Clayton Comments

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THE VENICE COMMISSION AND THE RULE OF LAW CRISIS

The Venice Commission is an advisory body of the Council of Europe, comprising independent experts in the field of constitutional law. Its rationale reflects the aims of the Council of Europe itself- to protect human rights, pluralist democracy and the rule of law; [1] to strengthen the understanding of the legal systems of the participating states, notably with a view to bringing these systems closer; to promote the rule of law and democracy and to examine the problems raised by the working of democratic institutions and their reinforcement and development.[2] The Commission was established in 1990 after the fall of the Berlin wall,[3] when constitutional advice to the new democracies of central and eastern Europe was urgently required. Its original purpose reflected a view that the new democracies would be assisted by a more systematic approach to establishing constitutional norms than relying on the principles which emerge in a haphazard way through individual applications to the European Court of Human Rights (ECtHR).

For its first 15 years the Commission flourished in an expansive and benevolent environment which promoted human rights. Its membership rapidly expanded and the Commission extended to North Africa and South America. The first UK member to the Commission, Professor Sir Jeffrey Jowell QC, described the Commission's work in 2001 as being to help us all not only to fashion our democracy to the conditions of our particular climate, but to discover those necessary features of a properly democratic state- wherever it may be situated.[4]

More recently, the Commission has needed to address some difficult rule of law issues in countries like Russia, [5] Azerbaijan, Poland and Hungary. It is, however, important to keep a sense of

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[1] https://www.coe.int/en/web/sarajevo/objectives-mission

[2] The Revised Statute of the European Commission on Democracy through Law Art 1b CDL (2002) 27

[3] The Statute of the Commission was adopted by the Committee of Ministers of the Council of Europe on 10 May 1990 as Resolution (90) 6.

[4] J Jowell 'The Venice Commission: disseminating democracy through law [2001] PL 675

[5] In 2015 the Russian Constitutional Court No 21-P/2015 decided that a judgment of the ECtHR was not enforceable in Russian territory if the Constitutional Court finds that it conflicts with the Russian

perspective about the scale of this development. Most of the Commission's work carries on- much as it always has done. Nevertheless, the Commission's role in Poland and Hungary provides some illuminating insights into contemporary international human rights concerns.

The role of the Venice Commission

The Commission fulfils its role by providing opinions on constitutional law, fundamental human rights and elections issues, but also drafts *amicus* briefs for Constitutional Courts (when asked), publishes guidelines on general issues (often together with the Organisation for the Security and Co-operation in Europe's Office for Democratic Institutions and Human Rights)[6] such as ***Guidelines on Freedom of Association***,[7] and it publishes Codes of Practice eg on elections.[8]

The Commission's official name is the European Commission for Democracy through Law. It holds plenary meetings four times a year in Venice, from which it takes its name. The Commission originally comprised 18 member states, but, soon after, all the Council of Europe member states joined. Since 2002 non-European states became full members like Brazil, Chile, Korea, Israel, Mexico

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constitution. In 2015 the Government enacted legislation to empower the Constitutional Court to determine whether findings by international bodies on protection of human rights and freedoms (including the ECtHR) are to be implemented or not. In 2016 the Russian Constitutional Court No. 12- П/2016 considered the question of executing the ECtHR judgment in the prison vote case, ***Anchugov and Gladkov v Russia***, in accordance with the Russian Constitution and decided to do so was effectively impossible. In an interim opinion the Commission expressed serious concerns as regards the compatibility of the 2015 amendments with the obligations of the Russian Federation under international law, notably Article 46 of the European Convention on Human Rights. The Commission published an interim opinion CDL-AD(2016)005 and a final opinion CDL-AD(2016)016-e and concluded that the Constitutional Court should not be tasked with the identification of the manners of execution of an international judgment.

