

Appendix D: Case studies



15 February 2022

CASE STUDY 1 – DEMOCRACY AND FUNDAMENTAL RIGHTS	2
1.1 Introduction and description of the interventions	2
1.2 Evaluation of the European Commission for Democracy through Law (Venice Commission)	7
1.3 Achievements and challenges	9
1.4 Conclusions and lessons learned	10
1.5 References	10
CASE STUDY 2 – CONSTITUTIONAL JUSTICE	11
2.2 Evaluation of the European Commission for Democracy through Law (Venice Commission) interventions in focus	14
2.3 Achievements and challenges	16
CASE STUDY 3 – ELECTIONS, REFERENDUMS AND POLITICAL PARTIES	18
3.1 Introduction and description of intervention	18
3.2 Evaluation of the European Commission for Democracy through Law (Venice Commission) interventions in focus	21
3.3 Achievements and challenges	24
3.4 Conclusions and lessons learned	24
3.5 References	24
CASE STUDY 4 – TECHNICAL ASSISTANCE PROJECTS	26
4.1 Introduction	26
4.2 Description of interventions	26
4.3 Evaluation of the Venice Commission's interventions in focus	30
4.4 Achievements and challenges	33
4.5 Conclusions and lessons learned	34
4.6 References	34
CASE STUDY 5 – INTERNATIONAL CO-OPERATION AND EXTERNAL RELATIONS	36
5.1 Introduction and description of interventions	36
5.2 Evaluation of the Venice Commission's interventions in focus	38
5.2 Achievements and challenges	40
5.3 Conclusions and lessons learned	41
5.4 References	42

Case study 1 – Democracy and fundamental rights

The thematic area known as “democratic institutions and fundamental rights” covers a wide range of interventions from the Venice Commission. Indeed, one of the missions the Venice Commission has engaged in is what De Visser (2015) refers to as “comparative constitutional engineering”,¹ that is, the setting of legal standards for its member states to improve their practices in three overarching areas, namely, **democratic institutions, the rule of law and the separation of powers**. To this end, the Venice Commission covers a wide range of sub-areas contained in the three overarching areas just mentioned, which include but are not limited to:²

- ▶ balance and relations between the different branches of power
- ▶ interinstitutional co-operation
- ▶ rule of law issues
- ▶ judicial reforms
- ▶ protection of fundamental rights
- ▶ minority protection
- ▶ emergency powers
- ▶ parliamentary immunity
- ▶ ombudsman institutions
- ▶ the role of extra-institutional powers
- ▶ decentralisation
- ▶ federalism and regionalisation
- ▶ international law issues

The Venice Commission is key to assisting its members states in their constitutional, legislative and institutional functioning so as to ensure the robustness of their democracies and the respect for fundamental rights. This case study will examine several outputs in the field of **minority protection** (Ukraine), **balance and relations between the different branches of powers** (Malta), **rule of law** issues (Malta and Romania) and **judicial reform** (Romania).

The purpose of the case study is to illustrate how the Venice Commission has been delivering its work in this overarching area. The analysis presented in this case study was performed through desk research by reviewing the content of the opinions and report and was complemented by feedback generated from interviews with Venice Commission members involved but also with relevant Venice Commission Secretariat members. In addition, the field trip to Ukraine also informed the case study, particularly on the “Language Law”³ (opinion 2) as the evaluation was able to meet with a wide range of relevant stakeholders, notably the Ukrainian state service for ethno-politics and freedom of conscience.

1.1 Introduction and description of the interventions

For the purposes of this case study, four outputs were selected. The rationale for their selection was agreed with the Council of Europe’s Directorate of Internal Oversight (DIO) and was underpinned by the need to strike a balance in terms of geographic coverage and include countries that have received extensive support from the Venice Commission (for example Ukraine and Romania). The rationale for the case study sampling was also informed by the need to review different sub-legal areas within the overarching three areas. In the case of democracy and fundamental rights, the Maltese opinion presented itself as an opinion covering the separation of powers as well as several other legal areas. Last, scoping interviews and inputs from the Reference Group also informed the sampling process.

On that basis, three opinions were selected and reviewed. The first opinion is on the constitutional arrangements and separation of powers and the independence of the judiciary and law enforcement in Malta and was adopted by the Venice Commission in 2018. The second opinion reviewed is on the provisions of the law on

1 Visser M.D., 2015. “A critical assessment of the role of the Venice Commission in processes of domestic constitutional reform”. *The American Journal of Comparative Law*, 63(4), pp. 963-1008.

2 These sub-areas are the official areas listed on the Venice Commission’s website; however, it is reasonable to assume further sub-areas have been covered by the Venice Commission since its creation. Subsequent research will seek to determine the breadth of legal areas covered by the Venice Commission in a more comprehensive manner. See www.venice.coe.int/WebForms/pages/?p=01_Const_Assistance.

3 As it is colloquially referred by local stakeholders in Ukraine.

education of 5 September 2017 which concern the use of the state language and minority and other languages in education in Ukraine and was adopted by the plenary session in 2017. The last opinion within the scope of this case study is an opinion addressed to Romania on amendments to the Criminal Code and the criminal procedure code, adopted in 2018. In addition, one report was also reviewed: “Parameters on the relationship between the parliamentary majority and the opposition in a democracy: a checklist”, published in 2019.

The objectives of the case study are i) to provide an overview of the interventions in scope; ii) to assess them against the four evaluation criteria for the overall study (relevance, effectiveness, efficiency and impact); iii) to identify a number of good practices which will subsequently help inform the recommendations in the final report.

1. Opinion on constitutional arrangements and separation of powers and the independence of the judiciary and law enforcement (Malta).

This opinion, adopted in December 2018, came first at the request of the Parliamentary Assembly of the Council of Europe (PACE) in the wake of the killing of investigative journalist Daphne Caruana Galizia.⁴ The death of Daphne Caruana Galizia prompted a public outcry as the investigative authorities failed to take decisive action to identify the intellectual perpetrators of Caruana Galizia’s death.⁵ In this context, PACE requested the Venice Commission to review the institutional arrangements of the republic of Malta with a view to determining whether there was an adequate level of separation of powers and of independence of the judiciary and law-enforcement bodies.

Concomitantly, the then Maltese Minister of Justice, Culture and Local Government, Mr Owen Bonnici, also submitted a request to the Venice Commission on the legal and institutional structures of law enforcement, investigation and prosecution in his country in light of the need to secure proper checks and balances.

The opinion was therefore drafted with the goal of addressing these two requests. No legal texts were specifically requested to be included in the scope of the opinion, leaving the potential ground to cover for the five appointed rapporteurs⁶ rather quite large. Ultimately, the opinion focused on three core institutional settings in Malta, namely:

- ▶ judicial institutions: including judicial appointments, judicial discipline, prosecution, effects of judgments of the Constitutional Court and Specialised Tribunals;
- ▶ legislative institutions: including the role and power of the House of Representatives and of the Ombudsman;
- ▶ executive institutions: including the office of President of Malta, the office of prime minister, the civil service and the police.

A more anecdotal and high-level review was also undertaken regarding the rights and freedoms enjoyed by the press and media as well as civil society. Given the nature of the mandate of the Venice Commission, the rapporteurs addressed this last issue by acknowledging concerns raised by several stakeholders as well as important international standards that ought to be respected.

The rapporteurs undertook their analysis by comparing, where relevant, the Maltese institutional and constitutional settings with those of the United Kingdom (UK), given that Malta, as a former Crown colony of the British empire, inherited many of the tenets of the British parliamentary tradition. However, it is important to note that the opinion concedes the limitations of such comparative work by pointing out that the significantly smaller size of the Maltese state warrants different institutional arrangements, such as the small number of members of parliament (MPs) or a unicameral parliamentary system. Nevertheless, the use of a comparative analysis by the rapporteurs provides a good example of the different methodologies the Venice Commission has at its disposal when drafting opinions.

Several actionable recommendations⁷ were provided with a view to strengthening Malta’s separation of powers and overall democratic functioning. They were the following.

- ▶ Remove from the prime minister’s (PM) purview the vetting of applicant judges and transfer those powers over to the Judicial Appointments Committee (JAC), which should be enlarged as a result. The Maltese

⁴ Venice Commission (2018).

⁵ Camilleri, Ivan (21 October 2017). “Caruana Galizia’s police protection ‘relaxed’ after 2013 election”. *The Times*, Malta. Archived from the original on 21 October 2017. Retrieved 22 October 2017.

⁶ The five rapporteurs were Mr Richard Clayton, Mr Martin Kuijer, Mr Myron Nicolatos, Ms Kjerulf Thorgeirsdottir and Mr Kaarlo Tuori.

⁷ Extracted from the opinion on constitutional arrangements and separation of powers and the independence of the judiciary and law enforcement. See pp. 28-29.

President's powers to appoint new judges was thus deemed appropriate by the Venice Commission so long as it is informed by an input from the JAC.

- ▶ Limit the concentration of power within the office of Attorney General by establishing an independent Director of Public Prosecutions (DPP). This was intended to separate the investigative from the prosecutorial functions of the Attorney General in an effort to achieve a higher balance of power.
- ▶ Reduce the risks of partisan appointments by strengthening the role of the Maltese parliament and of its MPs by ensuring they have access to adequate staff to undertake policy research and are compensated to a higher degree, so they become less reliant on cabinet positions as a means to increase their income.
- ▶ Strengthen the role of the president by granting his office powers to appoint officials without having to consult the PM.
- ▶ Reduce the appointing powers of the PM, notably regarding independent commissions and permanent secretaries.

2. On the provisions of the law on education of 5 September 2017 which concern the use of the state language and minority and other languages in education (Ukraine).

This opinion, adopted on 11 December 2017, sought to review two new articles (Article 7 and Article 3, paragraph 18) to the new law on education of 5 September 2017 (referred to as the “Education Law” in the opinion⁸). The opinion was requested by the Ukrainian Ministry of Foreign Affairs and, a couple of months later, a resolution from PACE⁹ expressed concerns regarding these two new articles and asked the Ukrainian authorities to fully implement the recommendations and conclusions that would later be included in the opinion. Three rapporteurs were appointed to draft the opinion; however, they also received support from an additional two experts.¹⁰

It is worth noting that the Venice Commission had already reviewed similar provisions pertaining to the protection of languages in Ukraine in 2011, when it was asked by the Ukrainian authorities to assess two draft laws dealing with similar issues.¹¹ The findings and recommendations contained in the 2011 opinion, which were drafted by the same two Venice Commission members who also worked on the 2019 opinion, were referenced throughout the opinion, and informed the legal analysis.

While the 2011 opinion determined that the provisions made in the law to protect the Russian language did so at the expense of the Ukrainian language – despite the need to protect minority group rights – the 2018 opinion, on the other hand, argued that the legal protections that were conferred to the Russian language were inadequate. The rapporteurs acknowledged the need for the Ukrainian state to consolidate the place of Ukrainian in education as the state's official language and in an effort to further the unity of the Ukrainian people. However, while this objective was deemed legitimate and was commended by the Venice Commission, a couple of inadequacies in the draft laws were identified.

First, the Ukrainian authorities made a distinction between indigenous and minority groups and their respective rights in terms of having the ability to use their language as medium for their schooling as well as a subject itself. Indigenous groups are groups which have a kinstate (for example Romanian, Bulgarian, etc.) while minority groups do not have a state where their group is officially recognised outside of Ukraine (these groups include Crimean Tartar and Krymchak populations among others). This distinction in the Education Law had the potential, the opinion argues, to create inequalities before the law, with fewer rights conferred to minority groups.

Second, potential differential treatments within minority groups were also identified by the Venice Commission as Article 7 contained provisions which allowed for the teaching of one or more school subjects in an EU official language, thus providing, in effect, a privilege to EU minority groups while being prejudicial to non-EU minority groups. The provisions of Article 7 were described by the rapporteurs as potentially leading to the inability for Russian, Jewish and Belarusian minority groups to receive their schooling in their language at the secondary level.

8 As mentioned in footnote 3, the “Education Law” is also known as the “Language Law” in Ukraine given the significance of linguistic aspects underpinning the opinion.

9 Resolution 2189 (2017) of 12 October 2017.

10 The three rapporteurs were Mr Michael Frendo, Mr Sergio Bartole and Mr Jan Velaers. The two experts were Mr Robert Dunbar (European Charter for Regional and Minority Languages) and Mr Rainer Hofmann (Framework Convention for the Protection of National Minorities).

11 Opinion on the Draft Law on languages in Ukraine adopted by the Venice Commission at its 86th Plenary Session (Venice, 25-26 March 2011), CDL-AD(2011).

Third, beyond the difficulty encountered by the rapporteurs regarding the tension between fostering the uptake of a common national language and preserving minority rights, the drafting of the opinion was also made difficult by technical issues. Indeed, the analysis of the articles within the scope of the opinion was rendered difficult by the lack of clarity of the new provisions and the rapporteurs expressed their concerns about the vagueness of the texts, which could, as was argued by the Venice Commission, negatively affect the implementation of the new Education Law.

In terms of the process surrounding the drafting of the opinion, the analysis was also rendered difficult by the lack of access to important material, particularly regarding the issue of the diminution of rights enjoyed by minorities, including case law and doctrinal comments. Nevertheless, the rapporteurs and experts analysed the articles against the international treaties Ukraine is a signatory to and its constitutional provisions regarding minority rights.

Overall, the opinion concluded that a balance ought to be struck between the legitimate aim of the Ukrainian state to consolidate the use and place of its state language within its educational system and the need to provide legal protections for the preservation of national minorities' culture and languages. Aiming to strike a conciliatory tone, the rapporteurs provided the following recommendations.¹²

- ▶ Use, when adopting and implementing legislation, the possibilities provided for by paragraph 4 of Article 7 to ensure a sufficient level of teaching in official languages of the European Union for the respective minorities.
- ▶ Continue ensuring a sufficient proportion of education in minority languages at the primary and secondary levels, in addition to the teaching of the state language.
- ▶ Improve the quality of teaching of the state language.
- ▶ Amend the relevant transitional provisions of the Education Law to provide more time for a gradual reform.
- ▶ Exempt private schools from the new language requirements in accordance with Article 13 of the Framework Convention for the Protection of National Minorities.
- ▶ Involve important stakeholders, particularly representatives of national minorities, in the implementation of the new Education Law by establishing a cross-community dialogue.
- ▶ Ensure that the implementation of the law does not endanger the preservation of the minorities' cultural heritage and the continuity of minority language education in traditional schools.

3. Opinion on amendments to the Criminal Code and the criminal procedure code (Romania).

The third opinion reviewed in this case study is an opinion that focused on certain amendments to the Romanian Criminal Code and the Criminal Procedure Code. This opinion was drafted as the result of a joint request, from the president of Romania and from the Monitoring Committee of PACE. A group of six rapporteurs was appointed as well as one expert.¹³ The opinion was adopted by the Venice Commission's plenary session in 2018.

The amendments to the Criminal Code and the criminal procedural code in Romania were marked by a swift and opaque legislative process, which garnered criticism from many parts of the Romanian public. In addition, the adoption in January 2017 of a Government Emergency Ordinance decriminalising certain corruption offences, such as the abuse of office and the proposal for a pardon for offenders, was one of the concerns of the Venice Commission regarding the Romania prosecutorial system. In light of this, the amendments that were reviewed by the Venice Commission were the focus of a public debate at the national level where allegations were made that some of the new amendments could have the potential of undermining the fight against corruption in the country.

Against this backdrop, the group of rapporteurs and experts took on the task to review the proposed amendments. In order to conduct their analysis, the group of rapporteurs and the expert relied on standards from international instruments on anti-corruption (including, for instance, the Criminal Law Convention on Corruption signed in 1999 and ratified by Romania in 2002) and standards stemming from positive (procedural) obligations under human rights treaties. Rule of law principles were also used to guide the analysis.

¹² Extracted from the opinion on the provisions of the law on education of 5 September 2017 which concern the use of the state language and minority and other languages in education. See p. 25.

¹³ The six rapporteurs were Mr Richard Barrett, Mr Alexander Baramidze, Mr Martin Kuijer, Mr Jorgen Steen Sorensen, Mr Kaarlo Tuori and Mr Guido Neppi Modona. Mr Marc Touillier was appointed as an expert.

Given the high number of amendments, the Venice Commission was unable to undertake a comprehensive review and only reviewed in detail the most concerning amendments.¹⁴

The following amendments to the Criminal Code were reviewed.

- ▶ Ancillary penalties (Article 65CC¹⁵)
- ▶ Extended confiscation measures (Article 1121CC)
- ▶ Statute of limitations (Article 154, 155 CC)
- ▶ Definition of public servant (Article 175 CC)
- ▶ False testimony (Article 273 CC)
- ▶ Compromising the interest of justice (Article 277CC)
- ▶ Giving bribes (Article 290 CC)
- ▶ Influence trading (Article 291CC)
- ▶ Buying of influence (Article 292CC)
- ▶ Embezzlement (Article 295 CC)
- ▶ Abuse of office (Article 297CC)

In addition, the following amendments to the criminal procedure code were also reviewed.

- ▶ Communication on ongoing criminal investigation (Article 4 CPC¹⁶)
- ▶ Starting a criminal investigation (Article 305 CPC)
- ▶ Thresholds for investigations and sentences (multiple amendments)
- ▶ Inability to use certain forms of evidence (multiple amendments)
- ▶ Defendant's rights (Article 83,84, 92, 99(2), 145, 305, 307 CPC)
- ▶ Access to evidentiary material (multiple amendments)
- ▶ Confiscation measures (Article 249(4) CPC)
- ▶ Signing of judgments (406(2) CPC)
- ▶ Final and transitional provisions (Article II)

This opinion also reviewed the legislative process leading up to the proposed amendments. The group of rapporteurs and expert acknowledged the negative view held by many Romanian stakeholders, including members of the judiciary, by stating that the "[Venice Commission] is critical of situations in which acts of parliament regulating important aspects of the legal or political order were being adopted in an accelerated procedure".¹⁷ In addition, the Venice Commission also expressed concerns regarding provisions in certain amendments to the Criminal Code, which could, it argued, directly affect pending judicial proceedings in which some parliamentarians were involved. Legal precedents to this departure from the rule of law principles regarding the independence and good functioning of the judiciary were raised to support the legal analysis by making mention of European Court of Human Rights ("Court") case law.¹⁸

Moreover, the Venice Commission expressed the view that the proposed amendments were necessary for the implementation of EU directives and decisions from the Romanian Constitutional Court. However, the Venice Commission also deplored the lack of transparency and engagement of stakeholders. Consequently, the Venice Commission recommended that the Romanian authorities conduct an overall reassessment of the amendments to the criminal and criminal procedure codes by putting in place an inclusive consultation process. Furthermore, the Venice Commission also recommended that specific amendments reviewed in the opinion were changed to accommodate the concerns put forth by the group of rapporteurs and experts. Unlike the two previous opinions reviewed, few practical recommendations were provided. Interviewees confirmed this finding by indicating the position of the Venice Commission was in favour of a complete overhaul.

