

THE COUNCIL OF EUROPE

Its Law and Policies

STEFANIE SCHMAHL
MARTEN BREUER

OXFORD
UNIVERSITY PRESS

2017

CONSTITUTIONAL STANDARD- SETTING AND STRENGTHENING OF NEW DEMOCRACIES

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A. Introduction

32.01 Within the CoE the issue of constitutional standard-setting and strengthening of new democracies is closely connected with the European Commission for Democracy through Law. When perceiving each new democracy as a 'workshop for constitution-making',¹ the question arises as to the platform, the structure, and the functioning of such a workshop. Serving as a 'tool for [emergency] constitutional engineering'² is both the *raison d'être* and a challenging task for the European Commission for Democracy through Law, widely known as the Venice

¹ A La Pergola, Opening Speech at the UniDem Conference on 'Constitution Making as an Instrument of Democratic Transition', Istanbul, 8–10 October 1992.

² P Garrone, 'La Commission de Venise à la veille de son dixième anniversaire' (1999) 66 *Rivista di studi politici internazionali* 527; CDL-INF(2000)12, The Venice Commission at ten years old.

Commission. The Venice Commission is the CoE's advisory body on constitutional matters. Its role is to provide legal advice to its Member States, to other CoE bodies, and international organisations and, in particular, to help States wishing to bring their legal and institutional structures in line with European standards and international experience in the fields of democracy, human rights, and the rule of law.

The present contribution deals with the Venice Commission as an instrument for constitutional standard-setting and the strengthening of new democracies. First, some general information on the origin, composition, and working methods of the Commission will be given. The second part will then exemplify the Commission's major fields of activities. Finally, the impact of the Venice Commission's work will be discussed. **32.02**

B. Organisation and Working Method of the Venice Commission

I. Origin and Statute

The idea of creating a Commission for 'Democracy through Law' in the form of a group of experts in the field of constitutional law was conceived by Antonio La Pergola, the President of the Commission from its establishment in 1990 until his death in 2007.³ The choice of the name for the Commission was to express the conviction that sustainable democracy can only be built in a sound constitutional framework based on the rule of law.⁴ **32.03**

Since constitutional law is necessarily close to issues touching upon State sovereignty, the establishment of cooperation in the field of constitutional law was by no means obvious within the framework of an intergovernmental organisation such as the CoE.⁵ Initially, not all Member States of the CoE were in favour of creating this body. When it was established in 1990 in the light of the pressing need to assist Central and Eastern European countries in adopting new constitutions after the fall of the Berlin wall, only eighteen out of the then twenty-three Member States were ready to participate in the Commission, namely: Austria, Belgium, Cyprus, Denmark, Finland, France, Greece, Ireland, Italy, Luxembourg, Malta, Norway, Portugal, San Marino, Spain, Sweden, Switzerland, and Turkey. Therefore, the **32.04**

³ La Pergola was among other functions President of the Constitutional Court of Italy, Minister of European Community Policy of Italy, and Judge at the Court of Justice of the European Union.

⁴ 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* (2009), pp 29–34.

⁵ See 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* (2013), p 241.

Venice Commission was first created in the form of a partial agreement,⁶ an instrument which allowed only those Member States of the CoE, which were parties to the agreement, to participate in the Commission's activities.⁷ The Resolution on the partial agreement establishing the European Commission for Democracy through Law was adopted by the Committee of Ministers on 10 May 1990; the Commission's Statute was adopted as an appendix.

32.05 Following the accession of the originally hesitating States and in the light of the strong interest expressed by non-Member States of the CoE in the work of the Venice Commission, the CM in its Resolution (2002) 3 on the revised Statute of the Commission transformed the partial agreement into an enlarged agreement.⁸ This conversion allowed for the accession of non-European States as full members of the Commission. Therefore, on 1 January 2004, Kyrgyzstan became the first non-European full Member State of the Venice Commission, followed by Chile in 2005, the Republic of Korea in 2006, Morocco and Algeria in 2007, Israel in 2008, Peru and Brazil in 2009, Mexico and Tunisia in 2010, Kazakhstan in 2012, the United States of America in 2013 as well as Kosovo in 2014. This brings the current membership of the Venice Commission to sixty States: all forty-seven Member States of the CoE and thirteen non-European Members.⁹

32.06 According to Article 8.3 of the Statute, the seat of the Commission is based in Venice.¹⁰ The Commission's secretariat is located in the Agora building of the CoE in Strasbourg.

