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# The Venice Commission of the European Council – Standards and Impact

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## Abstract

*The article analyses the activities of the European Commission for Democracy through Law. Addressed are the standards applied in the Commission's opinions, especially on constitutional provisions and other legal norms or drafts. The article looks at the impact that these (non-binding) opinions have on the states concerned as well as on the European Court of Human Rights. Though recommendations are sometimes disregarded, most states do react positively, at least in part. To some extent the Commission could enhance the effect of its opinions by joining forces with other relevant institutions in the field, especially the Council of Europe and the European Commission. Endorsing and implementing recommendations gives states an opportunity to share in the reputation that comes with being part of a community founded on Human Rights, the Rule of Law, and Democracy. An overall assessment is made of the Commission's approach to its work.*

## 1 The Venice Commission

One of the challenging tasks of the 21st century is continuing the development of democracy. In this area, an important contribution is being made by the European Commission for Democracy through Law, an institution of the Council of Europe<sup>1</sup> that has proved to be relatively effective in providing guidance where politics and law

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<sup>1</sup> See Res. (2002)3 adopting the Revised Statute of the European Commission for Democracy through Law (adopted by the Committee of Ministers on 21 Feb. 2002); concerning the VC see, *inter alia*, S. Rülke, *Venedig-Kommission und Verfassungsgerichtsbarkeit: Eine Untersuchung über den Beitrag des Europarates zur Verfassungsentwicklung in Mittel- und Osteuropa* (2003); Ubeda de Torres, 'La régionalisation par la coordination interétatique: le rôle catalyseur de la Commission de Venise', in S. Doumbé-Billé (ed.), *La régionalisation du droit international* (2012); Buquicchio and Granata-Menghini, 'The Venice Commission Twenty Years On. Challenge Met but Challenges Ahead', in M. van Roosmalen et al. (eds), *Fundamental Rights and Principles – Liber amicorum Pieter van Dijk* (2013), at 241 ff; further articles on the Venice Commission are listed on the website of the VC: [www.venice.coe.int](http://www.venice.coe.int).

converge. Since this Commission holds each of its four annual meetings in Venice, it is called the ‘Venice Commission’ – hereinafter abbreviated as the VC.

Currently, the VC can count 58 states as members. Among these are all 47 states of the Council of Europe, as well as other countries in Europe, Africa, North and South America, and Asia. The Commission’s main task<sup>2</sup> is to issue opinions on its own initiative or – as usual – at the request of institutions authorized to ask for an opinion.<sup>3</sup> Most of the VC’s opinions deal with constitutional provisions and other legal norms, or drafts of them. The VC also prepares studies, *amicus curiae* briefs, reports, and guidelines for its practice based on earlier opinions.<sup>4</sup> In the following, the term ‘opinion’ will be used for all these statements.

This article first addresses the standards applied by the VC when developing its opinions. It then looks at the effects that these opinions have on the parties to whom they are addressed, as well as on other institutions, such as the European Court of Human Rights (ECtHR). Finally, an overall assessment is made of the VC’s approach to its work. The analysis will address mainly written documents, specifically those that the *plenum* has adopted based on preliminary work by *rapporteurs*, the Secretariat, or, in some cases, a sub-commission.<sup>5</sup>

## 2 Standards

### A *Soft Law and Soft Instruments*

Common to all opinions of the VC is the fact that they are not legally binding. They are at most soft law.<sup>6</sup> The work of the VC provides examples for the general observation that the increased internationalization of the law is accompanied by a growing fragmentation of norms.<sup>7</sup> Traditional hard law is increasingly complemented and/or replaced by soft law. The concept of soft law includes norms that are legally

<sup>2</sup> The VC also makes use of conferences and seminars to fulfil its task of training.

<sup>3</sup> See Revised Statute, *supra* note 1, at Art. 3(2).

<sup>4</sup> See, e.g., OSCE/ODIHR-Venice Commission Guidelines on Freedom of Peaceful Assembly (2nd edn, CDL-AD(2010)020, 4 June 2010); OSCE/ODIHR-Venice Commission Guidelines for Review of Legislation Pertaining to Freedom of Religion (2nd edn (in preparation), CDL(2010)046).

<sup>5</sup> The following analysis draws on the author’s personal experience and insights as a member of the Venice Commission.

<sup>6</sup> Concerning soft law in general cf. Friedman, ‘Borders: On the Emerging Sociology of Transnational Law’, 32 *Stanford J Int’l L* (1996) 65; L. Senden, *Soft Law in European Community Law* (2003); Fischer-Lescano and Teubner, ‘Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law’, 25 *Michigan J Int’l L* (2009) 999, at 1008 ff; V. Boehme-Nesler, *Unschärfes Recht: Überlegungen zur Relativierung des Rechts in der digitalisierten Welt* (2008); N. C. Ipsen, *Private Normenordnungen als Transnationales Recht?* (2009), at 29 ff; G.E. Schuppert, *Governance und Rechtsetzung: Grundfragen einer modernen Regelungswissenschaft* (2011); Peters, ‘Soft Law as a New Mode of Governance’, in U. Diederichs, W. Reiners, and W. Wessels (eds), *The Dynamics of Change in EU Governance* (2011) 21.

<sup>7</sup> Fischer-Lescano and Teubner, *supra* note 6; Koskenniemi, ‘Legal Fragmentation(s): An Essay on Fluidity and Form’, in G.-P. Calliess *et al.* (eds), *Soziologische Jurisprudenz: Festschrift für Gunther Teubner zum 65. Geburtstag* (2009), at 795; Sieber, ‘Rechtliche Ordnung in einer globalen Welt’, 41 *Rechtstheorie* (2010) 151, referring to a ‘fragmented system of national, international, and private norms’.

non-binding, or binding to only a very limited extent, and lack sovereign enforceability/sanctionability, but nevertheless provide other *stimuli* for compliance and thus for enabling effectiveness. Soft instruments can implement soft law – as well as hard law – and/or add to its efficacy. Soft instruments dispense with legal formality and, above all, with legal bindingness. They include critical evaluations, moral persuasion, recommendations etc.

