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Transnational Constitution-Making: The Contribution of the Venice Commission on Law and Democracy

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Transnational Constitution-Making: The Contribution of the Venice Commission on Law and Democracy

Paul Craig*

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* Professor of English Law, St John's College, Oxford. I am the alternate UK representative on the Venice Commission. This article contains my personal views. I am grateful for comments received from participants at a conference at UC Irvine School of Law in 2016, and for further comments from Gregory Shaffer, Tom Ginsburg and Terence Halliday thereafter.

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This article examines the contribution to transnational constitution-making of the European Commission for Democracy through Law, better known as the Venice Commission. While part of the Council of Europe, the Venice Commission is much less understood than the European Court of Human Rights (ECHR), notwithstanding the existing literature.¹ This chapter therefore seeks to explicate and evaluate. It begins by explicating the organizational foundations of the Venice Commission, followed by analysis of its remit and role. The focus then shifts to triggering and working methodology.

The remainder of the article is concerned with evaluation of the Commission's role in relation to constitution-making as broadly conceived, the analysis being situated within the literature concerning transnational legal orders (TLOs).² There is an overview of the central elements of TLO theory, the reasons why the Venice Commission can be conceptualized within this theoretical frame, and its distinctive contribution to constitution-making. TLOs are increasingly prevalent across diverse fields, including those concerned with constitutions, democracy, human rights and the rule of law. The prevalence of TLOs renders it all the more important that they are subject to the same searching evaluation that we commonly bring to bear when analyzing national norms. To this end there is more detailed analysis of the process rights and procedure afforded to the state that is the subject of a Venice Commission opinion, and the substantive criteria and standards that the Commission considers when producing its opinions. The article concludes with discussion of implementation by the addressee of the opinion, and the broader impact of the Commission through sharing best practice and cooperation.

1. See, e.g., Gianni Buquicchio & Pierre Garrone, *L'harmonisation du droit constitutionnel européen: La contribution de la Commission européenne pour la démocratie par le droit*, 3 UNIFORM L. REV./ REVUE DE DROIT UNIFORME 323 (1998); Sergio Bartole, *Final Remarks: The Role of the Venice Commission*, 26 REV. OF CENT. & E. EUR. L. 351 (2000); Giorgio Malinverni, *La réconciliation à travers l'assistance constitutionnelle aux pays de l'Europe de l'est: le rôle de la Commission de Venise*, 10 LES CAHIERS DE LA PAIX 207 (2004); Gianni Buquicchio & Schnutz Dürr, *The Venice Commission's Action in Africa*, in ESSAYS IN HONOUR OF ERGUN OZBUDUN 165 (S. Yazici, et al. eds., 2008); Gianni Buquicchio, *Vingt ans avec Antonio La Pergola pour le développement de la démocratie*, in LIBER AMICORUM ANTONIO LA PERGOLA 29 (Pieter van Dijk & Simona Granata-Menghini eds., 2009); Gianni Buquicchio & Simona Granata-Menghini, *The Venice Commission Twenty Years on: Challenges Met but Challenges Ahead*, in FUNDAMENTAL RIGHTS AND PRINCIPLES 241 (Marjolein van Roosmalen et al. eds., 2013); Maartje de Visser, *A Critical Assessment of the Role of the Venice Commission in the Processes of Domestic Constitutional Reform*, 63 AM. J. COMP. L. 963 (2015); Wolfgang Hoffmann-Riem, *The Venice Commission of the European Council – Standards and Impact*, 25 EUR. J. INT'L L. 579 (2014); Sergio Bartole, *International Constitutionalism and Conditionality: The Experience of the Venice Commission*, 4/2014 RIVISTA (2014).

2. See generally, TRANSNATIONAL LEGAL ORDERS (Terence C. Halliday & Gregory Shaffer eds., 2015).

FOUNDATIONS AND ORGANIZATION

The impetus for the creation of the Venice Commission came from Antonio La Pergola, Italy's minister for European affairs, who, in the late 1980s, raised the possibility of a body that would monitor respect for democracy and the rule of law.³ The communist regime in Poland fell in 1989, followed by the fall of the Berlin Wall in November 1989, and the ousting of communist governments in Czechoslovakia, Romania, Bulgaria and Albania in the ensuing two years. La Pergola organized a conference in Venice in January 1990 in which members of the Council of Europe participated, complemented by observers from some central and east European countries.⁴ It was the catalyst for the creation of the Venice Commission,⁵ although the original agreement was for two years.⁶ Membership was initially confined to states that were party to the Council of Europe.⁷

The current statute dates from 2002, and it enables states that were not parties to the Council of Europe to become members of the Venice Commission,⁸ which now has sixty-one member states, comprising the forty-seven Council of Europe member states, plus fourteen other countries.⁹ The Venice Commission is funded from a budget to which the participating states contribute, which has to be agreed by the Committee of Ministers.¹⁰ The Venice Commission has a permanent secretariat, which provides the Commission with assistance;¹¹ it is located in Strasbourg at the headquarters of the Council of Europe. Plenary sessions are held in Venice four times a year, with the secretariat preparing the agenda and supporting materials,¹² which are normally distributed two weeks before the plenary.¹³ The Commission of the European Union participates in the plenary sessions of the Venice Commission. So too do the Organization for Security and Cooperation in

3. Jeffrey Jowell, *The Venice Commission: Disseminating Democracy through Law*, Winter 2001 PUB. L. 675, 675 (2001).

4. *Id.*

5. *See id.*

6. The Council of Europe's Committee of Ministers established the Venice Commission with Res. 90(6) adopted May 10, 1990, which contained the original statute of the Venice Commission. *See* COUNCIL OF EUROPE, RES. (90)6 (1990), http://www.venice.coe.int/WebForms/pages/?p=01_01_Statute_old.

7. *See de Visser, supra* note 1, at 969–70.

8. Council of Europe, Revised Statute of the European Commission for Democracy through Law, Feb. 21, 2002, Res. (2002) 3 [hereinafter Revised Statute], http://www.venice.coe.int/WebForms/pages/?p=01_01_Statute.

9. Algeria, Brazil, Chile, Costa Rica, Israel, Kazakhstan, the Republic of Korea, Kosovo, Kyrgyzstan, Morocco, Mexico, Peru, Tunisia and the USA. It is for the Committee of Ministers of the Council of Europe to invite a non-member state to join the Venice Commission. Revised Statute, *supra* note 8, at art. 2.5.

10. Revised Statute, *supra* note 8, at art. 6.1.

11. *See* Revised Statute, *supra* note 8, at art. 8; Venice Commission, Revised Rules of Procedure, CDL-AD(2015)044, at art. 7.

12. Revised Rules of Procedure, *supra* note 11, at art. 8.1.

13. Revised Rules of Procedure, *supra* note 11, at art. 9.1.

Europe (OSCE)¹⁴ and the OSCE office for Democratic Institutions and Human Rights (ODIHR),¹⁵ which also participate in sub-commissions of the Venice Commission.

The Venice Commission elects a bureau, renewable for two years, composed of the president, three vice-presidents, and four other members.¹⁶ The president presides over the Commission's work and represents the Commission.¹⁷ There are sub-commissions dealing with fundamental rights; federal states and regional states; international law; protection of minorities; the judiciary; democratic institutions; working methods; Latin America; the Mediterranean Basin; the rule of law; and gender equality. Opinions and reports are discussed by the relevant sub-commission before consideration by the plenary.¹⁸ In addition, there is a joint Council on Constitutional Justice, as well as a Council on Democratic Elections, which are discussed below. There is also a Scientific Council, composed of the President and Vice-Presidents of the Commission; the Chairs of the sub-commissions; and members who direct research centers on constitutional, international or human rights law. The Scientific Council prepares restatements of Commission doctrine in specific areas; takes stock of implementation of Commission opinions and reports; proposes the studies that should be undertaken; and provides rapporteurs with material for the preparation of opinions and reports.¹⁹

Membership of the Venice Commission is regulated by Article 2 of the Statute. It stipulates that 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."²⁰ The members of the Commission serve in their individual capacity and "shall not receive or accept any instructions."²¹ Members are appointed by their respective countries, hold office for four years, and may be reappointed.²² The individual members are professors of public law and international law, national judges, practising lawyers, members of national parliaments, and civil servants.²³ Representatives of the Committee of Ministers, the Parliamentary Assembly of the Council of Europe, the

14. See generally ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE (Nov. 08, 2016), <http://www.osce.org/>.

15. See generally OSCE Office for Democratic Institutions and Human Rights, ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE (Nov. 08, 2016, 8:00 PM), <http://www.osce.org/odihhr>.

16. Revised Statute, *supra* note 8, art. 4; see also Revised Rules of Procedure, *supra* note 11, art. 6.

17. Revised Rules of Procedure, *supra* note 11, art. 6. Gianni Buquicchio has been President since December 2009. Gianni Buquicchio, VENICE COMMISSION (Nov. 8, 2016, 8:08 PM), http://www.venice.coe.int/WebForms/pages/?p=cv_1376.

