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Serkan Yolcu*

Constitutional Courts' Helpdesk: The Venice Commission's Advisory Role in Constitutional Adjudication

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Abstract: This article aims to analyse how constitutional courts make use of advisory opinions of the European Commission for Democracy through Law (Venice Commission). Despite that national constitutional courts significantly engage with the advisory work of the Venice Commission, the causes and effects of this engagement remain less explored in constitutional law scholarship. In order to address this gap, this article, from a macro perspective, examines the case law in which the Venice Commission is referred to by constitutional courts, drawn from the Venice Commission's constitutional adjudication database (CODICES). In addition, appropriate data from the case law of the Constitutional Court of Turkey is examined in particular to expand the scope of the research through micro lens. The article argues that constitutional advice has some advantages for constitutional judges given that it provides a strategic tool for determining reasoning. Despite its non-binding nature, the Venice Commission's constitutional advice is occasionally considered by constitutional courts, depending on the strategic preferences of the courts, and the judges in a given jurisdiction.

Keywords: constitutional courts, advisory opinion, constitutional advice, Venice Commission, constitutional adjudication

1 Introduction

Constitutional law involves several components including judicial interpretation. Yet, judicial decision-making on constitutional matters is rarely associated with non-binding recommendations from advisory bodies. Typically, ad hoc committees, permanent parliamentary mechanisms or inter-state organizations advise on

***Corresponding author: Serkan Yolcu**, Faculty of Law, Bilkent University, Ankara, Turkey, E-mail: serkan.yolcu@bilkent.edu.tr; https://orcid.org/0000-0002-2951-4406

constitutional issues upon request. None of this advice, however, addresses the judiciary, given that courts are supposed to be independent and impartial actors in reaching a final decision. Nonetheless, in exceptional circumstances, constitutional courts make use of constitutional advice from a third party to justify or strengthen their judgments while dealing with delicate or complex disputes.

In this context, the Council of Europe's (CoE) advisory body on constitutional matters, the European Commission for Democracy through Law (Venice Commission), provides a unique example. The Venice Commission (hereinafter 'the Commission' or the 'the VC') was designed as 'an independent consultative body on issues of constitutional law, including the functioning of democratic institutions and fundamental rights, electoral law and constitutional justice.'[1] Since its creation, the Commission has advised national authorities by 'providing constitutional support primarily, but not exclusively, to new and restored democracies of Central and Eastern Europe.'[2] This 'constitutional assistance' function of the Commission takes the form of adopting opinions about constitutional matters at the request of the concerned States or bodies of the CoE.[3] Thus, the Commission primarily is an international advisory body whose main addressees are the CoE or its member States. A closer look, however, reveals that the VC plays a significant role in national constitutional courts' decision-making process too.

Although several aspects of the Commission's work have been studied before, the engagement between the Commission and constitutional courts remains underexplored. This article addresses this gap by studying the role of advisory work of the Commission in constitutional courts' decision-making. It will do so by discussing the decisions of constitutional courts in which they explicitly cite the Commission's constitutional advice. For this purpose, the article engages with the following questions: How frequently do constitutional courts refer to the Commission's opinions? In which context do they use these opinions? How seriously do constitutional courts take the Commission's advice? Answers to these questions will provide some preliminary explanations on the causes and the consequences of the engagement between the constitutional courts and the Commission.

Yet, there is a challenge for the data examined. The article's scope is restricted to the relevant case law, which is available only in English. It is of course possible that other decisions may exist in each country's own language of which the author is

1 Sergio Bartole, 'International Constitutionalism and Conditionality: The Experience of the Venice Commission' (2014) 4 Rivista AIC 1.

2 Valentina Volpe, 'Drafting Counter-Majoritarian Democracy: The Venice Commission's Constitutional Assistance' (2016) 76 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 811.