## **B Examples of How Standards are Developed by the VC**

In carrying out its mandate, the VC develops standards that it derives from hard law, such as the European Convention on Human Rights (ECHR). But it also goes beyond this basic task. The objective is to identify best practices through a comparison of the bodies of rules and concepts in place in various member states, and also to develop standards through benchmarking. The standards are intended to serve as a guide in developing the rule of law and democracy, both for the VC's own work as well as for the practical application by states. In some cases, the VC expressly elaborates on these standards in its opinions, but usually it applies them as a matter of course.<sup>8</sup>

An instructive example of express elaboration on the development of standards can be found in the Report on the Independence of the Judicial System (Part I).<sup>9</sup> Here, the VC drew on the ECHR, Article 10 of the Universal Declaration of Human Rights, and standards developed by the UN for the independence of the judiciary.<sup>10</sup> However, it also relied on previous VC opinions, as well as on documents from other institutions.<sup>11</sup> The requirements it developed in the process serve as indicators for common normative premises and as a source of inspiration for new regulations, too. This is a technique that – in principle – is also used by the ECtHR in interpreting and applying the ECHR.<sup>12</sup>

Below, I will attempt to systematize several elements that the VC uses in developing standards.

## **C In Particular: Hard Law as a Standard**

A standard that the VC continuously relies upon is the ECHR and its concretization through interpretation and application by the ECtHR as 'hard law'. This law constitutes the absolute minimum standard for the VC.<sup>13</sup> States that do not belong to the Council of Europe but that participate in the work of the VC or request opinions from it

<sup>8</sup> The VC's opinion on legal issues concerning the ban on political parties in Turkey exemplifies how it expressly addresses the origin and quality of standards: Opinion on the Constitutional and Legal Provisions Relevant to the Prohibition of Political Parties in Turkey, CDL-AD(2009)006, 13/14 Mar. 2009, at paras 11–12.

<sup>9</sup> Report on the Independence of the Judicial System Part I: The Independence of Judges, CDL-AD(2010)004, 12/13 Mar. 2010.

<sup>10</sup> *Ibid.*, at para. 18.

<sup>11</sup> *Ibid.*, at paras 15–17.

<sup>12</sup> Cf. App. No. 34503/97, *Demir and Baykara v. Turkey*, ECHR (2008), at 60 ff.

<sup>13</sup> Cf. *inter alia* Opinion on the Constitutional and Legal Provisions relevant to the Prohibition of Political Parties in Turkey, *supra* note 8, at para. 62.

accept – to a certain extent, implicitly – the legal standards contained in the ECHR for opinions by the VC. In any event, these standards are applied to them as well.

When it comes to developing general standards, the VC tends to deal with the ECHR and international treaties, such as the human rights covenants, and other sources of law in cursory fashion and refrains from examining in detail to what extent they contain entirely identical standards and consequences. Rather, it looks more for general principles than for detailed regulations applicable to the case at issue.

To the extent that the VC relies on shared legal traditions – for instance when elaborating on best practices or when benchmarking – the standards become enshrined not only in written law but also in practices and traditions, i.e., also in the practical experiences of states and the international community.

### ***D In Particular: Soft Law as a Source of Standards***

While not making a clear delineation when relying on hard law, the VC does draw on a variety of documents that are more in the character of mere soft law. Examples of soft law include recommendations of the Committee of Ministers, the Parliamentary Assembly of the Council of Europe, and its committees.<sup>14</sup>

The standards that the VC acquires from other sources generally contain significant latitude for concretization when they are applied to the case at issue, since they normally remain at the level of general principles. To this extent, the VC also creates standards autonomously and later feeds them into other decisions as if they were virtually self-evident. Such methods for developing and refining standards in a self-referential manner are not unique to the work of the VC, but rather can be found, for instance, in recommendations of the Parliamentary Assembly of the Council of Europe and in decisions of constitutional courts. In addition, guidelines, such as the one on freedom of assembly,<sup>15</sup> show that a wealth of detail-oriented standards can be developed in case practice.

### ***E Legitimacy of the Development of Standards***

The development of standards is very dynamic. It therefore must necessarily take into account not only existing bodies of rules, shared values, and comparable traditions, but also how the substance of standards is structured. In this respect, the VC's work is undeniably characterized by political elements, too.

The VC derives its formal legitimacy for this purpose from its statute. Its members participate by virtue of their appointment by the member states, i.e., by their respective governments.<sup>16</sup> If the VC were to make binding decisions, the foregoing would be insufficient in terms of the requirements for democratic legitimacy. However, as its opinions need to be implemented by the states concerned, which in so doing have to adhere to the requirements for democratic decision-making applicable to them, this does not

<sup>14</sup> Cf. Statute of the Council of Europe, Arts 15(b) and 20.

<sup>15</sup> Cf. *supra* note 4.

<sup>16</sup> The government of each member state sends one member and one substitute to the VC. The members are to serve in their individual capacity and do not receive or accept any instructions.

constitute a substantial deficit. The individual members of the VC are to act as experts and not as ‘mere’ appliers of the law, comparable to the role of a judge. Otherwise, this would preclude approaches like developing best practices.

Because the VC’s work draws on such experts, this ensures a high degree of diverse experiences, values, and willingness to find solutions. From a procedural standpoint, this plurality is filtered and tied together, particularly by the decision-making authority of the *plenum*. Its opinions normally require (only) a majority of votes.<sup>17</sup> In practice, however, they are almost always unanimous, which is clearly facilitated by the fact that opinions are non-binding. The ability to reach consensus also requires that the individual members see themselves as having collective responsibility – understood particularly as loyalty to the purpose of the VC – and refrain from unilateral advocacy of interests that ignores the complexity of the subject matter.

## F Flexibility of Standards

Above all, there is a need to be very open to the variety of possibilities for realizing the rule of law and democracy. There is no complete, let alone uniform, model for this. While many alternatives are feasible in theory, practical necessities also demand that the VC be open to different means of achieving its objectives. In doing so, it has to be sensitive to cultural, political, economic, legal, religious, and similar traditions and trends in each of the various societies in which the rule of law and democracy in the modern sense are to take root.<sup>18</sup> In this regard, mention is made of the long-running discussion about the possibility and legitimacy of cooperating with and providing advice to other states, particularly in so-called developing and transition countries.<sup>19</sup>

Transferring the rule of law and democracy is a project associated with a great number of prerequisites. Its success depends on whether and to what extent it is integrated in a process of change that is not restricted to law in the strict sense but also covers societal transformation, as well as structures of governance and their informal organization. At the same time, the VC has to deal with the risk that long-term success might fail due to messianic legal optimism or hegemonic ideas of development work.

The broader the VC’s scope of action and its membership becomes, the more generous it will have to be in acknowledging the features unique to the respective cultures in the relevant societies and when undertaking modelling. For instance, the VC is confronted with this challenge in connection with its advisory activity in states where the ‘Arab Spring’ has led to upheavals. It is by no means appropriate to apply specifically Western European (i.e., also Christian) standards, which have formed the bulk of the VC’s work up to now, as a matter of course and without any modification whatsoever. For example, the idea of individual self-determination and concepts of social justice,

<sup>17</sup> Revised Rules of Procedure, CDL-AD(2004)050, Art. 13(2).