[6] The OSCE Office for Democratic Institutions and Human Rights (ODIHR) provides support, assistance and expertise to participating States and civil society to promote democracy, rule of law, human rights and tolerance and non-discrimination. ODIHR observes elections, reviews legislation and advises governments on how to develop and sustain democratic institutions. The Office conducts training programmes for government and law-enforcement officials and non-governmental organizations on how to uphold, promote and monitor human rights. See also L Malksoo 'Russian Constitutional Court defies the European Court of Human Rights (2016) ECL Review 377.

[7] https://www.osce.org/odihr/132371?download=true

[8] http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2002)023rev-e ***The Code of Good Practice in Electoral Matters*** was examined by the Grand Chamber in the prisoner vote case, ***Hirst v United Kingdom (No.2)***) (2006) 42 E.H.R.R. 41 [32].

and the United States and it currently comprises 61 members. Belarus is an associate member, there are five observers including Argentina and Japan and three with special status, the EU, the Palestinian National Authority and South Africa.

The Commission's members are independent experts who have achieved eminence through their experience in democratic institutions or by their contribution to the enhancement of law and political science and serve in their individual capacity.[9] Members are appointed for renewable four years terms by the participating countries, either as a country's member or substitute member and frequently are senior academics, particularly in constitutional or international law, supreme or constitutional court judges or members of national parliaments.

The Commission's working methods

The Commission main activity is to issue opinions on prospective legislation, although it has no power to publish an opinion on its own initiative.[10] A request for an opinion is made either from the government of the country in question or, in relation to many of the Commission's most controversial opinions, the Parliamentary Assembly of the Council of Europe (PACE).[11] When

[9] Revised Statute of the European Commission for Democracy through Law Statute: Resolution(2002)3 Article 2(1) (adopted by the Committee of Ministers on 21 February 2002)

[10] Article 3(2) of the Revised Statute states that 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 organisation or body participating in the work of the Commission. 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.

[11] For example, in anticipation of the Russian presidential elections in 2012 PACE requested the Commission to provide 5 opinions on various subjects: 686/2012 - ***Opinion on Federal Law No. 65-FZ of 8 June 2012 of the Russian Federation amending Federal Law No. 54-FZ of 19 June 2004 on Assemblies, Meetings, Demonstrations, Marches and Picketing and the Code of Administrative Offences***; 661/2012 - ***Opinion on the Federal Law on the Federal Security Service (FSB) of the Russian Federation***; 660/2012 - ***Opinion on the Federal Law on Combating Extremist Activity of the Russian Federation***; 659/2011 - ***Opinion on the Federal Law no. 54-FZ of 19 June 2004 on assemblies, meetings, demonstrations, marches and picketing of the Russian Federation*** and 658/2011 - ***Opinion on the law on political parties of the Russian Federation***

drafting opinions to identify international norms, the Commission looks both at hard law (ECtHR decisions and other international courts, if relevant) and soft law (such as recommendations of the Council of Ministers, PACE and PACE committees).

In drafting opinions on proposed legislation, the Commission appoints a working group of 3 or 4 rapporteurs (primarily from amongst its members) so as to advise national authorities on its implications. Rapporteurs invariably make a country visit to discuss the legislation with stakeholders, government and interested parties. A draft opinion prepared by the Secretariat is discussed and adopted at a plenary session, usually in the presence of representatives from that country, sometimes after an earlier discussion by a relevant sub-commission.[12] After adoption, the opinion becomes public and is forwarded to the requesting body.

The impact of the Commission opinions on national states

Although its opinions are generally reflected in the adopted legislation, the Commission does not impose its solutions, but adopts a non-directive approach based on dialogue. The Commission does not have any systematic means to assess whether the opinions it publishes are implemented in the countries it advised, but the Secretariat makes considerable efforts to track whether its opinions are implemented- through formal channels with national governments and informal processes through communicating with Council of Europe field offices, Commission members and other contacts, which reported to the Commission. The power of the Commission is, therefore, the power to persuade although it seems that, where the state, itself, requests an opinion, it is normally implemented.[13] It is, therefore, very difficult to assess the Commission's effectiveness in shaping constitutional or