14 The way these amendments were selected is not disclosed in the opinion. However, interviews with stakeholders involved in the drafting of the opinion revealed that the amendments were selected on the basis of the degree of controversy they engendered in the domestic public debate.

15 Criminal Code.

16 Criminal Procedure Code.

17 Page 10.

18 *Stran Greek Refineries and Stratis Andreadis v. Greece*.

4. Report on parameters on the relationship between the parliamentary majority and the opposition in a democracy: a checklist

The report on “parameters on the relationship between the parliamentary majority and the opposition in a democracy: a checklist” reviewed for this case study differs from the outputs covered above. Indeed, the report on the relationship between the parliamentary majority and the opposition in democracies was published in 2019 and takes on the form of a checklist. This report was drafted with the intention of providing safeguards against majoritarianism at the expense of pluralism in democracies and came after the publication of an earlier report on the role of the opposition in a democratic parliament, published in 2010 by the Venice Commission. This report was derived from the political and constitutional philosophy of pluralism and the need for proper checks and balances in democracies. Issues such as the majority using its legislative powers and dominant position to exclude other political actors from the legislative process were among those that prompted the drafting of this report.

The rapporteurs¹⁹ tasked with the drafting of this report decided to use the format of a checklist, which was argued to be less prescriptive than guidelines, as the report was initially conceived to be. According to the Venice Commission’s 2019 annual report, this choice of format was primarily due to the lack of hard international standards in this area and the great diversity of parliamentary systems.

The report enumerates five principles to ensure an adequate relationship between the majority and the opposition.

- ▶ Respect for and value of pluralism.
- ▶ Proper checks and balances across institutions.
- ▶ Loyal and constructive co-operation between the majority and the minority parties.
- ▶ Shared responsibility towards society, as encapsulated by the concept of “political solidarity”.
- ▶ Ensure no legal and procedural changes can constrain “political change channels”.
- ▶ Ensure efficient decision making is achieved and preserved.

The report provides commentary under each of these principles by providing examples of how these principles can be respected across different settings. The structure of the checklist reflects the Venice Commission’s experience and working methods. Commentary to the questions were based on previous opinions of the Venice Commission, opinions and recommendations of other international bodies, best practices from several jurisdictions, etc. Country examples were also included but for illustrative purposes only, in order to refrain from being prescriptive.

In addition, some of the questions raised in the report concerned not only the rights of the opposition as such, but also the rights of parliament and of all MPs in general, as these institutional actors also play a crucial role in the relationship between majority and opposition.

1.2 Evaluation of the European Commission for Democracy through Law (Venice Commission)

1. Relevance

In line with the evaluation matrix, evaluating the relevance of the opinions and report reviewed has been undertaken based on their relevance relative to each beneficiary and stakeholder group within the scope of this study, namely the member states, the Council of Europe and the Venice Commission itself.

Regarding member states, our review indicates that all the interventions were highly relevant. The high level of relevance across the different documents can be explained by the fact that all opinions were requested by the concerned member state. Even in the instances where a request from PACE preceded the requests from the Maltese and Romanian governments, the national authorities also made their own request following PACE’s initiative. In addition, interviews with stakeholders indicate the checklist on the relationship between the parliamentary majority and minority was well received and contributed to the setting of standards in this legal area.

Regarding the Venice Commission, all the interventions reviewed displayed a high degree of relevance regarding the strategic objectives of the Venice Commission. For instance, the Maltese opinion offered a

¹⁹ The rapporteurs were: Mr Bogdan AURESCU (substitute Member, Romania), Ms Regina KIENER (Member, Switzerland), Ms Hanna SUCHOCKA (Honorary President of the Commission, former Member, Poland), Mr Kaarlo TUORI (Member, Finland) and Mr Ben VERMEULEN (Member, The Netherlands).

high level of relevance regarding the field of democracy and fundamental rights as most democratic institutions were reviewed.

Regarding the objectives of the Council of Europe, the level of relevance is also high. According to its 2016-2021 Programme and Budget document, the Council of Europe is pursuing a number of pillars around the promotion of human rights and dignity, the rule of law and democracy. The Maltese opinion was relevant to the Council of Europe's goal to foster better democratic governance while the checklist on the relationship between the majority and opposition was relevant to Pillar 3 of the Council of Europe. The Ukrainian opinion proved relevant for the anti-discrimination and minority languages legal area, tied to the Council of Europe's human rights pillar. Lastly, the rule of law pillar was also addressed in the Maltese, and to a great extent, in the Romanian opinion.

2. Effectiveness

The interventions reviewed can be argued to have exhibited a moderate level of effectiveness. For some countries, partial implementation of the recommendations issued by the Venice Commission was observed (Malta and Ukraine), while in other countries there is a lack of evidence of the implementation (Romania).

First, in terms of the nature of the recommendations offered, the Maltese opinion, and to a lesser extent the Ukrainian opinion, offered practical and implementable recommendations. For instance, in the case of the Maltese opinion, the group of rapporteurs recommended that the Maltese state create an independent Director of Public Prosecutions to avoid the dual role of the Attorney General as counsel to the government and state prosecutor. This recommendation was also shown to have proven successful in the UK where an office of the Director of Public Prosecutions was created as a result of the recommendations of the Phillips Royal Commission on Criminal Procedure in 1981, suggesting its feasibility given the important similarities between the Maltese and British institutional settings. In the case of the Maltese opinion, the effectiveness of the Venice Commission, as measured by the degree to which it impacted legislation of its member states, can be considered high. Indeed, less than a hundred days following the issuance of that opinion, the Maltese government published a road map on the adoption of the recommendations according to prioritisation and subject matter. A number of legislative processes were immediately launched in the Maltese parliament, with the first priority area being the reform of the prosecution system.

Regarding the opinion on the Education Law, evidence gathered from the desk research and the field visit indicate that the recommendations made by the Venice Commission were partially implemented. The recommendation on the need for private schools to be allowed in the eyes of the law to provide teaching in their respective minority languages was heeded and the bill was amended in the Rada accordingly. National authorities who were consulted reported that new provisions reflected the tone of the opinion and sought to strike a balanced approach. Therefore, the new provisions of the Education Law include the possibility for private schools, from grade 5, to provide 80% of their teaching in their language while the remaining 20% must be delivered in Ukrainian. From grade 11, 60% of the teaching should be in Ukrainian. The recommendation regarding the need to have an adequate transition period was also heeded and so was the recommendation on the need for the Ukrainian authorities to engage with minority stakeholders via stakeholder consultations. This was in the process of being undertaken when the research team met with state officials in November 2021, however, the public health situation following the Covid-19 pandemic has made progress in this area difficult. More negatively, the recommendation on the need to protect all minority languages, including Russian, was not fully implemented due to political tensions. Indeed, it was the view of the state authority competent in this area that the Russian minority does not face any difficulty in preserving their language and associated culture, in contrast to other minorities, for whom the Ukrainian state is making efforts to support. The rationale for the exclusion of the Russian language from the provisions for the protection of minority languages in secondary education was underpinned by the important role the Russian language has played for significant parts of the Ukrainian history (such as the process of Russification during the Soviet era) and was therefore not faced with any immediate threat regarding its preservation. In addition, the current political climate has also played a role in the non-implementation of the recommendation of the Venice Commission.

Regarding the other outputs, both the Romanian opinion and the checklist on the relationship between the parliamentary majority and the opposition did not contain any practical recommendations but rather more high-level and strategic guidance. While this can be argued to be an unavoidable result given the nature of the mandate of the Venice Commission and of its recommendations (which remain non-binding), the Romanian opinion concluded by stating that an overhaul of the new amendments was needed. At present, there is no evidence that the recommendations were implemented by the Romanian authorities.

Regarding the process of the issuing of opinions, several observations can be made. First, the review of new legal provisions is sometimes made very difficult by the fact that certain laws, such as the Education Law in Ukraine, were designed as framework laws. Although framework laws are more specific than constitutional provisions, they only lay down general obligations and principles but leave to governing authorities the task of enacting the further legislation and other specific measures. This makes it difficult for rapporteurs to adequately assess *ex ante* the likely outcomes that a new piece of legislation might have in the future.

Second, and linked to this, the effectiveness of the opinions is also affected by the challenging task faced by the rapporteurs and the Secretariat, who also provide important support. In the case of the Romanian opinion, over 300 amendments were being legislated on and the rapporteurs had to ultimately be selective and only review those which were most controversial. Similarly, in the case of the Maltese opinion, the rapporteurs were tasked with reviewing the constitutional arrangements, which constituted a wide scope of institutions and constitutional provisions. This was very challenging for the rapporteurs and the Secretariat who operate against short timescales and with very limited resources (both financial and human).

Third, the work of the Venice Commission is also limited by its ability to obtain access to relevant material. For example, in the case of the Ukrainian opinion, the issue of the diminution of rights enjoyed by minorities was made difficult by a lack of access to domestic case law and doctrinal comments. In addition, the rapporteurs also had to rely on the quality of the translations of the texts of law that were under review. This was also an issue acknowledged in the case of the Romanian opinion.

3. Efficiency

The Venice Commission was very efficient in the delivery of the opinions and of the checklist. The documentary review revealed that it took on average around three months from the Venice Commission to issue its opinions after requests were made either by PACE or the concerned member state, constituting a short period of time in light of the large scope of certain opinions (for example Malta and Romania). This indicates the Venice Commission delivered opinions in a highly efficient manner and within the requested timescales. The rapporteurs interviewed all praised the efficiency of the Secretariat and the valuable work it provided in undertaking the research and supporting the drafting of the opinions. The beneficiaries were also pleased with the high turnaround of the opinions, many suggesting that it is one of the key elements of the added value of the Venice Commission.

4. Impact

In terms of impact, while it is difficult to quantify the amount of change induced by the Venice Commission over the longer term, **the evidence collected points to a good level of impact of the Venice Commission.**

A follow-up statement in the Venice Commission's 2019 annual report indicates that the recommendations found in the Maltese opinion were taken seriously by the national authorities. In that spirit, a committee on constitutional reform was established in order to examine the recommendations made. According to the 2019 annual report the Maltese Minister of Justice presented a bill that would transfer the advisory powers of the Attorney General to a new State Advocate, in line with the recommendation of the Venice Commission. Interviews with relevant stakeholders also support this finding. The recommendations of the Maltese opinions were well received by lawmakers and other political actors across the board, reflecting the reputation the Venice Commission enjoys in this member state.

In addition, a follow-up to report on the report entitled "Parameters on the relationship between the parliamentary majority and the opposition in a democracy: a checklist" was endorsed by the Committee of Ministers of the Council of Europe. According to the Venice Commission's 2019 annual report, the Committee of Ministers invited government, parliamentary actors and other relevant stakeholders in the member states to take note to the report and play an active role in its dissemination.

1.3 Achievements and challenges

The four outputs reviewed have all contributed to several achievements on the part of the Venice Commission and the Council of Europe more broadly. The opinions have been instrumental in providing the member states with valuable expertise from the Venice Commission. Despite the difficulties (whether technical and/or political), the opinions reviewed showed to have been able to provide implementable recommendations as well as insightful legal reasoning and guidelines. The checklist was also instrumental in setting legal standards, which has become an important function of the Venice Commission over the years and one that is valued by its stakeholders.

One potential challenge identified is the timescale for the drafting of opinions. Given the relatively short amount of time it took the rapporteurs to draft the opinions (around three months) it is legitimate to raise the question of whether the current timescales are indeed appropriate. In the case of the Maltese opinion, a wide array of institutional settings had to be reviewed and, similarly in the Romanian opinion, over 300 amendments could have potentially been included within the scope of the opinion. The rapporteurs in the first paragraphs of the opinions emphasised that the scope of their respective opinion had to be narrowed down. However, this begs the question of whether additional resources might be needed in light of the increasing number of opinions being requested if the timescales need to be kept as they are to continue yielding the most impact in the “windows of opportunities” before draft bills are passed.

1.4 Conclusions and lessons learned

It appears that the different interventions reviewed were all relevant and effective. There also seems to have been a high level of efficiency regarding the delivering of opinions. Last, the impact dimension is more difficult to assess. While there is information to indicate that an opinions made a direct impact in the legislation of the member state (for example Malta), additional time and data will be needed to ascertain this for this opinion and the other interventions in scope.

In terms of lessons learned, the important role played by the political will as a factor for the non-achievement of the objectives of the Venice Commission is a central finding. The case of the Ukrainian opinion shows that despite the high respect and authority of the Venice Commission, certain recommendations which are politically too sensitive are not taken forward.

1.5 References

Stran Greek Refineries and Stratis Andreadis v. Greece. Application no. 13427/87 [1994] ECHR 48.

Venice Commission (2017). Opinion on the provisions of the law on education of 5 September 2017 which concern the use of state language and minority and other languages in education. CDL-AD(2017)030.

Venice Commission (2018a). Opinion on constitutional arrangements and separation of powers and the independence of the judiciary and law enforcement. CDL-AD(2018)028.

Venice Commission (2018b). Opinion on amendments to the Criminal Code and the criminal procedure code. CDL-AD(2018)021.

Venice Commission (2019a). Annual Reports, available at [www.venice.coe.int/webforms/documents/?pdf=CDL-RA\(2019\)001-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-RA(2019)001-e).

Venice Commission (2019b). “Report on parameters on the relationship between the parliamentary majority and the opposition in a democracy: a checklist”.

Visser M. D. (2015). “A critical assessment of the role of the Venice Commission in processes of domestic constitutional reform”. *The American Journal of Comparative Law*, 63(4), 963-1008.

Case study 2 – Constitutional justice

This case study analyses the work of the Venice Commission in constitutional justice, which is one of the main fields of activity of the Venice Commission. The principal objective in this area of activity is to achieve the rule of law by strengthening the constitutional courts and supporting co-operation between the constitutional courts, regional and linguistic groups. We can distinguish two major forms of activity of the Venice Commission in the area of constitutional justice:

- ▶ **support for constitutional courts or member states** under pressure for which the Venice Commission provides legal advice on the adoption, amendment or implementation of their constitutions or constitutional laws;
- ▶ the **promotion of judicial cross-fertilisation** through transnational opinions, studies or exchange of information between countries, which often gives the opportunity to the Venice Commission to identify European standards that contribute to the common constitutional heritage, that is, standards based on the basic principles of the Council of Europe: democracy, the protection of human rights and the rule of law.

Through the different activities, from opinions to reports, the Venice Commission provides guidance to strengthening the constitutional courts in order to effectively implement the constitutions and laws of the member states.

2.1 Introduction and description of intervention

The main activities of the Venice Commission in the field of constitutional justice are drafting opinions, amicus curiae briefs and reports; the publication of the Bulletin on Constitutional Case-Law, which has become electronic (the e-bulletin) and the CODICES database; and organising conferences to promote the constitutional heritage. This case study provides a summary of a selection of interventions.

- ▶ Amicus curiae brief: **CDL-AD(2019)028 Republic of Moldova** – Amicus curiae brief on the Criminal Liability of Constitutional Court judges;
- ▶ Opinions: **CDL-AD(2016)001 Poland** – opinion on constitutional issues addressed in amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland and – **CDL-AD(2021)012 Montenegro** – opinion on the draft amendments to the law on the state prosecution service and the draft law on the prosecutor's office for organised crime and corruption;
- ▶ Report: **CDL-AD(2018)030 Report** on separate opinions of Constitutional Courts;
- ▶ **Bulletin on Constitutional Case-Law.**

1. Amicus curiae brief on the Criminal Liability of Constitutional Court judges of the Republic of Moldova – CDL-AD(2019)028

The President of the Constitutional Court of the Republic of Moldova requested an amicus curiae brief from the Venice Commission on the criminal liability of Constitutional Court judges. The request came after the interim General Prosecutor brought an application to the Constitutional Court of the Republic of Moldova regarding the interpretation of Article 137 of the Constitution, which provides that “for the tenure of their mandate the judges of the Constitutional Court are irremovable, independent, and abide only by the Constitution”. The interim General Prosecutor asked the court to interpret the nature and scope of this irremovability and independence of Constitutional Court judges in the light of provisions of the Law on the Constitutional Court, the Constitutional Jurisdiction Code and Article 307 of the Criminal Code. In particular, he asked the Constitutional Court whether the constitutional nature of the irremovability and independence of Constitutional Court judges could prevent the General Prosecutor from initiating criminal proceedings against a Constitutional Court judge during or following his or her term of office without prior approval by the Constitutional Court.

In this regard, the Venice Commission were requested to answer three questions (as developed below). Before providing a detailed and clear response to the questions, the Venice Commission clarified the use of some terms involved and provided general remarks on the principles involved.

The Venice Commission highlighted that one of the fundamental principles of the rule of law is the independence of individual judges, which need to be protected against the criminalisation of their activities to carry out their role independently. However, another fundamental principle of the rule of law is the principle of non-discrimination and equality before the law. Therefore, the immunity granted to public officials (members of parliament, the President of the Republic or judges) is an exception to this principle. The Venice Commission stated that when this exception is granted it should be functional immunity (or non-liability immunity) and not general immunity (or inviolability-immunity or procedural immunity). Functional immunity, as previously

defined by the Venice Commission in other *amicus curiae* briefs, refers to non-liability for opinions expressed by parliamentarians or judgments handed down by judges and “inviolability-immunity” or “procedural immunity”, which protects an official from prosecution.²⁰

The first question asked to the Venice Commission was whether **the independence of Constitutional Court judges would still be guaranteed in a state governed by the rule of law, if these judges could be held liable (criminal liability, administrative liability, etc.) for their votes, opinions or for actions taken during the exercise of their functions.** The Venice Commission explained that constitutional judges should be protected by functional immunity to guarantee the principle of independence and impartiality. However, that does not mean that judges cannot be accountable for their work. Functional immunity (as opposed to general immunity) does not cover ordinary crimes, such as bribery or any other crime that the judge as an individual could commit. Therefore, Constitutional Court judges with functional immunity can be held legally liable if in the exercise of their functions, intentionally and with deliberate abuse, commit a judicial mistake. However, the Venice Commission noted that there should be clearly bad faith and that only the Constitutional Court should decide on the disciplinary liability of its judges.