<sup>18</sup> On the need for sensitivity cf. Jowell, ‘The Venice Commission: Disseminating Democracy through Law’, *Public Law* (2001) 675, at 682.

<sup>19</sup> Cf. Riegner and Wischmeyer, ‘“Rechtliche Zusammenarbeit” mit Transformations- und Entwicklungsländern als Gegenstand öffentlich-rechtlicher Forschung’, 50 *Der Staat* (2010) 436, with further references.

as have long informed (Western) European thinking, may need to be redefined. The process of expanding the circle of members, and thus increasing heterogeneity, is an explosive issue for the VC's work that still needs to be defused.

In addition to factors of input legitimacy anchored in the functioning of the VC, there are also factors of output legitimacy. These include, in particular, the practical effects of the results of the VC's work, and especially how those who are affected by VC opinions deal with them. The following section will examine these issues.

### 3 The Impact of Opinions

#### A Dimensions of Effects

Since no systematic studies have been undertaken as to what influence the VC has on the accomplishment of its objectives, the following consists only of my own assessments, which may serve to a certain extent as hypotheses to be explored in further research.

Effects can arise on a variety of levels. Actual effects can most readily be measured by the conclusions drawn by the parties to whom opinions are addressed, such as implementation of or non-compliance with recommendations. The sphere of effectiveness also extends to conclusions drawn by states or institutions from opinions that, while not directly addressed to them, nonetheless have a substantive bearing on them. In addition, effects can also manifest themselves in decisions made by the bodies of the Council of Europe as well as by the ECtHR. The VC summarizes its activities in annual reports, which are submitted to the Council of Ministers of the Council of Europe, where they are then discussed. There is probably also an influence on decisions of the European Union, particularly since in a number of instances the European Commission has taken the initiative to win over the VC for its activities.<sup>20</sup> It is furthermore probable that the work of the VC has an effect on other international organizations and advisory bodies.

A very positive assessment of the VC's work is always to be found in reports and welcoming addresses by representatives from member states and international organizations that are normally delivered at the beginning of the plenary session, for instance by ministers, ambassadors, or presidents of constitutional courts. This part of the plenary session sometimes comes across as a High Mass of praise for the VC, which is certainly attributable to conventions of diplomatic civility. Nonetheless, the great urge to express esteem for the VC points to more than the mere desire to be polite.

The VC also receives public attention in a number of states, particularly by the media and in the work of entities involved in democratic discourse, such as NGOs. The VC Secretariat occasionally – but by no means comprehensively – compiles reactions by the national or international press in the form of press reviews.<sup>21</sup>

<sup>20</sup> For examples see *infra*, at C(4).

<sup>21</sup> An example can be found in the press review of 23 Apr. 2012, 'Venice Commission's opinions on Hungarian Legislation, January–April 2012', available at: [revue.presse@coe.int](mailto:revue.presse@coe.int).

The VC makes available its opinions and important related documents by publishing them on its website.<sup>22</sup> However, the degree to which the public is aware of the VC's work varies. While in some Western European countries the VC is hardly known among journalists and politicians, and its work is rarely reported on, it has a greater public presence in other, mostly Eastern European countries. Opinions affecting these states are mainly reported on by non-governmental media (press, radio, Internet), sometimes even through leaked draft opinions prior to their adoption by the *plenum*. The analyses and recommendations elaborated by the VC find their way into the battleground of political opinion, where they are used to buttress arguments made by the political opposition in the relevant state or by NGOs, as well as by the government itself. Unfortunately, no systematic analysis has yet been made of the extent to which such public reference has political consequences for the VC's opinions.

In what follows two different levels of effects will be addressed: first, how courts view the VC based on its rulings and, secondly, the reactions to opinions in the states concerned.

## B *The Use of Opinions by the ECtHR and Other Courts*

### 1 *ECtHR case law*

The ECtHR has often relied on the VC in its published decisions.<sup>23</sup> Since VC opinions are not legally binding, they cannot be used by the Court as a source of directly applicable standards. That said, the ECtHR does use VC opinions as a source of information, as well as for normative and empirical guidance. It is also possible that the Court seeks in this way to strengthen the acceptance of its decisions.

#### (a) References to the VC

An analysis<sup>24</sup> of the decisions and judgments of the ECtHR from 2001 to mid-2012 shows that the VC was cited in some 71 rulings, frequently in those by the Grand Chamber but also in important holdings by other chambers. Reference has been made, *inter alia*, to 20 opinions and 19 guidelines/reports, with electoral law issues being the most frequent subject matter (40 citations in nine documents). Citation of opinions has increased in matters dealing with the judicial system (15 citations in 10 documents), political parties (16 citations in seven documents), freedom of religion (four citations in one document), and freedom of assembly (two citations in one document).

The majority of references (58) are to be found in the 'Facts' section of the decisions, particularly in the sub-sections 'Relevant International Material/Documents', 'Relevant Domestic and International Law and Practice', and 'Relevant Council

<sup>22</sup> *Supra* note 1.

<sup>23</sup> A compilation of such decisions and respective links can be found on the VC website, *supra* note 1, under 'References', 'European Court of Human Rights'.

<sup>24</sup> At my suggestion, this analysis was undertaken by the law student Anna Schimke, and published under the title, 'Arbeit und Einfluss der Venedig-Kommission des Europarats. Die Gutachten der Venedig-Kommission in der Rechtsprechung des EGMR', 3 *Hamburger Rechtsnotizen* (2013) 1, at 12 ff.

of Europe Material'. In the 'Law' section, they can be found, for example, in the 'Comparative Law'<sup>25</sup> or 'The Court's Assessment' sub-section, for instance in connection with the proportionality test.<sup>26</sup> In some cases, dissenting or concurring opinions<sup>27</sup> also have relied on the VC.

More important than these figures is the contextual relevance of these references to the VC. In the 'Facts' section, excerpts from VC opinions have been reproduced – often *verbatim* – alongside documents of other institutions. In particular, the ECtHR has made references to VC surveys and evaluations on the legal or factual situation, such as on general principles for conflict resolution. In the 'Law' section, references have been made 27 times. Some of these were used to show that the ECtHR and the VC have an identical understanding of the issue or to illustrate that the ECtHR is relying on the VC (and usually on other sources as well). Others indicated that the ECtHR had received information from the VC that was important to its reasoning.