3 Bartole (n 1) 5.

unaware. The case-law analysis, therefore, is limited to court decisions accessed from the CODICES database[4] provided by the Commission. In addition, the case law in Turkey is examined exclusively, given that Turkish is the author's mother tongue. Thus, the data analysed in the article is neither complete nor final. It should be considered only as a beginning in portraying the characteristics of the engagement between the Commission and constitutional courts.

The article proceeds with an explanation of the importance of the Commission from both structural and functional perspectives. The next section both analyses the case law from various constitutional courts where the Commission is taken into consideration during adjudication and provides a closer look at the place of the Commission within constitutional adjudication in Turkey in order to reveal data at the micro level. Through analysing the experiences of various constitutional courts to explain the comparative practice of using constitutional advice in constitutional adjudication, the article concludes by asking more questions to enable further research.

2 What is Special About the Commission?

The Commission's role has grown remarkably since it began its operation more than thirty years ago. It has rapidly become 'an actor of significance in constitutional engineering'.[5] Despite being overshadowed for a while by the European Court of Human Rights (ECtHR) in terms of public recognition, the Commission has 'matured' in the sense that it became 'a well-known, widely respected and influential' international advisory body.[6] Indeed, it is now considered 'the CoE's most influential institution next to the ECtHR'.[7] The Commission has consolidated its reputation in contemporary constitutionalism, and is considered as a leading body

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4 Venice Commission, 'The InfoBase on Constitutional Case-Law of the Venice Commission' <http://codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm> accessed November 2021.

5 Maartje De Visser, 'A Critical Assessment of the Role of the Venice Commission in Processes of Domestic Constitutional Reform' (2015) 63 American Journal of Comparative Law 963.

6 Simona Granata-Menghini and Stefania Ninatti, 'The evolving paradigm of human rights protection as interpreted and influenced by the Venice Commission' in Lorena Violini and Antonia Baraggia (eds), *The Fragmented Landscape of Fundamental Rights Protection in Europe: The Role of Judicial and Non-Judicial Actors* (Edward Elgar 2018) 281.

7 L Bode-Kirchhof, 'Why the road from Luxembourg to Strasbourg leads through Venice: the Venice Commission as a link between the EU and the ECHR' in K Dzehtsiarou et al (eds), *Human Rights Law in Europe The Influence, Overlaps and Contradictions of the EU and the ECHR* (Routledge 2014) 56. Although only speculative, there is disagreement on which CoE institution is more valuable. While some argue that ECtHR is the *crown jewel* of the entire CoE order (*see* https://academic.oup.com/ejil/article/19/1/125/430843), others believe that the Commission deserves this

for ‘constitutional standard-setting’.[8] Throughout its operation the Commission has become an authority in constitutional dispute settlement. There is hardly an issue of constitutional law on which the Commission has not produced a work. Thus, today, it is almost impossible to ignore the Commission’s opinions while conducting constitutional law research. Given its high degree of recognition in the constitutional universe, the importance of the Commission can be examined from two points of view, composition and function.

2.1 In Terms of Composition

The Commission is a unique institution in the sense that ‘no international collective body to provide advice on constitutional matters existed’ before the Commission was created following the fall of the Berlin Wall, and no such institution exists as of today.[9] Moreover, although it was founded as a *European* institution in the strict sense, today the Commission is a more international or transnational, even perhaps a global actor in the field of constitutionalism. While the Commission had only eighteen members in 1991, today it is ‘much more than a regional actor’ with its many non-European members.[10] Currently, the Commission is composed of 62 members including fifteen non-CoE states, plus four observer states and one associate member.[11] It has thus become a platform for ‘worldwide constitutional dialogue’.[12] Indeed, the contemporary composition of the Commission resembles an extra-European/global institution. In other words, although the Commission began its journey as a ‘European club’, the Commission has transformed into ‘a global, transnational, constitutional forum’.[13]

title rather than the Strasbourg Court <https://www.euractiv.com/section/elections/opinion/venice-commission-an-unbiased-criticism-of-hungary/> accessed 25 September 2020.

