

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

Paul Craig\*

This article examines the contribution to transnational constitution-making of the European Commission for Democracy through Law, better known as the Venice Commission. It is part of the Council of Europe, but much less understood than the European Court of Human Rights, ECtHR, notwithstanding the existing literature.<sup>1</sup> This chapter therefore seeks to

---

\* Professor of English Law, St John's College, Oxford. I am the alternate UK representative on the Venice Commission, but this chapter contains my personal view. I am grateful for comments from the participants at a conference at the Law School, UC Irvine, and subsequently from Greg Shaffer, Terry Halliday and Tom Ginsburg.

<sup>1</sup> See, e.g., Gianni Buquicchio and Pierre Garrone, 'L'harmonisation du droit constitutionnel européen: La contribution de la Commission européenne pour la démocratie par le droit' (1998) 3 Uniform Law Review/Revue de Droit Uniforme 323; Sergio Bartole, 'Final Remarks: The Role of the Venice Commission' (2000) 26 Review of Central and East European Law 351; G.Malinverni, 'La reconciliation a travers l'assistance constitutionnelle aux pays de l'Europe de l'est: le role de la Commission de Venise' (2004) 10 Les Cahiers de la Paix 207 (2004); Gianni Buquicchio and Schnutz Durr, 'The Venice Commission's Action in Africa', in S. Yazici, G. Kemal and E. Goztepe (eds.), *Essays in Honour of Ergun Ozbudun* (Ankara: Yetkin, 2008), Vol II, p. 165; Gianni Buquicchio, 'Vingt ans avec Antonio La Pergola pour le développement de la démocratie', in Pieter van Dijk, and Simona Granata-Menghini (eds.), *Liber amicorum Antonio La Pergola* (Lund: Juristförlaget I, 2009), p. 29; Gianni Buquicchio and Simona Granata-Menghini, 'The Venice Commission Twenty Years on, Challenges met, but Challenges Ahead', Marjolein van Roosmalen, Ben Vermeulen, Fried van Hoof, Marten Oosting (eds.), *Fundamental Rights and Principles, Liber Amicorum Pieter van Dijk* (Cambridge: Intersentia, 2013), p. 241; Martje de Visser, 'A Critical Assessment of the Role of the Venice Commission in the Processes of Domestic Constitutional Reform' (2015) 63 American Journal of Comparative Law 963; Wolfgang Hoffmann-Riem, 'The Venice Commission of the Council of Europe – Standards and Impact (2014) 25 EJIL

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 chapter is concerned with evaluation of the Commission's role in relation to constitution-making broadly conceived, the analysis being situated within the literature concerning transnational legal orders, TLOs.<sup>2</sup> 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 that concerned with constitutions, democracy, human rights and the rule of law. It 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 brings to bear when producing its opinions. The chapter 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 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. The communist regime in

---

579; Sergio Bartole, 'International Constitutionalism and Conditionality, 'The Experience of the Venice Commission', Rivista No. 4/2014, Associazione dei Italiana Costituzionalisti.

<sup>2</sup> Terence C. Halliday and Gregory Shaffer (eds.), *Transnational Legal Orders* (New York: Cambridge University Press, 2015).

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. It was the catalyst for creation of the Venice Commission,<sup>3</sup> the original agreement being for two years.<sup>4</sup> Membership was initially confined to states that were party to the Council of Europe.

The current statute dates from 2002, and it enabled states that were not parties to the Council of Europe to become members of the Venice Commission,<sup>5</sup> which now has 60 member states, comprising the 47 Council of Europe member states, plus 13 other countries.<sup>6</sup> It is funded from a budget to which the participating states contribute, which has to be agreed by the Committee of Ministers.<sup>7</sup> Its permanent secretariat, which provides assistance to the Commission,<sup>8</sup> 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,<sup>9</sup> which are normally distributed two weeks before the plenary.<sup>10</sup> The

---

<sup>3</sup> <http://www.venice.coe.int/webforms/events/>

<sup>4</sup> 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.