The ECtHR sometimes invites the VC under Article 36(2) ECHR<sup>28</sup> to submit comments as a 'third party', i.e., as *amicus curiae*.<sup>29</sup> In such cases, the VC's position is more than merely cited by the ECtHR – not to mention that VC opinions are also cited in the submissions of other third parties<sup>30</sup> – but may also very well influence the Court's legal reasoning. This can be seen where the ECtHR expressly mentions the VC, as well as when it implicitly refers to it through the (sometimes almost literal) adoption of VC wording.<sup>31</sup> But there are also instances where the ECtHR follows the reasoning of the VC only in part.<sup>32</sup>

### (b) Reflections on the scope of references to the VC

Illustrative of the general degree to which VC opinions are effective is the way in which the ECtHR reflects on how these opinions are to be used. In some cases, these reflections are made in connection with general remarks on interpretation methods, for instance in the 'The Practice of Interpreting Convention Provisions in the Light of Other International Texts and Instruments' sub-section. In one case, the Court noted:<sup>33</sup>

In order to interpret the exact scope of the rights and freedoms guaranteed by the Convention, the Court has, for example, made use of the work of the European Commission for Democracy through Law....

<sup>25</sup> Cf., e.g., App. No. 9103/04, *Georgian Labour Party v. Georgia*, ECHR (2008), at 59.

<sup>26</sup> Cf., e.g., App. No. 71251/01, *Parti nationaliste basque – Organisation régionale d'Iparralde v. France*, ECHR (2007-II), at 45, 47 ff.

<sup>27</sup> Cf. App. No. 74025/01, *Hirst v. The United Kingdom (no. 2)*, ECHR (2005-IX), concurring opinion of Judge Caflisch, at paras 7–8.

<sup>28</sup> Cf. also Annex to Rules of Court, Art. A I, para. 2.

<sup>29</sup> For further details see Bode-Kirchhoff, 'Why the Road from Luxembourg to Strasbourg Leads Through Venice', in K. Dzehtsiarou et al. (eds), *Human Rights Law in Europe: The Influence, Overlaps and Contradictions of the EU and ECHR* (2014) 55, at sect. III. Cf. also *infra*, Section C(4)(e).

<sup>30</sup> Cf. App. No. 41183/02, *Jeličić v. Bosnia and Herzegovina*, ECHR (2005-XII), at A 2.

<sup>31</sup> Cf. the references in Bode-Kirchhoff, *supra* note 29, at sect. III 3 c.

<sup>32</sup> Cf. *ibid.*, at sect. III 3 d.

<sup>33</sup> *Demir and Baykara v. Turkey*, *supra* note 12, at para. 75.



Citations of the references made by the ECtHR follow this remark.

Where the VC finds that there is no uniform regulatory model for problem resolution in the various legal systems, the ECtHR can use this as justification for respecting the discretion afforded to the respective state. This was the case, for instance, in connection with issues concerning party financing by foreign political parties.<sup>34</sup> Likewise, discussion of the importance of VC opinions can be found in dissenting or concurring opinions, for example:<sup>35</sup>

Two out of the above four elements are contained in the Code of Good Practice of the Venice Commission: I say this not because I consider that Code to be binding but because, in the subject matter considered here, these elements make eminent sense.

### (c) ‘Cross-fertilization’?

Pieter van Dijk, a former member of the ECtHR and the VC, refers to a ‘two-way street’ when talking about the relationship of the two institutions and to ‘cross-fertilization’.<sup>36</sup> This is being somewhat generous. The ECtHR does not have to rely on VC opinions, though its decisions may be enriched by references to VC studies. By contrast, the VC has to rely on the jurisprudence of the ECtHR when determining minimum standards for the examination of norms and legal instruments. In other words, the VC could not work effectively without referring to decisions of the ECtHR.

If one considers statements about the relevance of VC opinions in terms of how they are interpreted and specifically applied, it is apparent that the ECtHR uses the VC as a source of information and inspiration.<sup>37</sup> However, there is no indication that the Court’s decisions would have been any different without the work of the VC. The VC is just one of several sources of information for the Court. But, in any case, the VC’s opinions provide direction, for example, when examining the justification for restrictions on human rights violations under a proportionality test. The ECtHR also evidently uses them to strengthen the acceptance and legitimacy of its rulings.

On the other hand, there is no evidence that the ECtHR grapples with VC opinions in cases where it might reach a different conclusion in a normatively relevant respect. For example, the VC prepared an opinion in March 2012 on the Russian assembly law, which had been roundly criticized internationally. In the opinion, the VC disapproved, *inter alia*, of the notification and prohibition regulation, which it partly qualified as a violation of Article 11 ECHR.<sup>38</sup> The VC characterized the Russian regulation as a disguised approval procedure, which does not guarantee sufficient protection from arbitrary application and hollows out the presumption in favour of freedom of assembly.

<sup>34</sup> *Parti nationaliste basque v. France*, *supra* note 26, at para. 47.

<sup>35</sup> *Hirst v. The United Kingdom*, *supra* note 27, concurring opinion of Judge Caflisch, at para. 8.

<sup>36</sup> van Dijk, ‘The Venice Commission on Certain Aspects of the European Convention of Human Rights *Ratione Personae*’, in S. Breitenmoser *et al.* (eds), *Human Rights, Democracy and the Rule of Law: Liber Amicorum Luzius Wildhaber* (2007), at 183.

<sup>37</sup> *Ibid.*, at 184: ‘The two institutions do not duplicate but endorse and complement each other’s work’.

<sup>38</sup> Opinion on the Federal Law No. 54-FZ of 19 June 2004 on Assemblies, Meetings, Demonstrations, Marches and Picketing of the Russian Federation, CDL-AD(2012)007, 16/17 Mar. 2012, at paras 10 ff, especially paras 21 ff.

The ECtHR took up this law, delivering its judgment in July 2012.<sup>39</sup> In it, the Court did not cite this or other opinions of the VC, and it did not ponder the substance of the concerns expressed by the VC about such a law. The ECtHR also tried to avoid phrasing its reasoning in a way that raised doubts about the law's conformity with the ECHR, and it offered some abstract hints as to how to deal with the risk of abuse. The ECtHR examined only the application of the law in the present case.<sup>40</sup>

#### (d) Other methods of influence

Even if one agrees that the evidence for 'cross-fertilization' is not easily found in formal documents, it should be noted that there are other methods of influence. Some former members of the VC have later become judges at the ECtHR and vice versa. Oral exchanges (conversations) between staff members of the VC and the ECtHR<sup>41</sup> provide one opportunity for mutual inspiration. If the VC goes so far as to comment on problems of the ECtHR itself – as has been the case on questions of its reform, i.e., with respect to the enforcement of decisions<sup>42</sup> – this is also a sign of possible mutual influence.

