

# Clayton Comments

Richard Clayton QC

## THE RULE OF LAW IN THE MIDDLE EAST: THE ROLE OF VENICE COMMISSION

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;<sup>1</sup> 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.<sup>2</sup> The Commission was established in 1990 after the fall of the Berlin wall,<sup>3</sup> 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.<sup>4</sup>

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

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<sup>1</sup> <https://www.coe.int/en/web/sarajevo/objectives-mission>

<sup>2</sup> The Revised Statute of the European Commission on Democracy through Law Art 1b CDL (2002) 27

<sup>3</sup> 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.

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

<sup>5</sup> 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 constitution. In 2015 the Government enacted legislation to empower the Constitutional Court to

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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)<sup>6</sup> such as ***Guidelines on Freedom of Association***,<sup>7</sup> and it publishes Codes of Practice eg on elections.<sup>8</sup>

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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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- II/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.

<sup>6</sup> 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.

<sup>7</sup> <https://www.osce.org/odihr/132371?download=true>

<sup>8</sup> [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2002\)023rev-e](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].

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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.<sup>9</sup> 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.<sup>10</sup> 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).<sup>11</sup> When drafting opinions to identify international norms, the Commission looks both at hard law (ECtHR

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<sup>9</sup> 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)

<sup>10</sup> 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.

<sup>11</sup> 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*

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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.<sup>12</sup> After adoption, the opinion becomes public and is forwarded to the requesting body.

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<sup>12</sup> Eg Sub Commission on Fundamental Rights or the Sub Commission on Democratic Institutions