II. Membership

32.07 According to Article 2 of the Statute, the Commission shall be composed of independent experts who have achieved eminence through their experience in democratic institutions or by their contribution to the enhancement of law and political science. The members of the Commission serve in their individual capacity and shall not receive or accept any instructions. By far most of the members of the Venice Commission are either judges of constitutional courts and other high courts

⁶ Resolution (90) 6 on a Partial Agreement Establishing the European Commission for Democracy through Law.

⁷ For details on the general possibility of partial agreements see C Walter, Chapter 2, in this volume, MN 2.31–3.

⁸ Resolution (2002) 3 on the Revised Statute of the Commission.

⁹ Belarus has the status of an associated member with the Venice Commission. Argentina, Canada, the Holy See, Japan, and Uruguay have the status of observers. The European Union, the Palestinian National Authority, and South Africa have a special cooperation status, equivalent to the status of observers.

¹⁰ Article 6.3 provides that the *Regione Veneto* shall put a seat at the disposal of the Commission free of charge. Expenditure relating to the local secretariat and the operation of the seat of the Commission shall be borne by the *Regione Veneto* and the Italian government, under terms to be agreed between these authorities.

or eminent professors of law.¹¹ A few countries have chosen to appoint high-level (retired) civil servants or even members of national governments or ambassadors. Such appointments require special diligence on the part of the Member States in order to provide for independence and impartiality of the individual members. The members are appointed by the governments for a period of four years. They can be reappointed. The Member States shall also appoint a substitute member.

III. Types of documents

The Venice Commission may exercise its functions in four different ways:¹² first, it may carry out research on its own initiative and, where appropriate, may prepare studies and draft guidelines, laws, and international agreements.¹³ Second, the Commission may supply, within its mandate, opinions upon request submitted by the CM, the PACE, the Congress of Local and Regional Authorities, the Secretary General, or by a State or international organisation or body participating in the work of the Commission.¹⁴ Third, the Commission may establish links with documentation, study and research institutes and centres.¹⁵ Fourth, the Commission may cooperate with constitutional courts and courts of equivalent jurisdiction bilaterally and through associations representing these courts.¹⁶ At the request of a constitutional court or the ECtHR, the Commission may provide *amicus curiae* opinions, not on the constitutionality of the act concerned, but on comparative constitutional and international law issues.¹⁷

The two main types of activities which result in documents are (country specific) opinions and (general) studies, reports, and guidelines. In 2014 the Venice Commission adopted four opinions on constitutional reforms and issues; thirty-one opinions on legislative texts or specific legal issues; four reports of a general nature; and two sets of guidelines.

1. Opinions

The primary task of the Venice Commission is to provide impartial legal opinions on draft constitutions or constitutional amendments, or on other draft legislation or legislation already in force, which is submitted to it for examination. The aim

¹¹ While the Statute mentions law and political science on an equal footing, in practice a clear majority of the members are (public) lawyers.

¹² Article 3 Statute.

¹³ Article 3.1 Statute (the respective proposals of the Commission can be discussed and adopted by the statutory organs of the CoE) eg Code of Good Practice.

¹⁴ Article 3.2 Statute.

¹⁵ Article 3.5 Statute.

¹⁶ Article 3.4 Statute.

¹⁷ For the relevance of the *amicus curiae* opinions of the Venice Commission for the practice of the ECtHR see L. Bode-Kirchhoff, 'Why the road from Luxembourg to Strasbourg leads through Venice: the Venice Commission as a link between the EU and the ECHR' in K. Dzehtslarou et al (eds), *Human Rights Law in Europe. The Influence, Overlaps and Contradictions of the EU and the ECHR* (2014), pp 55–72.

of an opinion is to provide a complete, precise, detailed, and objective analysis not only of the compatibility with European and international standards, but also of the practicality and viability of the solutions envisaged by the States concerned.¹⁸ The Commission does not put forward models of the ideal constitution or law, but endeavours, on the basis of common standards, to understand through its dialogue, countries' needs and constraints, before it gives its specific opinions to requesting countries. The Commission's opinion is purely advisory: the State concerned may accept it in whole or in part, or it may reject it altogether. In no case does the State have any legal obligation in relation to the Venice Commission or the CoE.