<sup>5</sup> Resolution Res. (2002) 3 Adopting the Revised Statute of the European Commission for democracy through Law, CDL (2002) 27.

<sup>6</sup> Algeria, Brazil, Chile, 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 (n 5) Art 2.5.

<sup>7</sup> Revised Statute (n 5) Art 6.1.

<sup>8</sup> Revised Statute (n 5) Art 8; Revised Rules of Procedure, CDL-AD(2015)044, Art. 7.

<sup>9</sup> Revised Rules of Procedure (n 8) Art 8.1.

<sup>10</sup> Revised Rules of Procedure (n 8) Art 9.1.

Commission of the European Union participates in the plenary sessions of the Venice Commission. So too does the Organization for Security and Cooperation in Europe, OSCE,<sup>11</sup> and the OSCE office for Democratic Institutions and Human Rights, ODIHR,<sup>12</sup> which also participates in sub-Commissions of the Venice Commission.

The Venice Commission elects, for two years renewable a Bureau, composed of the President, three Vice-Presidents and four other members.<sup>13</sup> The President presides over the Commission's work and represents it.<sup>14</sup> 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.<sup>15</sup> There is in addition a joint Council on Constitutional Justice, and 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 Centres on Constitutional, International or Human Rights Law. It 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.<sup>16</sup>

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

---

<sup>11</sup> <http://www.osce.org/>.

<sup>12</sup> <http://www.osce.org/odihr>.

<sup>13</sup> Revised Statute (n 5) Art 4.

<sup>14</sup> Revised Rules of Procedure (n 8) Art 6. Gianni Buquicchio has been President since December 2009.

<sup>15</sup> Guidelines Related to the Working Methods of the Commission, CDL-AD(2010)034, II.D.

<sup>16</sup> Ibid II.C; Revised Rules of Procedure (n 8) Art. 17a..

eminence through their experience in democratic institutions or by their contribution to the enhancement of law and political science'.<sup>17</sup> The members of the Commission serve in their individual capacity and 'shall not receive or accept any instructions'.<sup>18</sup> They are appointed by their respective countries, and hold office for four years, renewable.<sup>19</sup> The individual members are professors of public law and international law, national judges, practising lawyers, members of national parliaments and civil servants. Representatives of the Committee of Ministers, the Parliamentary Assembly of the Council of Europe, the Congress of Local and Regional Authorities of Europe and the Giunta of the Regione Veneto may attend the sessions of the Commission.<sup>20</sup> The European Union is 'entitled' to participate in the work of the Commission,<sup>21</sup> and the Committee of Ministers is empowered to authorise the Commission to invite international organisations to participate in its work.<sup>22</sup> It is open to the Venice Commission to use consultants to facilitate attainment of its objectives.<sup>23</sup>

## **2 Remit and Role**

The Venice Commission's role is elaborated in Article 1.1 of the statute, which mandates that it is to fulfil 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

---

<sup>17</sup> Revised Statute (n 5) Art 2.1.

<sup>18</sup> Ibid Art 2.1.

<sup>19</sup> Ibid Arts 2.2-2.3.

<sup>20</sup> Ibid Art 2.4.

<sup>21</sup> Ibid Art 2.6.

<sup>22</sup> Ibid Art 2.7.

<sup>23</sup> Ibid Art 5.

their reinforcement and development. 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. The reality is that the Venice Commission works in three broad areas.

#### **(a) Democratic Institutions and Fundamental Rights**

The first concerns democratic institutions and fundamental rights, which includes:<sup>24</sup> 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.

Constitutional reform is central to the Venice Commission's work, including the drafting of constitutions and 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 paradigm being whether a state's law relating to a fundamental right, such as speech, is consistent with European and international standards.

#### **(b) Constitutional Justice**

---

<sup>24</sup> [http://www.venice.coe.int/WebForms/pages/?p=01\\_Const\\_Assistance&lang=EN](http://www.venice.coe.int/WebForms/pages/?p=01_Const_Assistance&lang=EN).