[12] Eg Sub Commission on Fundamental Rights or the Sub Commission on Democratic Institutions
[13] P van Dijk 'The Venice Commission in Certain Aspects of the European Convention of Human Rights, Ratione Personae' in S Breitenmoser, B Ehrenzeller, M Sassoli (ed) "Human Rights Democracy and the Rule of Law: Libor Amicorum for Lucius Wildhaber" (2007). But W Hoffmann-Riem, Wolfgang takes a different view in 'The Venice Commission of the Council of Europe – Standards and Impact' [2014] 25 EJIL 57

human rights standards,[14] and some argue that such a role is objectionable in principle as being counter-majoritarian.[15]

The impact of the Commission on court decisions

The Commission's opinions, however, have been influential in Human Rights Act (HRA) cases, as well as cases before the ECtHR. The domestic courts have looked at the views of the Commission in 11 HRA decisions. The Commission's work in election law was examined in cases concerning the ban on prisoners voting in the Scottish independence elections (***Moohan v Lord Advocate***),[16] the disenfranchisement of most European Union (EU) citizens from parliamentary elections in (***R(Tomescu) v Lord President of the Council***),[17] the Sark electoral system (***R(Barclay) v Lord Chancellor and Secretary of State for Justice***),[18] and a several cases considering the inability of EU citizens to vote as a result of not registering to vote in UK parliamentary elections for more than 15 years.[19] The Commission's Rule of Law Report was discussed by Lord Reed in ***AXA General***

[14] See eg S Bartoli 'Comparative Constitutional Law- an Indispensable Tool for the Creation of Transnational Law' European Constitutional Law Review, 13, 2017 601;. G Buquicchio, G / S Dürr 'Constitutional Courts - the living heart of the separation of powers, The role of the Venice Commission in promoting Constitutional Justice', in Raimondi, Guido / Motoc, Iulia / Pastor Vilanova, Pere / Morte Gomez, Carmen, eds., Human Rights in a Global World, Essays in honour of Judge Luis Lopez Guerra, Oisterwijk (2018), pp. 515-544.; P Craig "Transactional Constitution making: the Contribution of the Venice Commission on Law and Democracy' (2017) UC Irvine Journal of International, Transnational, and Comparative Law 2 Vol 57; M de Vissser 'A Critical Assessment of the Role of the Venice Commission in the Process of Domestic Constitutional Reform' (2015) 63 AM J COMPl 963; W Hoffmann-Riem, Wolfgang, The Venice Commission of the Council of Europe – Standards and Impact above;

[15] V Volpe 'Drafting Counter-Majoritarian Democracy: the Venice Commission's Constitutional Assistance' Heidelberg Journal for International Law, ZaöRV76(2016), 811

[16] [2015] A.C. 9; see also the discussion of ***Hirst*** by Laws LJ in ***R(Chester) v Secretary of State for Justice*** [2011] 1 W.L.R. 1436 [15]

[17] [2016] 1 C.M.L.R.

[18] [2010] 1 A.C. 464 [68] per Lord Collins

[19] In the recent decision in ***Shindler v Chancellor of the Duchy of La***ncaster [2016] 3 C.M.L.R. 22 which concerned the inability to vote of EU citizens who had not been registered to vote in UK parliamentary elections for more than 15 years, the Divisional Court considered material produced by the Commission concerning flexibility in relation to the right to vote, because the ECtHR had done so in ***Shindler v United Kingdom*** (19840/09) (2014) 58 E.H.R.R. 5 where the same complaint was made in

Insurance Ltd v HM Advocate,[20] and other reports were analysed in ***R (Smith) v Oxfordshire Assistant Deputy Coroner*** by the House of Lords,[21] and by the Court of Appeal in ***R(Al-Skeini) v Secretary of State for Defence***.[22]

