutions, through the Venice Commission which conveys their arguments where appropriate, find a channel of communication with the Court, which otherwise would ordinarily not hear their voices.

The Council of Europe statutory bodies which are entitled to seek opinions from the Venice Commission, *in primis* the Parliamentary Assembly, may also, through such requests, provide the Court with additional, precious material.

This well-established synergy between the Court and the Venice Commission is mutually beneficial, and brings a substantive contribution to human rights protection in Europe.