The second area in which the Venice Commission works is constitutional justice.<sup>25</sup> From its early years, it facilitated dialogue between constitutional courts, as manifest by the creation in 1992 of a documentation centre to foster mutual exchange of information between the courts, and to inform the public about their decisions. 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.<sup>26</sup> There is a facility, the 'Venice Forum', which fosters information exchange between the courts on current issues.

Cooperation between the constitutional courts and the Venice Commission was institutionalized post-2002, through the Joint Council on Constitutional Justice, (JCCJ).<sup>27</sup> The JCCJ is co-chaired, one being a member of the Commission, the other being a liaison officer elected by the liaison officers during a meeting of the JCCJ.<sup>28</sup> 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.

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,<sup>29</sup> which, since 1993, contains summaries of the most important decisions submitted by the constitutional courts of circa 50 countries, the European Court of Human Rights, ECtHR, and the Court of Justice of the European Union, CJEU. The JCCJ

---

<sup>25</sup> [http://www.venice.coe.int/WebForms/pages/?p=01\\_Constitutional\\_Justice&lang=EN](http://www.venice.coe.int/WebForms/pages/?p=01_Constitutional_Justice&lang=EN).

<sup>26</sup> <http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm>.

<sup>27</sup> Revised Statute (n 5) Art. 3.4.

<sup>28</sup> Revised Rules of Procedure (n 14) Art. 18.

<sup>29</sup> [http://www.venice.coe.int/WebForms/pages/?p=02\\_02\\_Bulletins](http://www.venice.coe.int/WebForms/pages/?p=02_02_Bulletins).

also oversees the CODICES database, which is updated three times per year. It contains circa 4000 summaries that are also published in the Bulletin, and the full texts of approximately 5000 decisions. 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 elsewhere, thereby fostering trans-constitutional exchange of ideas. The JCCJ annual meeting will be followed by a conference on a topic of current interest concerning constitutional justice.

### **(c) Elections, Referendums and Political Parties**

The third area in which the Venice Commission is active concerns elections,<sup>30</sup> including referendums and political parties.<sup>31</sup> 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 are subject to approval by the plenary of the Venice Commission in the same way as those on other topics.

The Council for Democratic Elections proffers advice and gives opinions on electoral legislation. The Venice Commission has adopted approximately 120 opinions and issued 60 texts of a general character on elections, referendums and political parties. Considerable attention has been devoted to codes of good electoral practice, analogous documents

---

<sup>30</sup> [http://www.venice.coe.int/WebForms/pages/?p=01\\_Elections\\_and\\_Referendums&lang=EN](http://www.venice.coe.int/WebForms/pages/?p=01_Elections_and_Referendums&lang=EN).

<sup>31</sup> [http://www.venice.coe.int/WebForms/pages/?p=02\\_parties](http://www.venice.coe.int/WebForms/pages/?p=02_parties).



concerning referendums, and guidelines that relate to political parties.<sup>32</sup> 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.<sup>33</sup>

#### **(d) 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 to furnish more general guidance on particular fundamental rights or political parties, with the hope that these can assist legislators, public authorities, the judiciary, and the like.<sup>34</sup> Closely related to the general studies are the compilations of extracts from opinions adopted by the Venice Commission in particular areas.<sup>35</sup> The objective is to provide an overview of doctrine in the particular area, as a reference resource for drafters of constitutions and of legislation.<sup>36</sup>

---

<sup>32</sup> See, e.g., Code of Good Practice in Electoral Matters, CDL-AD(2002)23 rev; Code of Good Practice on Referendums, CDL-AD(2007)008; Guidelines on Political Party Regulation by OSCE/ODIHR, CDL-AD(2010)024; Code of Good Practice in the Field of Political Parties, CDL-AD(2009)021.

<sup>33</sup> [http://www.venice.coe.int/WebForms/pages/?p=02\\_seminars](http://www.venice.coe.int/WebForms/pages/?p=02_seminars).