Perhaps the most striking use of a Venice Commission opinion concerns the contentious question as to whether freedom of expression under Article 10 confers a right of access to information, which the newer ECtHR case law confirm- as highlighted in a Commission's opinion concerned with obtaining information about the activities of the courts in Azerbaijan.[23] The Supreme Court rejected that the Commission's view in ***Sugar v BBC***[24]and, again, before a 7 judge court in ***Kennedy v Charity Commission***.[25] However, Lord Wilson dissented, stating:[26]

> I cannot subscribe to the view that the development of article 10 which was in effect initiated in the ***Társaság*** case has somehow been irregular.[27] The wider approach is not in conflict with the "basic" ***Leander*** approach:[28] it is a dynamic extension of it. The judgment in the **Társaság** case is not some arguably rogue decision which, unless and until squarely validated by the Grand Chamber, should be put to one side. Its importance was quickly and generally recognised. Within a year of its delivery the European Commission For Democracy through Law ("the Venice Commission") had hailed it as a "landmark decision on the relation between freedom to information and the … Convention"; and, in giving the judgment of the Court of Appeal in ***Independent News and Media Ltd v A***,[29] Lord Judge CJ had, at para 42, specifically endorsed that description of it.

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relation to a parliamentary election. See also ***R(Preston) v Wandsworth London Borough Council*** [2013] Q.B. 687

[20] [2012] 1 A.C. 868 [118]

[21] [2011] 1 A.C. 1 [165] per Lord Mance where the Commission discussed ***Bankovic v United Kingdom*** (2001) 11 BHRC 435 and the Commission's report on ***Report on the Preferential Treatment of National Minorities by their Kin-States***.

[22] [2007] Q.B. 140 [119] per Rix LJ for the Court on the ***Report on the Preferential Treatment of National Minorities by their Kin-States***

[23] Opinion No 458/2009 on the Draft Law Obtaining Information of the Courts of Azerbaijan, 14 December 2009

[24] [2012] 1 W.L.R. 439 [95]

[25] [2015] A.C. 45

[26] Above, [188]

[27] ***Tarsasag v Hungary*** (2011) 53 E.H.R.R. 3

[28] ***Leander v Sweden*** (1987) 9 E.H.R.R. 433

[29] [2010] 1 WLR 2262

This debate about the scope of Article 10 was eventually resolved in favour of the Commission's opinion, when the Grand Chamber effectively overruled ***Kenned***y in ***Magyar Helsinki Bizottság v. Hungary***.[30]

The ECtHR has considered the Commission's work in 119 chambers judgments and 29 Grand Chamber judgments.- since 2012 the Commission's views have been discussed in 14 Grand Chamber judgments.[31] By contrast, the CJEU has looked at the Commission's views in one case only.[32]

However, identifying cases where references are made to the Commission's publications may seriously overstate the significance of its views. For instance, in March 2012 the Commission