### 2 *The practice of other courts*

In addition to the ECtHR, other courts, including national constitutional courts, have referred to the VC in their decisions. This especially happens when such courts ask the VC to provide an *amicus curiae* opinion (see section 3(C)(4)(f) of this article), but also in other cases.<sup>43</sup>

## C. *Reception of Opinions by the State Concerned*

### 1 *Status of information*

Unfortunately, it is rarely examined – at least systematically – whether and to what extent the states to which VC opinions are addressed take up and implement its suggestions and recommendations. Although VC plenary sessions have the agenda item 'Follow-up to earlier Venice Commission decisions', this is usually just a brief oral account of information available to the Secretariat, with only the most important results being recorded in the minutes. Only rarely does such information indicate that the relevant state followed the VC's suggestion completely, though somewhat more

<sup>39</sup> App. No. 34202/06, *Berladir and others v. Russia*, 10 July 2012, joint dissenting opinion of judges Vajić und Kovler.

<sup>40</sup> *Ibid.*, at paras 47 ff. For an example of a much more thorough examination of proportionality than that undertaken in the *Berladir* case, see App. No. 10877/04, *Sergey Kuznetsov v. Russia*, 23 Oct. 2008.

<sup>41</sup> For references, see Bode-Kirchhoff, *supra* note 29, at sect. III 1.

<sup>42</sup> Opinion on the Implementation of the Judgments of the European Court of Human Rights, CDL-AD(2002)34, 13/14 Dec. 2002.

<sup>43</sup> Examples: Supreme Court of Ireland: *Mark McCrystal v. The Minister for Children and Youth Affairs, The Government of Ireland, Ireland and the Attorney General*, judgment of 11 Dec. 2012, at paras 41 ff; and the Russian Constitutional Court: *Judgment concerning the Constitutionality of the Federal Law 'amending the code of administrative infringements of the Russian Federation and the Federal Law on Assemblies, Rallies, Demonstrations, Marches and Picketing'* of 14 Feb. 2013, at para. 2.4.

often it is reported that certain suggestions of the VC have been or are in the process of being implemented. That said, the ‘Follow-up’ agenda item never reports on the results of all VC opinions. There is an obvious need to improve impact assessment. In order to accomplish this goal, the VC needs assistance.<sup>44</sup>

The assessment that states or organs affected by VC opinions have followed them in almost all cases<sup>45</sup> is probably too optimistic. My finding is based on a preliminary internal overview of the period between 2009 and mid-2012, which the Secretariat of the VC has kindly produced at my request. It shows that in many instances the relevant state did not take up the recommendations contained in opinions, at least not in a way that was noticed by the VC.<sup>46</sup> In some cases, this is due to the fact that the project submitted for review – including in reaction to the criticism by the VC – was abandoned or had yet to be completed. In other cases, the project was pursued without taking up the VC’s suggestions, or at least the majority of them. But with regard to other opinions, there is information about complete or partial implementation of recommendations or about a constructive reaction to criticism.<sup>47</sup>

The follow-ups undertaken by the VC are (naturally) restricted to the description of immediate reactions, especially the adoption of recommendations to change draft laws or norms. These also look at whether and to what extent the enacted norms are subsequently put into practice in terms of the rule of law and democracy as understood by the VC. In analysing this – for instance, with regard to some Eastern European states – it is worth bearing in mind the fundamental difficulties and the need for time in developing a political culture based on the notion of democracy and the spirit of constitutionalism.

Relatively detailed information on the adoption of recommendations is available in cases where the VC is asked to prepare an opinion on an issue it had previously dealt with, which makes it possible to analyse the law’s implementation and further developments.<sup>48</sup> Some analyses reveal that despite changes having been made, these did not clear up the objections raised by the VC or even resulted in new points of criticism.<sup>49</sup>

## 2 Long-term dialogues

One and the same issue can also result in a sequence of new opinions, sometimes beginning with interim opinions, and lead to a long-term dialogue. For example, several opinions have been prepared on the electoral law in Albania that address amendments

<sup>44</sup> At a minimum, those states that initiate requests to the VC on their own could be obligated to report, *inter alia*, about the implementation of recommendations in a systematic, comprehensive, and reliable manner. The same could also be asked from member states when requests are initiated by other authorities, such as the Parliamentary Assembly. Moreover, the members appointed to the VC by member states could be tasked with helping the Secretariat document and evaluate implementation efforts and making themselves available to the *plenum* for further questions.

<sup>45</sup> See van Dijk, *supra* note 36, at 188.

<sup>46</sup> According to the overview, in approximately one third of the cases the VC has no information about reactions to opinions by the states concerned.

<sup>47</sup> Unfortunately, the available information does not enable me to state detailed figures or evaluate positive reactions in qualitative terms.

<sup>48</sup> Cf., e.g., the sequence of reactions in Opinion CDL-AD(2011)033, 14/15 Oct. 2011 (concerning Ukraine).

<sup>49</sup> Cf. Opinion CDL(2011)094, 1 Dec. 2011, at para. 114 (concerning Georgia).

and current practice. Albania and the VC – the latter together with the OSCE’s Office for Democratic Institutions and Human Rights (ODIHR) – have been communicating about this issue for years. While this revealed the effectiveness of many recommendations, it also showed deficits in implementation. New experiences have brought to light new deficits, including those that have less to do with the judicial system than with the political culture and practices. One opinion stated:

The recurring problems with the conduct of democratic elections in Albania cannot be resolved merely through changes in electoral legislation. Any meaningful improvement in the quality of the electoral process will not be achieved without a change of attitudes and practices of the main political groupings and their leaders.<sup>50</sup>

### 3 *Limited range of influence by the VC*

In this way, the VC points out a fundamental problem. It can analyse and compare the texts of norms and suggest changes, but it has no direct influence on the basic conditions that drive practical application of norms in the state concerned. Such conditions include the way in which a society traditionally deals with law – for example, legal nihilism developed over a long period of time, the prevailing political culture (such as continuing to think in terms of the authoritarian state instead of developing an open and pluralistic public dialogue), the attitudes of stakeholders (and consequently the influence of old elites in maintaining the status quo), and making the rule of law and democracy nothing more than symbolic acts. The often (still limited) capability of the judicial infrastructure (solicitors, courts, prosecution), obstacles to access to justice, and the level of knowledge about law have to be taken into account, as does the limited progress being made in combating corruption.

One premise of the VC’s work is the presumption that several factors can result in gradual changes, even those that become apparent only in the long run. These include: (i) communicating with representatives of the state and its political and social organizations, for example, when visiting the country, (ii) publishing opinions and submitting them for discussion by the public, (iii) offering praise in response to reactions by the relevant legal system, often characterized in opinions as a ‘step in the right direction’, (iv) following up in subsequent opinions, and (v) participating in seminars and conferences. Such changes may also include the basic conditions for the application of law.