8 Christoph Grabenwarter, ‘Constitutional Standard-setting and Strengthening of New Democracies’ in Stefanie Schmahl and Marten Breuer (eds), *The Council of Europe: Its Law and Policies* (OUP 2017) 733.

9 Gianni Buquicchio and Simona Granata-Menghini, ‘The Interaction Between the Venice Commission and the European Court of Human Rights: Anticipation, Consolidation, Coordination of Human Rights Protection in Europe’ in Linos-Alexandre Sicilianos et al (eds), *Regards Croisés sur la Protection Nationale et Internationale des Droits de L’homme/Intersecting Views on National and International* (Wolf Legal Publishers 2019) 36–37.

10 Volpe (n 2) 815.

11 Venice Commission, ‘For democracy through law’ <https://www.venice.coe.int/WebForms/pages/?p=01_Presentation> accessed 25 September 2020.

12 Simona Granata-Menghini and Ziya Caga Tanyar (eds), *Venice Commission Thirty-Year Quest for Democracy Through Law 1990– 2020* (Juristförlaget i Lund 2020) 14.

13 Kaarla Tuori, ‘From a European to a universal constitutional heritage? Conference On ‘Global Constitutional Discourse and Transnational Constitutional Activity’ (The European Commission

The Commission provides a platform where national courts cooperate within 'extra-case-law' activities in the sense that it motivates 'a communication outside (extra) of judicial proceedings' among courts.[14] The Commission, in this respect, facilitates cooperation among constitutional courts by reducing the risks of the delicate dynamics of judicial review. Commentators even argue that the Commission is an example of a 'trans-national organization of government actors' to the extent that its work does not track 'territorial boundaries', weakens 'jurisdictional formalism', and 'promote shared or overlapping policies that mediate conflicts by reducing differences in rules and practices'.[15] Thus, the global role played by the Commission in constitutional matters, does not only provide a 'user's manual of constitutional democracy' but also smoothens the tension between national constitutional orders and the transnational legal environment.

Moreover, the Commission's transformation into a global actor is related to the phenomenon of the internationalization of constitutional law in general. Briefly, this phenomenon demonstrates that 'constitutional decision-makers are 'internationalizing', increasingly looking to internationally shared principles and foreign sources when setting up institutions and interpreting constitutional texts'.[16] This fact corresponds to the argument that 'manifestations of global discourse attest to genuine inter-legality in constitutional law'.[17]

2.2 In Terms of Function

The Commission is an institution primarily 'devoted to providing assistance in restructuring constitutional arrangements'.[18] It does so by delivering opinions at the request of institutions authorized to ask for an opinion.[19] Requests for advisory

for Democracy Through Law, 14 December 2016) 2 <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2016)015-e> accessed 6 October 2020.

14 Gertrude Lübbe-Wolff, 'Transnational Judicial Interactions and the Diplomatization of Judicial Decision-Making' in Christine Landfried (ed), *Judicial Power: How Constitutional Courts Affect Political Transformations* (Cambridge UP 2019) 237–238.

15 Judith Resnik, 'Judging Methods of Mediating Conflicts Recognizing and Accommodating Differences in Pluralist Legal Regimes' in: Christine Landfried (ed), *Judicial Power: How Constitutional Courts Affect Political Transformations* (Cambridge UP 2019) 253–254.

16 Michel Rosenfeld and Andras Sajó, 'Constitutionalism: Foundations for the New Millennium' in Gagik G Harutyunyan (ed), *New Millennium Constitutionalism: Paradigms of Reality and Challenges* (NJAR Publishers 2013) 11.

17 Tuori (n 13) 4.

18 De Visser (n 5) 966.

19 Hoffmann-Riem, 'The Venice Commission of the Council of Europe – Standards and Impact' (2014)25 European Journal of International Law 579.

opinions concern constitutional amendments, drafting new constitutions or fundamental laws affecting the functionality of domestic constitutional systems as well as ordinary laws on several subjects such as human rights, judiciary or elections. Moreover, such requests might come from individual member states, as well as institutions of the CoE.