The second question requested to the Venice Commission was whether **Constitutional Court judges benefit from immunity for their votes and opinions expressed during the exercise of their functions after the end of their mandate.** To which the Venice Commission answered that **the functional immunity should continue to apply after their term of office.** This is necessary to allow the judge to make his or her reasoned decision without fear of prosecution after the end of his or her term of office.

The final question was about which body is competent to decide whether a Constitutional Court judge – in the exercise of his or her judicial functions – intentionally acted contrary to the constitution resulting in criminal proceedings under Article 307 of the Criminal Code (issuance by a judge of a sentence, decision, ruling or judgment contrary to the law). The Venice Commission replied that there could be three possibilities depending on the interpretation of some provisions of the Law on the Constitutional Court, the Constitutional Jurisdiction Code and Article 307 of the Criminal Code, and it is for the Constitutional Court to decide which of these possibilities may be applicable.

In summary, in the *amicus curiae* brief for the Constitutional Court of the Republic of Moldova on the criminal liability of Constitutional Court judges, the Venice Commission found that Constitutional Court judges should be protected by functional and not general immunity, which should protect them after their end of their mandate. However, the Venice Commission provided an open answer on which public authority could be attributed the power to ascertain the constitutionality or legality of an act by the Constitutional Court.

2. CDL-AD(2016)001 Poland – Opinion on constitutional issues addressed in amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland

On 23 December 2015, the Minister for Foreign Affairs of Poland, Mr Witold Waszczykowski, requested the opinion of the Venice Commission on the constitutional issues addressed in two legislative proposals to amend the Act on the Constitutional Tribunal of 25 June 2015, which were later on adopted to remedy a dispute regarding the appointment of judges to the Constitutional Tribunal. While these amendments do not directly relate to the composition of the Constitutional Tribunal, it is evident that they have an intrinsic link to the composition of the tribunal, not least because one of the provisions of the amendments sets a quorum for the tribunal (13 out of 15 judges) that cannot be reached if the court is not fully composed.

The Venice Commission urged the finding of a solution to the conflict over the composition of the Constitutional Tribunal, calling both the majority and opposition to find a solution, since as long as the Constitutional Tribunal cannot carry out its work in an efficient manner the rule of law, democracy and human rights are in danger. In a state based on the rule of law, any such solution must be based on the obligation to respect and fully implement the judgments of the Constitutional Tribunal. The Venice Commission therefore called on all state organs to fully respect and implement the judgments of the tribunal.

The Venice Commission recommended that Poland should hold a principled and balanced debate, which provides enough time for full participation by all institutions, on the reform of the procedure and on the organisation of the court and whether and what types of proceedings warrant reasonable time limits before the tribunal. It further recommended to amend the constitution in the long run to introduce a qualified majority for the election of the Constitutional Tribunal judges combined with an effective anti-deadlock mechanism.

²⁰ Republic of Moldova – *Amicus curiae* brief for the Constitutional Court on the immunity of judges (CDL-AD(2013)008), paragraph 22.

The Venice Commission suggested an alternative that would be to introduce a system by which a third of the judges of the Constitutional Tribunal are each appointed/elected by three state powers – the President of Poland, parliament and the judiciary. Of course, even in such a system, it would be important for the parliamentary component to be elected by a qualified majority.

3. CDL-AD(2021)012 Montenegro – Opinion on the draft amendments to the law on the state prosecution service and the draft law on the prosecutor’s office for organised crime and corruption

By letter of 16 February 2021, the Minister of Justice, Human and Minority Rights of Montenegro, Mr Vladimir Leposavić, requested an opinion of the Venice Commission on the draft law on amendments to the Law on the State Prosecutor’s Service and the draft law on the Prosecutor’s Office for organised crime and corruption (amending the currently existing law on the Special State Prosecutor’s Office). In February 2021, a group of MPs from the ruling coalition introduced two draft laws proposing a reform of the prosecution service. The first draft law amends the 2015 law on the state prosecution service (hereinafter “the law on the SPS”). The second draft law (“On the Prosecutor’s Office for organised crime and corruption”) is in essence nearly identical to the 2015 Law of the Special State Prosecutor’s Office (hereinafter “the law on the SSPO”). To those two draft laws the government introduced their amendments, which were also tabled before parliament.

The adoption of the two draft laws had been originally planned for 18 February 2021. The two draft laws were put on the agenda in an expedited procedure. Neither the Prosecutorial Council nor the prosecutors were consulted in the process of the preparation of those proposals. According to the civil society, the proposals contained in the two draft laws were not submitted to any meaningful public discussion either.

The adoption of these two draft laws by parliament has been adjourned pending their examination by the Venice Commission, which is welcome. The Venice Commission is grateful for the opportunity to assist the authorities of Montenegro and comment on these two draft laws, but it also encourages the authorities to submit them to a meaningful public discussion, involving all major stakeholders and experts.

The Venice Commission expressed concerns about the proposed replacement of the Special State Prosecutor (the SSP) following the change in the name of the SSPO, which will henceforth be called “the Prosecution Office for organised crime and corruption”, and a change in the manner of his/her election. The security of tenure of the current officeholder should be respected. If the current SSP is guilty of any misbehaviour, he should face disciplinary or criminal liability, and not be replaced under the pretext of a legislative reform.

The Venice Commission stated that the immediate replacement of all currently sitting members of the Prosecutorial Council has no justification and infringes their security of tenure. And regarding the current stalemate regarding the election of the new Prosecutor General, the Venice Commission regrets that the Constitution of Montenegro does not provide for an anti-deadlock mechanism, despite the Venice Commission’s earlier recommendation to this effect. Pending the introduction in the constitution of an appropriate anti-deadlock mechanism for the appointment of the Prosecutor General, the law should be amended to provide that the outgoing Prosecutor General will continue to exercise its functions *ad interim*. Finally, the Venice Commission recommends reviewing the new provisions on disciplinary liability of prosecutors in order to specify that such liability may only be imposed for gross misbehaviour and not simply for an incorrect application of the law.

4. CDL-AD(2018)030 – Report on separate opinions of Constitutional Courts

In June 2018, the Venice Commission prepared a report on separate opinions of constitutional courts as suggested by the Venice Commission’s Scientific Council. The aim of the report is to compare and contrast the allowance and use of separate or dissenting opinions in constitutional courts of all member states of the Venice Commission. The report covers member states that have a Constitutional Court or a Supreme Court entitled to review constitutional matters. It also covers the supranational court of the European Court of Human Rights but not the European Court of Justice (CJEU) where dissenting opinions are not allowed.

In the vast majority of the member states of the Venice Commission, constitutional judges (or judges from the Supreme Court in countries where there are no constitutional courts) have the right to submit separate opinions whenever they do not agree with the court’s judgment. Whereas 12 member states do not permit separate opinions or have no relating provisions on this and reject this in practice.²¹ In this report the Venice

²¹ The Venice Commission’s member states that prohibit or have no provision on separate opinions are Algeria, Andorra, Austria, Belgium, France, Italy, Liechtenstein, Luxembourg, Malta, San Marino, Switzerland and Tunisia.

Commission analysed the advantages and disadvantages of separate opinions and compared the different rules governing the separate opinions across member states.

In the members states where separate opinions are allowed, the level and density of regulations varies significantly. The report compared these rules looking at the level of regulation; the differences according to the types of proceedings; time limits of the opinion; the wording, content and style; whether or not the majority is allowed to respond; the pronouncement, anonymity and whether or not the number of votes are disclosed; and the publication of separate opinions.

Regarding the advantages and disadvantages of separate opinions, the Venice Commission assessed whether separate opinions undermine the authority and unity of the court, or on the contrary, favours the quality of judgments by making the decision-making process more transparent and democratic. It also pondered whether or not separate opinions guarantee the independence of judges and whether the role of the separate opinions as developers of the law and legal culture – i.e., whether or not it is advantageous that separate opinions contribute to public, academic and political debate. The report clearly explained the advantages and disadvantages of these arguments and concludes that if separate opinions are used, these should contribute to the development of the law. The Venice Commission provided some recommendations for the states that allow separate opinions such as that judges should not use them for selfish motives and the abuse of separate opinions should be avoided by only using them as last resort measure and with respect to the majority opinion. The Venice Commission favoured the introduction of the right to submit separate opinions but stressed that the basic choice of whether or not to introduce the right to submit separate opinions clearly remains with the states.

5. Bulletin on Constitutional Case-Law

The **electronic Bulletin on Constitutional Case-Law** (“e-bulletin”) regularly reports on the case law of constitutional courts and courts with equivalent jurisdiction in Venice Commission member and observer states, including the case law of the European Court of Human Rights, the Court of Justice of the European Union and the Inter-American Court of Human Rights. The e-bulletin is sent to liaison officers and to subscribers by e-mail three times a year, each mailing reports on the most important case law gathered during a four-month period.

The regular issues of the bulletin are supplemented by a series of special bulletins containing descriptions of the courts and important case law on specific topics, often upon request by the Conference of European Constitutional Courts (2017: Constitutional Principles). A series on leading cases presents the basic decisions of the participating courts before the bulletin’s inception in 1993.²²

The bulletin’s main purpose is to encourage exchange of information between courts and help judges settle sensitive legal issues, which often arise simultaneously in several countries. It is also a useful tool for academics and all those with an interest in the field of constitutional justice. The dialogue between the courts via the Bulletin on Constitutional Case-Law benefits both longer established courts and courts which have been established more recently.²³

2.2 Evaluation of the European Commission for Democracy through Law (Venice Commission) interventions in focus

1. Relevance

The selection of interventions – opinions, amicus curiae briefs, reports and the bulletin – in this case study can be considered relevant to the achievement of the objectives of the Venice Commission and aligned with the objectives of the Council of Europe. In this selection of interventions in the area of constitutional justice, we can distinguish two major forms of activity of the Venice Commission:

- i) **support for constitutional courts or member states** under pressure, for which the Venice Commission provides legal advice on the adoption, amendment or implementation of their constitutions or constitutional laws. This is the case of the two opinions for Poland and Montenegro and the amicus curiae brief for Moldova.
- ii) the **promotion of judicial cross-fertilisation** through transnational opinions, studies or exchange of information between countries that promote standards based on the basic principles of the Council

²² Venice Commission: Cooperation with Constitutional Court, available at www.venice.coe.int/files/publications/JU_info_Brochure_eng.pdf.

²³ Ibid.

of Europe: democracy, the protection of human rights and the rule of law. Examples of this are the Report on separate opinions and the Bulletin on Constitutional Case-Law.

The assistance offered varied significantly depending on the type of intervention. Some interventions, such as the *amicus curiae* brief and the two opinions, are relevant to the needs of the member state concerned. And in this case, the level of application of the Venice Commission's recommendations varied depending on the member state and its context. On the other hand, there are other types of interventions, such as the report and the e-bulletin, which promote judicial cross-fertilisation. The work of the Venice Commission in these types of activities is relevant for other stakeholders beyond national constitutional courts, such as academics, legal practitioners or constitutional law experts, for whom the comparative law material provided by the Venice Commission both in the report and the e-bulletin is regarded as an important contribution to the promotion of the objectives of the Council of Europe.

2. Effectiveness

The effectiveness of the work of the Venice Commission with these interventions varied depending on the type of activity. As explained above, the work of the Venice Commission in the area of constitutional justice can be classified into two different forms of activity.

For the first form, which consists of providing legal advice to constitutional courts or member states under pressure due to constitutional issues, the achievement of the Venice Commission's objectives should be measured in accordance with the national context of each intervention. As can be expected, there are some countries that are more favourable to recommendations and others that are more reluctant to introduce legal changes as suggested by the Venice Commission. In this case study, we can find examples of both. On the one hand, there is the opinion on constitutional issues addressed in amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, where Venice Commission's recommendations were not implemented. According to some interviewees, some legal changes were introduced that aligned with the recommendations; however, these did not relate with the substantial elements covered in the opinion. On the other hand, the *amicus curiae* brief for Moldova can be highlighted as an example of alignment of national legislation with the Venice Commission's expertise. Moldova introduced a regulation on functional immunity of the judges, and on 23 September 2021, the Parliament of Moldova adopted the amendments to the constitution, which followed the recommendations by the Venice Commission contained in the *amicus curiae* brief and other opinions (CDL-AD(2020)001 and CDL-AD(2020)007).

From the interviews that we held with a range of different stakeholders from both countries, it can be concluded that there are several factors influencing the achievement or not of the objectives. Most of the factors related to the specific national context; however, political willingness was identified as the key element for the implementation of the recommendations despite the member state. Interviewees noted that the fact that the Venice Commission's recommendations are not binding favours member states that are reluctant to international oversight. Some interviewees mentioned that there is a reduced number of member states that are prioritising their sovereignty over the European standards and, in these cases, the Venice Commission's work does not influence to adopt, amend or implement the necessary changes to comply with the rule of law. For the rest of the member states, the Venice Commission is perceived as an independent body that produces high-quality opinions or *amicus curiae* briefs, and this influences the implementation of some recommendations; this was the case for Moldova according to some interviewees.

For the other interventions that aim for the **promotion of cross-fertilisation**, such as the report on separate opinions of the Constitutional Court and the Bulletin on Constitutional Case-Law, the effectiveness of its measures is harder to measure given it is difficult to quantify the number of judges, courts and other stakeholders that consulted these tools and were influenced by them. Some stakeholders consulted mentioned that the bulletin or the reports that contain a comparative law exercise are important for the promotion of the rule of law and democracy. Interviewees noted that the main beneficiaries are judges or legal practitioners who can find useful information and analysis from other countries that could be applicable to their national legal context contributing this way to the common constitutional heritage. However, the interview feedback revealed that the level of effectiveness in communicating these types of actions within the main target or the wider public is moderate.

3. Efficiency

Our research suggests that the Venice Commission has been efficient in implementing its activities. Interviewees noted that the interventions, namely the opinions and *amicus curiae* briefs, were delivered within requested deadlines. Despite being short time frames, they commented that the quality of the interventions was not

affected. Some interviewees from Poland were critical that, although the Venice Commission is open to meeting different types of stakeholders when issuing an opinion, the Venice Commission should spend similar time hearing both sides of the view on the matter. Some argued that this disproportion of the input by stakeholder with an involvement in the opinion was because, in their view, the mission to Poland did not last long enough to have a balanced representation.

Another issue raised that some interviewees attributed to the lack of time or resources is the follow-up of the opinions or the amicus curiae briefs. Some stakeholders mentioned that it would be useful for the member state that received the opinion or the amicus curiae brief that the Venice Commission conducted further communication or control on the extent to which the recommendations were implemented. However, as one interviewee noted there is a risk that following up on the opinions took time away from the delivery of other activities that are equally important to the Venice Commission, such as the promotion of legal cross-fertilisation.

4. Impact

The impact of the interventions analysed in this case study can also be classified according to its purpose of either assisting constitutional courts by providing legal advice and recommendations or contributing to the exchange of information on constitutional matters. Regarding the first, as mentioned above, the impact of the two opinions and the amicus curiae brief which aim to contribute to national legal authorities' capacities to adopt, amend and implement their constitutions or legislation in compliance with the European standards varied significantly depending on the member state concerned.

In the case of Moldova, some interviewees affirmed that the amicus curiae brief is directly linked with the legal changes that Moldova introduced on the issue of the immunity of judges. Moldova passed a regulation that guarantees functional immunity at the constitutional level and this is aligned with the Venice Commission recommendations.

With regard to the opinion on the draft amendments to the law on the state prosecution service and the draft law on the prosecutor's office for organised crime and corruption of Montenegro, it is too early to assess the extent to which the Venice Commission has contributed to significant changes in the country since the opinion was issued in 2021.

As for the other opinion addressed to Poland, as already mentioned, the intervention did not contribute to legal changes as suggested by the Venice Commission. However, interviewees noted that the opinion has had a positive impact for several stakeholders. It was argued that this opinion, together with the rest of opinions on constitutional matters that have taken place after it, are perceived as an impartial and independent point of view that critics to the government can rely on to support their arguments. Other stakeholders such judges, legal practitioners or civil society organisations also commented that they use the Venice Commission's interventions as sources of consultation and to support their arguments. Moreover, interviewees argued that the opinion influenced other institutions and courts such as the EU and the Court of Justice of the European Union and the European Court of Human Rights. For instance, in the *Xero Flor w Polsce sp. zo.o v. Poland* judgment, the European Court of Human Rights referenced the opinion and was consonant with the recommendations.

Finally, regarding the interventions that favour the exchange of information on constitutional matters, the Report on separate opinions and the Bulletin on Constitutional Case-Law have contributed to the development of the common constitutional heritage which also helps other stakeholders to identify and implement (in the case of national courts) the European standards.

2.3 Achievements and challenges

The most relevant impact of the outputs analysed in relation to the functioning of the Venice Commission can be summarised as having contributed to a greater or lesser extent to the development of the common constitutional heritage. All the interventions analysed contributed in one way or another to the promotion and protection of the European standards. In some cases, this contribution was provided in the form of legal advice, which then falls on the national authorities to implement (or not) the recommendations. Indeed, the main challenge faced by the Venice Commission is that due to its non-binding nature some activities cannot transcend member states that are reluctant to enact the opinions offered by an external body.

2.4 Conclusions and lessons learned

Overall, the Venice Commission's interventions analysed in this case study are relevant to the promotion of the rule of law and constitutional justice in member states. The research has found that the Venice Commission

is perceived as a highly influential body. Stakeholders consider the Venice Commission's opinions, the report, the amicus curiae briefs and the Bulletin on Constitutional Case-Law as reliable sources that can support the arguments of a wide range of stakeholders. The Venice Commission is seen as a source of authority that can exercise influence on governments, constitutional courts or other courts – including the European Court of Human Rights and the European Court of Justice – lawyers, academics and civil society, who rely on the Venice Commission's work to implement their recommendations, such as in the case of Moldova, or as a reliable source of interpretation of the European standards.