### 4 *Indicators of effectiveness*

The degree to which VC opinions are effective by no means depends only on the persuasiveness of the VC’s arguments. It is sometimes claimed that the VC relies on the ‘soft power of persuasion’,<sup>51</sup> and, while this is not incorrect, it does not shed any light on the circumstances that facilitate or hamper successful persuasion. Development of

<sup>50</sup> Joint Opinion on the Electoral Law and the Electoral Practice of Albania, CDL-AD(2011)042, 15/16/17 Dec. 2011, at paras 133–134.

<sup>51</sup> Cf. Bode-Kirchhoff, *supra* note 29, at sect. I 3.

the rule of law and democracy is also about interests and power. Therefore, arguments alone are generally insufficient to bring about lasting changes.

Several observations on how recommendations interact with other factors may serve to illustrate possibilities for success or the lack of it.

- (a) First, opinions are often disregarded where they concern states, such as Belarus, that have not yet overcome totalitarianism and are therefore uninterested in the rule of law and democratic discourse.<sup>52</sup>
- (b) It is more likely that the VC's assumptions and recommendations will be received positively when requests are made in the state's own interest, i.e., when they are initiated by the state itself rather than by a third party.
- (c) Because the VC is an institution with a high standing and a pluralistic composition, it can be very motivating for states that lack any tradition or experience with democracy and the rule of law, yet are trying to spur it to receive specific suggestions on regulations from the VC pursuant to a request.<sup>53</sup> Such suggestions can be interpreted and applied in the country concerned as a sort of certification that compliance with the rule of law has been examined. This can facilitate the elaboration of specific norms and increase their acceptance at home.
- (d) It appears likely from the way that states and their organs deal with VC opinions that some anticipate involvement of the VC when drafting legislation. This particularly concerns states that have their own interest in involving the VC, but also those that have to assume an assessment by the VC based on prior experience, for example because of a request by the Monitoring Committee of the Parliamentary Assembly or political pressure from the EU (see below (g),(h)). This can cause the states concerned to attempt to rule out, or at least attenuate, criticism in advance when drafting legislation.
- (e) A request may also be prompted by the prospect of documenting that the state is affiliated with the community of democracies committed to the rule of law, sometimes paired with the hope of stronger political connectedness and/or support in ongoing political conflicts. For instance, this motive has probably been at the bottom of several requests by Georgia and its willingness to follow many (but by no means all) suggestions of the VC: hope for support in its conflict with Russia.
- (f) Opinions, such as *amicus curiae* briefs, that are requested by national constitutional courts in a specific legal action are in their own interest. In such opinions the VC's assessment is restricted. Usually it gives an assessment only of the abstract legal question which has been brought before the court in the light of European standards, but it does not attempt to provide an interpretation of the specific provisions, e.g., of Georgian law.<sup>54</sup> A constitutional court can also request

<sup>52</sup> Indeed, there has been no reaction to, e.g., Joint Opinion on the Law on Mass Events of the Republic of Belarus, CDL-AD(2012)006, 16/17 Mar. 2012.

<sup>53</sup> A request may also be aimed at obtaining assistance with the development of the constitution. See Opinion CDL-AD(2010)028, 15/16 Oct. 2010, at paras 2, 14–16 (concerning Georgia).

<sup>54</sup> See, e.g., *Amicus Curiae* Opinion on the Relationship between the Freedom of Expression and Defamation with Respect to Unproven Defamatory Allegations of Fact as requested by the Constitutional Court of Georgia, CDL-AD(2004)011, 12 Mar. 2004, at para. 1.

systematic information, including comparison of laws, when faced with analysing legal questions that have cropped up in other legal systems and found resolution there.<sup>55</sup> In such cases the VC does not comment on the underlying conflict itself, but rather elaborates a detailed account, making use of experiences by countries inside and outside Europe.

Some constitutional courts request opinions on the interpretation of national constitutional law.<sup>56</sup> Others are simply interested in the compatibility of domestic law with applicable European standards.<sup>57</sup>

(g) As mentioned in subsection (b) above, the willingness of the state concerned to accept an opinion correlates closely with whether the opinion was requested by it or instead imposed upon it. Consequently, requests initiated by the Parliamentary Assembly of the Council of Europe, for example by its Monitoring Committee, often (though not always) meet with opposition by the state concerned. Such requests usually concern political controversies<sup>58</sup> related to developments in countries that have previously been viewed critically by the Parliamentary Assembly.

In what follows, I will deal with two examples where the VC's activities – mainly initiated by the Parliamentary Assembly – met with strong reservations by the countries concerned.

(i) Several recent requests by the Parliamentary Assembly have been rebuked by the Russian government as an unfriendly act. They concern a number of laws dealing with election law, political parties, the law of assembly, the combating of extremism, and the Russian Federal Security Service.<sup>59</sup> But despite their obvious displeasure, the Russian authorities nevertheless provided information, and the VC was able to hold talks in Moscow with representatives of the government, the parliament, the courts, NGOs, and the (governmental) Institute for Legislation and Comparative Law.<sup>60</sup> However, their willingness to cooperate and provide information was limited, and the talks were instead marked by attempts to disabuse VC representatives of their critical positions. This also became clear in later written statements prepared by the Institute for Legislation and Comparative Law,<sup>61</sup> which were clearly intended merely to head off criticism. At the same time, however, such efforts indicated that criticism by the VC

<sup>55</sup> Amicus Curiae Brief on the case *Santiago Bryson de la Barra et al.* (on crimes against humanity) for the Constitutional Court of Peru. CDL-AD(2011)041, 14/15 Oct. 2011.

<sup>56</sup> See, e.g., Amicus Curiae Opinions CDL-AD(2004)034, 8/9 Oct. 2004, at paras 3 ff; CDL-AD(2010)002, 12/13 Mar. 2010, at para. 2; CDL-AD(2011)030, 14/15 Oct. 2011, at para. 12; CDL-AD(2012)028, 14/15 Oct. 2012; CDL-AD(2009)044, 9/10 Oct. 2009.

<sup>57</sup> Cf. Joint Amicus Curiae Brief CDL-AD(2013)004, 8/9 Mar. 2013, at para. 4.

<sup>58</sup> See, e.g., Opinion on the compatibility of the 'Gasparri' and 'Frattini' Laws of Italy with the Council of Europe standards in the field of freedom of expression and pluralism of the media. CDL-AD(2005)017, 10/11 June 2005.