18. Venice Commission, Guidelines Relating to the Working Methods of the Commission, at II-D, CDL-AD (2010) 034.

19. *Id.* at II-C; Revised Rules of Procedure, *supra* note 11, art. 17a.

20. Revised Statute, *supra* note 8, art 2.1.

21. *Id.*

22. *Id.* at arts. 2.2–2.3.

23. See generally *Members of the Venice Commission*, VENICE COMMISSION, <http://www.venice.coe.int/WebForms/members/default.aspx?lang=EN> (last visited Nov. 23, 2016).

Congress of Local and Regional Authorities of Europe, and the Giunta of the Regione Veneto may attend the sessions of the Commission.²⁴ The European Union is “entitled” to participate in the work of the Commission,²⁵ and the Committee of Ministers is empowered to authorise the Commission to invite international organisations to participate in its work.²⁶ The Venice Commission may also use consultants to facilitate attainment of its objectives.²⁷

REMIT AND ROLE

The Venice Commission’s role is elaborated in Article 1.1 of the Revised Statute, which mandates the following objectives: strengthen the understanding of the legal systems of the participating states, with a view to bringing them closer; promote the rule of law and democracy; and examine the problems raised by the working of democratic institutions and their reinforcement and development.²⁸ Article 1.2 instructs the Venice Commission to give priority to work concerning: the constitutional, legislative, and administrative principles and techniques, which serve the efficiency of democratic institutions and their strengthening, as well as the rule of law; fundamental rights and freedoms; and the contribution of local and regional self-government to the enhancement of democracy.²⁹ The reality is that the Venice Commission works in three broad areas.

Democratic Institutions and Fundamental Rights

The first area of the work of the Commission concerns democratic institutions and fundamental rights, which includes: the relations between the different branches of state power; inter-institutional co-operation; the rule of law; judicial reform; protection of fundamental rights; protection of minorities; emergency powers; parliamentary immunity; ombudsman institutions; decentralisation; federalism and regionalisation; and the interplay between international law and human rights.³⁰

Constitutional reform is central to the Venice Commission’s work, including the drafting of constitutions, constitutional amendments, and legislation of a constitutional nature. The Venice Commission is also concerned with the functioning of political institutions, the balance of power between the main state organs, and the legal framework of national judicial systems. Opinions on fundamental rights constitute a significant part of the Commission’s workload, the

24. Revised Statute, *supra* note 8, art. 2.4.

25. *Id.* at art. 2.6.

26. *Id.* at art. 2.7.

27. *Id.* at art. 5.

28. *Id.* at art. 1.

29. *Id.* at art. 1.1.

30. *Democratic Institutions and Fundamental Rights*, COUNCIL OF EUROPE: VENICE COMMISSION (2014), http://www.venice.coe.int/WebForms/pages/?p=01_Const_Assistance&lang=EN (last visited Nov. 23, 2016).

paradigm being whether a state's law relating to a fundamental right, such as speech, is consistent with European and international standards.

Constitutional Justice

The second area in which the Venice Commission works is constitutional justice.³¹ From its early years, the Venice Commission facilitated dialogue between constitutional courts, as manifest in the 1992 creation of a documentation centre to foster mutual exchange of information between the courts, and to inform the public about their decisions.³² The Commission established a network of liaison officers with constitutional courts. They contribute three times per annum to the Bulletin on Constitutional Case-Law and the Commission database CODICES.³³ There is a facility, the 'Venice Forum,' which fosters information exchange between the courts on current issues.³⁴

Cooperation between the constitutional courts and the Venice Commission was institutionalized post-2002, through the Joint Council on Constitutional Justice (JCCJ).³⁵ The JCCJ is co-chaired by one member of the Commission and a liaison officer elected by the liaison officers during a meeting of the JCCJ.³⁶ The Venice Commission invites constitutional courts and courts of equivalent jurisdiction in its member states, associate member states, observer states, and states with special co-operation status (South Africa, Palestine) to participate in the JCCJ. Courts from other States can be invited to JCCJ meetings as special guests.³⁷

The JCCJ is thus the steering body for co-operation between the Venice Commission and the constitutional courts. It has responsibility for publication of the Bulletin on Constitutional Case-Law,³⁸ which, since 1993, contains summaries of the most important decisions submitted by the constitutional courts of circa fifty countries, the European Court of Human Rights (ECHR), and the Court of Justice of the European Union (CJEU). The JCCJ also oversees the CODICES database, which is updated three times per year. It contains over 4,000 published summaries in the Bulletin and the full texts of approximately 5,000 decisions.³⁹ The Bulletin and CODICES make data available from countries whose constitutional decisions would not otherwise be readily available. This facilitates research and offers a resource to constitutional courts as to how endemic problems have been dealt with

31. *Constitutional Justice*, COUNCIL OF EUROPE: VENICE COMMISSION (2014), http://www.venice.coe.int/WebForms/pages/?p=01_Constitutional_Justice&lang=EN (last visited Nov. 23, 2016).

32. *Id.*

33. *CODICES* (2016), <http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm> (last visited Nov. 23, 2016).

34. *Constitutional Justice*, *supra* note 31.

35. Revised Statute, *supra* note 8, art. 3.4.

36. Rules of Procedure art. 18 (No. 14), Venice Commission, 105th Sess., (*revised* 2015).

37. *Constitutional Justice*, *supra* note 31.

38. *Bulletin on Constitutional Case Law*, COUNCIL OF EUROPE: VENICE COMMISSION (2014), http://www.venice.coe.int/WebForms/pages/?p=02_02_Bulletins.

39. *Constitutional Justice*, *supra* note 31.

elsewhere, thereby fostering trans-constitutional exchange of ideas. The JCCJ annual meeting is followed by a conference on a topic of current interest concerning constitutional justice.

Elections, Referendums and Political Parties

The third area in which the Venice Commission is active concerns elections,⁴⁰ including referendums and political parties.⁴¹ The electoral work is undertaken under the auspices of the Council for Democratic Elections (CDE) which is a tripartite body composed of members of the Venice Commission, the Parliamentary Assembly of the Council of Europe, PACE, and the Congress of Local and Regional Authorities of the Council of Europe. The CDE and Commission co-operate with OSCE/ODIHR. CDE opinions, like other Commission opinions, are subject to approval by the plenary of the Venice Commission.

The Council for Democratic Elections proffers advice and gives opinions on electoral legislation. The Venice Commission has adopted approximately 120 opinions and issued sixty texts of a general character on elections, referendums, and political parties.⁴² Considerable attention has been devoted to codes of good electoral practice, analogous documents concerning referendums, and guidelines that relate to political parties.⁴³ The Commission also organises the annual European Conference of Electoral Management Bodies, provides training for those involved in electoral work, and participates in some electoral observation missions.⁴⁴

The Specific and the General

The Venice Commission's work is an admixture of opinions concerning particular countries, and general studies that draw, *inter alia*, on these opinions to furnish more general guidance on particular fundamental rights or political parties. The hope is that these opinions can assist legislators, public authorities, the judiciary, and the like.⁴⁵ Closely related to the general studies are the compilations of extracts

40. *Elections and Referendums, Political Parties*, COUNCIL OF EUROPE: VENICE COMMISSION (2014), http://www.venice.coe.int/WebForms/pages/?p=01_Elections_and_Referendums&lang=EN (last visited, Nov. 23, 2016).

41. *Political Parties*, COUNCIL OF EUROPE: VENICE COMMISSION (2014), http://www.venice.coe.int/WebForms/pages/?p=02_parties.

42. *Elections and Referendums*, *supra* note 40.

43. See, e.g., Code of Good Practice in Electoral Matters, Doc. No. CDL-AD (2002) 23 (*revised*); Code of Good Practice on Referendums, Doc. No. CDL-AD (2007) 008; Code of Good Practice in the Field of Political Parties, Doc. No. CDL-AD (2009) 021. Guidelines on Political Party Regulation by OSCE/ODIHR, Doc. No. CDL-AD (2010) 024.

44. *Seminars, Training Workshops and Assistance Missions*, COUNCIL OF EUROPE: VENICE COMMISSION (2014), http://www.venice.coe.int/WebForms/pages/?p=02_seminars (last visited Nov. 23, 2016).

45. See, e.g., Guidelines for Legislative Reviews of Laws relating to Religion or Belief, Doc. No. CDL (2004) 061; OSCE/ODIHR—Venice Commission Guidelines on Freedom of Peaceful Assembly, 2nd ed., Doc. No. CDL-AD (2010) 020; Venice Commission—OSCE/ODIHR Joint

from opinions adopted by the Venice Commission in particular areas.⁴⁶ The objective is to provide an overview of doctrine in the particular area, as a reference resource for drafters of constitutions and of legislation.⁴⁷

Such compilations facilitate the task of Venice Commission members when preparing an opinion on a particular country, helping to ensure consistency of treatment between countries. They are structured thematically and are regularly updated. For example, for the compilation concerning freedom of association, the principal thematic headings are: definition of freedom of association; national and international frame of reference; content of freedom of association; expression of freedom of association; legal status and registration of an association; dissolution of an association; non-governmental organizations; and, religious or belief organizations.⁴⁸ Such well-structured compilations are an important part of the Venice Commission's work.