<sup>34</sup> See, e.g., Guidelines for Legislative Reviews of Laws relating to Religion or Belief, CDL(2004)061; OSCE/ODIHR—Venice Commission Guidelines on Freedom of Peaceful Assembly, 2<sup>nd</sup> ed, CDL-AD(2010)020; Venice Commission—OSCE/ODIHR Joint Guidelines on Freedom of Association, CDL-AD(2014)046; Report on the Implementation of International Human Rights Treaties in Domestic Law and the Role of the Courts, CDL-AD(2014)036.

<sup>35</sup> [http://www.venice.coe.int/WebForms/pages/?p=04\\_Compilations&lang=EN](http://www.venice.coe.int/WebForms/pages/?p=04_Compilations&lang=EN).

<sup>36</sup> See, e.g., Compilation of Venice Commission Opinions concerning Freedom of Association, CDL-PI(2014)004; Compilation of Venice Commission Opinions concerning Constitutional Provisions for Amending Constitutions, CDL-PI(2015)023; Compilation of Venice Commission Opinions and Reports concerning

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. Thus to take the compilation concerning freedom of association by way of example, 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.<sup>37</sup>

### **3 Triggering and Methodology**

#### **(a) 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.

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.

---

Political Parties, CDL-PI(2016)003; Compilation of Venice Commission opinions and Reports concerning Gender Equality, CDL-PI(2016)007.

<sup>37</sup> Compilation of Venice Commission Opinions concerning Freedom of Association (n 36).

Where an opinion is requested by a state on 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.

The reality is that most opinions are triggered by requests from a state party to the Venice Commission. It 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 purpose. The reference may also be explicable because of 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 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, 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 will be a site visit to the country, in which the working group

talk to official and non-official players alike. The outcome of all this 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’ when it becomes apparent that it 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. The Parliamentary Assembly for the Council of Europe is the source of many such requests. There are, inevitably, differences in the ‘tone and feel’ of an opinion that has not been requested by the state, more especially where it does not want such scrutiny, and the relationship between the Commission and the state can be more adversarial in such instances.

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.<sup>38</sup> It can also provide *amicus curiae* opinions, not on the constitutionality of the act concerned, but on comparative constitutional and international law issues, at the request of a constitutional court, or the ECtHR.<sup>39</sup>

## **(b) Working Methodology of the Venice Commission**

The way in which opinions are prepared is determined by the Guidelines on Working Methods,<sup>40</sup> and by practice that has evolved over time. When a reference has been made to

---

<sup>38</sup> Revised Statute (n 5) Art 3.3.

<sup>39</sup> 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*, CDL-AD(2011)041; *Amicus Curiae Brief for the Constitutional Court of Georgia on the non ultra petita rule in criminal cases*, CDL-AD(2015)016; *Republic of Moldova -- Amicus Curiae Brief for the Constitutional Court on the Right of Recourse by the State against Judges*, CDL-AD(2016)015.

<sup>40</sup> [http://www.venice.coe.int/WebForms/pages/?p=01\\_founding\\_documents&lang=EN](http://www.venice.coe.int/WebForms/pages/?p=01_founding_documents&lang=EN).

the Venice Commission, a working group, normally between four and six, is then established. These are the rapporteurs, who are national members of the Venice Commission.<sup>41</sup> They are chosen 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 time lines.<sup>42</sup> The rapporteurs are assisted by a member of the secretariat.<sup>43</sup> 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.<sup>44</sup>

The draft opinion will be produced by the rapporteurs, in conjunction with the member of the secretariat. The rapporteurs are sent the preceding material, which 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 individual rapporteurs, although it is possible for the working group to meet between Commission sessions.<sup>45</sup> 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

---

<sup>41</sup> 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, Guidelines Related to the Working Methods of the Commission (n 15) II.E.

<sup>42</sup> Ibid II.E., which provides 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.’

<sup>43</sup> Ibid II.E.