<sup>59</sup> Cf. Opinion. CDL-AD(2012)002, 16/17 Mar. 2012; CDL-AD(2012)003, 15 Mar. 2012; CDL-AD(2012)015, 15/16 June 2012; CDL-AD(2012)016, 15/16 June 2012.

<sup>60</sup> VC representatives in delegations are usually listed in the respective opinion.

<sup>61</sup> Cf., e.g., Opinion on two Sets of draft Amendments to the Constitutional Provisions relating to the Judiciary of Montenegro. CDL(2012)024, 14/15 Dec. 2012.

was being taken seriously, presumably because it could have an influence on national and international public opinion and possibly damage Russia's reputation.

However, it is not (yet) foreseeable to what extent the VC's criticism and its recommendations will have consequences. One response to the critical opinion on the assembly law could be seen in its amendment shortly after President Putin took office again in 2012: the law (as amended by Federal Law No. 65-FZ of 8 June 2012) was tightened, with no sign that any of the VC's suggestions had been adopted. At the request of the Monitoring Committee of the Parliamentary Assembly, the VC adopted a new opinion extending its criticism to this amendment.<sup>62</sup>

(ii) Also meeting with considerable resistance was the VC's work<sup>63</sup> in analysing the new Hungarian Fundamental Law (2011), additional amendments, as well as accompanying cardinal laws, which included such topics as freedom of religion, judicial independence, and nationality law. The new constitutional provisions and the accompanying laws attracted considerable public attention, including in the international press, and were roundly criticized by the Council of Europe and the EU.<sup>64</sup>

During preparation of the VC's opinions, it became clear that the Hungarian side was trying to maintain a dialogue with the VC by commenting on the drafts in detail<sup>65</sup> and making verbal and written proposals as to how Hungary could respond to the criticism constructively. The statements by the government on the VC's opinions usually emphasized – and sometimes embellished – how the VC had commented positively on legal developments in its draft and final opinions. On other points, it sought to attenuate the criticism, e.g., by attempting to construe the criticized norms differently from the VC. In some cases, the government made precise proposals for incorporating the VC's recommendations.<sup>66</sup> Shortly before the VC issued its opinion, the Hungarian government pledged to do away with some of the sharply criticized arrangements.<sup>67</sup>

<sup>62</sup> Opinion on Federal Law No. 65-FZ of 8 June 2012 of the Russian Federation amending Federal Law No. 54-FZ of 19 June 2004 on Assemblies, Meetings, Demonstrations, Marches, and Picketing and the Code of Administrative Offences, CDL-AD(2013), 8/Mar. 2013.

<sup>63</sup> Cf. Opinions CDL-AD(2011)016, 17/18 June 2011; CDL-AD(2012)001, 16/17 Mar. 2012; CDL-AD(2012)004, 16/17 Mar. 2012; CDL-AD(2012)011, 15/16 June 2012; CDL-AD(2012)012, 15/16 June 2012; CDL-AD(2012)001 on Hungary, CDL-AD(2012)020, 12/13 Oct. 2012; CDL-AD(2012)023, 12/13 Oct. 2012; CDL-AD(2013)012, 14/15 June 2012.

<sup>64</sup> Cf., *inter alia*, European Commission Press Release IP/12/24 dated 17 Jan. 2012, available at: [http://europa.eu/rapid/press-release\\_IP-12-24\\_en.htm](http://europa.eu/rapid/press-release_IP-12-24_en.htm), as well as IP/12/222 dated 7 Mar. 2012, available at: [http://europa.eu/rapid/press-release\\_IP-12-222\\_en.htm](http://europa.eu/rapid/press-release_IP-12-222_en.htm). The scope of the criticism levelled by the EU and potentially to be dealt with in the procedure under Art. 258 TFEU was narrower than it would have been in a VC opinion. The EU chose not to pursue a breach of the fundamental values listed in Art. 2 TEU under the procedure set out in Art. 7 TEU. Cf. also Bode-Kirchhoff, *supra* note 29, at sect. IV 3.

<sup>65</sup> Cf., e.g., CDL(2012)034, CDL(2012)044, CDL(2012)045, CDL(2012)046, CDL(2012)047 CDL(2012)072, CDL(2012)074, CDL(2013)019.

<sup>66</sup> Cf., in particular, CDL(2012)034.

<sup>67</sup> For instance, the Hungarian government announced that the highly criticized system of transfer of cases will be eliminated on the constitutional and the legislative level, and that it will introduce the parliamentary procedure to abandon the special tax in case of unexpected expenses due to decisions of European Courts and the

The VC and the Hungarian government were engaged in an on-going, often contentious dialogue. In the process, however, it became clear that the Hungarian government was only – if at all – willing to accept criticism and propose changes where the relevant issues were also the subject of talks with the European Commission regarding an infringement procedure, since it was known that the European Commission wanted to base its assessment in part on the analyses of the VC.

At the same time, however, the EU progressively softened its threat of an infringement procedure. For instance, the European Commission decided in 2012 to limit the infringement procedure to only two points: the independence of the data protection authority and changes to the retirement ages for judges, prosecutors, and public notaries. In a press release elaborating on this,<sup>68</sup> the European Commission stated that it had additional concerns, particularly about the independence of the judiciary. The press release expressly stated:

The [EU] Commission will keep the matter under close review ... and will take into account whether the amendments will be implemented in line with the Venice Commission's opinions.

The fact that the Hungarian government responded constructively to certain aspects of the VC's criticism was quite evidently due more to the activities of the European Commission than to the 'force of argument'. The VC therefore was acting in the shadow of an institution's threat to impose (albeit limited) sanctions. In addition, the prospect of further activities by the EU and the Council of Europe and of persistent public dialogue probably spurred the government to continue in discussions, thus enhancing the effect of the VC's recommendations.

Such enhanced (though still limited) effect was thus achieved by marshalling the actions of several important European institutions and their cooperation in a special institutional setting: the European Commission, the Parliamentary Assembly, and the Secretary-General of the Council of Europe, as well as the VC. The European Commission clearly wanted to avoid an infringement procedure as far as possible, or at least to limit its reach, and for this purpose it relied on the influence of the VC, i.e., its authority to issue non-binding opinions, thus facilitating continued dialogue and enabling positions to be changed in a manner that permitted all sides to save face. The European Commission was apparently interested in resolving the conflict outside the infringement procedure. This strategy was supported by the Council of Europe.<sup>69</sup>

However, such a coordinated approach is not without its problems, for instance, in how to handle evaluation standards that are not always identical. One example of this is the treatment of the Hungarian law on changes to the retirement ages for judges, prosecutors, and public notaries. For its part, the European Commission considered this

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Hungarian Constitutional Court and to delete Art. 37(6) of the Fundamental Law: see Opinion on the Fourth Amendment to the Fundamental Law of Hungary, CDL-AD(2013)012, 14/15, June 2012, at paras 75, 128.