TRIGGERING AND METHODOLOGY

Triggering the Venice Commission

The Venice Commission has power to produce reports on its own initiative. Article 3.1 states that without prejudice to the competence of the organs of the Council of Europe, the "Commission may carry out research on its own initiative and, where appropriate, may prepare studies and draft guidelines, laws and international agreements." Any proposal from the Commission can then be discussed and adopted by the statutory organs of the Council of Europe.⁴⁹

Article 3.2 lists the institutions/states that can request an opinion from the Venice Commission, on a subject that falls within its mandate.

The Commission may supply, within its mandate, opinions upon request submitted by the Committee of Ministers, the Parliamentary Assembly, the Congress of Local and Regional Authorities of Europe, the Secretary General, or by a state or international organization or body participating in the work of the Commission. Where an opinion is requested by a state on

Guidelines on Freedom of Association, Doc. No. CDL-AD (2014) 046; Report on the Implementation of International Human Rights Treaties in Domestic Law and the Role of the Courts, Doc. No. CDL-AD (2014) 036.

46. *Compilations of Studies and Opinions*, COUNCIL OF EUROPE: VENICE COMMISSION (2014), http://www.venice.coe.int/WebForms/pages/?p=04_Compilations&lang=EN (last visited on Nov. 23, 2016).

47. See, e.g., *Compilation of Venice Commission Opinions Concerning Freedom of Association*, Doc. No. CDL-PI (2014) 004; *Compilation of Venice Commission Opinions concerning Constitutional Provisions for Amending Constitutions*, Doc. No. CDL-PI (2015) 023; *Compilation of Venice Commission Opinions and Reports concerning Political Parties*, Doc. No. CDL-PI (2016) 003; *Compilation of Venice Commission opinions and Reports concerning Gender Equality*, Doc. No. CDL-PI (2016) 007.

48. *Compilation of Venice Commission Opinions Concerning Freedom of Association*, Doc. No. (2014) 0004-e <http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI%282014%29004-e> (*revised* 2014).

49. Venice Commission Res. 3, Committee of Ministers, 784th Meeting (Feb. 21, 2002).

a matter regarding another state, the Commission shall inform the state concerned and, unless the two states are in agreement, submit the issue to the Committee of Ministers.⁵⁰

The reality is that most opinions are triggered by requests from a state party to the Venice Commission. A state party may seek help in drafting a constitution or changes thereto, or it may request assistance because it has learned that a national law is in some way deficient, or not fit for its purpose. The reference may also be due to some intra-institutional tension within the referring state, whereby the request becomes part of some larger struggle between executive and legislature, or between rival political parties. The request from the state means, in effect, a request from the current governing party and the Venice Commission does not formally inquire as to the intra-state political forces that precipitated the reference. These forces will, however, invariably become apparent when the working group begins its inquiry, aided by documentation provided by the secretariat, and further information in this respect will be forthcoming when the Commission undertakes its site visit, during which it will talk to a wide range of parties, official and unofficial.

It might, in a more cynical vein, be felt that state referrals serve as window dressing, helping the state to buttress its democratic credentials when it has no intention to implement the recommendations. The Venice Commission has no formal enforcement mechanism,⁵¹ but we should nonetheless be cautious about this argument. There may be a plethora of reasons why it proves difficult to effectuate Commission recommendations, many of which are consistent with good faith motivation for the initial request for help. It is, moreover, doubtful whether a rational state actor would act in this way. It sounds simple. The state takes the democratic plaudits from asking the Commission for help, while avoiding the costs, since it has no intention to comply with the opinion. Matters are more complex. The reference to the Commission inevitably lets the genie out of the bottle. The defective law is revealed, thoroughly analysed, and there is a site visit to the country in which the working group talk to official and non-official players alike. The outcome of the process is not predictable when the state makes the request for assistance, and any benefits it secures from willingness to make the referral would be significantly outweighed by the costs if it becomes apparent that the state had no interest in implementing the opinion.

It is clear from Article 3.2 that the Venice Commission can also be triggered by other bodies.⁵² The Parliamentary Assembly for the Council of Europe is the source of many such requests.⁵³ There are inevitable differences in the ‘tone and feel’ of an opinion that has not been requested by the state, especially where it does

50. *Id.*

51. Compilation of Venice Commission Opinions, Reports, and Studies on Constitutional Justice, Doc. No. CDL-PI (20015) 002, [http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI\(2015\)002-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2015)002-e).

52. Venice Commission Res. 3, *supra* note 49.

53. *Id.*

not want such scrutiny, and the relationship between the Commission and the state can be more adversarial in such instances.⁵⁴

The Venice Commission's expertise can, in addition, be triggered by a state that is not a member by making a request to the Committee of Ministers.⁵⁵ At the request of a constitutional court or the ECHR, the Venice Commission can also provide *amicus curiae* opinions not on the constitutionality of the act concerned but on comparative constitutional and international law issues.⁵⁶

Working Methodology of the Venice Commission

The way in which opinions are prepared is determined by the Guidelines on Working Methods,⁵⁷ and by practice that has evolved over time. When a reference has been made to the Venice Commission, a working group, of normally between four and six people, is established. These are the rapporteurs, who are national members of the Venice Commission.⁵⁸ They are selected to the working group for their expertise over the subject matter, and their availability to contribute within the time frame. The temporal dimension is important in this respect, the reality being that for a plethora of reasons most Venice Commission opinions have to be produced within tight timelines.⁵⁹ The rapporteurs are assisted by a member of the secretariat.⁶⁰ The secretariat proposes the time schedule for preparation of the draft opinion or study, and provides the rapporteurs with information concerning the background of the request, the national legislation, the applicable standards, and previous Commission work that is relevant.⁶¹

The draft opinion will be produced by the rapporteurs, in conjunction with the member of the secretariat. The rapporteurs are sent the preceding material from the secretariat that is translated into English or French. In the paradigm situation all rapporteurs on the working group write an individual report on the issues raised by the request for an opinion. There is normally no direct collaboration between the

54. *Id.*

55. Revised Statute, *supra* note 8, art. 3.3.

56. *See, e.g.*, Amicus Curiae Brief on the case Santiago Bryson de la Barra et. al. (on crimes against humanity) for the Constitutional Court of Peru, Doc. No. CDL-AD (2011) 041; Amicus Curiae Brief for the Constitutional Court of Georgia on the *non ultra petita* rule in criminal cases, Doc. No. CDL-AD (2015) 016; Republic of Moldova—Amicus Curiae Brief for the Constitutional Court on the Right of Recourse by the State against Judges, Doc. No. CDL-AD (2016) 015.

57. Founding Documents, COUNCIL OF EUROPE: VENICE COMMISSION, http://www.venice.coe.int/WebForms/pages/?p=01_founding_documents&lang=EN (last visited Nov. 9, 2016).

58. COUNCIL OF EUROPE: VENICE COMMISSION, GUIDELINES RELATED TO THE WORKING METHODS OF THE VENICE COMMISSION, 4 (2010) [hereinafter GUIDELINES]. Any member of the Commission may indicate an interest in becoming a member of a particular working group, provided that he or she is in a position to participate within the relevant time-frame. *Id.*

59. GUIDELINES, *supra* note 58, at 4 (providing that “the rapporteurs will present their observations and text proposals in due time to enable the Secretariat to prepare a draft (consolidated) opinion within the time limit previously agreed upon”).

60. *Id.*

61. *Id.* at 5.

individual rapporteurs, although it is possible for the working group to meet between Commission sessions.⁶² The member of the secretariat then produces a draft opinion, which draws on the views of the individual rapporteurs. This is circulated to the working group, who can suggest amendments. The proposed amendments are circulated to the working group, and a consensus is reached on the draft opinion that represents the view of the working group as a whole. In some cases the procedure is different: where the subject matter is large, as with the drafting of a constitution, the individual rapporteurs may be assigned specific issues. The reports from the rapporteurs will be collated by the member of the secretariat, and the draft opinion will be circulated to all rapporteurs, who can suggest amendments to the draft text.

The draft opinion thus produced will analyse the issue against the backdrop of the relevant standards, the content of which will be considered below. It is normal for there to be a site visit to the country. This might not occur where there has already been extensive discourse between the Commission and the state when the opinion was being drafted, or because the state does not allow the Commission to enter its territory. The Commission has no right to enter a state without its consent. Thus, there can be difficulties where the Commission has been triggered by a request from a body other than the state itself, although the reality is that even in such instances the state normally does allow the Commission to visit.