<sup>44</sup> Ibid II.G.

<sup>45</sup> Ibid II.E.

represents the view of the working group as a whole. In some cases the procedure is different. Thus where the subject matter is large, as with the drafting of a constitution, then 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, and 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 ‘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 an opportunity for ‘voice’ to non-governmental bodies who 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,<sup>46</sup> 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.<sup>47</sup> Such opinions 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 that is the subject of the report. The comments may concern the factual accuracy of the opinion; the state may contest the working group's interpretation of its law, or its compatibility with international standards; or the state may query the specific recommendations. When the state has voiced its view at the plenary the floor is then open 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 there is the opinion requested by the state, which is content with the recommendations, more especially because it 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 there can be opinions that originate from references by bodies other than the state, where the state is not happy with the scrutiny or with the opinion, notwithstanding that it had the opportunities for voice adumbrated above. In such instances discussion can be more protracted and heated. There are of course intermediate positions along this spectrum.

---

<sup>46</sup> Ibid II.E.

<sup>47</sup> 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 adoption at the plenary, Ibid II.E.

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 its being addressed. The rapporteurs will then meet on the day of the plenary, draft an amendment to the relevant point, which is circulated 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.<sup>48</sup>

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.

## **4 The Venice Commission, Transnational Legal Orders and Constitution-Making**

### **(a) 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. These are defined by Terence Halliday and Greg Shaffer as 'a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions'.<sup>49</sup> 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.

---

<sup>48</sup> [http://www.venice.coe.int/WebForms/pages/?p=01\\_activities&lang=EN](http://www.venice.coe.int/WebForms/pages/?p=01_activities&lang=EN).

<sup>49</sup> Terence C. Halliday and Gregory Shaffer, 'Transnational Legal Orders', in Halliday and Shaffer (n 2) 5.



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’,<sup>50</sup> whereby the normative orientation of those applying the law are changed and their behaviour 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’.<sup>51</sup> 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’,<sup>52</sup> such that transnational organizations and networks are ‘part of the process of the legal norms’ formation, conveyance, and potential institutionalization’.<sup>53</sup> 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’.<sup>54</sup>

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’.<sup>55</sup> They can evolve over time, there may be more than one TLO that covers a particular substantive area,

---

<sup>50</sup> Ibid 8.

<sup>51</sup> Ibid 11.

<sup>52</sup> Ibid 12.

<sup>53</sup> Ibid 12.

<sup>54</sup> Ibid 18.

<sup>55</sup> Ibid 18-19.

and there may be contestation between TLOs that cover the same area, or where the coverage of TLOs overlaps.<sup>56</sup>

There can be various catalysts for the creation of TLOs.<sup>57</sup> There might be a disjunction between national regulation and global markets in the 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, national, and local lawmakers and law practitioners dynamically and recursively affect each other’.<sup>58</sup>

## **(b) 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 trans-national role in the dispersion of legal norms concerning democracy, human rights and the rule of law. This is readily apparent from three related perspectives: function, membership and values.

### *(i) Function*

The Commission’s origins were adumbrated above, becoming part of the Council of Europe, CoE, following the initiative from Antonio La Pergola. This enhanced the role of both

---

<sup>56</sup> Ibid 30.

<sup>57</sup> Ibid 32.

<sup>58</sup> Ibid 38.

institutional actors, since they performed complementary functions. The Council of Europe was already part of a TLO that fostered human rights and the rule of law, most prominently through the ECtHR. 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 Council of Europe the opportunity for more generalized intervention *ex ante*, whereby the Commission could give opinions on constitutions, legislation and the like, with the objective of fire prevention, thereby helping to avoid problems concerning human rights and the rule of law arising within a state, or suggesting 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 Council of Europe 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. It was not just another organization among many seeking to promote human rights.

The agreement whereby the Venice Commission became part of the CoE thereby strengthened both players. It provided the Council of Europe with the opportunity, through the Venice Commission, for shaping the post-communist political order, 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.