The advice and assistance provided by the Commission imply 'an intellectual and interpretative activity aimed at comparing those different experiences and drawing principled conclusions from the domestic choices of the European Countries' in order to comply with 'the choice of an accepted and commonly shared yardstick' which is defined as the European Constitutional Heritage.[20] Thus, European constitutional heritage is considered to lie at the core of the Commission's functions.[21] Although the content of this concept is vague, it is argued that the creative dimension in the Commission's activities both identifies and shapes it.[22]

Opinions of the Commission are advisory given that they cannot 'impose solutions, but nevertheless gives forthright opinions which it seeks actively to implement through dialogue and persuasion'.[23] In this respect, advisory opinions delivered by the Commission 'resembles that of abstract constitutional review by a constitutional court' although such opinions of the Commission are non-binding, unlike constitutional courts[24] given that the Commission 'cannot impose solutions or rely on coercion with regard to the implementation of its opinions'.[25] Advisory opinions of the Commission on constitutional issues provide 'critical evaluations, moral persuasion, recommendations' with no legal bindingness. Accordingly, the legally non-binding opinions of the Commission are defined as soft law in the sense that they 'lack sovereign enforceability/sanctionability, but nevertheless provide other stimuli for compliance and thus for enabling effectiveness'.[26]

Nevertheless, as a recent study emphasizes 'the practical effects of the VC opinions should not be confined to legal enforceability (or lack of it)' given that the

20 Bartole (n 1) 5.

21 The concept of 'constitutional heritage' has its legal roots too. The Council, according its founding Statute (Article 1/a), aims to 'achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage'. Thus, the CoE is legally based on the idea that there is a common European heritage including a constitutional dimension.

22 Volpe (n 2) 814.

23 Jeffrey Jowell, 'The Venice Commission: Disseminating Democracy Through Law' [2001] Public Law 676.

24 Iain Cameron, 'Russian Constitutional Law and Judgments of the European Court of Human Rights' in Eric Bylander et al (eds), *Essays in Honour of Prof Dr Kaj Hobér Forward: Essays in Honour of Prof Dr Kaj Hobér Iustus Förlag* (Iustus Förlag 2019) 57.

25 Bode-Kirchhoff (n 7) 57.

26 Hoffmann-Riem (n 19) 580–581.

opinions 'produce effects on a variety of levels'[27] including national judiciaries. Indeed, the Commission's work, somehow, influences the national constitutional adjudication process despite the nonbinding nature of its work. Since its establishment, the Commission 'has specially devoted its attention to the constitutional justice, supporting with its advice and proposals the establishment and the take-off of the Constitutional Courts.' Thus, constitutional courts engage with the Commission due to its high reputation among judges. They do so in two ways. First, national constitutional courts refer to the previous advisory opinions of the Commission to strengthen the legitimacy of their judgments. They do so consciously to support their reasoning. Second, they ask the opinion of the Commission about 'the possible solution for hard cases.'[28] Commission, in this respect, provides guidance for the interpretation of national constitutional provisions through *amicus curiae* briefs. In this advisory work, requested by constitutional courts, the VC 'analyses the constitutional issue at stake from a comparative and/or international perspective, while leaving to the requesting court to determine whether the statute under review comports with the constitution.'[29] In other words, the Commission acts as a filter at the request of constitutional courts by providing *amicus curiae* opinions 'not on the constitutionality of the act concerned, but on comparative constitutional and international law issues.'[30] These opinions, however, are the results of courts' own initiatives and thus not surprisingly accepted by them. The article omits the relationship between courts and the VC based on *amicus* because it does not demonstrate whether courts are affected by VC's advice without their prior wish to do so.