2. Studies, reports, and guidelines

- 32.11** Although most of its work concerns specific countries, the Commission is also concerned with broader developments and acts on what it calls 'transnational'¹⁹ issues. It does this by carrying out research designed to establish and guide constitutional values shared throughout Europe, giving the opportunity to identify (or even define) standards in the field of constitutional law, which constitute the common constitutional heritage.²⁰ The work on transnational issues is carried out through studies and reports. These studies or reports may then, *inter alia*, culminate in the drafting of guidelines. Important examples of such documents are the Report on the Preferential Treatment of National Minorities by their Kin-State,²¹ the Opinion on PACE Recommendation 1713(2005) on Democratic Oversight of the Security Sector in Member States,²² the Opinion on the need for a code of good practice in the field of funding of electoral campaigns.²³ Important examples for guidelines are the Code of Good Practice in Electoral Matters²⁴ as well as a Code of Good Practice and guidelines on political parties.²⁵

IV. Working methods

- 32.12** Requests for opinions may be addressed to the Commission by State institutions, governments, parliaments (not individual political parties or coalitions), or heads of State of the Member States; and on the part of the CoE by the Secretary General,

¹⁸ Guide to the Venice Commission's Activities and Working Methods, CDL(2010)109, p 8.

¹⁹ *ibid*, p 9.

²⁰ RS Dürr, 'The Venice Commission' in T Kleinsorge (ed), *Council of Europe* (2010), pp 151–63, at 160.

²¹ Report on the Preferential Treatment of National Minorities by their Kin-State, CDL-INF(2001)019.

²² Opinion on PACE Recommendation 1713(2005) on Democratic Oversight of the Security Sector in Member States, CDL-AD(2005)033.

²³ Draft Opinion on the need for a code of good practice in the field of funding of electoral campaigns, Study No 601/2010, CDL(2011)012.

²⁴ Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report, CDL-AD(2002)023.

²⁵ Code of Good Practice in the field of Political Parties and Explanatory Report, CDL-AD(2009)021.

the CM, the PACE, and the Congress of Local and Regional Authorities. In most cases, though, requests for opinions do not originate from the government or parliament of the State concerned but from the PACE, usually within the framework of the latter's monitoring function. The EU, the OSCE/ODIHR, and other international organisations involved in the Commission's work can also request an opinion.

Upon receipt of a request, the President of the Commission, assisted by the secretariat and—in delicate cases—after consultation with the members of the Bureau, nominates a team of *rapporteurs* which takes care of regional aspects as well as expertise and experience in the field. The secretariat prepares an information note with all the relevant material and information including previous Venice Commission opinions and other documents. Then the *rapporteurs* prepare provisional comments on an individual basis. Afterwards, in most cases, the *rapporteurs* and members of the secretariat visit the country concerned for discussions with the authorities, civil society, and other interested stakeholders. A visit is organised to allow further inquiry and discussions in questions of law and fact—and a face-to-face discussion among the *rapporteurs* before they return home to prepare the draft opinion. **32.13**

Depending on the complexity of the issue, the draft opinion is then either referred to a sub-commission²⁶ or directly submitted to all members of the Venice Commission before the plenary, which discusses and adopts the opinion, often with the participation of representatives of the country concerned. It is the practice of the Venice Commission to send the draft opinion to the State concerned before it is discussed in Venice. In many cases changes are made following remarks by the government and members of the Commission. The final text of the opinion is then submitted to the requesting authority and the opinion is published on the Commission's website.²⁷ **32.14**

C. Fields of Activities

The action of the Venice Commission is based on the three main principles of the European constitutional heritage: democracy, human rights, and the rule of law, which at the same time form the basis of the CoE's activities.²⁸ These principles find their expression in three key areas of action of the Commission: Democratic **32.15**

²⁶ In addition to the three special organs (Joint Council on Constitutional Justice, Council for Democratic Elections, Scientific Council) the following sub-commissions have been established: Fundamental Rights, Federal State and Regional State, International Law, Protection of Minorities, Judiciary, Democratic Institutions, Working methods, Latin America, Mediterranean Basin, Rule of law, Gender Equality.

²⁷ <<http://www.venice.coe.int>>.

²⁸ G Malinverni, 'The Contribution of the European Commission for Democracy through Law (Venice Commission)' in L-A Stilianos (ed), *The Prevention of Human Rights Violations* (2001), p 124.

institutions and fundamental rights, Constitutional justice and ordinary justice, Elections, referendums and political parties.