## *(ii) Membership*

The relationship between the CoE and the Venice Commission also enhanced this TLO because of 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 more 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, which 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 this that provides the linkage with membership of the Commission. The answer to that broader question takes us beyond the scope of this paper. Suffice it to say for the present that viewed from the perspective of the rational state actor, Russia must believe that the legitimacy gains of membership outweigh the costs in terms of challenges to Russian laws through the ECtHR, and through the Venice Commission, although there are signs that it wishes to limit as far as possible the impact of both arms of the CoE while still remaining a member.<sup>59</sup>

Membership expanded further post-2002, whereby states that were not party to the CoE were allowed to become members of the Commission. The revised statute allowing for non-CoE members to join the Commission was driven initially by the desire of such states to become full members, but not surprisingly this was pushing at an open door as far as the Commission was concerned, since the expanded membership enhanced its status. The reasons

---

<sup>59</sup> Russian Federation - Final Opinion on the Amendments to the Federal Constitutional Law on the Constitutional Court, CDL-AD(2016)016-e.

why such states sought membership are eclectic, ranging from the straightforward desire to tap into Commission expertise when framing constitutions and laws, to the legitimacy gains for the state by becoming a full member. The rationale was almost different yet again in the case of the USA, since neither of the preceding reasons have much purchase in explaining its transition from observer status, to full member. This was probably driven more 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 US foreign policy.

The Commission membership of 60 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 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 common, most especially 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 this flows from its institutional structure.

Its membership of two representatives from each state, combined with the institutional support of the secretariat, means that it 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 this area. 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,<sup>60</sup> 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

---

<sup>60</sup> Kim Scheppele, 'Worst Practices and the Transnational Legal Order, or (How to Build a Constitutional "Democratorship" in Plain Sight)', forthcoming.

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.<sup>61</sup>

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.

### **(c) 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 on 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,<sup>62</sup> and this is attested to by the large number of opinions that have dealt with this issue.<sup>63</sup> 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 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,<sup>64</sup> Iceland,<sup>65</sup>

---

<sup>61</sup> Halliday and Shaffer (n 49) 59.

<sup>62</sup> [http://www.venice.coe.int/WebForms/pages/?p=02\\_Reforms&lang=EN](http://www.venice.coe.int/WebForms/pages/?p=02_Reforms&lang=EN).

<sup>63</sup> <http://www.venice.coe.int/webforms/documents/?topic=4&year=all>.

<sup>64</sup> Opinion on the Final Draft Constitution of the Republic of Tunisia, CDL-AD(2013)032-e.

<sup>65</sup> Opinion on the Draft New Constitution of Iceland, CDL-AD(2013)010-e.

Bosnia and Hercegovina,<sup>66</sup> Hungary,<sup>67</sup> Moldova,<sup>68</sup> and Armenia.<sup>69</sup> 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 amendment. The process of constitutional reform is often complex and lengthy. In some countries it has spanned several years, with changes wrought through constitutional amendment. The catalyst for such amendment varies. 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 amendment designed, for example, to limit the power of the judiciary.<sup>70</sup> An overview of the Commission's many opinions can be gleaned from its compilation on constitutional amendments,<sup>71</sup> and its conceptual approach to constitutional amendment is evident in a separate report on the topic.<sup>72</sup>

---

<sup>66</sup> Opinions on the constitutional regime of Bosnia and Herzegovina, CDL-INF(1998)015-e.

<sup>67</sup> Opinion on the new Constitution of Hungary, CDL-AD(2011)016-e.

<sup>68</sup> Co-operation between the Venice Commission and the Republic of Moldova on Constitutional Reform, CDL-INF(2001)003-e.

<sup>69</sup> 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.

<sup>70</sup> Scheppele (n 60).

<sup>71</sup> Compilation of Venice Commission Opinions concerning Constitutional Provisions for Amending the Constitution, CDL-PI(2015)023.

<sup>72</sup> Report on Constitutional Amendment, CDL-AD(2010)001.