The site visit serves two related purposes. It provides an opportunity for the state to have a “voice” and proffer observations in response to questions posed by the working group. The questions focus on issues that the group regards as problematic from the work that it has undertaken thus far. The site visit also enables the working group to make contact with civil society and other interested stakeholders. This may be especially important where the reference to the Venice Commission was made by a body other than the state. However, even where the reference has been made by the state, the site visit provides a “voice” to non-governmental bodies that will often bring perspectives to bear that complement, supplement, or contradict those of the official state entities.

The final draft opinion is prepared after the site visit. It is sent to all Commission members two weeks before the plenary session,⁶³ including the representatives of the state that is the subject of the report, who will normally receive it slightly earlier than the other members of the Commission.⁶⁴ The final draft opinion may be considered by a sub-commission, which meets the day before the plenary session. There can be discussion between the rapporteurs and the state prior to the plenary. The final draft opinion is then presented to the plenary session by one of the rapporteurs. This is followed by opportunity for comment by the state

62. *Id.* at 4.

63. *Id.*

64. *Id.* at 4-5 (providing that when the national situation so requires, the President, in consultation with the Bureau, may authorise that the rapporteurs’ opinion that has not yet been adopted to be sent to the national authorities prior to its adoption at the plenary).

that is the subject of the report. The state may make comments concerning the factual accuracy of the opinion; contest the working group's interpretation of its law, or its compatibility with international standards; or query the specific recommendations. When the state has voiced its view at the plenary, the floor is opened for any other member of the plenary to comment.

How much discussion takes place at the plenary perforce varies. At one end of the spectrum is the situation where the opinion was requested by the state, which is content with the recommendations, more especially because the state discussed the issues during the site visit and subsequent thereto. In such instances discussion at the plenary is brief. At the other end of the spectrum is a situation where the opinions originate from references by bodies other than the state, where the state is not happy with the scrutiny or with the opinion, notwithstanding its opportunities to have a "voice" adumbrated above. In such instances discussion can be more protracted and heated. There are of course intermediate positions along this spectrum.

It should, moreover, be emphasized that discourse continues throughout the process. Thus, if the plenary discussion reveals contestable issues that had not been fully recognized hitherto, the rapporteurs may acknowledge a point, and the final draft opinion is accepted subject to the point being addressed. The rapporteurs will then meet on the day of the plenary, draft an amendment to the relevant point, and circulate the amendment to the plenary. The opinion is made public when it has been adopted by the plenary, and is then available on the Commission website. The dialogic nature of the process is captured by this statement on the Commission website:

The Commission does not seek to impose the solutions set out in its opinions. Rather, it adopts a non-directive approach based on dialogue and shares member states' experience and practices. For this reason, a working group visits the country concerned to meet the various stakeholders and to assess the situation as objectively as possible. The authorities are also able to submit comments on the draft opinions to the Commission.⁶⁵

THE VENICE COMMISSION, TRANSNATIONAL LEGAL ORDERS AND CONSTITUTION-MAKING

Transnational Legal Orders

The discussion thus far has been concerned principally with explication. The focus now shifts to evaluation, and this is framed within the emerging literature on transnational legal orders ("TLOs"). Terence Halliday and Gregory Shaffer define TLOs as "a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across

65. *The Commission's Activities*, COUNCIL OF EUROPE: VENICE COMMISSION, (2014) http://www.venice.coe.int/WebForms/pages/?p=01_activities&lang=EN.

national jurisdictions.”⁶⁶ The term “associated organization” is construed broadly to include any organization or social formation, so too is the term “actor,” which includes collective actors and individuals whose activities span national boundaries.

The concept of order within TLO thought is conceived of in terms of shared social norms and institutions that orient social expectations, communication, and behavior. Much social ordering is achieved through law, and “this ordering becomes authoritative when the legal norms become accepted and institutionalized across national jurisdictions,”⁶⁷ whereby the normative orientation of those applying the law are changed and their behavior affected.

A TLO is legal “when it involves international or transnational legal organizations or networks, directly or indirectly engages multiple national and local legal institutions, and assumes a recognizable legal form.”⁶⁸ The resulting transnational legal norms may reflect pre-existing national ones, such as those of powerful nation-states, or they “may reflect norms developed by private parties and networks through bottom-up processes,”⁶⁹ such that trans-national organizations and networks are “part of the process of the legal norms’ formation, conveyance, and potential institutionalization.”⁷⁰ For Halliday and Shaffer, the legal dimension of TLOs does not, however, require a “single hierarchy of norms, nor is it always formally binding, nor is it invariably backed by coercion.”⁷¹

A legal order thus defined is transnational insofar as it orders social relationships in some way that transcends the nation state. It is clear, moreover, that “TLOs span legal orders that vary in their geographic scope, from bilateral and plurilateral agreements to private transnational codes to regional governance bodies to global regulatory ordering.”⁷² They can evolve over time; there may be more than one TLO that covers a particular substantive area; and there may be contestation between TLOs that cover the same area, or where the coverage of TLOs overlaps.⁷³

There can be various catalysts for the creation of TLOs.⁷⁴ There might be a disjunction between national regulation and global markets in light of changes in economic interdependence; the driving force might be technological change; or it might be the ascendancy of certain political ideals that are regarded as central for state legitimacy, such that states employ TLOs to advance such ideals. Transnational theory is recursive, in the sense that it integrates the study of law production and law implementation within a single frame, assessing how “the production and implementation of transnational legal norms among international, transnational,

66. HALLIDAY AND SHAFFER, *supra* note 2.

67. HALLIDAY AND SHAFFER, *supra* note 2, at 8.

68. HALLIDAY AND SHAFFER, *supra* note 2, at 11.

69. HALLIDAY AND SHAFFER, *supra* note 2, at 12.

70. HALLIDAY AND SHAFFER, *supra* note 2.

71. HALLIDAY AND SHAFFER, *supra* note 2, at 18.

72. HALLIDAY AND SHAFFER, *supra* note 2, at 18-19.

73. HALLIDAY AND SHAFFER, *supra* note 2, at 30.

74. HALLIDAY AND SHAFFER, *supra* note 2, at 32.

national, and local lawmakers and law practitioners dynamically and recursively affect each other.”⁷⁵

The Venice Commission and Transnational Legal Orders

The study of TLOs provides a helpful frame for consideration of the Venice Commission, which plays an important transnational role in the dispersion of legal norms concerning democracy, human rights, and the rule of law. This is readily apparent from three related perspectives on the Venice Commission’s function, membership, and values.

(i) Function

The Commission’s origins were adumbrated above; it became a part of the Council of Europe (CoE) following the initiative from Antonio La Pergola. This enhanced the role of both institutional actors, since they performed complementary functions. The CoE was already part of a TLO that fostered human rights and the rule of law, most prominently through the ECHR (the Strasbourg Court). The Strasbourg Court, in common with other judicial institutions, was primarily concerned with fire-fighting—dealing with particular adjudicative problems when cases were brought to the Court—although its judgments could have some effect on shaping state behaviour *ex ante*. The Venice Commission offered the CoE the opportunity for more generalized intervention *ex ante*. The Commission could give opinions on constitutions, legislation and the like, with the objective of fire prevention. In this way, the Commission could help to avoid problems concerning human rights and the rule of law arising within a state, or suggest ways in which they could be addressed through reform of the constitution or law that was the source of the problem.

From the perspective of the nascent Venice Commission, the institutional home within the CoE was equally beneficial not only because the Commission could tap into CoE institutional resources but also because the association meant that the Venice Commission did not have to build its legitimacy from scratch. Association with the CoE meant that the Venice Commission was not just another organization among many seeking to promote human rights.

The agreement whereby the Venice Commission became part of the CoE thus strengthened both players. It provided the Council of Europe with the opportunity, through the Venice Commission, to shape the post-communist political order by providing advice on the establishment of more liberal democratic regimes within the relevant states. This was regarded both as an intrinsic good, and was also perceived more instrumentally as a way of strengthening the polities that had hitherto been communist regimes.

75. HALLIDAY AND SHAFFER, *supra* note 2, at 38.

(ii) Membership

The relationship between the CoE and the Venice Commission also enhanced this TLO through overlapping membership. The Commission did not actively have to solicit states to become members, since it could tap directly into the existing membership of the CoE. This provided the initial core of Commission members, and also fuelled its expansion as ex-Communist states joined the CoE during the 1990s. It increased the immediate client base, and did so through the addition of states that were most likely to call on the Commission for assistance, since they sought help to ensure that their constitutions and laws were in accord with a liberal democratic ordering.