Regarding the promotion and interpretation of European standards, the research has found that although the Venice Commission is viewed as a unique institution due to its independence and legal expertise in constitutional law, its great reputation in many cases comes from its work on opinions. Or at least this is the area better known for most stakeholders. The presence of the Venice Commission could be further promoted and communicated for other areas of work beyond the opinions, especially regarding the interventions that promote judicial cross-fertilisation.

2.5 References

Craig P. (2016), "Transnational Constitution-Making: The Contribution of the Venice Commission on Law and Democracy", in *UCI Journal of International, Transnational and Comparative Law*, University of Oxford, Faculty of Law, 1 October 2016.

Buquicchio G. and Granata-Menghini S. (2019), "The interaction between the Venice Commission and the European Court of Human Rights: Anticipation, Consolidation, Coordination of Human Rights Protection in Europe" in *Regards Croisés sur la Protection Nationale et Internationale des Droits de L'homme* [Intersecting Views on National and International Human Rights Protection], Liber Amicorum Guido Raimondi, W.L.P. (Wolf Legal Publishers).

www.venice.coe.int/files/articles/Durr_Venice_Commission.pdf.

www.venice.coe.int/files/articles/Buquicchio_Durr_constitutional_justice_melanges_Lopez-Guerra.pdf.

www.venice.coe.int/files/publications/JU_info_Brochure_eng.pdf.

www.venice.coe.int/WebForms/pages/?p=01_Constitutional_Justice&lang=EN.

[www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)001-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)001-e).

www.codices.coe.int.

[www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2018\)030-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2018)030-e).

Case study 3 – Elections, referendums and political parties

Since its inception, the Venice Commission has worked within the area of elections, referendums and political parties. This activity has mostly revolved around issuing opinions on draft national electoral legislation though it also includes issuing opinions through reports and providing legal advice in electoral observation. The activity is designed to preserve and disseminate the principles of the European electoral heritage jointly developed with the Council of Democratic Elections (CDE). The purpose of these principles is to provide electoral law stability and construct an electoral tradition.

3.1 Introduction and description of intervention

The activity of the Venice Commission in the area of electoral issues has been frequent with regard to Eastern Europe and Central Asia but has also extended to other areas including Western Europe and Latin America. Below are examples of opinions, election observation and reports for Kyrgyzstan, Georgia, Turkey and for the Organization of American States.

Kyrgyzstan – Urgent amicus curiae brief relating to the postponement of elections motivated by constitutional reform

In relation to a case before the Constitutional Chamber of the Supreme Court on new constitutional laws introduced by the Kyrgyz Parliament, the president of the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic requested an urgent amicus curiae brief from the Venice Commission.

The context prior to the introduction of these laws involved disputed parliamentary elections on the 4 October 2020 and subsequent protests alleging electoral fraud and demanding a repeat election and the resignation of the president. Following these events, the Kyrgyzstan Central Election Committee (CEC) annulled the results of the elections on 6 October and, on 21 October, the committee announced a repeat of the elections for 20 December 2020. Nevertheless, the Kyrgyz Parliament adopted amendments which postponed these elections to June 2021 (beyond the time limit stipulated in the constitution) to allow for the introduction of constitutional reforms. This raised criticisms that a caretaker parliament was forcing through significant reforms before a new parliament could be sworn in after repeat elections. The actions also raised criticisms that the parliament had violated procedural norms having submitted these amendments to three readings in just one day rather than with a two-month interval between each reading as required by Article 114 of the constitution. The Kyrgyzstan Constitutional Chamber subsequently announced that they would appeal against the constitutionality of these amendments.^{24 25 26}

The constitutional amendments entailed what critics called “far-reaching” changes which they argued would, *inter alia*, weaken the powers of the parliament and concentrate authority in the president, thereby eroding the constitutional checks and balances already in place.²⁷

The request for an amicus curiae brief sought to clarify whether the actions of the parliament were consistent with democratic principles and international standards. Considering these established norms, the request asked:

- ▶ whether the scope of the parliament’s powers can be expanded during the period between the end of its mandate and the first session of the newly elected parliament; in this context, in which elections have been cancelled and new parliamentary elections are to be held, the question asks whether the parliament has legitimacy to enact constitutional reforms;
- ▶ whether the parliament in this context can suspend parliamentary elections in order to implement constitutional reforms;
- ▶ whether it is consistent with these norms for the parliament to amend electoral legislation in order to suspend the electoral process;
- ▶ whether the parliament can adopt amendments to legislation disregarding the procedure established at the national level for the adoption of laws.²⁸

²⁴ See www.hrw.org/news/2020/11/21/kyrgyzstan-bad-faith-efforts-overhaul-constitution

²⁵ European Commission for Democracy Through Law. (2020). Urgent Amicus Curiae Brief Relating to the Postponement of Elections Motivated by Constitutional Reform.

²⁶ See www.bbc.co.uk/news/world-asia-54553173.

²⁷ See www.hrw.org/news/2020/11/21/kyrgyzstan-bad-faith-efforts-overhaul-constitution.

²⁸ European Commission for Democracy Through Law. (2020). Urgent Amicus Curiae Brief Relating to the Postponement of Elections Motivated by Constitutional Reform.

On 17 November, in response to this request, the Venice Commission's opinion noted that although legally the powers of the previous parliament end at the newly elected parliament's first sitting, the parliament no longer has political legitimacy once its mandate has ended.²⁹ Therefore, between the annulment of previous elections and the repeat of these elections, the parliament is only allowed to engage in ordinary functions. It cannot engage in extraordinary measures such as the constitutional reforms enacted. Constitutional reforms in such contexts can only be limited to necessary "punctual and technical reforms needed to hold elections".³⁰ Furthermore, the opinion argues that the "postponement of parliamentary elections beyond the time limit determined by" the constitution is not in line with established democratic norms. It adds that the amendments extend the timeframe to around seven months rather than "the usual few weeks necessary to carry out the electoral activities". The opinion notes that the suspension of an election can potentially undermine democratic principles and should only be done for "legitimate purposes".³¹ Additionally, the opinion notes that the Republic of Kyrgyzstan was "not in a state of emergency, emergency situation or force majeure circumstances" and that the adoption of significant electoral legislation should be done within the established procedures as outlined by the constitution and existing national legislation. Otherwise, such actions can undermine democratic principles and international standards.³²

Georgia – Follow-up to the joint opinion on amendments to the Election Code of Georgia as of 8 January 2016

Georgian authorities requested an opinion from the Venice Commission via letters on the 14 and 22 January 2016 on two laws being implemented to redraw electoral districts. The laws were intended to reduce a perceived disparity across single-mandate constituencies in the number of voters located in each constituency. These laws were introduced following a ruling by the Georgian Constitutional Court in May 2015 arguing that the current electoral system in Georgia does not respect the principle of equality of vote because of the large difference in the number of voters located in each district: over 100 000 voters in one district compared to fewer than 6 000 in another district. Georgia has an electoral system in which 73 of the 150 parliamentarians are elected under a majoritarian system, and 77 parliamentarians are voted for under a proportional representation system. The court highlighted that the issue of disparity across districts is seen particularly in the districts under majoritarian elections.³³

In response to the request, the Venice Commission and OSCE/ODIHR issued a joint opinion in March 2016 which commended the revisions to the Election Code seeking to redraw the districts in question as well as amend the threshold – increased from 30% to 50% – required to determine a winner within a single-member constituency. Agreeing with the Georgian Constitutional Court, the opinion indicated that the redrawing of districts to ensure more comparable voter numbers across constituencies would help the Georgian electoral system better respect the principle of equal suffrage which was undermined under the previous system.³⁴

Moreover, the opinion issued other recommendations to improve the effectiveness of the measures being implemented. The Venice Commission recommended that the Georgian authorities ensure that measures such as the redrawing of districts be performed at least one year before an election, and that they define in law the manner in which majoritarian districts can be distributed, the timeframe in which this can be done, and the extent to which the number of voters across districts can differ. Furthermore, the opinion noted that authorities should launch public consultations when redrawing districts as well as establish independent commissions to redraw the districts.³⁵

Considering the issue of follow-up, the 2016 annual report of activities notes that the new redrawn districts were already in force by the time the opinion on the redistricting was issued and that the CEC was tasked with establishing the boundaries. Nevertheless, in line with the Venice Commission recommendations, the CEC held consultative meetings to ensure an open process in the redrawing of constituencies.³⁶

29 Ibid.

30 Source available at www.hrw.org/news/2020/11/21/kyrgyzstan-bad-faith-efforts-overhaul-constitution.

31 European Commission for Democracy Through Law. (2020). Urgent Amicus Curiae Brief Relating to the Postponement of Elections Motivated by Constitutional Reform.

32 Ibid.

33 Source available at <https://civil.ge/archives/125135>.

34 European Commission for Democracy through Law. (2019). Annual Report of Activities 2018.

35 Ibid.

36 Ibid.

Report on term limits – Part I: presidents

The Secretary General of the Organization of American States (OAS) invited the Venice Commission to perform a study on the issue of presidential term limits. The report notes that this request was made following observed bad practice in which presidential term limits had been changed through a Constitutional Court decision instead of through the regular constitutional reform procedure.

The report notes that the generally accepted democratic principles do not have provide a “specific right to be re-elected”. Furthermore, limits on re-election prevent excessive concentrations of power. Therefore, such limits protect the right to participate and the right to be elected. In this lens, limits on presidential terms form part of the checks and balances placed on the head of state to strengthen democracy and respect of its principles. Consequently, presidential terms cannot be considered as excessive burdens on the right to participate and the right to be elected. The report further indicates that term limits do not entail an excessive restriction on voters’ rights because, while the voter’s ability to choose is reduced, the presidential term limit preserves other democratic principles. On the procedures followed to reform laws governing term limits, the report notes that changes to the rules determining the limits to presidential terms must be subject beforehand to public debate and must have followed the procedure established by the constitution. Considering the latter, a referendum on the presidential term limits must only be held if it is allowed for by the constitution. Moreover, reforms which have the effect of increasing the power of the executive should not be in force for the presiding president.³⁷ The report also indicates that the intervention of a Constitutional or Supreme Court can only occur after the amending text to the legislation “has been adopted by the constitutional legislator”.³⁸

Turkey – Early presidential and parliamentary elections: 24 June 2018

On 24 June 2018, Turkey held an early general election (initially planned for the 3 November 2019). On 23 April 2018, the Bureau of the Parliamentary Assembly, subject to being invited, decided to observe these elections. On 8 May 2018, Mr Akif Çağatay Kılıç, Chairperson of the Turkish delegation to the Parliamentary Assembly, invited the PACE delegation to observe the elections.³⁹

In its report on the election observation, the PACE’s report highlights that following the 2017 constitutional amendments and referendum, these elections would institutionalise the shift towards a presidential system from a parliamentary system. The previous constitutional amendments had concentrated power in the office of the president, it abolished the position of prime minister and reduced the oversight authority of the parliament. While the ruling government saw the elections as part of this process of transition, the opposition parties viewed the elections as the last opportunity to prevent the move. The report further notes that part of the context involved a state of emergency that had been extended several times since the failed coup attempt in 2016. Concern had been expressed about the integrity of the election within this environment. The report notes that the possibility for open democratic debate and expression of differing points of view had been curtailed in the context of a high number of arrests of journalists and politicians, tighter control of the media and security interventions in the south east of the country. It further notes that the Venice Commission considers open debate to be necessary for voters to be able to make informed choices in an election.⁴⁰

In terms of the election itself, the report notes that the International Election Observation Mission indicated that they assessed positively 94% of polling stations, highlighting that the other 6% often had issues of large police and security presence which at times hampered the voting process. Nonetheless, the PACE report reiterated several of the concerns involved in the context of the elections. It noted that changes to the election law weakened the transparency and safeguards of the voting and were introduced hastily and close to the election itself. It also reiterated previous concerns of the Venice Commission concerning previous constitutional amendments which weakened the parliament and concentrated power in the president, and prior issues with the election law which hampered the representativeness of the parliament. Additionally, concerning the media independence and freedom of expression, the report cites a previous Venice Commission opinion noting that fair access was denied.⁴¹

³⁷ Ibid.

³⁸ Parliamentary Assembly. (2018). Observation of the early presidential and parliamentary elections in Turkey (24 June 2018).

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Ibid.

3.2 Evaluation of the European Commission for Democracy through Law (Venice Commission) interventions in focus

1. Relevance

The activities of the Venice Commission in the field of elections, referendums and political parties appear to be relevant as the institution is responsive to political developments occurring in its member countries as well as in other states. In the case of the early elections in Turkey, Human Rights Watch noted its concern with the state of media freedom, the restriction on opposition parties' ability to campaign due to unbalanced airtime and coverage in the media as well as the issue of detention of politicians, journalists and media officers. These concerns were also raised in several Venice Commission opinions as well as the PACE report on the election as noted above. Furthermore, in underlining its concern about the excessive concentration of power, Human Rights Watch made reference to the Venice Commission's opinion concerning the 2017 referendum and the effect it would have on the checks and balances on the presidential power.⁴² Similarly, concerning the parliamentary activity surrounding the Kyrgyzstan constitutional reforms, Human Rights Watch argued that the Kyrgyzstan Parliament had forced through far-reaching constitutional reforms before new elections and that these efforts represented a threat to human rights and democratic principles. In arguing the caretaker parliament's lack of legitimacy to engage in such activity, Human Rights Watch cited the Venice Commission's urgent *amicus curiae* brief of 17 November cited above.⁴³

Similarly, the issue of constitutional reforms on presidential term limits in Latin America covered by the Venice Commission report cited above has been a topic extensively explored in academia.^{44 45 46} The report issued in March 2018 notes that the invitation to study the issue comes following "recently observed bad practice of modification of presidential terms through a decision of constitutional courts rather than through a reform process".⁴⁷ Recent examples of such practice include the April 2015 decision by the Constitutional Chamber of the Supreme Court of Honduras which stated that the constitutional ban on re-election (one-term limit) was unconstitutional as it infringed international human rights by limiting the right to free speech and the right of voters to a free choice of candidates. Critics argued that such a decision allowed for the possibility of authoritarian rule and pointed to the composition of the court as a reason for the decision.⁴⁸ The report of the Venice Commission on the matter directly challenges the reasoning given under the individual's rights to free choice and free speech, indicating as noted that there is no specific right to re-election and that the limits on terms help consolidate other principles of democracy. Other similar examples of this practice include Nicaragua, which involved what critics argued was a Supreme Court dominated by members of the Sandinista party lifting the constitutional laws limiting multiple terms,⁴⁹ and Bolivia which saw the Constitutional Court remove term limits in November 2017 responding to a petition by the governing Movimiento al Socialismo party.⁵⁰

2. Effectiveness

Similar to the situation with regard to the level of impact (detailed in a subsequent section), the involvement of all stakeholders in the legislative process on which the Venice Commission is providing an opinion depends on the government's prior willingness to abide by international standards and accept Venice Commission recommendations. Georgia is a country in which there appears to be a significant degree of willingness, and several interviewees have pointed out that this is due to the influence the EU has over the country. In 2011, the president of Georgia expressed his desire for the country to become a member state of the European Union and as of January 2021 it has begun preparing a formal bid to accede. Accession to the European Union and the provision of funding and aid often is dependent on the country's alignment with Venice Commission opinions. This context also means that EU delegations often visit the country to co-operate on such topics.

In the case of the opinion concerning the redistricting in Georgia, interviewees noted that it is very likely that the government would have performed the redistricting regardless of the opinion by the Venice Commission.

⁴² Source available at www.hrw.org/news/2018/06/07/q-turkeys-elections.

⁴³ See www.hrw.org/news/2020/11/21/kyrgyzstan-bad-faith-efforts-overhaul-constitution.

⁴⁴ See <https://journalofdemocracy.org/articles/manipulating-term-limits-in-latin-america/>.

⁴⁵ See <https://oxford.universitypressscholarship.com/view/10.1093/oso/9780198837404.001.0001/oso-9780198837404-chapter-24>.

⁴⁶ See <https://constitutionnet.org/news/term-limits-manipulation-across-latin-america-and-what-constitutional-design-could-do-about-it>.

⁴⁷ European Commission for Democracy through Law. (2018). Report on Term-Limits Part 1 – Presidents.

⁴⁸ See <https://constitutionnet.org/news/term-limits-manipulation-across-latin-america-and-what-constitutional-design-could-do-about-it>.

⁴⁹ See <https://theglobalamericans.org/2019/06/presidential-terms-in-latin-america-are-like-potato-chips-you-can-never-stop-at-one/>.

⁵⁰ See <http://country.eiu.com/article.aspx?articleid=1136364497&Country=Panama&topic=Politics>.

On the other hand, the opinion allowed for a process of dialogue with the opposition and civil society, allowing their views to be considered in the Venice Commission's opinion. Interviewees noted that it is possible that the opening of such channels prevented discontent from such sectors. Prior to the request for an opinion, there had been critical responses on the part of civil society to the proposal to redraw some of the electoral districts. Furthermore, the goals of the Venice Commission as it pertains to the Georgian opinion was to have a balanced legislation on redistricting which was achieved in the opinion of interviewees.

The dialogue with the government, civil society and opposition during the preparatory work and drafting of the opinion also meant that by the time the opinion of the Venice Commission had been made, the redrawing of constituencies had already been enacted following the recommendations that were later issued by the Venice Commission in its opinion. An example of such a recommendation was for the Electoral Commission to hold consultative meetings before redrawing the districts (in addition to the dialogue held by the Venice Commission rapporteurs). Dialogue with civil society occurred through country visits by the rapporteurs, as well as meetings with different stakeholders.

For other countries where such conditionality is lacking, the effectiveness of the Venice Commission is less clear. This is arguably the case on the issue on constitutional term limits. It has been highlighted by several interviewees that the involvement of the OAS in the request and in the dialogue which formed part of the preparation of the study provided weight to the Venice Commission opinions and that the co-operation between the institutions functioned well. While this may contribute to diminishing the perception that the opinions of the study represented a foreign imposition, as discussed below, the impact of the opinion is yet to be seen.

Other issues have been highlighted as having an influence over the effectiveness. One of these is the type of opinion requested from the Venice Commission. For the opinion pertaining to the parliamentary activity in Kyrgyzstan, an *amicus curiae* brief was requested which meant there were no visits to the country, and consequently no dialogue with parliament, NGOs or other stakeholders. According to one interviewee, *amicus curiae* briefs do not lead to such dialogue because rapporteurs have to avoid the impression that they are informing the judges of what they should be doing. Nevertheless, while one can argue that such opinions limit the inclusiveness of the drafting process, the interviewees that highlighted this issue noted that there should not be changes to this way of issuing opinions as they agreed that dialogue would cause interference.