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[30] 8 November 2016

[31] ***Merabishvili v. Georgia*** (28 November 2017) (***Report on the relationship between political and criminal ministerial responsibility***); ***Muršić v. Croatia*** (20 October 2016) (the ***Code of Good Practice in Electoral Matters***); ***Baka v. Hungary*** (23 June 2016) (the ***Position of the Government of Hungary on the Opinion on the Fundamental Law of Hungary*** adopted by the Venice Commission at its 87th Plenary Session); ***Karácsony v Hungary*** (17 May 2016) (the ***Report on the Role of the Opposition in a Democratic Parliament*** (Study No. 497/2008); ***Report on the Scope and Lifting of Parliamentary Immunities*** (Study No. 714/2013); ***İzzettin Doğan v Turkey*** (26 April 2016) (***Opinion on the legal status of religious communities in Turkey and the right of the Orthodox Patriarchate of Istanbul*** (CDL-AD(2010)005-f); ***Guidelines for Legislative Reviews of Laws affecting Religion or Belief*** CDL-AD(2004)028); ***Couderc and Hachette Filipacchi Associés v. France*** (10 November 2015) (***Opinion on the balance of powers in the Constitution and the legislation of the Principality of Monanco***); ***Pentikäinen v. Finland*** (20 October 2015) (the OSCE/ODIHR/Venice Commission ***Guidelines on freedom of peaceful assembly*** (2nd edition); ***Kudrevičius v Lithuania*** (15 October 2015) (the OSCE/ODIHR/Venice Commission ***Guidelines on freedom of peaceful assembly*** (2nd edition); ***Martínez v. Spain*** (12 June 2014) ***(Guidelines for Review of Legislation Pertaining to Religion or Belief*** adopted by the OSCE/ODIHR); ***Maktouf and Damjanović v. Bosnia and Herzegovina*** (18 July 2013) (***Opinion on Legal Certainty and the Independence of Judiciary in Bosnia and Herzegovina***); ***El-Masri v. the former Yugoslav Republic of Macedonia***, (13 December 2012)(***Opinion on the international legal obligations of Council of Europe member States in respect of secret detention facilities and inter-State transport of*** **prisoners**); ***Centro Europa 7 S.r.l. and Di Stefano v. Italy*** (7 June 2012) (***Opinion of the Venice Commission on the compatibility of the "Gasparri" and "Frattini" laws of Italy with the Council of Europe standards in the field of freedom of expression and pluralism of the media***); ***Scoppola v. Italy (No 3)*** (22 May 2012) (***Code of Good Practice in Electoral Matters***); ***Sitaropoulos and Giakoumopoulos v. Greece*** (15 March 2012) (***Code of Good Practice in Electoral Matters***).

[32] ***Klyuyev v Council of the European Union*** (T-731/15) General Court, 21 February 2018 EU:T:2018:90 which considered [76] the ***Rule of Law Checklist***

published an opinion on freedom of assembly in Russia.[33] The Commission expressed concerns about a legislative scheme which required an organiser to notify a demonstration in advance, entitling the authorities to respond with 'a well-motivated proposal to alter the place … and/or time of holding the public event', compelled the organiser to indicate whether it accepted the modification and gave it the option of either giving up the event or holding it in a different place from the original intention. The Commission advised that the organiser's autonomy in deciding the place of the event should be norm and any interferences with that principle must be justified as proportionate. However, when the ECtHR considered the issue in July 2012 in ***Berladir v Russia***, it stressed that it was not tasked to review the relevant legislation in the abstract, but must confine itself, as far as possible, without losing sight of the general context, to examining the issues raised by the case before it, and it went on to dismiss the application on its facts.[34]

The current climate

The Commission's influence is heavily dependent on the mood music of prevailing political and cultural attitudes to international human rights norms. The positive and supportive environment towards human rights in its first 15 years led to the Commission's expansion into Africa and South America. It meant that the Commission played a valuable role during the Arab spring by eg drafting published an opinion on the final draft constitution of Tunisia- pointing out that a constitutional provision providing that 'the State shall ensure equality of opportunity between women and men in assuming different responsibilities' was ambiguous and, could be interpreted restrictively, limiting equal opportunities to certain responsibilities, so that it would be preferable to delete the words 'in assuming different responsibilities'.[35] Unfortunately, however, more recently, populism and the

[33] 686/2012 - Opinion on Federal Law No. 65-FZ of 8 June 2012 of the Russian Federation amending Federal Law No. 54-FZ of 19 June 2004 on Assemblies, Meetings, Demonstrations, Marches and Picketing and the Code of Administrative Offences
[34] (Judgment, 10 July 2012]
[35] Opinion 733 / 2013 Opinion on the Final Draft Constitution of the Republic of Tunisia [44] http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)032-e

crisis of liberal democratic values have affected the Commission's work in countries like Hungary and Poland, much as it has with international courts.[36]

Developments in Hungary

The Republic of Hungary adopted its Constitution in 1949 and was only post- Soviet new democracy not to enact new Constitution. The Constitution was first amended in 1990. However, when the Fidesz party won more than two-thirds of the seats in the Hungarian parliament in the 2010 election, the government used its supermajority to make major changes to the legal framework in ways that have raised serious concerns in relation to human rights protection and the rule of law, prompting several requests for Commission opinions.[37] By March 2011 the Constitution had been amended ten times.