I. Democratic institutions and fundamental rights

- 32.16** Assisting States in the constitutional and legislative field so as to ensure the democratic functioning of their institutions and respect for fundamental rights is one of the Venice Commission's key tasks.

1. Constitutional reform

- 32.17** For many years, constitutional reforms relating to the foundations of a democratic State have been at the core of the Venice Commission's activities. From a geographical point of view the main activity of the Commission—following its initial aim—was mostly directed to the legal situation of States in Central and Eastern Europe. For instance, in recent years, the Venice Commission worked on constitutional reforms and constitutional issues in Hungary (2011–13), Georgia (2009, 2010, and 2013), Ukraine (2013–14), Romania (2012–14), Armenia (2015), and—even outside Europe—Tunisia (2015). However, the Commission also assisted in reforms in other European States, such as Finland and Iceland (both in 2013).

- 32.18** In a number of cases of constitutional reform, requests to the Venice Commission were submitted by the government of a country concerned.²⁹ The expectation behind such a request is obviously to add legitimacy to a reform which is—not always, but under certain circumstances—criticised either by the opposition or by parts of civil society. When analysing these requests, one may distinguish various types: requests to obtain special expertise, requests to influence the public debate in the country, requests to influence a European debate. In the last two cases, in particular, the Venice Commission has inevitably (also) a political role, which it has to deal with carefully.

2. Democratic institutions

- 32.19** In the institutional field, the Venice Commission's opinions and reports focus on the functioning of political institutions, the balance of powers between the main State organs, their responsibilities, cooperation, and mutual control. The Commission's work on democratic institutions also includes the assistance provided to State authorities in relation to the legal framework pertaining to the national judicial systems and related reforms.³⁰

²⁹ eg Opinion No 621/2011 on the new Constitution of Hungary, CDL-AD(2011)016; Opinion No 702/2013 on the Draft New Constitution of Iceland, CDL-AD(2013)010; First and Second Opinions on the Draft Amendments to the Constitution of the Republic of Armenia, CDL-AD(2015)037 and CDL-AD(2015)038; on 23 December 2015 the Minister of Foreign Affairs of Poland, on behalf of the Polish government, requested the Venice Commission's opinion on the constitutional issues addressed in the two proposals for the legislation amending the Act on the Constitutional Court of 25 June 2015.

³⁰ See generally G Buqulechio/SR Dürr, 'European Standards for an Independent Judiciary in a Democratic State—Contribution of the Venice Commission' in Z Csehi/B Schanda/P Sonnevend

3. Judiciary

Another important part of the activities of the Venice Commission are judicial reforms in various Member States. In this field the aim is to ensure the independence of the judiciary and the functioning of the judicial system. The Venice Commission has adopted a large number of opinions on judicial reforms in particular Member States during the last two decades. In some cases, the Venice Commission provided more than one opinion relating to the same reform; the two opinions of the Venice Commission on the draft Act on the Constitutional Tribunal of Poland in 2016 are the most prominent example in the recent past.³¹ Moreover the Commission adopted general reports where all the experience of the opinions is taken together and presented in an abstract way. In 2007, the Venice Commission adopted a report on judicial appointments.³² In 2010, the Commission adopted two reports on the most important European standards applicable to the judiciary.³³ Today, all three reports constitute a key reference for the Commission in the assessment of country-specific legislation regulating the judiciary and the guarantees put in place to ensure its independent functioning.

4. Fundamental rights

The activities of the Venice Commission cover nearly all fields of fundamental rights.³⁴ In this respect, the Commission has adopted a large number of opinions and studies, which assess legislation touching freedom of expression and the press (eg Opinion on the compatibility of the Laws 'Gasparri' and 'Frattini' of Italy with CoE standards in the field of freedom of expression and pluralism of the media³⁵), freedom of assembly (eg Opinion on the legislation of the Russian Federation on assemblies, demonstrations, marches and picketing³⁶), freedom of conscience and religion (eg Opinion on the Legal Status of Religious Communities in Turkey³⁷), protection of national minorities³⁸ (eg

(eds), *Viva Vox Iuris Civilis, Tanulmányok Sólyom László Tiszteletére 70. Születésnapja Alkalmából (Mélanges László Sólyom)* (2012), pp 105–18.

³¹ CDL-AD(2016)1, CDL-AD(2016)026.

³² CDL-AD(2007)028.

³³ Report on the Independence of the Judicial System—Part I: the Independence of Judges, CDL-AD(2010)004; Report on the Independence of the Judicial System—Part II: the Prosecution Service, CDL-AD(2010)040.