Another issue is whether or not the opinion is on legislative issues. One interviewee noted that the Venice Commission functions most effectively when issuing opinions on legislation. When it comes to legislation, the Venice Commission can more easily draw on case law and previous legislation in other countries. For the opinion on Kyrgyzstan, the opinion dealt with the behaviour of parliament which draws more on the Venice Commission's understanding of political ethics, which, according to the interviewee, is harder to argue and more difficult for countries to accept.

3. Efficiency

Considering the issue of efficiency for these cases, budgetary constraints has often been raised but for most of these issues, rapporteurs have nevertheless argued that the quality of the opinions themselves has not been affected and the Venice Commission continues to deliver opinions quickly. It has been highlighted for example that rapporteurs are not provided with significant resources for the research or the country visits. On the other hand, it has been highlighted that the Venice Commission's limited budget means that they are unable to do significant follow-up on the recommendations made. While also considered by some interviewees as not in the mandate of the Venice Commission, this could increase the effectiveness of the opinions and assist in the work of the Council of Europe and the Parliamentary Assembly in their follow-up.

4. Impact

Similar to the situation concerning effectiveness, the impact of the Venice Commission's opinions and studies often depends on whether there exists external conditionality that provides incentives for the countries to adhere to the recommendations made.

This is most clearly seen in Georgia's situation where the government's desire to have a positive relationship with the EU makes them more willing to enact reforms. It has been highlighted that – in addition to providing recommendations to the states – the opinions are helpful for providing information on the countries' adherence to international norms on democratic values and provides useful information for EU officials in their assessments on a country's accession bid or when choosing to provide funding to these countries. In this context, the

countries themselves are keen to have positive assessments expressed in Venice Commission opinions. When it comes to Georgia, it means that despite having a hegemonic party in government that does not have the need to form a pact with the opposition, they are willing to take on board the recommendations of holding broad consultations before implementing any decisions on the redrawing of districts.

On the other hand, as noted in its report on the election observation in Turkey, the Venice Commission has responded continuously to recent developments in the election and constitutional law changes that have occurred in Turkey and several of these opinions have expressed concerns which the Turkish government consistently fails to address. As noted previously, the early elections of 2018 had been seen by the ruling party as a continuation of the reform process moving the Turkish electoral system from a parliamentary system to a presidential system. Throughout this process, the Venice Commission has noted concerns in their opinions about the increasing concentration of executive power in the presidential office. This is seen for example in response to the 2017 constitutional reforms which the Venice Commission argued “lead to an excessive concentration of executive power in the hands of the president and the weakening of parliamentary control of that power”.⁵¹ In another opinion the Venice Commission stressed the importance of “fair access to the broadcasting media, both public and private” during the constitutional referendum campaign and that “balanced and neutral coverage by the public broadcasters is necessary to assist voters in making an informed choice”.⁵² These two issues continued to be highlighted as problems in the report on the elections of 2018, underlying that the Turkish government had not resolved these matters. Interviewees have pointed out that the recommendations even if not taken on board do provide the international community with an opinion which can be pointed to in attempting to exert pressure on the country. Furthermore, it has been noted that these election observations have allowed for regular contact with a broad array of stakeholders in Turkey and that they have facilitated a channel for discussion with the Turkish authorities which can allow for the possibility of change over time. Nevertheless, at this stage, the impact of such recommendations has not borne fruit. It has been suggested that, contrary to Georgia, Turkey’s increasingly deteriorating relationship with the EU has meant that the Venice Commission’s activities have not been able to have a significant impact since Turkey is not bound by the EU’s conditionality over funding and accession.

Another case which highlights the importance of external conditionality concerns the study on term limits requested by the OAS. As noted above, many national constitutional courts in Latin America had declared the restriction on re-election for presidential office was unconstitutional, arguing that this represented a violation of human rights under the American Convention of Human Rights (Pact of San Jose). Following the report by the Venice Commission, the Inter-American Court of Human Rights issued a consultative opinion (non-binding) in June 2021 citing the Venice Commission study echoing its recommendations. Nonetheless, despite some opposition politicians (in the case of Bolivia) arguing that the Constitutional Court is compelled to withdraw its opinion as a result of this decision, courts or governments that have questioned the term limits have not had to revoke their positions. The opinion therefore can serve as a reference point to which different domestic actors can point but does not compel actions from the governments or courts involved.

On the other hand, following the study by the Venice Commission, the Caribbean Court of Justice cited this opinion to rule on a case in June 2018 in which it declared that limiting presidential terms to two terms was not unconstitutional. This court’s decision prevented the former Guyanese President Bharrat Jagdeo from running for another term after having already served two terms as president.⁵³ This development indicates that the impact of the Venice Commission’s recommendations also depends on how the domestic actors make use of its pronouncements.

Interviewees noted another trend that has represented a significant factor in influencing whether a country will take on board the reforms proposed by the Venice Commission. This involved whether the request was made by the government itself or an external actor such as the Parliamentary Assembly or even domestic actors not in government. A potentially revelatory example is the opinion for Kyrgyzstan which was requested by the Supreme Court of the Kyrgyz Republic. Despite the recommendations of the Venice Commission, the Kyrgyzstan parliament did not reverse its actions to prolong its stay, nor did it halt the process of constitutional reforms it sought to enact.

51 European Commission for Democracy through Law. (2017). Turkey: Opinion on the Amendments to the Constitution Adopted By The Grand National Assembly On 21 January 2017 And To Be Submitted To A National Referendum On 16 April 2017.

52 European Commission for Democracy through Law. (2016). Turkey: Draft opinion on the measures provided in the recent emergency decree laws with respect to freedom of the media.

53 See www.telesurenglish.net/news/Caribbean-Court-Rules-Guyanese-Presidential-Term-Limits-Legal-20180626-0027.html.

3.3 Achievements and challenges

Considering the cases discussed, the activity of the Venice Commission in the area of elections, political parties and referendums has had several achievements. This is particularly seen in the relevance of the opinions whereby topics discussed concern issues that are extensively explored in academia and are often highlighted by the media and human rights observers. Moreover, the recommendations consistently tackle issues relevant to the Venice Commission's attempts to uphold international standards in democratic values and human rights. In the latter case, this includes tackling issues of the rights of individuals within the context of electoral and constitutional law.

The cases also indicate that in the areas in which the Venice Commission does have influence, co-operation with other institutions such as the OAS has functioned well and the Venice Commission has been able to disseminate their values and international good practices.

The examples detailed above nevertheless do highlight some challenges the Venice Commission faces. A clear issue is its ability to have influence over the direction of certain countries where the conditionality imposed by the EU for funding or accession is not present. In the cases discussed, this can be seen most clearly in Latin America, where the opinion on term limits has had limited impact, and in Turkey, which consistently develops contrary to the recommendations made by the Venice Commission. Relatedly, the Venice Commission faces the challenge of increasing the involvement of its Latin American members (besides Mexico, which is extensively involved) in its activities. This, *inter alia*, could improve the influence that the Venice Commission has in upholding its values.

Another possible challenge is in the Venice Commission's ability to have an impact on topics besides electoral law. One interviewee highlighted that the Venice Commission's work is most effective when it deals with legislation where there is more case law and specific electoral laws that can be pointed to as good practice. This is less the case when it comes to actions of individuals or institutions acting within the electoral field.

3.4 Conclusions and lessons learned

As in other thematic areas of the Venice Commission's activities, the Venice Commission's impact in electoral matters often depends on whether the countries it is issuing an opinion about is subject to external conditionality. Often, such conditionality is set by the European Union for access to EU funding programmes or accession as a member state.

In other situations, the impact of the Venice Commission's recommendations is determined by how domestic and regional political actors make use of the opinion itself. An example highlighted above is that of the Inter-American Court of Human Rights and the Caribbean Court of Justice. Both made reference to the Venice Commission when issuing its opinion, although the former provided a consultative opinion while the latter issued a binding decree on its members.

In terms of improvements, interviewees highlighted possible issues with the budget, meaning that there are limited resources for the Venice Commission to be engaged in follow-up to its opinions, which could increase its impact. On the other hand, this may mean that the Venice Commission would begin extending itself beyond its mandate. One suggestion made on improving the capacity of the Venice Commission is to take up fewer of the urgent requests for opinions, particularly in cases where such opinions would remain relevant if issued at a later stage.

3.5 References

- ▶ European Commission for Democracy through Law. (2016). Turkey: Draft opinion on the measures provided in the recent emergency decree laws with respect to freedom of the media.
- ▶ European Commission for Democracy through Law. (2017). Turkey: Opinion on the Amendments to the Constitution Adopted by the Grand National Assembly On 21 January 2017 and to be Submitted to a National Referendum on 16 April 2017.
- ▶ European Commission for Democracy through Law. (2018). Report on Term-Limits Part 1 – Presidents.
- ▶ European Commission for Democracy through Law. (2019). Annual Report of Activities 2018.
- ▶ European Commission for Democracy Through Law. (2020). Urgent Amicus Curiae Brief Relating to the Postponement of Elections Motivated by Constitutional Reform.
- ▶ Parliamentary Assembly. (2018). Observation of the early presidential and parliamentary elections in Turkey (24 June 2018).

- ▶ www.bbc.co.uk/news/world-asia-54553173.
- ▶ <http://country.eiu.com/article.aspx?articleid=1136364497&Country=Panama&topic=Politics>.
- ▶ <https://civil.ge/archives/125135>.
- ▶ <https://constitutionnet.org/news/term-limits-manipulation-across-latin-america-and-what-constitutional-design-could-do-about-it>.
- ▶ www.hrw.org/news/2018/06/07/q-turkeys-elections.
- ▶ www.hrw.org/news/2020/11/21/kyrgyzstan-bad-faith-efforts-overhaul-constitution.
- ▶ www.hrw.org/news/2020/11/21/kyrgyzstan-bad-faith-efforts-overhaul-constitution.
- ▶ <https://journalofdemocracy.org/articles/manipulating-term-limits-in-latin-america/>.
- ▶ <https://oxford.universitypressscholarship.com/view/10.1093/oso/9780198837404.001.0001/oso-9780198837404-chapter-24>.
- ▶ www.telesurenglish.net/news/Caribbean-Court-Rules-Guyanese-Presidential-Term-Limits-Legal-20180626-0027.html.
- ▶ <https://theglobalamericans.org/2019/06/presidential-terms-in-latin-america-are-like-potato-chips-you-can-never-stop-at-one/>.

Case study 4 – Technical assistance projects

This case study analyses the work of the Venice Commission in the field of technical assistance projects in selected partner countries. In particular, it describes three types of technical assistance projects the Venice Commission carries out in different geographies and the co-operation framework underpinning these projects. The included countries have a formal co-operation agreement in place in the form of, for example, an action plan that falls under the European Neighbourhood Policy (ENP).

4.1 Introduction

In addition to providing legal opinions on draft legislation, the Venice Commission has engaged in other co-operation activities such as technical assistance projects with member states. These technical assistance projects aim to channel expertise and experience from the Venice Commission into partner countries in the Venice Commission's core areas of focus: i) Democratic institutions and fundamental rights; ii) Constitutional justice; and iii) Elections, referendums and political parties. For instance, this can involve helping develop the skills of electoral commissions and other oversight bodies and their ability to ensure the observance of voters' rights, while at the same time promoting voter education and participation.

According to the terms of reference for this evaluation, 19 technical assistance projects have been conducted or initiated since 2014. As illustrated in the figure below, the total spend on such projects in the period 2016-2020 was €6 866 428.⁵⁴ These projects cover a range of areas spanning all three core areas of focus; they can be multilateral, regional or bilateral in nature, and they can take a range of forms, such as capacity building and dialogue with authorities.

This case study provides further detail on the following three technical assistance initiatives.

- ▶ **Partnership for Good Governance (PGG) Phase II** (2019-2021) and, in particular, the provision of ad hoc legal advice through the Quick Response Mechanism (QRM);
- ▶ **bilateral co-operation with Ukraine**, mainly focusing on "Assistance to public authorities in reforming the electoral legislation and practice" (2015-2018); and
- ▶ **South Programme III**, entitled "Ensuring Sustainable Democratic Governance and Human Rights in the Southern Mediterranean" (2018-2020), which included the Venice Commission's assistance to countries of the southern Mediterranean. The case study will place particular focus on the assistance provided to Tunisia.

Figure 4.1: Technical assistance project volume, per country (in €k)



Source: Terms of reference for this evaluation

4.2 Description of interventions

1. Partnership for Good Governance 2019-2021 – Quick Response Mechanism (QRM)

A vital example of the Venice Commission's technical assistance activities includes its participation in European Union and Council of Europe initiatives to promote the rule of law, human rights and fundamental freedoms within Europe and other regions, such as Central Asia and the southern Mediterranean. An example of these initiatives is the Partnership for Good Governance (PGG) programme, which has supported the development of national legislation in Eastern Partnership countries (Armenia, Azerbaijan, Georgia, Republic of Moldova,

⁵⁴ Council of Europe, Directorate of Internal Oversight, (2020). Terms of References: Evaluation of the European Commission for Democracy through Law (Venice Commission).

Ukraine and Belarus) to align their electoral and governance standards with European standards.⁵⁵ There have been two triennial iterations of the PGG so far; PGG Phase I (2015–2018) and PGG Phase II (2019–2021). Both phases have focused on strengthening the judicial frameworks of these countries, including creating anti-corruption ombudspersons. The total budget for the PGG was €36 million, funded mainly by the EU (85%), with support from the Council of Europe (15%). Negotiations for a third phase are ongoing. Some of the activities conducted under the PGG include legislative reviews, seminars, working groups and training sessions, but especially legal opinions and analyses.

One of the tools that have been deployed as part of the PGG is the **Quick Response Mechanism (QRM)**, which is activated upon request by a participating country. This is a tool through which the Venice Commission may provide ad hoc legal advice in response to requests for legislative analysis and assistance from countries or the European Commission. The Venice Commission can provide analyses and assistance in the Eastern Partnership countries covered by the PGG on the following thematic areas: democratic institutions and fundamental rights; elections, referendums and political parties; and constitutional and ordinary justice.

The requests for the use of the QRM can be made either by heads of states, speakers of the parliament and government ministers, national constitutional courts or relevant actors from the EU and Council of Europe.⁵⁶ In addition to being submitted by a qualified authority, QRM requests must follow a set of criteria. The request must be relevant to the expertise of the Venice Commission (for example addressing democratic institutions, fundamental rights, constitutional and electoral matters), must be relevant to the needs identified for the requesting country and relate to policy aspects of strategic importance, as well as avoiding any duplication with other tools deployed by the Council of Europe and the EU. Furthermore, the requests should specify the type of legislation on which expertise is needed, the reasons for changing legislation and the timeline for legislative steps.

As highlighted above, the QRM covers Armenia, Azerbaijan, Georgia, Moldova, Ukraine and Belarus. Armenia, Ukraine and Moldova have made the most significant use of the tool since its inception. The following box provides some examples of recent QRM support.

Box 4.1: Examples of opinions issued through the Quick Response Mechanism

Moldova: The Venice Commission has issued urgent opinions for Moldova in the framework of the QRM in areas related to electoral campaign policies. An example has been the opinion on the draft Law no. 263, which aimed to amend the: i) Electoral; ii) Contravention; and iii) Audiovisual Media Services codes.⁵⁷

The Venice Commission positively assessed that Moldova's new laws defined the definitions for electoral campaigns and their timelines more clearly. The new law also positively assessed the introduction of campaign rules violations, while the scope of individuals being able to submit complaints has widened. However, the Venice Commission recommended that for these changes to be more far-reaching, it must limit the restrictions on freedom of expression concerning campaign participation and introduce an effective enforcement mechanism preventing public officials' misuse of resources.

The Venice Commission has also used the QRM to provide opinions on judicial matters in Moldova, such as the recent *amicus curiae* on three questions concerning the Supreme Court of Moldova.⁵⁸ This QRM opinion addressed the mandate of the lay members of Moldova's Supreme Court, including the length of their mandate and the number of required parliamentary votes needed to elect them. Comments were also made on the best practices needed to ensure how these appointments are made.

Armenia: Armenia has benefited from opinions expressed through the QRM on constitutional matters, such as on Article 300.1 of the Criminal Code, which clarified the Armenian Parliament's power to revoke its decision calling for a referendum. This opinion addressed an issue related to the separation powers, on the constitutional order and how these concepts ought to be interpreted according to European standards. Beyond purely constitutional matters, the QRM has been used

55 Council of Europe and European Commission, (2014). Statement of intent for the Co-operation between the Council of Europe and the European Commission in the EU Enlargement Region and the Eastern Partnership and Southern Mediterranean Countries (EU Neighbourhood Region).

56 Council of Europe. (n.d.). The Quick Response Mechanism, available at <https://rm.coe.int/brochure-qrm-web/16809c3c48>.

57 Venice Commission. (2020). Republic of Moldova Urgent Joint Opinion on Draft Law No. 263 Amending the Electoral Code, the Contravention Code and the Code of Audiovisual Media Services, available at [www.venice.coe.int/webforms/documents/default.aspx?pdf=CDL-PI\(2020\)011-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdf=CDL-PI(2020)011-e).

58 Council of Europe. (2020). Urgent joint *amicus curiae* brief on three legal questions, available at: www.coe.int/en/web/chisinau/-/urgent-joint-amicus-curiae-brief-on-three-legal-questions-concerning-the-mandate-of-members-of-constitutional-bodies-of-the-republic-of-moldova.

to offer opinions on thematic areas that intersect constitutional matters with human rights, for instance, noting that the ratification of the Istanbul Convention would not counter the constitutional order of Armenia.⁵⁹

Georgia: The Venice Commission has issued urgent opinions through the QRM on issues related to electoral matters, such as the Election Code of Georgia. The Venice Commission notably asked Georgia to consider several amendments to the laws on Political Associations of Citizens and the Rules of Procedure of the Parliament of Georgia.⁶⁰

These issues provided warnings and recommendations regarding potential reforms that could have been seen as limiting the political force's ability to access free airtime in public media, which could reduce the public's access to information from opposition sources. Other questions the QRM has addressed have been the public funding granted to electoral blocs, whereby parties would be deprived of public funding should individual MPs not participate in plenary sessions, which was deemed "disproportionate".