It should also be acknowledged that there are states that are members of the Venice Commission, such as Russia, that are unlikely to request assistance and are likely to resist inquiries when they are triggered by an institutional player. It begs the question as to why they remain within the Council of Europe, since it is their membership of CoE that provides the linkage with membership of the Commission. The answer to that broader question takes us beyond the scope of this article. Suffice it to say for the present that viewed from the perspective of the rational state actor, Russia must believe that the gains of legitimacy from membership outweigh the costs in terms of challenges to Russian laws through the ECHR, and the Venice Commission, although there are signs that Russia wishes to limit the impact of both arms of the CoE while still remaining a member.⁷⁶

Membership expanded further post-2002, when states that were not party to the CoE were allowed to become members of the Commission.⁷⁷ The revised statute allowing for non-CoE members to join the Commission was initially driven by the desire of such states to become full members, though these states were pushing at an open door as far as the Commission was concerned, since the expanded membership enhanced its status. The reasons why such states sought membership are eclectic, ranging from the straightforward desire to tap into the Commission's expertise when framing constitutions and laws, to the legitimacy gains for the state by becoming a full member. The rationale was different in the case of the United States of America, since neither of the preceding reasons have much purchase in explaining its transition from observer status to full member. This transition was probably driven by the desire to lend support to an organization that was perceived to be a force for the maintenance of liberal democratic ordering and stability in Europe and beyond, which would be in accord with more general precepts of U.S. foreign policy.

The Commission membership of sixty states is diverse, and this has augmented the recursive nature of the Commission's *modus operandi*. The Commission, as will be seen more fully below, utilizes a blend of hard and soft law

76. VENICE COMMISSION, *Russian Federation-Final Opinion on the Amendments to the Federal Constitutional Law on the Constitutional Court*, CDL-AD (2016) 016-e (June 2016).

77. Revised Statute, *supra* note 8.

when writing opinions. The very diversity of membership, which is replicated within working groups, highlights the need for plurality in the application of Commission values, and serves as a constant reminder of the need to be cognizant of local circumstance when applying such values.

There is a further dimension to membership that enhanced this TLO with respect to democracy, human rights, and the rule of law. The Commission membership rules institutionalize cooperation with other prominent institutional actors that form part of this TLO, most notably the European Commission and OSCE/ODIHR, while leaving it open for the Venice Commission to liaise on a more ad hoc basis with other organizations. Liaison between the Venice Commission and the European Commission has been especially prominent in relation to rule of law problems that have arisen in EU countries, such as Hungary and Poland, while cooperation with OSCE/ODIHR is most common in the context of elections.

(iii) Values

The values advanced by the CoE and the Venice Commission are democracy, human rights, and the rule of law. The Commission plays an important role in this TLO. It is, drawing on Halliday and Shaffer, one of the associated organizations that authoritatively order the understanding and practice of law across national jurisdictions within this domain. There are many other organizations that make important contributions to the TLO concerned with human rights and the rule of law, but the Commission's contribution is nonetheless distinctive and flows from its institutional structure.

Its membership of two representatives from each state, combined with the institutional support of the secretariat, means that the Commission is capable of responding to numerous requests for assistance at any one point in time. The institutional capacity to accept multiple requests for assistance that require detailed evaluation of national constitutions and laws within a tight time frame enables the Commission to make a distinctive contribution to constitutional reform. This is further enhanced by the diversity of membership, which means that those with expertise and cultural understanding can be combined on the same panel. This has in turn facilitated the development of databases, compilations, and the like, which furnish guidance on particular areas such as speech, association, assembly, and good electoral practice. The authority of the formalized legal norms within this area is thereby enhanced. Implementation is, as we shall see below, not perfect. There can, moreover, be contestation as to the 'correct' application of such values in a particular instance, but much of this occurs within the frame of the underlying values that are central to this TLO.

There is, however, as Kim Scheppele has cogently argued,⁷⁸ increased evidence of states seeking to cloak themselves with the garb of constitutionalism, while seeking to undermine it from within. This in itself provides interesting evidence about the evolution of TLOs, as the established TLO within the relevant area is challenged, with the possible emergence of a rival TLO. The Venice Commission nonetheless exemplifies the following principle enunciated by Halliday and Shaffer:

It is a demonstrable premise of constructivist theory in international relations scholarship that the ability of an international organization to promulgate norms that are widely adopted by nation-states across the world is likely to increase the power of those international organizations themselves. That is to say, the transnational propagators of legal norms become more than the sum of the interests of nation-states – they become emergent actors in their own right and thus come to exert organizational interests that cannot be reduced to an amalgam of their constituent state delegations.⁷⁹

The Venice Commission and Constitutions

There are at least four “sedimentary” layers that can be discerned in the study of constitutions: the making and terms of the constitution itself; constitutional amendment; legislation that impacts directly or indirectly the meaning and application of the constitutional terms; and constitutional practice, whether in the form of institutional conventions, or perceptions of the constitution by the people. Constitution-making broadly conceived is an important part of the Venice Commission’s work,⁸⁰ as confirmed by the large number of opinions that have dealt with this issue.⁸¹ The Commission’s work in this area is dependent on a reference being made by the relevant state, or another institution that is entitled to do so, and this will determine the scope of the opinion. Commission’s opinions have addressed three out of the four aspects of constitutions set out above.

First, there are opinions that concern the drafting and terms of the constitution, or significant parts thereof. This is exemplified by Commission opinions on Tunisia,⁸² Iceland,⁸³ Bosnia and Herzegovina,⁸⁴ Hungary,⁸⁵ Moldova,⁸⁶

78. KIM SCHEPPELE, *Worst Practices and the Transnational Legal Order, or (How to Build a Constitutional “Democratorship” in Plain Sight)*, (forthcoming 2016).

79. HALLIDAY AND SHAFFER, *supra* note 2, at 59.

80. *Constitutional Reform*, COUNCIL OF EUROPE: VENICE COMMISSION, (2014) http://www.venice.coe.int/WebForms/pages/?p=02_Reforms&lang=EN (last visited Nov. 23, 2016).

81. *Documents by topic*, COUNCIL OF EUROPE: VENICE COMMISSION, (2014) <http://www.venice.coe.int/webforms/documents/?topic=4&year=all> (last visited Nov. 23, 2016).

82. VENICE COMMISSION, *Opinion on the Final Draft Constitution of the Republic of Tunisia*, CDL-AD(2013)032-e (Oct. 2013).

83. *Opinion on the Draft New Constitution of Iceland*, CDL-AD (2013)010-e (Mar. 11, 2013).

84. *Opinions on the Constitutional Regime of Bosnia and Herzegovina*, CDL-INF (1998) 015-e (July 1, 1998).

85. *Opinion on the New Constitution of Hungary*, CDL-AD (2011)016-e (June 20, 2011).

86. *Co-operation Between the Venice Commission and the Republic of Moldova on Constitutional Reform*, CDL-INF (2001) 003-e (Jan. 24, 2001).

and Armenia.⁸⁷ While the scope of the Commission opinions differed in these cases, they exemplify its role in advising on the constitution as a whole, or in proffering advice on parts that were central to the constitutional schema of that particular country.

Second, there are a large number of opinions dealing with constitutional amendments. The process of constitutional reform is often complex and lengthy. In some countries it has spanned several years, with changes wrought through constitutional amendments. The catalysts for such amendments vary. In some instances it is the realization that the initial constitutional design is imperfect; in others it is the result of new political configurations that wish to re-shape the country's institutional and constitutional architecture; in yet other instances, the motives may be darker, such that current majorities seek to reinforce their power through constitutional amendments designed, for example, to limit the power of the judiciary.⁸⁸ An overview of the Commission's many opinions can be gleaned from its compilation on constitutional amendments,⁸⁹ and its conceptual approach to constitutional amendment is evident in a separate report on the topic.⁹⁰

Third, there is an even larger group of opinions concerned with legislation that fleshes out constitutional provisions. It is not fortuitous that the Commission website on constitutional reform lists, *inter alia*, the following issues: checks and balances between powers and the principle of inter-institutional co-operation; delegation of legislative powers; judicial reform; guarantees for the rule of law and fundamental rights and freedoms; electoral systems; and issues related to local self-government and decentralization.⁹¹ It might be felt that we should demarcate the constitution, its making and its provisions, from all else. The influences that shape the making of the constitution and the content of its provisions are clearly central. Counting how many constitutions contain provisions of a particular kind is of some help, albeit limited. It is nonetheless normatively and pragmatically mistaken to draw a rigid line between the constitution and legislation that is designed to fill out the meaning of the constitution's provisions, and it is misguided to elide the existence of the same provision in many constitutions with equivalence of application.

Constitutional legislation is in many respects the lifeblood of the constitution. Other things being equal, the thinner the constitution and the more abstract its provisions, the greater the role for constitutional legislation and adjudication to imbue the terms with more concrete meaning. Such legislation is nonetheless important in all constitutions, although its incidence may vary. The constitution may contain noble provisions concerning free and fair elections, but the reality can only

87. First Opinion on the Draft Amendments to the Constitution (Chapters 1 to 7 and 10) of the Republic of Armenia, CDL-AD (2015) 037-e (Oct. 29, 2015).

88. Scheppele, *supra* note 78, at 29.

89. Compilation of Venice Commission Opinions Concerning Constitutional Provisions for Amending the Constitution, CDL-PI (2015) 023 (Dec. 22, 2015).