Thirdly, 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:<sup>73</sup> 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. 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 its 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 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

---

<sup>73</sup> [http://www.venice.coe.int/WebForms/pages/?p=02\\_Reforms&lang=EN](http://www.venice.coe.int/WebForms/pages/?p=02_Reforms&lang=EN).

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 be 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'<sup>74</sup> 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'.<sup>75</sup> A distinctive contribution made by the Commission to constitutional study is that it provides a window onto the interaction between the constitution, amendment thereto and constitutional legislation, through the many Commission opinions that exemplify this relationship.

## **5 The Venice Commission, Process and Substance**

TLOs are increasingly prevalent across diverse fields, including that concerned with constitutions, democracy, human rights and the rule of law. It renders it all the more important that they are subject to the same searching evaluation that we commonly bring to

---

<sup>74</sup> Terence C. Halliday and Gregory Shaffer, 'Transnational Legal Orders', in Halliday and Shaffer (n 2) 5.

<sup>75</sup> Ibid 38.

bear when analyzing national norms. This is more especially so when the particular TLO 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.<sup>76</sup> It is only by doing so that we can draw any rounded conclusion concerning the normative contribution made by a particular TLO.

#### **(a) 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 ‘may inadvertently undermine the quality and usefulness of its assistance to national constitution-makers’.<sup>77</sup> 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.<sup>78</sup> De Visser’s also believes that there should be a more ‘comprehensive procedural framework to govern the Commission’s functioning’.<sup>79</sup> 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.<sup>80</sup>

---

<sup>76</sup> Much of the critical literature concerning bodies such as the World Trade Organization that constitute part of a TLO performs this function.

<sup>77</sup> De Visser (n 1) 965.

<sup>78</sup> Ibid 980.

<sup>79</sup> Ibid 992.

<sup>80</sup> Ibid 995.

Two comments can be made on these suggestions. First, there is a danger in expecting too great homogeneity as between the evidentiary foundation of different reports, or as to the 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.

Secondly, there is, however, 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 especially 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 by the plenary. 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 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 that if certain issues were not identified in the preliminary draft opinion, the state authorities would not mention them.

## **(b) 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, ECHR, and the jurisprudence of the ECtHR, the Strasbourg Court. The case law of the Strasbourg Court affords signatory states latitude in the application of 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 ECHR is binding as hard law for parties thereto. Article 46(1) ECHR 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.’ The peremptory force of Article 46(1) was emphasized by the Strasbourg Court in the *Scozzari* case,<sup>81</sup> 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.<sup>82</sup>

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 of 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.

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-

---

<sup>81</sup> *Scozzari and Giunta v Italy*, Appl. nos. 39221/98 and 41963/98, judgment of 13 July 2000, § 249.

<sup>82</sup> Buquicchio and Granata-Menghini (n 1) 244.

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’.<sup>83</sup>

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 implementation of European constitutional heritage implies respect for state sovereignty’,<sup>84</sup> as manifest in the use of standards, which allowed some choice to the affected state.<sup>85</sup>

In similar vein, Buquicchio and Granata-Menghini stated that choices between, for example, parliamentary, presidential and semi-presidential regimes, were primarily for the

---

<sup>83</sup> Jowell (n 1) 682.

<sup>84</sup> Bartole, ‘Final Remarks’ (n 1) 353.

<sup>85</sup> Ibid 355.

state concerned, since each could be consistent with democracy.<sup>86</sup> They emphasized that even hard law standards were obligations of result, rather than means. They counselled 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’.<sup>87</sup>

### *(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.’<sup>88</sup> 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, more 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

---

<sup>86</sup> Buquicchio and Granata-Menghini (n 1) 244.

<sup>87</sup> Ibid 246.

<sup>88</sup> De Visser (n 1) 973.



become a cause of disenchantment with the Venice Commission's provision of constitutional guidance',<sup>89</sup> 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, 'keeping the focus on principles avoids the trap of undue optimism on the incidence and extent of constitutional convergence, let alone constitutional universalism'.<sup>90</sup> 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'.<sup>91</sup>

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.