In 2012 and early 2013 the Constitutional Court made rulings considering legislation forcing early retirement of judges, the arbitrary registration process for churches with no possibility for judicial appeal, and the criminalization of homelessness. Rather than accepting Court rulings, the government introduced constitutional changes in March 2013 that curbed the Court's power to review constitutional changes or prevented the Court from striking down the legislation in question.

In March 2013 the Hungarian Parliament enacted the Fourth Amendment to its Fundamental Law and the Secretary General of the Council of Europe requested an opinion from the Commission.[38] To assess the Fourth Amendment the Commission had to examine 7 of its other opinions,[39] and advised

[36] See eg S Caserta and P Cebulak 'The Limits of International Adjudication and the Resistance of Regional Economic Courts in times of crisis' which argues that the CJEU has so far been reluctant to address rule of law violations in Poland and Hungary- unlike the Central American Court of Justice and the East African Court of Justice [2018] JLC 275.

[37] The Hungarian Government requested ***Opinion on three legal questions arising in the process of drafting the New Constitution of Hungary*** CDL-AD(2011)001-e whereas the Monitoring Committee of PACE requested the ***Opinion on the new Constitution of Hungary*** CDL-AD(2011)016-e.

[38] ***Opinion on the Fourth Amendment to the Fundamental Law of Hungary*** CDL-AD(2013)012-e.

[39] the ***Opinion on three legal questions arising in the process of drafting the new Constitution of Hungary*** above, the ***Opinion on the new Constitution of H***ungary above, the ***Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation***

that the Amendments had constitutional implications for the rule of law in numerous areas. For instance, the Amendment included a provision repealing Constitutional Court rulings made prior to the Amendment coming into force, so that the earlier rulings would no longer be treated as precedents. The Commission rejected the government's argument that the Constitutional Court should be freer to decide legal principles, and took the view that the principles developed by the Constitutional Court chimed with those of the Council of Europe: democracy, the protection of human rights and the rule of law.

In 2017 Hungary added a new ingredient to the current trend of imposing governmental restrictions on NGOs- as analysed in Commission opinions concerning Azerbaijan,[40] Egypt,[41] Russia,[42] and the Kyrgyz Republic.[43] In Hungary the Government decided to introduce detailed transparency obligations on foreign donors to NGO, but did not impose the same regime on funders of domestic organisations, which the Commission's opinion viewed as discriminatory.[44] Nevertheless, the principle of transparency has prompted Ukraine[45] and Romania[46] to enact similar legislation which

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and Administration of Courts of Hungary CDL(2012)03, the ***Opinion on Act CCVI of 2011 on the right to freedom of conscience and religion and the legal status of churches, denominations and religious communities of Hungary*** CDL-AD(2012)004, the ***Opinion on Act CLI of 2011 on the Constitutional Court of Hungary*** CDL-AD(2012)009, ***the Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary*** CDL-AD(2012)008 and the ***Opinion on the Cardinal Acts on the Judiciary*** CDL(2012)072.

[40] ***Opinion on the compatibility with human rights standards of the legislation on non-governmental organisations of the Republic of Azerbaijan*** CDL(2011)075-e; and again in CDL-AD(2014)043-e

[41] ***Interim Opinion on the Draft Law on Civic Work Organisations of Egypt*** CDL-AD(2013)023-e

[42] Opinion on Federal l***aw No. 7-FZ of January 12,1996 on non-profit organisations of the Russian Federation as amended on 11 February 2013*** CDL-REF(2013)037-e

[43] ***Joint Interim Opinion on the Draft Law amending the Law on Non-commercial Organisations and other Legislative Acts of the Kyrgyz Republic*** CDL-AD(2013)030-e