³⁴ F Flanagan, 'The Venice Commission and the Protection of Human Rights' in M van Roosmalen/B Vermeulen/F van Hoof/M Oostling (eds), *Fundamental Rights and Principles—Liberal amicorum Pieter van Dijk* (2013), p 255.

³⁵ Opinion No 309/2004, CDL-AD(2005)017.

³⁶ Opinion No 659/2011, CDL-AD(2012)007 and Opinion No 686/2012, CDL-AD(2013)003.

³⁷ Opinion No 535/2009 on the Legal Status of Religious Communities in Turkey and the Right of the Orthodox Patriarchate of Istanbul to use the adjective 'Ecumenical', CDL-AD(2010)005.

³⁸ For a general view see A Chablais/P Garrone, 'European Commission for Democracy through Law—Review of recent reports and opinions relevant to the protection of national minorities' (2005/6) 5 European Yearbook of Minority Issues 305–14; see also G Malinverni, 'L'expérience de

Opinion on the Act on the Rights of Nationalities of Hungary³⁹). Furthermore the Commission issued guidelines on certain fundamental rights issues, such as Guidelines on the Legal Personality of Religious or Belief Communities,⁴⁰ Guidelines on Freedom of Peaceful Assembly,⁴¹ Joint Guidelines on Freedom of Association.⁴²

II. Constitutional justice

32.22 In constitutional law, the exchange of information and ideas between long-established and new democracies is very important. In an effort to achieve the highest possible degree of mutual information about important legal issues frequently faced by the constitutional courts of many countries, the Venice Commission publishes a Bulletin on Constitutional Case Law.⁴³ The Commission also edits the database CODICES, which contains, in addition to the *précis* published in the Bulletin, texts of decisions in full, constitutions and descriptions of many courts and the laws governing them.⁴⁴ In 2002, the establishment of a Joint Council on Constitutional Justice in 2002 institutionalised the cooperation between constitutional courts and the Venice Commission, further underlining the important role of the participating courts in the Commission's activities. At the same time, in order to reinforce the position of the constitutional courts as guarantors of the constitutional law and the rule of law, since 1996 the Commission has organised seminars and conferences with the courts upon their requests. The most prominent example in this respect is the World Conference on Constitutional Justice (WCCJ) with ninety-eight constitutional courts covering all five continents, which takes place every three years and is co-organised by the Venice Commission.

III. Elections

32.23 Since its creation, the Venice Commission has been active in the field of elections, in particular, through the adoption of opinions on draft election laws. In twenty-five years, the Venice Commission adopted some 200 opinions and 100 texts of a more general character on elections, referenda, and political parties. In particular,

la Commission européenne pour la démocratie par le droit' (1993) 7 *Revue Universelle des Droits de l'Homme* 286, at 393.

³⁹ Opinion No 671/2012, CDL-AD(2012)011.

⁴⁰ OSCE/ODIHR/Venice Commission, Guidelines on the Legal Personality of Religious or Belief Communities, CDL-AD(2014)023.

⁴¹ OSCE/ODIHR/Venice Commission, Guidelines on Freedom of Peaceful Assembly, CDL-AD(2010)020.

⁴² OSCE/ODIHR/Venice Commission, Guidelines on Freedom of Association, CDL-AD(2014)046.

⁴³ The Bulletin appears (since 1993) in English and French three times a year and contains summaries of the most significant decisions taken by over sixty participating courts.

⁴⁴ The database is available at <<http://www.codices.coe.int>>.

the Commission defined the principles applicable to democratic elections in its Code of Good Practice in Electoral Matters⁴⁵ and a number of other electoral standard-setting texts,⁴⁶ as well as a code of Good Practice and guidelines on political parties.⁴⁷ Moreover, the Venice Commission also organises training seminars targeting all actors involved in the electoral process. The Commission cooperates closely with the Office for Democratic Institutions and Human Rights (OSCE/ODIHR). Most activities related to electoral matters are carried out jointly by these two organisations.

D. Impact of the Venice Commission's Work

The impact of the opinions, studies, and guidelines can be found at various levels: **32.24** at European level in the interpretation of treaties, and at national level with respect to the constitutions of States.