90. Report on Constitutional Amendment, CDL-AD (2010)001 (Jan. 19, 2010).

91. *Constitutional Reform*, *supra*, note 80.

be tested by examination of the detailed electoral legislation that puts flesh on these constitutional bones. There may be laudable constitutional guarantees for political parties, only for these to be heavily circumscribed by legislation that defines the qualifications for a political party to appear on the ballot. The force of constitutional protections for free speech may be qualified by legislative rules related to association. The need to be mindful of the link between constitutional terms and consequent legislation is important in relation to many other issues commonly found in constitutions, such as principles concerning equality, the judiciary and the like, which are then articulated in more detail in, or affected by, legislation. The importance of this linkage is repeatedly attested to by Commission opinions.

It is instructive to relate the preceding discussion back to that concerning TLOs. It would be possible to conceive of a TLO that was solely concerned with the making and terms of constitutions. We would then, in accord with Halliday and Shaffer's definition, identify the "collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions"⁹² in this respect. The reality is that a TLO thus conceived would miss much if it excluded the second or third dimension articulated above. Nor would this sit easily with the emphasis placed on national law in TLO discourse and on the recursive nature of TLO theory, which accords prominence to the way in which "the production and implementation of transnational legal norms among international, transnational, national, and local lawmakers and law practitioners dynamically and recursively affect each other."⁹³ A distinctive contribution made by the Commission to constitutional study is that it provides a window into the interaction between the constitution, amendments thereto, and constitutional legislation, through the many Commission opinions that exemplify this relationship.

THE VENICE COMMISSION, PROCESS AND SUBSTANCE

TLO theory deals with high-profile issues such as human rights or the rule of law, the meaning and application of which can be contestable. We should consider carefully the process through which determinations are made, and the substantive criteria used when making them.⁹⁴ It is only by doing so that we can draw any rounded conclusion concerning the normative contribution made by a particular TLO.

Process and Procedural Rights

Maartje de Visser has argued that greater procedural formality is desirable when the Commission produces its opinions, contending that the current flexibility

92. HALLIDAY AND SHAFFER, *supra* note 2, at 5.

93. *Id.* at 38.

94. Much of the critical literature concerning bodies such as the World Trade Organization that constitute part of a TLO performs this function.

“may inadvertently undermine the quality and usefulness of its assistance to national constitution makers.”⁹⁵ She perceives a lack of homogeneity concerning the evidence used to evaluate a draft constitution, and is concerned that an opinion did not discuss a source she believes should have been considered.⁹⁶ De Visser also believes that there should be a more “comprehensive procedural framework to govern the Commission’s functioning.”⁹⁷ This should, says de Visser, address the participatory rights of the country investigated, and the composition of the working group. There should be a procedural obligation to undertake a site visit, and the national authorities should be able to comment on the rapporteurs’ draft opinion after the country visit.⁹⁸

Two comments can be made on these suggestions. First, there is a danger in expecting too much homogeneity between the evidentiary foundations of different reports, or between sources discussed in any particular report. The danger is that the best can be the enemy of the good. It is always possible to criticize a particular report because a commentator believes that a source should have been discussed in greater detail. It should be remembered that opinions are produced under time constraints, and that most rapporteurs have “day jobs,” whether as judges, academics, practising lawyers and the like. The opinions are not, and are not intended to be, doctoral theses.

Second, there is a case for looking at the current procedural rules and working methods, with a view to improvement. The process rights of the state are clearly important, more so given that the Venice Commission is in the business of ensuring respect for the rule of law, a central component of which is the precept *audi alteram partem*. Deciding what due process demands in this respect is difficult, since the devil is always in the detail.

The default position is that a site visit takes place, subject to the exigencies mentioned above. The secretariat may indicate to the state the questions that will be raised prior to the visit. Where this is not so, the discussion during the visit alerts the state to the causes for Commission disquiet. If a draft opinion exists before the site visit this will be a preliminary document and is not therefore disclosed prior to the visit. When the national situation so requires, the president, in consultation with the bureau, may authorise that the rapporteurs’ opinion that has not yet been adopted can be sent to the national authorities prior to its consideration at the plenary. Subject to this, the state is sent the final draft opinion before the plenary, and its representatives are able to comment at the plenary and on occasion at a sub-commission prior to the plenary.

The *audi alteram partem* principle is therefore clearly met insofar as the state has the opportunity to proffer comments prior to the adoption of the final draft opinion

95. de Visser, *supra* note 1, at 965.

96. *Id.* at 980.

97. *Id.* at 992.

98. *Id.* at 995.

by the plenary.⁹⁹ There is, in addition, discretion for the state to be sent the final draft opinion earlier than normal. It is, moreover, not uncommon, for amendments to be made to the opinion as a result of comments at the plenary. The state will also have the opportunity to proffer views during the site visit.

The key issue is therefore whether the state should be able to see the preliminary draft opinion before the final draft is completed. The argument in favour is that it would enable the state to have a more detailed idea of Commission thinking. The argument against is that prior to finalization the draft opinion is a work in progress. Problematic issues may become apparent during the visit that were not apparent hitherto, the danger being that state authorities might resist change to the preliminary opinion. The site visit would become a detailed “negotiation” of the preliminary draft opinion, thereby precluding discussion of the salient issues, and if certain issues were not identified in the preliminary draft opinion, the state authorities would not mention them.

Substantive Criteria and Standards

(i) Hard and Soft Law Standards

The Venice Commission commonly distinguishes between hard and soft law standards when producing its opinions and studies.

The paradigm hard law standard is the European Convention on Human Rights (the “Convention”) and the jurisprudence of the ECHR. The case law of the Strasbourg Court affords signatory states latitude in the application of the Convention rights through the margin of appreciation. There is therefore some room for cultural and normative heterogeneity, and the status accorded to Strasbourg Court judgments within a signatory state is determined by that legal order.

Subject to this, adherence to the Convention is binding as hard law for parties thereto. Article 46(1) of the Convention imposes a binding obligation to comply with Strasbourg judgments, since it states that “the High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.”¹⁰⁰ The peremptory force of Article 46(1) was emphasized by the Strasbourg Court in the *Scozzari* case,¹⁰¹ where it made clear that it was incumbent on the state not just to pay those concerned in the instant case, but also to take measures to end the cause of the violation.

The Venice Commission also makes considerable use of soft law standards, the nature of which can vary, as is clear in the following extract from Gianni Buquicchio and Simona Granata-Menghini.

99. *See, e.g.*, Hlophe v. Constitutional Court of South Africa and Others, no. 08/22932, ZAGPHC 289, §20 (Sept. 25, 2008).

100. European Convention on Human Rights, Art. 46(1), Nov. 4, 1950.

101. *Scozzari and Giunta v. Italy*, App. nos. 39221/98 and 41963/98, § 249, EUR. CT. H.R. 2000-VIII.

In addition to hard law standards, the Venice Commission also assesses the compliance of constitutional and legal texts with soft law standards (e.g. recommendations by the Committee of Ministers of the Council of Europe) or best practices (for example, the guidelines prepared by the Venice Commission together with the Organization for Security and Cooperation in Europe (OSCE)/Office for Democratic Institutions and Human Rights (ODIHR) on freedom of assembly, political parties and freedom of religion; these are a combination of hard law standards, their interpretation and best practices). It also examines the expediency and workability of the constitutional or legal models actually chosen. These are areas where the standards are not fully binding and are not formulated in clear, univocal terms. States dispose therefore of a much broader margin of appreciation and are free to choose their own model. When there are several options equally in line with the standards, as is often the case, it is not the role of the Commission to express its preference, but only to indicate which option in its view better fits the situation in the country and whether it may function in practice.¹⁰²

This accurately captures Venice Commission practice. Some sources are an admixture of hard and soft law, such as the Commission guidelines and compilations, which contain a core of hard law, since they draw on Strasbourg Court jurisprudence. The balance between hard and soft law within any particular opinion will perforce vary. If the issue falls four-square in the realm of human rights where there is extensive case law, then hard law will predominate in the opinion. If the focus of the opinion is on broader issues of constitutional design, or the configuration of organs of government, then soft law will assume greater importance.