[44] ***Preliminary Opinion on the Draft Law on the Transparency of Organisations receiving support from abroad*** CDL-PI(2017)002-e

[45] ***Joint Opinion on Draft Law No. 6674 "On Introducing Changes to Some Legislative Acts to Ensure Public Transparency of Information on Finance Activity of Public Associations and of the Use of International Technical Assistance" and on Draft Law No. 6675 "On Introducing Changes to the Tax Code of Ukraine to Ensure Public Transparency of the Financing of Public Associations and of the Use of International Technical Assistance***" CDL-AD(2018)006-e

[46] ***Opinion on the compatibility of draft law 140/2017, amending Governmental Ordinance No. 26/2000 on Associations and Foundations***) CDL-AD(2018)004-e

the Commission has subsequently examined. Shortly afterwards, the Commission has published opinions on the restrictions on foreign universities[47] (which were widely criticized, domestically and internationally, as being directed specifically at the George Soros funded Central European University) and, most recently, on the so-called 'Stop Soros' legislation to criminalise NGOs which advise asylum seekers.[48]

Developments in Poland

The Venice Commission has also played a role in the complex Polish rule of law crisis. The problems concerning the Polish Constitutional Court began in October 2015 when five Constitutional Tribunal judges were appointed by the outgoing Civic Platform Party, which was predicted to lose the upcoming elections. Under Polish law judges of Constitutional Tribunal should be elected by Parliament on the date when the terms of previous judges expire. Nevertheless, the Government replaced three replaced judges whose nine-year terms expired in November 2015 (almost two weeks after elections), and another two whose terms expired in December. After the Law and Justice Party won the parliamentary election, the new Government made its own appointments to the court, arguing that the previous appointments of the five judges were unconstitutional. In December 2015 the Government then changed the court's decision-making power by prescribing a two-thirds majority vote and mandatory participation of at least 13 of the 15 judges on the Constitutional Tribunal. These appointments and amendments resulted in domestic protests and counter-protests in late December and early January 2016 and considerable international criticism.[49]

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[47] ***Opinion on Article XXV of 4 April 2017 on the Amendment of Act CCIV of 2011 on National Tertiary Education*** CDL-AD(2017)022-e

[48] ***Joint Opinion on the Provisions of the so-called "Stop Soros" draft Legislative Package which directly affect NGOs (in particular Draft Article 353A of the Criminal Code on Facilitating Illegal Migration*** CDL-AD(2018)013-e

[49] On 15 December 2015 Martin Schulz, President of the European Parliament, described the actions of the Polish government having "characteristics of a coup" and Anne Brasseur, President of the Parliamentary Assembly of the Council of Europe, called on Polish politicians "not to enact, precipitously, legislation relating to the Constitutional Tribunal which may seriously undermine the rule of law." On 13 January 2016 the European Commission launched a formal rule-of-law assessment

On 9 March 2016 the Constitutional Tribunal decided that the constitutional amendments in December 2015 were unconstitutional. However, the Government refused to publish the Tribunal's judgment, arguing that it had not followed the procedure stipulated by the December amendments. The Government then asked the Commission to assess these amendments.[50] The Commission called on both the parliamentary majority and opposition to do their utmost to find a solution and to respect and implement Constitutional Tribunal judgments. It expressed concerns that the Amendments endangered not only the rule of law, but also the functioning of the democratic system by crippling the Tribunal's effectiveness as a guardian of the Constitution and that the government refusal to publish the Constitutional Tribunal's decision on 9 March 2016 was, itself, in breach of constitutional law. The position, unfortunately, remained unresolved and on 13 April 2016 the European Parliament passed a resolution declaring that the Parliament was seriously concerned that the effective paralysis of the Constitutional Tribunal in Poland endangers democracy, human rights and the rule of law.