<sup>68</sup> European Commission Press Release IP/12/395 dated 25 Apr. 2012, available at: [http://europa.eu/rapid/press-release\\_IP-12-395\\_en.htm](http://europa.eu/rapid/press-release_IP-12-395_en.htm).

<sup>69</sup> Its Secretary-General has been involved in an in-depth exchange of information with the Hungarian government, the result being a newly enacted law on the legal status and remuneration of judges, which was then submitted to the VC for review. See CDL-REF(2012)024.



law to be a violation of Directive 2000/78/EC (prohibition of age discrimination) and it brought an action against Hungary before the Court of Justice of the European Union (CJEU). However, since the European Commission has no general competence in the field of national judiciaries, it did not raise the issue of a violation of judicial independence in those proceedings. On the other hand, the VC's concern in evaluating this law was solely the functioning of the judiciary and the supposed threat to judicial independence. In its opinion, it expressly stated that it would not deal with the issue of age discrimination.

In the proceedings before the CJEU, the European Commission focused solely on the issue of age discrimination, and the Court based its ruling solely on this point.<sup>70</sup> The Court did not address the concern at the forefront of the VC's evaluation – a concern shared by large sections of the public – that the Hungarian law was being used to force older, politically undesirable judges, especially chief judges, into early retirement and to enable them to be replaced with politically acceptable individuals, thus constituting an interference with judicial independence. This concern did not figure at all in the CJEU's examination of the legitimacy of the challenged law. In other words, in an effort to avoid the proceedings before the CJEU, the EU deployed the VC as a facilitator, even though the VC had to apply different standards from those of the European Commission. It was similar to a well-coordinated sporting match with assigned roles, but the game was being played in different arenas. For the ECJ, which had the final say, the VC's opinion played no discernible role.<sup>71</sup>

- (h) Further examples of enhanced effects through the presence of other actors with 'hard' instruments at their disposal have to do with states seeking to join the EU. When assessing candidates for membership, the EU takes into consideration the extent to which the rule of law is taking root, with the protection of human rights and democracy being of particular importance. Membership of the VC and willingness to cooperate show a respect for these standards.

Sometimes the European Commission explicitly calls on the VC to help bring about changes that need to be accomplished in the legal system prior to EU membership. One such candidate for EU membership is Serbia. In its Annual Progress Reports on Serbia, the European Commission has in part based its assessments on the work of the VC, to which it makes express reference on occasion.<sup>72</sup> Serbia's being granted official EU candidate status in March 2012 was undoubtedly facilitated through its cooperation with the VC.

## 4 Soft Regulatory Instruments as Guarantors of Success

### A Advantages of Soft Law and Soft Instruments

This analysis has sought to provide an insight into the workings of the VC, as well as reactions thereto, in particular by the states concerned, and in so doing to depict

<sup>70</sup> Case C-286/12, *European Commission v. Hungary*, judgment (First Chamber) of 6 Nov. 2012.

<sup>71</sup> For other major considerations on (more or less informal) cooperation between the ECtHR, the CJEU, and the VC, cf. Bode-Kirchhoff, *supra* note 29.

<sup>72</sup> Serbia 2007 Progress Report, SEC(2007) 1435, at 6, available at: <http://eur-lex.europa.eu>.

the soft instruments used by the VC and the effects these have. Though soft law is not legally binding its norms can potentially serve as functional equivalents for traditional legal norms.<sup>73</sup> But viewing soft law strictly in this manner would be too narrow and not do justice to its significance both in general terms<sup>74</sup> and with respect to the VC in particular. Soft law would then be nothing more than a substitute for hard law when the latter is not available or for various reasons not deployable. This would overlook the fact that soft law can also create opportunities for effectiveness where hard law might have only little or even no impact. The same goes for the use of soft instruments.

A major advantage of soft instruments is that they are both flexible and malleable, making them highly suited to serve as drivers of constant improvement. Another benefit is that they can vary in terms of bindingness, resulting in a ‘sliding scale of normativity’.<sup>75</sup> This makes it easier to deal with uncertainty and reach compromises.<sup>76</sup> At the same time, potential addressees of regulations may find it tempting to entertain a dialogue in the context of soft instruments without having to relinquish sovereignty. The non-binding nature of the results notwithstanding, this can however result in becoming entangled in a communication process that cannot be abandoned without repercussions, including loss of esteem in public opinion or negative consequences imposed by other authorities.

### **B The Venice Commission as a Reputation-enhancing Community**

The VC’s soft law and soft instruments are of significance not merely to its member states but also to other states that cooperate informally with the VC. These states accept the normative bases of the VC’s work and its practices. It is clear that they want to be seen as belonging to a community of states committed to the ideals of human rights, democracy, and the rule of law under a framework shaped by the VC. Put differently, states are looking for more than just suggestions on how to develop their own legal systems – they also want to share in the esteem that comes with being part of a community founded on human rights, democracy, and the rule of law. As a reputation-enhancing community, the VC affords states the opportunity to add to their esteem by contributing to the Commission’s work, as well as by the way in which they handle recommendations as part of their sovereign responsibility to their respective legal systems and societies.<sup>77</sup>

<sup>73</sup> Cf. Peters, *supra* note 6, at 34 ff.

<sup>74</sup> Peters, *ibid.*, refers to pre-law functions, promoting functions, complementation (law-plus functions), and para-law functions of soft law. She stresses its ‘soft legal consequences’.

<sup>75</sup> Cf. Weil, ‘Towards Relative Normativity in International Law’, 77 *AJIL* (1983) 436; Goldmann, ‘Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority’, in A. von Bogdandy *et al.* (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (2010), at 661.

<sup>76</sup> Cf. Abbott and Snidal, ‘Hard and Soft Law in International Governance’, in J.L. Goldstein *et al.* (eds), *Legalization and World Politics* (2001).

<sup>77</sup> On the significance of esteem in influencing the way soft law works see G.F. Schuppert, *Governance und Rechtsetzung: Grundfragen einer modernen Regelungswissenschaft* (2011), at 405–406.

However, there is an ambivalence associated with this if the European Commission and the Council of Europe are using the VC as a facilitator to solve problems that might otherwise lead to formal actions/sanctions by the EU or the Council. Because the VC's opinions are non-binding, states might welcome this cooperation. However, they might also become reluctant to accept the involvement of the VC if it comes to be viewed less as an institution that provides consultative support than as the arm of an outside authority like the EU.