I. Impact at European level

At European level, an increasingly important impact is the influence of the Commission on the case law of the ECtHR. Although the documents of the Venice Commission are not binding and thus cannot be used by the ECtHR as directly applicable standards, the Court does use them as a source of information, as well as for quasi-normative and empirical guidance.⁴⁸ Since 2004, when the ECtHR first referred to the Venice Commission's Code of Good Practice in Electoral Matters in the case of *Hirst v United Kingdom*,⁴⁹ the reference has become systematic. By 2015 more than 100 judgments and decisions of the ECtHR referred to Venice Commission documents. An analysis of the Court's case law shows that today, electoral law issues are the most frequent subject matter referred to by the ECtHR;⁵⁰ followed by matters dealing

⁴⁵ Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report, CDL-AD(2002)023.

⁴⁶ Report on Electoral Law and Electoral Administration in Europe—Synthesis study on recurrent challenges and problematic issues, CDL-AD(2006)018; Opinion on Parliamentary Assembly Recommendation 1704 (2005) on Referendums: towards good practices in Europe, CDL-AD(2005)028; Referendums in Europe—An analysis of the legal rules in European States, CDL-AD(2005)034.

⁴⁷ Code of Good Practice in the field of Political Parties and Explanatory Report, CDL-AD(2009)021.

⁴⁸ W Hoffmann-Riem, 'The Venice Commission of the Council of Europe' (2014) 25 *European Journal of International Law* 585; for a critical discussion see C Grabenwarter, 'Menschenrechtsschutz und Menschenrechtspolitik durch den EGMR' in C Hillgruber (ed), *Gouvernement des juges—Fluch oder Segen?* (2014), pp 45 et seq, at 59 et seq.

⁴⁹ *Hirst v United Kingdom (No 2)* [GC] Appl No 74025/01 (ECtHR, 6 October 2005).

⁵⁰ Reference to the Code of Good Practice in Electoral Matters in *Karimov v Azerbaijan* Appl No 12535/06 (ECtHR, 25 September 2014); *Oran v Turkey* Appl Nos 28881/07 and 37920/07 (ECtHR, 15 April 2014); *Sbindler v United Kingdom* Appl No 19840/09 (ECtHR, 7 May 2013); *Communist Party of Russia and Others v Russia* Appl No 29400/05 (ECtHR, 19 June 2012); *Sitaropoulos and*

with political parties⁵¹ and those dealing with the judicial system.⁵² Where the Venice Commission has found that there is no uniform solution for a certain problem in the various legal systems, the ECtHR has used this as justification for granting a wide margin of appreciation to the respective State. This was the case, for instance, in connection with issues concerning party financing by foreign political parties.⁵³

32.26 In a lot of cases Venice Commission documents are mentioned as relevant international law and practice (ie in the 'Facts' section of a decision) or as part of the judges' dissenting/concurring opinions. In a growing number of cases references to the Venice Commission are integrated in the 'Law' part of the judgment. References can be found either in the 'Comparative Law'⁵⁴ sub-section or in the course of the Court's reasoning in connection with the proportionality test, where the Venice Commission's opinions provide for guidance in the argument, when the Court examines the justification for restrictions on human rights.⁵⁵ The Court's methodological approach to the use of Venice Commission documents can be found in its reflection on interpretation methods in general in the case of *Demir and Baykara v Turkey* (2008). When reflecting on the interpretation of the Convention in the light of other international instruments, the Court notes:

In order to interpret the exact scope of the rights and freedoms guaranteed by the Convention, the Court has, for example, made use of the work of the European Commission for Democracy through Law ...⁵⁶

32.27 Moreover the ECtHR sometimes invites the Venice Commission under Article 36 para 2 ECHR to submit comments as a third party (or to provide an *amicus curiae* opinion). In such cases, the Commission's position is not merely cited by the ECtHR, but also influences the Court's legal reasoning.⁵⁷ This can be seen where the ECtHR expressly mentions the Venice Commission, as well as when

Giakoumopoulos v Greece Appl No 42202/07 (ECtHR, 15 March 2012); *Grosaru v Romania* Appl No 78039/01 (ECtHR, 2 March 2010).

⁵¹ Reference to the OSCE/ODIHR/Venice Commission Guidelines on Political Party Regulation in *Özgürlük ve Dayanışma Partisi (ÖDP) v Turkey* Appl No 7819/03 (ECtHR, 10 May 2012); reference to the Guidelines on prohibition and dissolution of political parties and analogous measures in *Republican Party of Russia v Russia* Appl No 12976/07 (ECtHR, 12 April 2011); *HADEP and Demir v Turkey* Appl No 28003/03 (ECtHR, 14 December 2010).