(ii) Universality and Plurality

The other factor that markedly affects the substance of the reports is the balance between universality and plurality/diversity, as attested to by several commentators. Thus, Jeffrey Jowell noted that while the “Commission possessed the self-assurance to insist that democracy contains a set of absolute standards from which there is limited scope for deviation,” it was nonetheless sensitive to “differences in culture and context in which democracy has to be rooted,” such that “the advice it dispenses properly takes into account the differing situations of countries with varied backgrounds and experience.”¹⁰³

Sergio Bartole echoed a similar theme when talking of the Commission’s approach to central and east European countries that were making the transition to democracy. He denied that adherence to a European constitutional heritage meant that “the constitutional choices of the new democracies be completely subordinated to strict guidelines provided by international organizations: rather the

102. BUQUICCHIO AND GRANATA-MENGHINI, *supra* note 1, at 244.

103. Jowell, *supra* note 3, at 682.

implementation of European constitutional heritage implies respect for state sovereignty,”¹⁰⁴ as manifest in the use of standards, which allowed some choice to the affected state.¹⁰⁵

In similar vein, Buquicchio and Granata-Menghini stated that choices between, for example, parliamentary, presidential and semi-presidential regimes, were primarily for the state concerned, since each could be consistent with democracy.¹⁰⁶ They emphasized that even hard law standards were obligations of result, rather than means. They counseled against the temptation to think that models from one state could be readily transplanted to another, stating that before consideration is given to borrowing a model from elsewhere “its compatibility with the different legal political and social context needs to be tested.”¹⁰⁷

(iii) Critique and Response

There may be differences of view concerning the Commission’s evaluation in a particular opinion. This is to be expected, given that application of abstract constitutional precepts can be contestable. De Visser is more generally critical of the Commission, stating at the outset that her study reveals “gratuitous inconsistencies in the manner in which the substantive evaluation of domestic constitutional texts is carried out and, in a related vein, highlights missed opportunities to give optimal guidance to national constitutional drafters.”¹⁰⁸ Suffice it to say at the outset that talk of “gratuitous inconsistencies” is either misplaced, or de Visser is setting the bar very high to sustain her allegation of inconsistency qualified by this adjectival form, especially given that it is based on evaluation of only four opinions.

The nub of her argument is that the Venice Commission is in danger of taking the notion of “common constitutional heritage” too far, by moving beyond constitutional principle to the more detailed manner of implementation in a way that is not sustainable. Thus, while de Visser acknowledges that the Commission seeks to provide assistance to states by giving more concrete guidance, she nonetheless cautions that “an overly broad catalogue of elements that together make up the common heritage is misconceived and could in the long run even become a cause of disenchantment with the Venice Commission’s provision of constitutional guidance,”¹⁰⁹ and that a more diversified analytical framework would be preferable.

The danger that de Visser sees in crossing the line between constitutional principle and implementation is that “states may feel that their autonomy in fashioning constitutional arrangements is unduly circumscribed,” rendering it less likely that states will adhere to Commission recommendations. By way of contrast,

104. Bartole, *Final Remarks*, *supra* note 1, at 353.

105. *Id.* at 355.

106. Buquicchio & Granata-Menghini, *supra* note 1, at 244.

107. *Id.* at 246.

108. de Visser, *supra* note 1, at 973.

109. *Id.* at 999.

“keeping the focus on principles avoids the trap of undue optimism on the incidence and extent of constitutional convergence, let alone constitutional universalism.”¹¹⁰ The Venice Commission should not, says de Visser, refrain from considering the implementation of constitutional principles altogether, but “should eschew conceiving of the operationalization of such principles as part of the common heritage as such.”¹¹¹

There are three related points that should be made in relation to this critique. First, the line between constitutional principles and their operationalization is not always easy to draw. If constitutional principles remain at too high a level of abstraction they risk becoming empty vessels, capable of justifying almost any constitutional arrangement, democratic or otherwise. There are many instances where issues related to “operationalization” are crucial to realization of the constitutional principle, and where conversely it makes little sense to speak of such a principle without being cognizant of the manner of its implementation.

Second, the Venice Commission acknowledges the central concerns voiced by de Visser, and has always done so. The previous extracts from members of the Commission and the secretariat reveal awareness of the tensions between universality and plurality. They repeatedly counsel against the idea that there is a one-size-fits-all constitutional model. They articulate the distinction between hard and soft law standards, whereby the state has greater latitude in relation to the latter. This is accepted chapter and verse in Commission thinking, and is a standard feature in Commission opinions.

Third, the reality is that states refer issues to the Commission to gain specific guidance on the constitutional acceptability of specific laws. To depict the Venice Commission’s modus operandi as one which imposes constitutional specifics on unwilling recipients, who are disturbed by intrusion into their autochthonous space, is to convey a misleading impression of everyday Commission business. The paradigm reference is one in which the state seeks help in relation to a particular law that it feels, or has been told, is deficient in some respects. The Commission is mindful of the need to respect local difference, and to acknowledge legitimate plurality and diversity. The bottom line is nonetheless that the state seeks something concrete to improve the law that was the subject of the referral. It is, moreover, instructive to note that the incentive for the Commission to imbue abstract concepts such as the rule of law with more concrete content has often come from newer democracies, who wish for more specific guidance on what the concept entails.

THE VENICE COMMISSION, COMPLIANCE AND IMPACT

We have already seen that classic coercive enforcement is not a condition precedent for the existence of a TLO, or for an organization to be regarded as part thereof. The extent of compliance is nonetheless important, since it is a factor that

110. *Id.* at 1000.

111. *Id.* at 1001.

affects the extent to which the TLO's legal norms can be said authoritatively to order the understanding and practice of law across national jurisdictions.

Compliance and the Addressee

The data on the impact of Venice Commission opinions on the addressees is regrettably thin, since there is no systematic method through which the Commission is cognizant of the extent to which its recommendations have been followed, notwithstanding space allotted on the plenary agenda for follow up on previously adopted opinions.¹¹² The data may, somewhat paradoxically, become apparent if the state becomes a repeat player in relation to the same issue. This does not alter the fact that systematic compliance data is not readily available. This problem could be alleviated relatively simply if Wolfgang Hoffmann-Riem's suggestion were to be acted upon. He argued that,

At a minimum, those states that initiate requests to the VC on their own could be obligated to report, *inter alia*, about the implementation of recommendations in a systematic, comprehensive, and reliable manner. The same could also be asked from member states when requests are initiated by other authorities, such as the Parliamentary Assembly. Moreover, the members appointed to the VC by member states could be tasked with helping the Secretariat document and evaluate implementation efforts and making themselves available to the *plenum* for further questions.¹¹³

This is a sensible proposal. There will, to be sure, be instances where states prove recalcitrant and fail to provide the requisite information, testimony to the fact that the world is imperfect, and that the Commission has no enforcement mechanism. The proposal nonetheless embodies a clear obligation, and failure to comply will be indicative of *prima facie* non-compliance, and thereby facilitate further inquiry. The very fact that there are differences of view as to implementation rates bears testimony to the importance of securing better information in this regard.

Thus, on one view implementation is the norm when states request a reference. This view has been voiced by Pieter van Dijk.¹¹⁴ It has been echoed by Buquicchio and Granata-Menghini, who state that "when the opinion requests come from the interested States themselves, it is the rule that they are followed, in part or in full."¹¹⁵ By way of contrast Hoffmann-Riem regarded that assessment as "probably too optimistic,"¹¹⁶ based on analysis of data concerning implementation

112. European Commission for Democracy Through Law (Venice Commission), *Annotated Agenda of the 106th Plenary Session*, CDL-PL-OJ (2016) 001 (Feb. 26, 2016).

113. Hoffman-Riem, *supra* note 1, at 589 n.44.

114. Pieter van Dijk, *The Venice Commission on Certain Aspects of the European Convention of Human Rights, Ratione Personae in HUMAN RIGHTS, DEMOCRACY AND THE RULE OF LAW: LIBER AMICORUM LUZIUS WILDHABER* 183, 188 (S. Breitenmoser *et al.* eds., 2007).

115. Buquicchio & Granata-Menghini, *supra* note 1, at 250.

116. Hoffman-Riem, *supra* note 1, at 589.

from a sample of opinions between 2009 and mid-way through 2012. He concluded that in some instances states did not take up the recommendations, although this was in part explicable because “the project submitted for review—including in reaction to the criticism by the VC—was abandoned or had yet to be completed,” while “in other cases, the project was pursued without taking up the VC’s suggestions, or at least the majority of them.”¹¹⁷ Hoffmann-Riem, however, also found evidence that other opinions had been fully or partially implemented. There can moreover be a temporal element to implementation: recommendations that have been ignored by the incumbent government may be taken up by a later government.¹¹⁸

Hoffmann-Riem identifies factors that affect compliance, which accord with basic intuition in this regard. The most significant factor is whether the state requested the opinion, or whether the opinion was thrust on the state through request for Commission intervention by an institutional player. Compliance is significantly less likely in the latter instance than the former. This is more especially so when one adds in the power of the relevant state, and the nature of the opinions requested by the institutional intervener. This is exemplified by the five opinions concerning Russia produced by the Commission in 2012 at the behest of the Parliamentary Assembly of the Council of Europe. Not only was the target state very powerful, but the opinions focused on high-profile laws relating to elections to the State Duma,¹¹⁹ political parties,¹²⁰ assembly,¹²¹ combating of extremism,¹²² and the Russian Federal Security Service.¹²³ It was scarcely surprising that Russia was resistant to change in these areas. The reality was nonetheless that Russia consented, after some delay, to site visits for the separate reports, and engaged with the reports when they went through the Commission decision-making process, culminating in heated exchanges at the plenary session.¹²⁴

There are, as Hoffmann-Riem notes, other factors that play into compliance. Thus, there is the extent to which the Venice Commission opinion draws support from other institutional players, such as the Commission of the European Union,

117. *Id.*

118. Buquicchio & Granata-Menghini, *supra* note 1, at 248.

119. European Commission for Democracy Through Law (Venice Commission), *Opinion on the Federal Law on the Election of the Deputies of the State Duma of the Russian Federation*, CDL-AD (2012) 002 (March 19, 2012). I was one of the rapporteurs on this opinion.