Secondly, 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

---

<sup>89</sup> Ibid 999.

<sup>90</sup> Ibid 1000.

<sup>91</sup> Ibid 1001.

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.

Thirdly, 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 in which it 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.

## **6 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 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.

### **(a) 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. 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,<sup>92</sup>

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

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.<sup>93</sup> It has been echoed by Buquicchio and Granata-

---

<sup>92</sup> Hoffmann-Riem (n 1) 589, n44.

<sup>93</sup> Pieter van Dijk, 'The Venice Commission on Certain Aspects of the European Convention of Human Rights, *Ratione Personae*', in S. Breitenmoser *et al.* (eds), *Human Rights, Democracy and the Rule of Law: Liber Amicorum Luzius Wildhaber* (2007), p. 183, 188.

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’.<sup>94</sup> By way of contrast Hoffmann-Riem regarded that assessment as ‘probably too optimistic’,<sup>95</sup> based on analysis of data concerning implementation from a sample of opinions between 2009 and mid-way through 2012. He concluded that 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.’<sup>96</sup> 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.<sup>97</sup>

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 it 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

---

<sup>94</sup> Buquicchio and Granata-Menghini (n 1) 250.

<sup>95</sup> Hoffmann-Riem (n 1) 589.

<sup>96</sup> Ibid 589.

<sup>97</sup> Buquicchio and Granata-Menghini (n 1) 248.

Duma,<sup>98</sup> political parties,<sup>99</sup> assembly,<sup>100</sup> combating of extremism,<sup>101</sup> and the Russian Federal Security Service.<sup>102</sup> 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.

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, 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, then the opinion is likely to fall on stony ground.<sup>103</sup>

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.’<sup>104</sup> This point is important and has wider resonance for the limits of transnational

---

<sup>98</sup> Opinion on the Federal Law on the election of the Deputies of the State Duma of the Russian Federation, CDL-AD(2012)002. I was one of the rapporteurs on this opinion.

<sup>99</sup> Opinion on the law on political parties of the Russian Federation, CDL-AD(2012)003.

<sup>100</sup> 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.

<sup>101</sup> Opinion on the Federal Law on Combating Extremist Activity of the Russian Federation, CDL-AD(2012)016.

<sup>102</sup> Opinion on the Federal Law on the Federal Security Service (FSB) of the Russian Federation, CDL-AD(2012)015.

<sup>103</sup> See, e.g., Joint opinion on the law on mass events of the Republic of Belarus, CDL-AD(2012)006.

<sup>104</sup> Hoffmann-Riem (n 1) 589.

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, the independence of the judiciary and access to court.

#### **(b) 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, more especially so in relation to countries making the transition to more liberal democratic regimes. The Commission has always recognized 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.<sup>105</sup> These initiatives are also significant in relation to countries that are not formally members of the Commission. It has developed programmes with Central Asia, the Southern Mediterranean and Latin America.

---

<sup>105</sup> See, e.g., the various initiatives listed on the front page of the Venice Commission website, <http://www.venice.coe.int/webforms/events/>.

Thus in Central Asia<sup>106</sup> 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. 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.

The Venice Commission activities in the Southern Mediterranean region focused 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.<sup>107</sup> The programme ran from

---

<sup>106</sup> [http://www.venice.coe.int/WebForms/pages/?p=03\\_Central\\_asia&lang=EN](http://www.venice.coe.int/WebForms/pages/?p=03_Central_asia&lang=EN).

<sup>107</sup> [http://www.venice.coe.int/WebForms/pages/?p=03\\_CampusUniDem&lang=EN](http://www.venice.coe.int/WebForms/pages/?p=03_CampusUniDem&lang=EN).

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. Such initiatives have been fostered by the sub-Commission on Latin America. The sharing of best practice is 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. 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.

## **7 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, more particularly so 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 the 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 very 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.