Ukraine: The Venice Commission's QRM has been used to provide opinions on constitutional affairs in Ukraine, on topics such as the possibility for the early termination of the mandate of a member of Ukraine's National Parliament (Verkhovna Rada), including when this should be appropriate and under what terms. In particular, the Venice Commission qualified whether it was acceptable to lose a parliamentary mandate due to failing to exit or join a parliamentary faction or for non-personal voting or absence.⁶¹

2. Bilateral co-operation in Ukraine: assistance to public authorities in reforming the electoral legislation and practice (2015-2018)

The Council of Europe has been engaged in electoral assistance projects in Ukraine since 2015. Many of these efforts have been integrated into Ukraine's 2015-2017 Council of Europe Action Plan, such as reforming the electoral practices in Ukraine, and further included in the Council of Europe Action Plan 2018-2022. The Council of Europe's action plans are joint initiatives between the Council of Europe and Ukraine, whose aim is to help Ukraine meet the obligations of members of the Council of Europe and meet their democratic governance standards at the local and national level. This aspect of the action plan's overarching goals was to ensure that Ukrainian authorities effectively organise fair elections while incorporating the best practices and technologies. Another focus of this project regards the accountability systems that aim to ensure political funding is transparent. Some of the objectives of the assistance project are outlined below.

- ▶ To increase the ability of national authorities to organise elections following European standards.
- ▶ To promote the use of new technologies in the electoral process to ensure that it operates by international standards.
- ▶ To support domestic election observers to ensure that European good practices and standards are applied.
- ▶ To educate Ukrainian voters, increasing their voice and accountability.

Throughout the process of electoral assistance projects in Ukraine, many organisations from various sectors have become partners in strengthening and contributing to more fair, transparent and inclusive electoral practices. Key partners involved in the Council of Europe's activities to improve the electoral practices in Ukraine include national authorities (legislative, executive, judicial), local civil society organisations and other international institutions working with the Council of Europe such as the OSCE/ODIHR.

Additional key projects that have been or are being undertaken in the electoral field to date include:

- 1) "Strengthening freedom of media, access to information and reinforcing public broadcasting system in Ukraine";
- 2) "Supporting constitutional and legal reforms, constitutional justice and assisting the Verkhovna Rada in conducting reforms aimed at enhancing its efficiency"; and
- 3) "Assistance in reforming electoral legislation and conducting constitutional reform".

⁵⁹ Council of Europe. (2019). On the Constitutional Implications of the Ratification of the Council Of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), available at [www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2019\)018-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2019)018-e).

⁶⁰ Council of Europe. (2021). Georgia – Joint Opinion of the Venice Commission and the OSCE/ODIHR on amendments to the Election Code, the Law on Political Associations of Citizens and the Rules of Procedure of the Parliament approved by the Council for Democratic Elections at its 71st meeting and adopted by the Venice Commission at its 126th Plenary Session.

⁶¹ Council of Europe (2019). Ukraine – Amicus Curiae Brief for the Constitutional Court of Ukraine on draft law 10257 on the early termination of a Deputy's mandate, adopted by the Venice Commission at its 121st Plenary Session (Venice, 6-7 December 2019).

Key themes and activities of these projects include establishing a liability framework against electoral offences, promoting fair and objective media coverage of electoral processes and enhancing media literacy and public oversight. Other areas in the scope of these activities include gender equality and, specifically, further encouraging women's participation in the political process. The projects under this headline of "Assistance to public authorities in reforming the electoral legislation and practice", conducted between July 2015 and February 2018, had a total value of €385 117.

In this regard, the Venice Commission has taken a lead role in assisting Ukraine's constitutional reform efforts by providing expert support to authorities. Indeed, it has offered opinions specifically on the need to unify the electoral code and called for a review of the legislation on campaign finance, expenditure and political party transparency.⁶² Moreover, the Venice Commission has also been called to provide recommendations on improving the operation of the Verkhovna Rada (Ukrainian Parliament) by helping it address procedural guidelines on the rights and responsibilities of the majority and the opposition⁶³ and has been helping it develop its internal rules. Finally, the Venice Commission has also been assisting Ukraine in helping the decentralisation of its government by assessing the relevant constitutional amendments.

3. South Programme (SP) III C3 – Venice Commission's assistance to countries of the southern Mediterranean: Tunisia

The Council of Europe has been actively engaging with partners in the southern Mediterranean (Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, Palestine and Tunisia) in a vast range of areas that include enhancing democratic governance. In this regard, the Council of Europe has co-operated closely with the EU in this region, and both have been active in mobilising resources. To date, the region has been a beneficiary of successive phases of the South Programme; Phase 1 (2012-14), Phase 2 (2015-17), Phase 3 (2018-20) and the ongoing Phase 4 (2020-22).

The programmes have been designed to respond to requests from partner countries for assistance in implementing democratic reforms. In return, the Council of Europe provides legislative expertise and recommendations on improving participating countries' institutional frameworks and administrative capacity. The programmes also seek to encourage these countries to adhere to the Council of Europe's international conventions and increase the legal co-operation, both with the Council of Europe member states and between countries in the southern Mediterranean, in such areas as the protection of human rights and the rule of law, which is deemed fundamental to achieving sustainable democratic systems based on the independent rule of law and good governance. One of the aims of this was to create a "common legal space" between Europe and the southern Mediterranean and expand knowledge-sharing networks between North and South. The programmes also sought to address issues related to combating corruption and gender discrimination.

The most recently completed programme, entitled "**Ensuring Sustainable Democratic Governance and Human Rights in the Southern Mediterranean**" (Phase 3, 2018-2020), had a total budget of **€3 334 000** and was co-funded by the EU and the Council of Europe.⁶⁴ One component of this programme was the **assistance of the Venice Commission to the southern Mediterranean countries through opinions, which was allocated €497 000**⁶⁵ covering all seven Southern Neighbourhood countries. No details have been disclosed publicly as to how much of this allocation was spent by countries and the amounts used for individual opinions.

Tunisia was a key beneficiary of this programme: it passed key new legislation within its framework with the help of the Venice Commission, which has helped Tunisia ratify and meet many international and European standards concerning good governance and fundamental rights. Beyond helping Tunisia accede to these conventions, other achievements include the issuing by the Venice Commission of an opinion on the Tunisian draft organic law on the organisation of political parties and their funding.⁶⁶ Moreover, Tunisia has also benefited from the UniDem programme that was set up to support institutional reform in the countries in the southern Mediterranean, through seminars and workshops held by experts aimed at supporting administrative reforms. Examples of reforms that were supported under this project included a reform of how high functionaries and experts are selected in Tunisia's administration, which is now done according to best practices and under open competition. Another success includes the training support endowed by the UniDem project to training and supporting the move of central administration officials to regional administration to strengthen local government in Tunisia.

⁶² Council of Europe. (2015). Action Plan for Ukraine 2015-2017.

⁶³ PACE Resolution 1601.

⁶⁴ Council of Europe (n.d.), South Programme III, available at <https://pjp-eu.coe.int/en/web/south-programme/south-programme-iii>.

⁶⁵ P&B 2020-2021.

⁶⁶ Council of Europe. (2018) Tunisia – Opinion on the draft institutional law on the organisation of political parties and their funding, adopted by the Venice Commission at its 116th Plenary Session (Venice, 19-20 October 2018).

4.3 Evaluation of the Venice Commission's interventions in focus

1. Relevance

The interventions carried out in the context of the technical assistance projects under assessment are considered relevant to the overall objectives of the Venice Commission and in line with the Council of Europe objectives. Stakeholders interviewed highlighted their appreciation for the Venice Commission assistance and contributions in the form of technical assistance projects addressing the areas of major reforms. Indeed, the projects are targeted and designed to fulfil specific goals, whether these are the publication of political opinions assessing electoral or constitutional reforms being undertaken in the countries in scope or helping these countries join specific international conventions (for example, the Istanbul Convention). In this respect, the analysed interventions were relevant to the designs of the Venice Commission, as outlined below.

- ▶ The Partnership for Good Governance II provided electoral opinions on some of the electoral reforms carried out by Armenia, Georgia, Moldova and others. This was done in particular through urgent opinions expressed through the QRM mechanism, such as: Urgent Joint Opinion on Draft Amendments to the Electoral Code and Related Legislation (Armenia); Joint Opinion of the Venice Commission on amendments to the Election Code, the Law on Political Associations of Citizens and the Rules of Procedure of the Parliament approved by the Council for Democratic Elections (Georgia); Urgent Opinion on the draft law on amending the Electoral Code and the Code of Audiovisual Media Services (Moldova).⁶⁷
- ▶ Bilateral co-operation with Ukraine has been addressing the most pressing reforms in the country and, among other things, supporting making the Verkhovna Rada more effective and improving the transparency of political funding for projects.
- ▶ Under the South Programme III, Tunisia has been able to accede to a series of international conventions and was assisted by the Venice Commission in the form of opinions, helping the country in the transition to democracy.

Another aspect supporting the relevance of the projects is the balance between planned activities within the project framework and those following an “on-demand” approach, meaning that opinions are drafted and expertise is delivered at the request of beneficiaries. The legal expertise through opinions is therefore targeted to fulfil the needs identified by the beneficiary who expresses the original request. The combination of activities and legal expertise in the form of participation of Venice Commission experts in events or capacity-building efforts is perceived as helpful to address the country's needs.

In addition, some of the technical assistance projects examined are co-ordinated with other relevant multilateral actors (for example the European Union) participating in similar fields of operations. This is the case for PGG and the South Programme (II and III). Synergies with other Council of Europe projects implemented in a given country, such as in the case of Ukraine, and the partnership with national civil society organisations in the implementation, have been highlighted as proof of a broader effort by national actors and the international community to support the ongoing reform process.

These synergies arise in some cases because the development of better governance, electoral mechanisms and the rule of law are joint objectives expressed by both the EU and the Council of Europe. Therefore, these institutions partner to pursue common goals. Moreover, the PGG is aligned with the more comprehensive Eastern Partnership, which aims to promote bringing legislation and practice closer to European standards in the fields of human rights, the rule of law and democracy in Azerbaijan, Armenia, Georgia, Belarus, Moldova and Ukraine. The objectives of the Council of Europe, Venice Commission and the EU also align as regards the southern Mediterranean, as the EU's European Neighbourhood Policy also has a southern dimension. Both are interested in promoting better knowledge sharing and promotion of standards in areas such as combating economic crime, violence against women, human trafficking and torture, but also in a bid to create a “North-South” legal space.

2. Effectiveness

The multidimensional approach of technical assistance projects has been highlighted by interviewees as a core component of their effectiveness. The close collaboration with national authorities through a dialogue-based approach characteristic of the Venice Commission, the partnership with relevant civil society organisations in the specific areas for joint implementation of activities, and the synergies with other Council of Europe

⁶⁷ Council of Europe. (n.d.) Quick Response Mechanism (QRM), available at [https://pjp-eu.coe.int/en/web/pgg2/quick-response-mechanism#{%2291352309%22:\[3\]}](https://pjp-eu.coe.int/en/web/pgg2/quick-response-mechanism#{%2291352309%22:[3]}).

projects in the country are considered to create an environment supportive of effective delivery. This is further strengthened by the flexibility of technical assistance projects to accommodate ad hoc needs: both the PGG and the South Programme include a component for the Venice Commission's assistance in the form of opinions and bilateral projects implemented by the Venice Commission in full, as with that in Ukraine to balance activities and opinions. In fact, activities carried out, for example, under the PGG programme have been described by interviewees as serving a complementary role to opinions. In that sense, seminars and round tables organised in Ukraine have been used as an additional platform to explain Venice Commission opinions and positions⁶⁸ or to present the Venice Commission "Rule of Law Checklist for Ukraine", thereby further helping in the promotion of European standards.

Technical assistance projects have been described as facilitating the formal framework for collaboration with national authorities. Activities carried out have allowed for the exchange of views with the relevant authorities, have created a platform for discussion on topics such as the judicial or the electoral reform and thereby made it possible to combine the local and international expertise on the matter. Although judging the effectiveness of specific interventions in isolation is not possible, interviewees suggested that the pace of requested opinions and the frequency of opinions have been increasing, especially since the introduction of specific programmes, such as the PGG and the South Programme. This suggests that technical assistance from the Venice Commission has increased awareness of such forms of legal expertise and encouraged the uptake of the Venice Commission's assistance. For example, for countries participating in the PGG, there have been increasing requests for opinions on electoral and constitutional matters, therefore granting the Venice Commission an increasing opportunity to shape electoral processes, constitutional reforms and promote international standards.

Although actual implementation of the recommendations issued in recent opinions varies, stakeholders stressed the value of such opinions also in terms of providing legal guidance for the reforms to be in line with European standards. They are often cited by civil society organisations, help stimulating debate and become a source of inspiration and discussion for future reforms. In addition, since the introduction of the South Programme, participant countries have increasingly acceded to international human rights conventions, such as the Istanbul Convention, due to participation in the programmes.

Finally, a possible factor compounding the effectiveness of the Venice Commission as a tool for better governance practice includes the fact that its goals align with the broader goals of the European Union in terms of democratic and governance standards. Indeed, achieving a certain threshold in these areas, notably regarding the EU's *acquis communautaire*, is a stated requirement to accede to the EU's structures. This means that participation in joint EU-Council of Europe programmes under the auspices of the Venice Commission might be perceived as attractive by the leadership of some countries as progress in many of these areas is seen as a condition for achieving closer association with the EU. This could explain the take-up of reforms recommended by the Venice Commission from countries operating in the PGG, such as Ukraine, Georgia and Moldova. These countries' political elites are committed to a path of European integration, which entails undertaking a series of judicial and electoral reforms to this end, meaning that Council of Europe assistance and co-operation are usually well received as they may help contribute to achieving this broader goal of European integration, beyond the better governance advantages.

3. Efficiency

Within the PGG and the South Programme, the Venice Commission assistance in the form of legal opinions is considered an integral part of the project and funded through the respective project budget. This approach creates an additional channel for the Venice Commission assistance without relying on the Venice Commission's own financial resources and is considered as a timely and efficient way of addressing the country's needs as requested by the authorities. Often requested as urgent opinions, the very short timeframe in which the Venice Commission is able to produce high-quality legal input was very valued by interviewees both from civil society and the authorities. The quick response and availability by the Venice Commission to assist on an ad hoc basis was seen as an efficient way to provide targeted assistance to the requesting country.

The bilateral co-operation projects implemented in Ukraine by the Venice Commission included activities and opinions as requested by the competent authorities. As such, the allocation of resources has been kept flexible to accommodate incoming requests for opinions as well as the activities planned. According to interviewees,

⁶⁸ Examples of such events are included in the internal reporting documentation of the Venice Commission projects planned for 2021, such as "Conducting working meetings with national experts on preparing of Annual Index 'Rule of Law in Ukraine' and practical commentary on the Electoral Code of Ukraine (Chapter 1)" (September 2021).

this has been managed in a successful way by prioritising financial and human resources for the drafting of opinions, for example in the preparation of the assessment trips by the Venice Commission rapporteurs or by dedicating resources to the translation into English of the relevant draft laws, and postponing activities to a later date. The flexible nature of the project, however, poses certain challenges to resource management given the limited predictability of needs in a given year. The sustainability of such a model was stressed as possibly compromising efficiency, as resources need to be reallocated at short notice; overall, the project was seen as running efficiently and on a modest budget when compared to the high-quality activities it provided.

In terms of activities, the joint organisation of events with other Council of Europe projects in the same country, for example in Ukraine, constitute an example of how synergies are exploited to carry out events in an efficient manner. The participation of Venice Commission experts in events such as conferences, seminars and training, organised and funded by civil society organisations in the field, was further stressed as an efficient way of maximising the Venice Commission's assistance to the broader stakeholder community. Interviewees were not aware of the Venice Commission having ever rejected a request for an opinion from the Ukrainian authorities, which points at a very effective use of its resources.

With regards to the technical assistance projects, some stakeholders felt that though the programmes in the southern Mediterranean (for example UniDem) had been considered successful – it was felt that it could benefit from allowing more people to participate in in-person seminars from national public administrations (the current average number of attendants is between two and three). Moreover, it was felt that participants would benefit more from a wider range of experts presenting on a given topic. A national co-ordinator from a North African country suggested that the workshops could be better targeted as they currently address topics selected ad hoc by a committee; it might be beneficial if workshops could be designed to be on one governance area (for example, local government) and held in countries that are currently implementing reforms related to local governance to make it a topic more relevant to the participants.

4. Impact

The impact of individual opinions issued in the context of the analysed projects as well as that of the projects themselves can only be analysed to a limited extent beyond the formal adoption of legal reforms as recommended by the Venice Commission and the accession to international instruments. The analysed projects have been implemented recently and major reforms tend to take place over a longer timeframe. However, it is clear that, since the beginning of the Venice Commission's activities in both Tunisia and Ukraine, there has been significant development in the areas in which the Venice Commission operates, either in terms of electoral rules, governance mechanisms and accountability systems, which have progressed significantly since the Arab Spring in 2011 and since 2014 in Ukraine. Although it is challenging to identify the extent to which changes are attributable to the Venice Commission entirely, interviewees consulted in Ukraine agreed on the positive impact of the Venice Commission's assistance through opinions, as well as other activities, and described it as instrumental in the ongoing reform process.

The Venice Commission is perceived as having a great impact through its (urgent) opinions in countries with EU aspirations. As a politically neutral and high-quality expert body, the review of draft laws by the Venice Commission as requested by the authorities is perceived as a "clearance" and a "quality stamp" of their compliance with European standards by those countries of the Eastern Partnership and in countries undergoing major reforms such as Tunisia. The on-demand provision of legal opinions means that assistance is specifically tailored to the needs of potential recipients, further increasing the impact the Venice Commission has in individual countries. Interviewees suggested that the impact of individual opinions depended, to a great extent, on the readiness of authorities to implement and carry out the changes recommended, thereby being out of the control of the Venice Commission.

Activities of a different nature carried out within the framework of the Venice Commission projects in Ukraine, including round tables, seminars and conferences, as well as capacity-building initiatives in which Venice Commission experts have participated, for example the training of judges by the National School of Judges, are regarded as highly effective. Although these events have a limited reach and have lower political visibility than opinions, stakeholders involved stressed the value of such activities and their contribution in the form of lasting impact. For example, the training of judges was seen as an effective way of having a real impact in the country in the medium to long term.