⁵² Reference to the Report on the Effectiveness of National Remedies in respect of Excessive Length of Proceedings in *McFarlane v Ireland* Appl No 31333/06 (ECtHR, 10 September 2010).

⁵³ *Parti nationaliste basque—Organisation régionale d'Iparralde v France* Appl No 71251/01 (ECtHR, 7 June 2007), at para 47.

⁵⁴ eg *Georgian Labour Party v Georgia* Appl No 9103/04 (ECtHR, 8 July 2008), at para 59.

⁵⁵ eg *Parti nationaliste basque—Organisation régionale d'Iparralde v France* Appl No 71251 (ECtHR, 7 June 2007), at para 45.

⁵⁶ *Demir and Baykara v Turkey* [GC] Appl No 34503/97 (ECtHR, 12 November 2008), at para 75.

⁵⁷ For further details see Bodc-Kirchhoff (fn 17), pp 58 et seq.

it implicitly refers to it through the (sometimes almost literal) adoption of the Commission's wording.⁵⁸

In addition to the ECtHR, other courts, including national constitutional courts, have repeatedly referred to the Venice Commission in their decisions, above all when such courts ask the Venice Commission to provide an *amicus curiae* opinion.⁵⁹ **32.28**

This process is not a one-way street: what the Venice Commission *rapporteurs* do in fact when they draft an opinion, in particular in human rights cases, is to study the case law of the ECtHR, but also that of constitutional courts carefully. They then draw conclusions from a certain set of judgments of the Strasbourg Court, sometimes not adding much to them, sometimes developing them further. Therefore it is appropriate to describe the relationship between the ECtHR and the Venice Commission as a 'two-way street' and 'cross-fertilization'.⁶⁰ The two institutions constantly endorse and complement each other's work.⁶¹ **32.29**

II. Impact at national level

There is no systematic analysis of whether and to what extent the States to which Venice Commission opinions are addressed implement its suggestions and recommendations. At the Venice Commission plenary sessions the agenda item 'Follow-up to earlier Venice Commission opinions' is usually a brief oral account of information available to the Secretariat.⁶² However in practice, the opinions of the Commission prove to enjoy great authority and are followed in the majority of cases, also by governments, parliaments, or organisations that have not themselves asked for the opinion.⁶³ An important reason for this authority is the fact that the EU strongly encourages States which want to join the EU, but also current members, to comply with the opinions. By doing this the EU contributes considerably to their effectiveness. **32.30**

Constitutional courts have repeatedly referred to the Venice Commission in their decisions, above all when such courts ask the Venice Commission to provide an *amicus curiae* opinion.⁶⁴ **32.31**

⁵⁸ *ibid*, p 62.

⁵⁹ Examples: Supreme Court of Ireland: *Mark McCrystal v The Minister for Children and Youth Affairs, The Government of Ireland, Ireland and the Attorney General*, judgment of 11 December 2012, at paras 41 et seq; and the Russian Constitutional Court: Judgment concerning the Constitutionality of the Federal Law 'amending the code of administrative infringements of the Russian Federation and the Federal Law on Assemblies, Rallies, Demonstrations, Marches and Picketing' of 14 February 2013, at para 2.4.

⁶⁰ P van Dijk, 'The Venice Commission on certain aspects of the Application of the European Convention on Human Rights Ratione Personae' in S Breitenmoser/B Ehrenzeller/M Sassöli (eds), *Human Rights, Democracy and the Rule of Law. Liber Amicorum Luzius Wildhaber* (2007), p 183.

⁶¹ *ibid* at 184.

⁶² Hoffmann-Riem (fn 48), p 589.

⁶³ van Dijk (fn 60), p 188.

⁶⁴ See fn 59.

32.32 Finally, it has to be mentioned that the Venice Commission's field of activities is not limited to Europe. The example of the WCJC mentioned above shows a broader focus which is not strictly limited to Europe. Algeria, Brazil, Israel, Korea, Mexico, Morocco, Peru, Tunisia, and the USA are full members; Argentina, Canada, Japan, the Holy See, and Uruguay are observers. The most prominent recent example of a successful activity outside Europe was the substantial role of the Venice Commission in the constitution-making process in Tunisia.