In 2017 the Government next proposed further largescale judicial reform which was criticised both nationally and internationally, which PACE asked the Commission to examine, [51] and the Commission concluded that legislation and drafted legislation (taken together) enabled the legislative and executive powers to interfere in a severe and extensive manner in the administration of justice, thereby posing a grave threat to the judicial independence as a key element of the rule of law.

based on rules set out in 2014 and the provisions of Article 7 of the Treaty of Lisbon, regarding the amendments of the constitutional court and the public media law in Poland.

[50] ***Opinion on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland*** CDL-AD(2016)001-e

[51] ***Poland - Opinion on the Draft Act amending the Act on the National Council of the Judiciary; on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts*** CDL-AD(2017)031-e

The European Commission's Article 7 procedure

The EU's unprecedented decision to invoke its rule of law procedure against Poland and Hungary for allegedly breaching Articles 2[52] and 7 of the Treaty on the Functioning of the European Union was, partly, based on Commission's opinions. The procedure, itself, is rather convoluted and requires unanimity to reach an ultimate conclusion.[53] On 20 December 2017 the European Commission decided there was a clear risk of serious breaches of the rule of law in Poland under Article 7.1, drawing heavily on various Commission opinions.[54] However, Prime Minister Orbán immediately responded, saying that Hungary would form an 'insurmountable roadblock' against EU attempts to trigger Article 7 against Poland.[55] Nonetheless, the European Parliament resolved in March 2018 by

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[52] Article 2 gives the EU the rights based on the rule of law and Article 7 gives the EU Commission allows permits the EU states:

> The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights … common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

[53] Article 7 states:

> 1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.
> The Council shall regularly verify that the grounds on which such a determination was made continue to apply.
> 2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.
> 3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.
> The obligations of the Member State in question under the Treaties shall in any case continue to be binding on that State …

[54] file:///C:/Users/rclayton.EPC/Downloads/1_EN_ACT_part1_v33pdf.pdf

[55] https://uk.reuters.com/article/uk-poland-eu-hungary-orban/pm-orban-hungary-will-block-any-punitive-eu-action-on-poland-idUKKBN1EG0MR

422 to 147 to support the European Commission's proposal to trigger Article 7 although it is unlikely that Poland will in due course be stripped of its voting rights.

The Article 7 proceedings against Hungary were initiated on 25 June 2018 when the Justice and Home Affairs Committee of the European Parliament decided to start the Article 7 process, relying on several Commission opinions, as well as breaches of its own resolutions, judgments of the CJEU and the ECtHR and the views of various UN bodies.[56] On 12 September 2018 the European Parliament commenced Article 7 proceedings with the support of 448 MEPs, narrowly clearing the required two-thirds majority. The next stage under Article 7 is that the General Affairs Council (comprising member countries' European affairs ministers) 'may determine that there is a clear risk of a serious breach' of the EU's fundamental values, after hearing from the accused country. However, Article 7 does not say that the Council must reach a determination, nor does it set any deadlines.

If the Council does determine a "serious breach," the Parliament, the Council or the Commission could take initiate a further step — deciding whether there is a "serious and persistent" breach of EU values. Reaching that conclusion could lead to the suspension of Hungary's right to vote on Council decisions. But the leaders of all EU governments (except Hungary) would need to vote in favour of a 'serious and persistent breach' in order for the process to reach the next stage. That requirement is a very high bar- and both Poland and the Czech Republic on 13 September 2018 that they will block the process from going further.[57]

Conclusion

The Commission has a unique role in promoting the rule of law and human rights when providing constitutional advice (whether in Hungary or Poland or in response to more routine requests for opinions), although it is not easy to evaluate the impact of its work on the national states to which

[56] 2017/2131(INL)
[57] https://www.irishtimes.com/news/world/europe/prague-and-warsaw-back-hungary-over-threat-of-eu-censure-1.3628464

its opinions are directed. However, its recent difficulties in addressing rule of law issues show the limitations on international bodies like the Commission in maintaining constitutional standards and fundamental norms.