Technical assistance projects have been suggested as increasing the visibility of the Venice Commission and the countries' awareness of its legal assistance capabilities, contributing to the increasing number of opinions requested. In the long term, and dependent on actual implementation of such opinions, this could be seen as increasing the impact of the Venice Commission globally. Outside of Europe, interviewed stakeholders

felt that the Venice Commission and its technical assistance projects have had a meaningful impact and that there was scope to reproduce its success in some North African countries to a wider group of countries, with suggestions to enlarge some of the activities under the South Programme to include other countries in the Arab world and Sub-Saharan Africa.

4.4 Achievements and challenges

Achievements

The clearest form of achievements for the PGG and the South Programme is the successful delivery of opinions and accession to international conventions respectively. In the areas of electoral affairs in Eastern Europe under the PGG QRM, opinions issued include the following.

Armenia
<ul style="list-style-type: none"> ▶ Urgent Joint Opinion on Draft Amendments to the Electoral Code and Related Legislation, providing a positive assessment of a reform to the electoral code in Armenia, ahead of parliamentary elections. ▶ Opinion on three questions concerning the constitutional amendments pertaining to the mandate of the judges of the Constitutional Court, providing an opinion of the latest two constitutional amendments. ▶ Joint Opinion on draft amendments to the legislation concerning political parties, providing recommendations to improve the institutional framework for political parties.
Georgia
<ul style="list-style-type: none"> ▶ Joint Opinion of the Venice Commission and the OSCE/ODIHR on amendments to the Election Code, the Law on Political Associations of Citizens and the Rules of Procedure of the Parliament providing recommendations to address issues identified in Georgia's electoral law. ▶ Urgent Opinion on the selection and appointment of Supreme Court judges, providing an assessment of the selection process of Georgia's Supreme Court judges.
Moldova
<ul style="list-style-type: none"> ▶ Amicus curiae brief on three legal questions concerning the constitutional review of the law-making procedures in Parliament reviewing three questions involving the Constitutional Court. ▶ Urgent Opinion on the draft law on amending the Electoral Code and the Code of Audiovisual Media Services, providing a review of a new law containing numerous amendments to the Electoral Code, introducing revisions to the Contravention Code and Code on Audiovisual Media Services.
Ukraine
<ul style="list-style-type: none"> ▶ Amicus curiae brief on draft law 10257 on the early termination of a deputy's mandate, responding to a question from the Constitutional Court concerning the condition for terminating an MP's mandate.

For Tunisia, as mentioned above, a vital success of the Council of Europe's South Programme III has been Tunisia's accession to a series of international instruments and conventions, including:

- ▶ the Ratification of the **Lanzarote Convention on Protection of Children against Sexual Exploitation and Sexual Abuse**;
- ▶ signature of the revised **Convention for the Protection of Individuals concerning the Processing of Personal Data (Convention 108+)**;
- ▶ invitation by the Committee of Ministers to become a contracting party to the **Istanbul Convention on Preventing and Combating Violence against Women and Domestic Violence**;
- ▶ accession to the **Šibenik Network of Corruption Prevention Agencies**.

As for Ukraine, the technical assistance provided by the Venice Commission in the major recent reforms including the constitutional reform, the judicial reform and electoral legislation was highlighted as instrumental and decisive to the progress made. Through both opinions and activities of a different nature, stakeholders considered the contribution of the Venice Commission to have been key to aligning national legislation with European standards in recent years. Indeed, in the last 18 months, there have been 11 requests for opinions for Ukraine alone. Although not all recommendations have been implemented, and for example the electoral reform is very much ongoing, interviewees consulted emphasised that the Venice Commission expertise had been crucial to the reform. The technical assistance project is seen as a solid framework providing the direct communication with the Venice Commission and ensuring stability and continuity in the established collaboration.

Challenges

The main challenge identified in the implementation of Venice Commission projects is the need to strike a balance between the planned activities and the resources needed to prepare ad hoc opinions, especially in light of the increasing number of urgent opinions. Although Venice Commission projects address this through what has been described as a “soft project framework”, which provides flexibility to update activities scheduled for the immediate future, this creates some tension in practice. Indeed, according to some of the interviewees, a future challenge includes the relatively small Council of Europe teams dedicated to some of the areas of operation. This may affect the ability of the Venice Commission to provide the material, oversight and assistance that some public administrations would need should the volume of requests for assistance/opinions increase in the future. Besides, it has been suggested that a further alignment of the Venice Commission project implementation with the overall Council of Europe project management methodology would be beneficial. This would bring, for example, the reporting in line with other Council of Europe projects to the extent suitable for Venice Commission projects.

Additional co-ordination across projects implemented by the Council of Europe, including those that have a Venice Commission component such as the QRM and those fully implemented by the Venice Commission, as well as communication with the official national point of contact on the side of the authorities would be beneficial. This was stressed by the Ukrainian national authorities and suggested as a way to further enhance the co-operation and monitor the contribution to ongoing reforms.

Finally, the independence of the Venice Commission is to be safeguarded, also in opinions issued in the framework of a joint programme implemented in collaboration with partner institutions such as the EU. Stakeholders highlighted this as being key to the Venice Commission’s image as well-respected authority, able to provide technical expertise free from political interference. Therefore, in the context of joint programmes funded partially by partner organisations, it is important for the Venice Commission to continue to act and be seen as the independent expert body it is, without bending to political interests at play.

4.5 Conclusions and lessons learned

Technical assistance projects are seen as a meaningful way for the Venice Commission to provide assistance within a structured framework, be it within broader Council of Europe projects through a specific mechanism like the QRM or dedicated Venice Commission projects. The multidimensional approach of bilateral projects, which combine opinions with other types of activities, is indeed perceived as an efficient and effective way to provide assistance from different angles and thereby facilitate change in line with the Venice Commission objectives. For instance, Tunisia’s accession to the Istanbul Convention contributes to the Venice Commission’s focus on respecting fundamental rights and freedoms, and the reforms in Ukraine, for example in the field of elections and constitutional reform, have brought the country closer to European standards.

The technical assistance projects examined demonstrate relevance to the objectives of the Venice Commission and the needs of the participating countries. As highlighted throughout, the on-demand nature of many of the interventions examined allows the Venice Commission to intervene only in the areas that best serve its participating states. Furthermore, the interventions are clearly targeted at supporting countries in the focal areas in which the Venice Commission works, namely democratic institutions and fundamental rights; constitutional justice; and elections, referendums and political parties. Thus, for instance, specific projects implemented as part of the bilateral assistance provided to Ukraine are targeted to reform electoral legislation and conduct constitutional reform.

To the extent that it is possible to observe the immediate impact of some of these projects, the general view is that there has been a substantial positive impact on the reforms. Examples are the implementation of some of the opinions in Ukraine and Tunisia and the capacity building through the training of judges in Ukraine. Technical assistance projects are seen as contributing to creating positive conditions for the implementation of recommendations. While partnering with the EU and national partners, the Venice Commission needs to remain impartial and independent so as not to compromise its full potential in any country at stake.

4.6 References

- ▶ Council of Europe (n.d.) [Quick Response Mechanism \(QRM\)](#).
- ▶ Council of Europe (n.d.). [South Programme III](#).
- ▶ Council of Europe (2015). Action Plan for Ukraine 2015-2017.

- ▶ Council of Europe (2017). Venezuela – opinion on the legal issues raised by Decree 2878 of 23 May 2017 of the President of the Republic on calling elections to a national constituent Assembly, endorsed by the Venice Commission at its 112th Plenary Session.
- ▶ Council of Europe (2018). Action Plan for Ukraine 2018-2022.
- ▶ Council of Europe (2019). [On the constitutional implications of the ratification of the Council of Europe Convention on preventing and combating violence against women and domestic violence \(Istanbul Convention\)](#).
- ▶ Council of Europe (2019). Ukraine – Amicus Curiae Brief for the Constitutional Court of Ukraine on draft law 10257 on the early termination of a Deputy's mandate, adopted by the Venice Commission at its 121st Plenary Session (Venice, 6-7 December 2019).
- ▶ Council of Europe (2020). [Urgent joint amicus curiae brief on three legal questions](#).
- ▶ Council of Europe (2020), Directorate of Internal Oversight. Terms of References: Evaluation of the European Commission for Democracy through Law (Venice Commission).
- ▶ Council of Europe (2021). Georgia – Joint Opinion of the Venice Commission and the OSCE/ODIHR on amendments to the Election Code, the Law on Political Associations of Citizens and the Rules of Procedure of the Parliament approved by the Council for Democratic Elections at its 71st meeting and adopted by the Venice Commission at its 126th Plenary Session.
- ▶ Council of Europe and European Commission (2014). Statement of intent for the Co-operation between the Council of Europe and the European Commission in the EU Enlargement Region and the Eastern Partnership and Southern Mediterranean Countries (EU Neighbourhood Region).
- ▶ PACE Resolution 1601.
- ▶ Venice Commission (2020). [Republic of Moldova urgent joint opinion on draft law no. 263 amending the electoral code, the contravention code and the code of audiovisual media services](#).

Case study 5 – International co-operation and external relations

This case study analyses the work of the Venice Commission in co-operation with three selected international organisations and with Mexico as example of the work done in Latin America. This international dimension contributes to the global presence of the Venice Commission, reinforces the value of its activities through the reference from well-established institutions, points at the relevance of its work through the growing interest in co-operation in the Americas and, all in all, strengthens the impact of its work worldwide.

5.1 Introduction and description of interventions

Since its creation in 1990, and especially after becoming an Enlarged Agreement, the Venice Commission has continued expanding its scope of work and engaging with countries and international organisations in Europe and beyond. As such, international co-operation by the Venice Commission focuses on dialogue and activities with countries in **Latin America**. On the institutional side, the main co-operation partners are the **European Union (EU)**, the **Organization for Security and Co-operation in Europe (OSCE)** and more recently **the Organization of American States (OAS)**. These three organisations have a special status to the Venice Commission, attend its plenary sessions with one representative and can request opinions.

The following section provides further details of each of these collaborations.

1. Co-operation with international organisations

European Union

The **European Union** is considered the key strategic institutional partner in political, financial and legal terms, as together both entities constitute “the institutional incarnation of the ideal of peace in Europe”.⁶⁹ This provides a solid foundation for a long-term co-operation. In general terms, the Statue of the Venice Commission gives the EU the status of “participant” in the work of the Venice Commission.⁷⁰ Despite this being a rather general statement with no details regarding the actual meaning of such status, which could possibly lead to uncertainty around the legal status of such co-operation, in practice this has not caused any obstacles to successful co-operation between the two entities.⁷¹ Indeed, since the signature of the Memorandum of Understanding between the EU and the Council of Europe in 2007,⁷² both partners have continued to strengthen their co-operation along three main pillars: **political dialogue, legal co-operation and programmatic co-operation**.

This is the case, on the one hand, in relation to the internal operation of the EU, in the form of **exchanges of views, practical advice and legal co-operation with the agencies and institutions of the EU**. For example, the Venice Commission has participated in consultations with the EU bodies on various issues concerning EU policies and its relations with countries, for example members of the EU, candidate states and neighbourhood states. It is customary for the Venice Commission to provide input to the ongoing EU efforts to support reforms in these states, whereas the EU systematically invites countries to follow the recommendations issued.⁷³ Interactions take place with the European Commission (for example help with the rule of law report and Review Cycle, and co-operation with the Legal Services), the European Council (strengthening of synergies of EU foreign policy with the Political and Security Committee), the European Parliament and its committees⁷⁴ (for example in the form of reference to the Venice Commission’s work in country-specific resolutions), the European Committee of the Regions and other EU institutions.⁷⁵ In addition, the **standards** developed by the Venice Commission on a range of topics are taken into consideration and adopted by the EU, be it in the form of general statements (for example the Code of Good Practice in Electoral Matters of 2002 and the Rule of Law Checklist of 2016), or with reference to a specific country, such as in the case of EU candidate countries.

69 Council of Europe (2021). Summary report on co-operation between the Council of Europe and the European Union, 131st Session of the Committee of Ministers, CM(2021)25-final.

70 Article 2 (6) of the [Resolution \(2002\) 3](#) of the Committee of Ministers of the Council of Europe.

71 Suchocka et al. (2016), EU engagement with other European regional organisations, Fostering Human Rights among European Policies, European Commission.

72 [Mémorandum d'accord CE_UE anglais.PDF \(coe.int\)](#).

73 Annual report of activities 2020.

74 Council of Europe (2021). Summary report on co-operation between the Council of Europe and the European Union, 131st Session of the Committee of Ministers, CM(2021)25-final.

75 For example, representatives of the European Union Agency for Fundamental Rights, the Legal Service and DG Justice, the European External Action Service as well as from the Committee of the Regions participated in the plenary sessions of the Venice Commission in 2016.

On the other hand, external co-operation with the EU is built on the implementation of **joint programmes (JP)** between the EU and the Council of Europe in several countries (for example the Horizontal Facility, the Partnership for Good Governance and the South Programme),⁷⁶ with the EU remaining the largest donor to the Council of Europe's technical co-operation activities.

Within the formal framework of co-operation, the EU can request formal opinions from the Venice Commission. Until recently, however, this had been the case only twice: for Bosnia and Herzegovina⁷⁷ and for Bolivia.⁷⁸ In 2020, the European Parliament issued for the first time a request to the Venice Commission, mainly for a comparative report on the measures taken by member states during the Covid-19 crisis. Besides formal requests by the EU, on some occasions EU representatives have triggered national requests to the Venice Commission, often in the context of the EU enlargement policy and negotiations with specific countries such as Kosovo* (1998/99), negotiations between Serbia and Montenegro (2002/2003) and Montenegro (2006).

In order to increase the **strategic dimension of the co-operation**, the EU has issued its priorities for co-operation with the Council of Europe since 2012, which are adopted every two years by the Council of the EU. In the latest publication for 2020-2022, the EU highlights the importance of co-operating with the Council of Europe, and the Venice Commission in particular, as it benefits from the "know-how of the Venice Commission to help improve constitutional standards and electoral law".⁷⁹ In addition, its contributions to reform processes such as judicial and governance processes, and to candidate countries and potential candidates, as well as in the European Neighbourhood Policy (ENP) countries, are mentioned as areas in which the EU seeks to strengthen the co-operation. Indeed, the EU stresses its interest in levelling up the co-operation in the promotion of democracy in Latin America and North Africa and in establishing regular exchanges with the Venice Commission Secretariat on electoral law standards.

Organization for Security and Co-operation in Europe – Office for Democratic Institutions and Human Rights (OSCE/ODIHR)

The partnership and long-standing alliance with the **Organization for Security and Co-operation in Europe (OSCE)** started in the early 1990s in the electoral field with the establishment of its Office for Democratic Institutions and Human Rights (OSCE/ODIHR). Primarily motivated by the need to avoid "forum shopping", understood as countries consulting with several international organisations on the same topic, this partnership further ensures that the two entities take a joint approach and speak with one voice. Their shared expertise has taken the form of **joint legal opinions** and **joint elections-related legal reviews** since 2002 and, from 2005 onwards, in other areas such as freedom of assembly and association, political party regulation and freedom of religion.

In addition, **exchanges of views and participation in each other's events** for mutual visibility are the main forms of co-operation, including the participation in ODIHR seminars and conferences, participation in ODIHR electoral events and, from the OSCE's side, participation in the European Conference of Electoral Management Bodies on Election Dispute resolution. Representatives of the OSCE/ODIHR participate in the plenary sessions of the Venice Commission, and the latter regularly attends the OSCE Human Dimension meetings.

Organization of American States (OAS)

Since 2017, the Venice Commission has co-operated with the **Organization of American States (OAS)**. Indeed, the two organisations signed a co-operation agreement in June 2020 with the aim of establishing the fields of their common action.⁸⁰ Representatives of both organisations have so far participated in their **respective multilateral events**, and the Venice Commission participated, for example, in the 14th Inter-American Meeting of Electoral Management Bodies co-organised by the Department of Electoral Co-operation and Observation of OAS, presenting the best practices in electoral reform processes. In addition, the Venice Commission has **co-organised activities in the electoral field**, for example in Argentina and Mexico in 2019, and prepared an **opinion** on the question of confidence upon request from the Peruvian authorities.

⁷⁶ For the purpose of this evaluation, EU-Council of Europe Joint Programmes are discussed under the thematic area Technical co-operation and case study 4.

⁷⁷ Opinion on legal certainty and the independence of the Judiciary in Bosnia and Herzegovina – CDL-AD (2012)014.

⁷⁸ Opinion on the draft code of constitutional procedure of Bolivia – CDL-AD (2011)038.

⁷⁹ Council of the European Union, 2020, "Council Conclusions on EU priorities for co-operation with the Council of Europe 2020-2022", §24, available at <https://data.consilium.europa.eu/doc/document/ST-9177-2020-INIT/en/pdf>.

⁸⁰ Co-operation agreement on strengthening democracy and supporting reforms of electoral legislation and practice between the European Commission for Democracy through Law of the Council of Europe (Venice Commission) and the General Secretariat of the Organization of American States, 2021, available at www.oas.org/es/sla/ddi/docs/acuerdos_bilaterales_13-2021.PDF.

2. Co-operation with Mexico

Since joining the Venice Commission in 2010,⁸¹ Mexico has benefited from its work mainly through the Supreme Court and the Electoral Tribunal of the Federal Judiciary of Mexico (TEPJF), which attend the plenary sessions, contribute to legal opinions on consultations from other member states and participate in the World Conference on Constitutional Justice.⁸² Two opinions have been issued, the **opinion on the electoral legislation of Mexico** (CDL-AD(2013)021-e) and the **opinion on constitutional reforms relating to the disappearance and murder of a great number of women and girls in Mexico** (CDL-AD(2005)006-e).

As for events, representatives of the Venice Commission have participated in and presented at events organised by different Mexican authorities, such as the “International conference on electoral justice by the Mexican Electoral Tribunal” (August 2016) and the International Seminar “Politics and Money: Democracy vs Corruption” by the National Electoral Institute of Mexico (2015, 2017). The international congress “Implementation of international human rights treaties in national legislation, focusing in particular on electoral rights” (October 2013) served to launch a new study on the implementation of international treaties on human rights in domestic law, produced together with the Venice Commission. The TEPJF has further played a key role in the creation of the **Global Network on Electoral Justice**, a network which aims to enable specialised debate about the main regulatory, theoretical and practical challenges encountered by entities involved in the field of electoral justice and the rule of law, and which regularly counts on the participation of Venice Commission members.⁸³ Furthermore, Mexico hosted the first meeting of the sub-commission on Latin America.