E. Evaluation

32.33 The Venice Commission's existence for over twenty-five years is a success story in itself. This success is based on various factors. It is first of all a question of the people working in and for the Commission. A highly qualified secretariat is a precondition, but can also be found elsewhere in the CoE. The second factor is the quality and, perhaps even more important, the mix of qualifications of the members. Although there is no provision to this end, the practice of the Member States has led to great variety of personalities. Many professors of public law and international law have been and currently are members; but also colleagues working in other fields of law have joined the Commission over the years. Judges from all branches, constitutional judges, criminal law judges, prosecutors, private law judges, judges from administrative courts, are members. Finally, also a certain number of former or current politicians and/or civil servants or diplomats have been nominated by their respective countries. While it would not be a positive development were the majority of the members (former) politicians and former civil servants or (former) diplomats, it is an undisputable advantage to have people with this type of experience among the members. A certain percentage contributes not only to the quality of the opinions and discussions; when there is a heated atmosphere, the presence of a former member of government or even head of government, or a speaker of parliament may considerably increase the weight of the Commission.

32.34 However, the expertise of the Venice Commission rests not only on the shoulders of the members and the secretariat, there are two more factors. First, the team of *rapporteurs* is often completed by external experts, who are in many cases experts at universities or in NGOs, who are well-known and enjoy a high reputation all over Europe. Recently, the Commission has established a practice of making use of the former members of the Commission. To this end, an association of former members has been founded and structures are currently being set up in order to establish a permanent and sustainable support from this angle. Secondly, the Commission cooperates with other expert bodies in the field of democracy and the rule of law in Europe and beyond. Apart from genuine CoE and EU institutions, the ODIHR,

based in Warsaw, and the OSCE should be mentioned as important partners. Cooperation between these institutions strengthens each of them, although (or perhaps because) they work in a similar, sometimes in the same field.

The combination of drafting by the *rapporteurs* and meetings with the institutions of a State concerned is another factor which makes the work of the Commission unique. The Commission is not a judicial organ and it is not a political organ either, but it takes elements of both on board. The know-how and the style of the reasoning are in many respects close to the reasoning in scientific articles or a judgment of a constitutional court. On the other hand, the procedure shows elements of a process of negotiation, which is typical in a political context. Above all, it is the time factor which makes the Commission so valuable and effective.⁶⁵ Very often, requests are made in situations of urgency and the Commission is able to provide its expertise within a few weeks, although it is a non-permanent body with plenary sessions only every three months.⁶⁶

In many cases, however, speed is not the decisive factor. The Commission also reflects on and accompanies slower processes and changes in society and law all over Europe, together with other actors, besides the ECtHR, in particular, the constitutional courts on the national level. The composition of the Commission may play a certain role in this respect.

It is the time factor which is also, to a certain degree, ambiguous. Speed makes the Venice Commission interesting and attractive to public constitutional debates also in the media. For example, the two opinions of the Venice Commission on the draft Act on the Constitutional Tribunal of Poland in 2016⁶⁷ have been eagerly awaited by the media and—after their adoption—widely discussed in international newspapers. On the other hand the procedure can sometimes be likened to a walk on a tightrope between a scientifically based opinion and a well-founded statement in a public dispute. In this context it has to be mentioned that nearly all opinions are adopted by consensus. Moreover, the fact that a discussion of a draft opinion with the national authorities takes place before its adoption contributes considerably to the acceptance of the opinion. The discussion and adoption of an opinion in the Plenary by more than fifty members does not enable all individual members to participate in each case in the same way. However, a four- or even five-step procedure seems to contain sufficient elements for securing quality and legitimacy at the same time.

⁶⁵ C Giakomopoulos, 'La contribution du Conseil de l'Europe aux réformes constitutionnelles: l'action de la Commission de Venise' in G Amato/G Braibant/E Venizelos (eds), *The Constitutional Revision in Today's Europe/La révision constitutionnelle dans l'Europe d'aujourd'hui* (2002), pp 695 et seq, at 704.

⁶⁶ See Dürr (fn 20), p 159 ('constitutional fire brigade', 'constitutional first aid').

⁶⁷ CDL-AD(2016)001, CDL-AD(2016)026.

32.38 While the political situation in some parts of Europe and in certain fields of law has become more difficult recently, the Commission seems to be prepared to take up new challenges. Its working methods enable the Venice Commission, in general, to fulfil its functions while contributing to the constitutional developments in its Member States and reacting in reasonable time and with adequate depth to the various dangers for democracy and the rule of law.