120. European Commission for Democracy Through Law (Venice Commission), *Opinion on the Law on Political Parties of the Russian Federation*, CDL-AD (2012) 003 (March 20, 2012).

121. European Commission for Democracy Through Law (Venice Commission), *Opinion on the Federal Law no. 54-FZ of 19 June 2004 on Assemblies, Meetings, Demonstrations, Marches and Picketing of the Russian Federation*, CDL-AD (2012) 007 (March 20, 2012).

122. European Commission for Democracy Through Law (Venice Commission), *Opinion on the Federal Law on Combating Extremist Activity of the Russian Federation*, CDL-AD (2012) 016 (June 20, 2012).

123. European Commission for Democracy Through Law (Venice Commission), *Opinion on the Federal Law on the Federal Security Service (FSB) of the Russian Federation*, CDL-AD (2012) 015 (June 20, 2012).

124. European Commission for Democracy Through Law (Venice Commission), *Synopsis of the 94th Plenary Session of the Venice Commission*, CDL-PV (2013) 002 (March 11, 2013).

where the state that is the subject of the opinion has reason not to offend that other institution. A factor that inclines in the other direction is the extent to which the state cares about the critique. Where the state remains authoritarian, with little appetite for change and little incentive to seek the imprimatur of more liberal states, the opinion is likely to fall on stony ground.¹²⁵

Limits as to the impact of opinions are explicable in part at least by the fact that the Commission “can analyse and compare the texts of norms and suggest changes, but it has no direct influence on the basic conditions that drive practical application of norms in the state concerned.”¹²⁶ This point is important and has wider resonance for the limits of transnational impact on national constitutions. Lawyers naturally focus, initially at least, on text, and the provenance thereof. We ask whether there is evidence that a country’s constitution was shaped by other constitutions. We inquire as to causality in this respect. We debate about the relative importance of indigenous influence and foreign input. This is an important part of the story, but it can only ever be part thereof, for the reason identified by Hoffmann-Riem. Thus even where there is formal implementation of Venice Commission opinions, substantive implementation will necessarily depend on a broad range of societal factors that affect reception of such norms in that state. These include, *inter alia*, the prevailing governmental culture, the bureaucratic willingness/capacity to apply the relevant provisions, and the independence of the judiciary and access to court.

Sharing Best Practice and Cooperation

Assessment of the Commission’s impact should not, however, be confined solely to consideration of whether the state implements the opinion addressed to it. From its very inception the Venice Commission has operated on a broader front, particularly in relation to countries making the transition to more liberal democratic regimes. The Commission has always recognised that change will not happen overnight, but that it can also be fostered through other activities, including training of personnel, seminars, engagement with judges, and conferences. The Venice Commission has initiatives across all these areas, and although it is difficult to assess their precise impact, it would be misguided to ignore or undervalue such initiatives.¹²⁷ These initiatives are also significant in relation to countries that are not formally members of the Commission. The Commission has developed programmes with Central Asia, the Southern Mediterranean, and Latin America.

125. See, e.g., European Commission for Democracy Through Law (Venice Commission), *Joint opinion on the law on mass events of the Republic of Belarus*, CDL-AD (2012)006 (Mar. 20, 2012).

126. Hoffmann-Riem, *supra* note 1, at 589.

127. See, e.g., Venice Commission, <http://www.venice.coe.int/webforms/events/> (various initiatives listed on the front page of the Venice Commission website) (last visited Nov. 4, 2016).

Thus, in Central Asia,¹²⁸ the Venice Commission developed projects, some of which involved particular countries, others of which were regional, in relation to issues such as constitutional assistance, constitutional justice, reform of the judiciary, and electoral legislation and practice. The bilateral dimension can be exemplified by co-operation, whereby the Commission furnished the newly created Constitutional Chamber of Kyrgyzstan with assistance in the field of constitutional justice. The Chamber requested such assistance in order to better understand international standards and best international practice, since it had no experience in the field of constitutional justice hitherto. The regional dimension to such co-operation is exemplified by the 2009 rule of law initiative, run jointly with the EU, which was aimed at the five Central Asian countries Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan.¹²⁹ The objectives of the programme were, *inter alia*, to strengthen the rule of law and separation of powers; enhance the independence of the judiciary; assist in reform of the public prosecutorial function; facilitate integration of international law into national law; reform electoral law and administration; and assist in the training of judges and officials.¹³⁰

The Venice Commission activities in the Southern Mediterranean region focus on provision of assistance and advice to Arab countries even before the Arab Spring, with close contacts established with Morocco and Tunisia. This can, as in the context of Central Asia, take the form of bilateral exchange, or regional support. The former is exemplified by Commission support, following a request from Morocco in 2014 for assistance in the preparation of two organic laws concerning the High Judicial Council and the Status of Judges. A good example of the regional dimension is the University for Democracy (UniDem) Campus for the Southern Mediterranean Countries.¹³¹ The programme ran from 2015 to 2017, with seminars on good governance, the rule of law, and fundamental rights for high-level civil servants of the region.

The theme of sharing best practice and cooperation is also apparent in relations between the Commission and countries in Latin America. Some countries from this region, such as Brazil, Chile, Mexico, and Peru, are members, and Commission initiatives designed to foster best practice in areas such as democratic transition, constitution-building, constitutional justice, and electoral legislation have been especially prevalent in relation to such countries.¹³² Such initiatives have been fostered by the sub-Commission on Latin America. The sharing of best practice is

128. Venice Commission, *Central Asia – recent activities*, http://www.venice.coe.int/WebForms/pages/?p=03_Central_asia&lang=EN (last visited Nov. 4, 2016).

129. Venice Commission, *Joint Programme with the European Union: EU – Central Asia Rule of Law Initiative*, http://venice.coe.int/WebForms/pages/?p=03_CARoLInitiative (last visited Nov. 4, 2016).

130. *Id.*

131. Venice Commission, *Sharing Democratic Practices between Civil Servants across the Mediterranean - UniDem Med Campus*, http://www.venice.coe.int/WebForms/pages/?p=03_CampusUniDem&lang=EN (last visited Nov. 4, 2016).

132. See, e.g., European Commission for Democracy Through Law (Venice Commission), *Opinion on the Electoral Legislation of Mexico*, CDL-AD(2013)021 (June 18, 2013).

not, however, confined to states that are members of the Commission. There have been further conferences involving in excess of twenty countries from Latin America and Europe, which dealt with matters such as individual access to constitutional justice, and implementation of human rights treaties at domestic level.¹³³ Moreover, in 2013, the first meeting of the Sub-Commission on Latin America outside Venice took place in Mexico City in 2013, and was attended by states that were not members of the Venice Commission.¹³⁴

CONCLUSION

There will be no attempt to summarise the entirety of the preceding argument. Suffice it to say the following; we should be cautious about extremes, particularly where they relate to the evaluation of the trans-national impact of a particular institution on national constitution-making broadly conceived. There are dangers of over-estimation, imagining a transformative effect that cannot readily be sustained on the facts. There are equally dangers of under-estimation, denying that change can be causally associated with the work of a particular institution. We should be equally mindful of the need for balance when considering the workings, procedural and substantive, of any particular institution. It is axiomatic that all institutions are imperfect to some degree, and we should therefore be ready to engage in critical scrutiny. We should, by the same token, subject critiques to careful evaluation.

The preceding discussion has sought to explicate and evaluate the work of the Venice Commission, and its impact on transnational constitution-making broadly conceived. The very fact that there is an institution, which is independent and can draw on the legal expertise of highly qualified members in order to proffer advice to countries concerning the compatibility of their constitutions and laws with the precepts of democracy, human rights, and the rule of law, is a force for good. The very fact that membership of the Venice Commission encompasses all states that are party to the Council of Europe, and some that are not, helps to ensure the plurality and respect for cultural difference that is necessary when engaged in the provision of such opinions. There will inevitably be instances where there will be contestation as to the content of a particular opinion. Thus was it ever so in this domain. It should nonetheless also be recognized that transnational contribution to national constitutions can take various forms, from aid in the drafting of the constitution itself to advice on laws concerning human rights, and from measures to safeguard the independence of the judiciary to those designed to secure free and fair elections. The very fact that the Venice Commission can operate across this range has enhanced its impact.

133. European Commission for Democracy Through Law (Venice Commission), *Meeting Report of the Sub-Commission on Latin America*, CDL-LA-PV (2013) 001 (Nov. 22, 2013).

134. *Id.*