Also especially relevant for the co-operation with Mexico is the **VOTA Database** on electoral legislation, managed through a co-operation agreement with the Electoral Tribunal of the TEPJF since 2012. Created within the framework of the joint programme between the Venice Commission and the European Commission “Democracy through free and fair elections” in 2003,⁸⁴ the VOTA Database contains electoral legislation, constitutional provisions and Venice Commission documents in the electoral field. It was updated in 2018 to include a total of 488 texts in English, French or Spanish.⁸⁵

In addition, the Venice Commission signed a memorandum of understanding with the National Electoral Institute (INE) in March 2019 which highlights the shared commitment to promote good practices in the field of electoral legislation and practice.⁸⁶

5.2 Evaluation of the Venice Commission’s interventions in focus

1. Relevance

The recognition by other international organisations such as the OSCE/ODIHR, OAS and the European Union institutions in the form of formal partnerships (the EU is a member of the Venice Commission with special status) and reference to its work in different contexts is evidence not only of the relevance of the Venice Commission’s work but ultimately of its role as an independent body contributing to the promotion and strengthening of international standards. This is shown by the frequent exchanges with different EU bodies, which rely on the Venice Commission’s expertise and recommendations to the point of making implementation conditional for financial and political purposes. Indeed, the assistance provided to candidate countries to adjust their legal framework, procedures and institutions with a view to fulfilling EU accession criteria is a key contribution of the Venice Commission, with Serbia and Georgia being recent examples. In 2020, the Covid-19 pandemic led the European Parliament to make its first request ever to the Venice Commission, asking for a report on the measures implemented at national level. This suggests that the Venice Commission is also today considered a relevant partner in the Council of Europe’s mission to uphold human rights, democracy and the rule of law and a crucial partner by international organisations in Europe.

As for institutions beyond Europe, the relevance is exemplified by the long-standing and expanding co-operation with the OSCE/ODIHR, a partnership which initially covered the electoral field and moved on to also cover other topics in recent years, indicating the mutual benefit of this co-operation. Similarly, the partnership with the OAS points to the relevance of the Venice Commission’s work also for the Americas. In this region,

⁸¹ Source available at www.venice.coe.int/WebForms/pages/default.aspx?p=03_Mandates_members&lang=EN.

⁸² Source available at www.scjn.gob.mx/relaciones-institucionales/en/comision-de-venecia.

⁸³ Information note Global Network on Electoral Justice, available at www.te.gob.mx/red_mundial/media/pdf/ee035b3245b56f4.pdf.

⁸⁴ The VOTA Database is available at www.te.gob.mx/vota_elections/.

⁸⁵ Source available at www.venice.coe.int/webforms/events/?id=2584.

⁸⁶ Annual report of activities 2020.

the increasing number of member states of the Venice Commission and the widespread interest in its work is the clearest evidence of its relevance. Indeed, the increasing interest and demand by countries for support from the Venice Commission in Latin America, accompanied by the increase in number of activities organised in the area, suggests that the Venice Commission's work and ways of working are considered relevant and beneficial by the authorities involved.

As for national authorities themselves, reference to the Venice Commission's opinions in Latin America indicates that its recommendations address key areas of development, for example in Mexico but also in Peru or Colombia. As for Mexico itself, although it has only benefited from two opinions, the close collaboration especially in the electoral field, for example with the VOTA database and in the organisation of events, and its leading role within Latin America, for example hosting the sub-commission on Latin America, serve as indication of the perceived role and relevance of the Venice Commission. This diversity in collaboration opportunities could serve as an example of the interest by Mexican authorities in benefiting from the Venice Commission's work.

2. Effectiveness

Coherence and complementarity of the work done by the Venice Commission and international organisations in co-operation are the two main dimensions for strong effectiveness in the consolidation of human rights, democracy and the rule of law in Europe and beyond. As such, joint efforts through structured co-operation agreements with institutions (EU and OAS) but also ad hoc efforts on shared thematic interests with the co-organisation and participation of events, in and outside Europe and Latin America specifically, could be understood as leading to increasing effectiveness of the Venice Commission's work. Shared opinions and joint reports allow the sending of a co-ordinated message with one voice to the international community, thereby being mutually reinforcing. Indeed, where opinions are prepared jointly, for example with OSCE/ODIHR, additional pressure is exercised on the given state.⁸⁷

In addition, the political pressure from the European Union, for example on candidate countries to follow the Venice Commission's recommendations, often contribute to implementation, thereby increasing the effectiveness of non-binding recommendations. For example, Moldova requested the assistance of the Venice Commission regarding draft amendments developed in order to implement the National Action Plan for the Republic of Moldova – European Union Association Agreement for the period of 2017-2019, also reflected in the Legislative Programme for the Implementation of the Association Agreement between the Republic of Moldova and the European Union for 2017.⁸⁸

In order to maximise effectiveness, a balance is to be found between joint efforts and timely action, so as to avoid a negative impact on effectiveness by bureaucratic procedures and internal co-ordination due to differences in working methods across institutions. In addition, interview feedback suggests that the large workload of the Venice Commission in the last few years has resulted in the prioritisation of opinions and limited participation in other types of activities such as events. As this is one of the main forms of co-operation with international institutions in terms of visibility and awareness raising of opinions, standards and best practices, an appropriate balance is to be found to dedicate enough resources to these forms of events.

Furthermore, field offices of international organisations and EU delegations, in addition to the Council of Europe's offices, could be further engaged to provide insights on the local context in advance of drafting an opinion. International actors in the field are well placed to share insights on the political nuances and could be, it has been suggested, involved further so as to increase the knowledge exchange and further strengthen the international co-operation dimension.

3. Efficiency

Joint efforts to the benefit of shared objectives, for example in the form of exchanges of views and consultation for mutual expertise, can be seen as efficient ways of pursuing common goals among institutions. Also, the drafting of joint opinions and reports with the OSCE/ODIHR or the co-organisation of events with a wide range of institutions as relevant can be seen as an effective use of resources by all parties involved, especially considering that costs for events are often covered by the host country or the organising entity.

Behind the scenes, the efforts among institutions to co-ordinate assistance through formal and informal channels to a given country further constitute an efficient way of achieving a shared goal. This is considered

⁸⁷ Buquicchio G. and Granata-Menghini S. (2013), "The Venice Commission Twenty Years on. Challenge met but Challenges ahead", in van Rosmalen M., Vermeulen B., van Hoof F. and Oostling M. (eds), *Fundamental Rights and Principles*, Liber amicorum Pieter van Dijk, Cambridge, Antwerp, Portland (Intersentia 2013), p. 241.

⁸⁸ CDL-AD(2020)001.

to work well for example with the OSCE/ODIHR, where regular communication takes place. There is some room for improvement, however, in the area of external communication, where interviewees suggested that better individual and shared dissemination and promotion of joint opinions could help increase the visibility of all institutions involved.

Timelines are generally kept tentative as they often remain dependent on developments in the field, and flexibility is generally considered key in the co-operation among institutions. Resources dedicated to co-operation are limited. The institutional co-operation relies mainly on shared efforts and joint expertise and is assessed on a case-by-case basis.

As for co-operation with Latin America, resources are highlighted as a challenge for some member states to attend plenary sessions in Venice, given the geographical distance. Some countries struggle to cover the annual fee to the Venice Commission, resulting in payment delays. The openness of some events hosted in the area to experts from non-member states such as Brazil and Colombia need to be balanced with the benefit of increasing visibility and reach. Instead, these countries could be encouraged to join and contribute, if considered to fulfil the required criteria, to fully benefit from the Venice Commission's work.

4. Impact

Co-operation with international organisations contributes to increasing the impact of the Venice Commission and its work. Although recommendations issued to individual countries are non-binding, the literature points at their “*de facto* binding” nature, for example for EU candidate countries. Indeed, as the European Union invites members and candidate states to follow Venice Commission recommendations, an opinion issued for a candidate member “will – almost without exception – impact its accession negotiations”.⁸⁹ The Venice Commission is also referenced in those cases in which the EU considers that the European standards of democracy, rule of law and human rights are at risk in EU member states, most recently in Poland and Hungary, for instance. The EU-Venice Commission co-operation has contributed – and continues to do so – to the Venice Commission's reach and impact as its recommendations guide the countries at stake and contribute to decision making within the European Union itself.⁹⁰

Furthermore, the EU has tied the implementation of Venice Commission recommendations to macro-financial assistance, thereby increasing the impact of the opinions in countries otherwise reluctant to implement them; Georgia is an example. Other political players such as the International Monetary Fund of the World Bank have also linked substantive funding to individual countries, for example Ukraine, to following the Venice Commission's recommendations.

As noted in the effectiveness dimension, joint positions with the OSCE/ODIHR on specific matters further strengthens the impact of the Venice Commission, as does, in a softer way, participating in national and international events. Offering a physical presence in order to share its expertise and provide visibility to and a better understanding of issued opinions, guidelines and reports is highlighted as an important contribution to further maximising the impact of the work done, currently limited by lack of resources.

Reference by courts at national and local level, for example in Mexico and Peru, further reinforce the impact of the Venice Commission and its outputs in Latin America. This was recently the case by the Inter-American Court of Human Rights (IACHR) quoting the report issued by the Venice Commission regarding the term limits for presidents,⁹¹ which concludes that re-election is not a fundamental right in itself. The IACHR explicitly referencing the Venice Commission's conclusions in its ruling⁹² and ruling in a similar fashion highlights the reliability and credibility of the Venice Commission, especially given the impact such opinion has had in Latin America as a region, in countries such as Venezuela, Bolivia and Nicaragua, and will have in the future.

5.2 Achievements and challenges

In terms of **achievements**, the Venice Commission has managed to successfully partner and co-ordinate efforts where relevant with international organisations like the EU, OSCE/ODIHR and OAS to promote values and standards for the benefit of the broader international community. These partnerships have evolved in an

⁸⁹ Buquicchio G and Granata-Menghini S., “Advisory or *de facto* binding? Follow up to the Venice Commission's opinions: between reality and perception”.

⁹⁰ Source: Suchocka.

⁹¹ Venice Commission (2018). *Report on term limits: Part I – Presidents*, CDL-AD(2018)010, available at [www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2018\)010-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2018)010-e).

⁹² Corte Interamericana de Derechos Humanos (2021). Opinion consultiva OC-28/21, available at www.corteidh.or.cr/docs/opiniones/seriea_28_esp.pdf.

organic manner, increasing in intensity and scope, and taken on an increasingly strategic approach in the last few years in the form of memorandums of understanding (MoU) with the OAS (2020) and to some extent with the EU through the EU-Council of Europe MoU (2007). In that sense, the biennial joint priorities of the Council of Europe and the EU is a promising development which could be emulated by other international organisations.

In Latin America, Mexico's leading role and diverse co-operation with the Venice Commission has served as channel to share their electoral best practices with the wider Latin American and Venice Commission community, and contributed to bringing its work closer to the continent. By hosting the first ever meeting of the sub-commission on Latin America, Mexico contributes to increasing the visibility of the Venice Commission beyond Europe. The flexibility in working methods of the Venice Commission has allowed Mexico to engage in a broad range of ways, which benefits the broader Spanish-speaking community, for example with the translation of the VOTA database content into Spanish.

The main **challenges** concern the timely and delicate nature of much of the Venice Commission's work, for example when it comes to urgent opinions, as working methods with other international organisations, including the dissemination and communication strategy, can differ. The Venice Commission benefits from a greater political independence than other such institutions, which makes it vital to keep the balance between maintaining its flexibility when addressing matters of democracy, rule of law and fundamental rights and finding a way to maximise these partnerships.

This is the case especially in the context of the EU-Venice Commission relationship. The risk of the Venice Commission being perceived as too closely linked to the EU interests, for example due to the use of its opinions in accession negotiations and through its large contribution to joint activities and technical assistance projects, could affect its status of independent legal adviser in the eyes of some national institutions. A delicate balance is to be kept to maximise the partnership without compromising independence.

In addition, legal critical views based on the interpretation of European democratic tradition and standards might meet resistance especially beyond Europe and be considered to interfere with state sovereignty.⁹³ This is the case in some Latin American countries, where its methodology for the drawing up of opinions, a balanced team of rapporteurs from different nationalities and areas of expertise, and independent legal assistance approach serve as tools for overcoming this challenge.

5.3 Conclusions and lessons learned

All in all, the co-operation with international organisations of a similar mission has strengthened the impact of the Venice Commission's work and served as a channel to unite efforts and speak with one voice. Although the strategic joint approach could in some cases be improved, a balance needs to be kept between independence of all these institutions and their shared pursuit of assisting countries undergoing reforms in the field of democracy, fundamental rights and the rule of law. It is important to maintain the flexibility to maximise their joint relevance and impact, keeping their individual priorities in mind and the need to respond quickly and effectively. Recognising different working methods across institutions could allow this to be tackled better.

The special role of the EU and its close collaboration with the Venice Commission especially vis-à-vis the Venice Commission's involvement in the EU's political structures and procedures, for example the infringement procedure⁹⁴ in Article 7 of the Memorandum of Understanding between the Council of Europe and the European Union, to ensure compliance by EU member states with EU fundamental values, principles and legal framework in the area of democracy, the rule of law and human rights, calls for special attention to maintaining the Venice Commission's political neutrality, independence and recognised authority. The perception of the Venice Commission as body providing rigorous, well-informed and comparative legal advice independent from other external political forces beyond its formal status is key to ensuring continuous impact.

The work of the Venice Commission in Latin America, distant from Europe geographically and to some extent in political culture and traditions, is based on the recognition of diversity. While respecting fundamental standards, the exchange of best practices from Europe, close co-operation in specific areas, for example Mexico sharing its expertise in the electoral field, and the interest from members to further maximise the role of the sub-commission on Latin America, all highlight the relevant work the Venice Commission does in the region. While the leadership role, proactivity and efforts of individual members of the Venice Commission is crucial to

93 Chané A.L. et. Al. (2016). EU engagement with other European regional organisations. Fostering Human Rights among European Policies (FRAME).

94 European Commission. Infringement procedure, available at https://ec.europa.eu/info/law/law-making-process/applying-eu-law/infringement-procedure_en.

driving and maximising the role of the sub-commission, its legitimacy could be increased by encouraging other countries in the region to fulfil the criteria to join the Venice Commission, be it as a member or an observer.

The role of the Venice Commission in Latin America could be further maximised by facilitating the participation of Latin American members in the plenary sessions by (partially) funding the trips or holding the sessions remotely through digital communication channels, by increasing the presence and participation in events in the continent and by translating more documents into French and Spanish, possibly even offering simultaneous translation into Spanish at the plenary sessions. The language barrier is considered a key challenge to the full participation of Latin American countries, which at the same time could further benefit from the Venice Commission's valuable work. Finally, the meetings of the sub-commission in Latin America have contributed to increasing the visibility of the Venice Commission in the region, which could be further strengthened by hosting these on a rotational basis across countries.

5.4 References

- ▶ Annual reports of activities of the Venice Commission 2016, 2017, 2018, 2019, and 2020.
- ▶ Buquicchio G. and Granata-Menghini S. (2013), "The Venice Commission twenty years on. Challenge met but challenges ahead", in van Roosmalen M., Vermeulen B., van Hoof F. and Oostling M. (eds), *Fundamental Rights and Principles*, Liber amicorum Pieter van Dijk, Cambridge, Antwerp, Portland (Intersentia 2013), p. 241.
- ▶ Buquicchio G. and Granata-Menghini S., "Advisory or de facto binding? Follow up to the Venice Commission's opinions: between reality and perception".
- ▶ Chané A. L. et al. (2016). EU engagement with other European regional organisations. Fostering Human Rights among European Policies (FRAME), European Commission, Large-Scale FP7 Collaborative Project GA No. 320000.
- ▶ Clayton R., QC (2019), "The Venice Commission and the rule of law crisis", in *Public Law*, July P.L., Issue 3, Thomson Reuters and Contributors, pp. 450-460.
- ▶ Co-operation agreement on strengthening democracy and supporting reforms of electoral legislation and practice between the European Commission for Democracy through Law of the Council of Europe (Venice Commission) and the General Secretariat of the Organisation of American states. (2021). Bilateral agreement, March 2021, available at www.oas.org/es/sla/ddi/docs/acuerdos_bilaterales_13-2021.PDF.
- ▶ Council of Europe (2016). Meeting Report of the Sub-Commission on Latin America, Chile, December 2015, European Commission for Democracy through Law, CDL-LA-PV(2015)001.
- ▶ Council of Europe (2017). Evaluation of the Council of Europe Support to the Implementation of the ECHR at National Level. Final report, Directorate of Internal Oversight.
- ▶ Council of Europe (2021). Summary report on co-operation between the Council of Europe and the European Union, 131st Session of the Committee of Ministers, CM(2021)25-final.
- ▶ Council of the European Union (2020). "Council Conclusions on EU priorities for co-operation with the Council of Europe 2020-2022", available at <https://data.consilium.europa.eu/doc/document/ST-9177-2020-INIT/en/pdf>.
- ▶ Craig P. (2016), "Transnational Constitution-Making: The Contribution of the Venice Commission on Law and Democracy", in *UCI Journal of International, Transnational and Comparative Law*, University of Oxford, Faculty of Law, 1 October 2016.
- ▶ European Parliament (2021). "Strengthening co-operation with the Council of Europe", Study commissioned by the Policy Department for Citizens' Rights and Constitutional Affairs at the request of the AFCO committee.
- ▶ European Parliamentary Research Service (2018). European Union – Council of Europe co-operation and joint programmes.
- ▶ Gonzalez Oropeza M. (2021), "Rule of law on the international context: 30 Years of the Venice Commission", Universidad Autónoma de México (UNAM), in *LEX*, January 2021, pp. 6-13 (original language Spanish).
- ▶ Memorandum of Understanding between the Council of Europe and the European Union, May 2007
- ▶ Multilateralism 2020, Annual report of the Secretary General of the Council of Europe, June 2020.
- ▶ OSCE Office for Democratic Institutions and Human Rights (ODIHR) (2021). Democracy and Human Rights in the OSCE, Annual Report 2020, available at www.osce.org/odihr/annual-report/2020.