Constitutional courts, in a sense, are the local stakeholders of the Commission's workload. As one recent study emphasizes, constitutional courts 'provide an extremely valuable and indeed indispensable input to the Commission's findings. This input makes the Commission's advice not abstract but tailor-made to the specific domestic context. … The impact of the Commission's work is also

27 Emre Turkut, 'The Venice Commission and Rule of Law Backsliding in Turkey, Poland and Hungary' (2021)2 (2) European Convention on Human Rights Law Review 224.

28 Bartole (n 1) 6.

29 De Visser (n 5) 967.

30 Grabenwarter (n 8) 735. According the current data, the Commission gave twenty-nine (29) opinions upon a request from a constitutional court until today (January 2022). All but two of these opinions were requested by only seven states, namely Moldova, Ukraine, Armenia, Albania, Bosnia and Herzegovina, Georgia, Former Yugoslav Republic of Macedonia. Moldova leads the group by ten (10) requests. Moreover, the Commission also gave an opinion upon requests from the Constitutional Courts of Peru, Kazakhstan and Kyrgyzstan, see <https://www.venice.coe.int/WebForms/documents/by_opinion.aspx?v=all> accessed 1 January 2022. There is one ongoing opinion request from Constitutional Court of Ukraine which is supposed to be adopted in 2022. <https://www.venice.coe.int/WebForms/documents/by_opinion.aspx?v=ongoing> accessed 1 January 2022.

facilitated by recognition of its authority through references and support by the constitutional courts.'[31] The next section examines the recognition of the Commission's authority by constitutional courts in detail.

3 The Influence of the Commission on Constitutional Courts

Constitutional courts occasionally engage in the Commission's constitutional advice. In fact, judges consider VC's constitutional advice for strategic reasons. Constitutional judges use the VC's advisory work and its rich comparative assessment with a particular aim under certain conditions. Indeed, constitutional courts engage with the Commission's work for three main reasons. Sometimes it is just because a party to the case at hand argues a claim based on the Commission's works.[32] On other occasions, constitutional courts deliberately and strategically cite the Commission's work to strengthen their justifications. Finally, the Commission's advice is also used to support a counter-argument in dissenting opinions. The first reason is out of judicial preferences and thus omitted from the analysis.

This section seeks to examine to what extent the VC has influenced national constitutional adjudication by analysing the use of VC's advisory work not requested by courts themselves. Therefore, the scope of the analysis is limited to the one-sided process in which constitutional courts make use of the VC's advisory work. Such an analysis would demonstrate the concrete impact that the VC advice

31 Granata-Menghini and Ninatti (n 6) 225.

32 For instance, on 3 March 2020, Norwegian Supreme Court of Norway issued a judgment concerning whether extradition to Poland amounts to a violation of Article 6 of ECHR. In this case, the Supreme Court of Norway assessed the opinion of the Commission because it was argued by the appellant that the Commission's opinion prohibits him from being extradited. Then the Court made a comprehensive evaluation of the Commission's opinion. In its assessment, Norwegian Supreme Court considered the Commission's advice extensively because, in the application, the appellant referred to the Urgent Joint Opinion of 16 January 2020 prepared by the Commission. The Court acknowledged the Commission's concerns with regard to the amendments undermining the independence Polish judiciary and concluded that 'there is no doubt that the independence of the Polish judiciary and judges is threatened and subject to even more pressure now than before the amendments.' Nevertheless, despite the Commission's concerns, in the case at hand, based on the evidence on the individual's assessment, the Court found no good reason to accept the denial of extradition. See Case 20-035,350STR-HRET *A v The Public Prosecution Authority* Supreme Court of Norway Appeals Selection Committee <https://www.domstol.no/globalassets/upload/hret/decisions-in-english-translation/hr-2020-553-u.pdf> accessed 6 October 2020.

can have on the national constitutional case law. Yet the impact of the Commission on constitutional courts remains underexplored. Although the interrelation between the Commission and the ECtHR has been studied before,[33] the dialogue between constitutional courts and the VC remains neglected. Indeed, there are studies that examine ECtHR's use opinions of the Commission 'as a source of information, as well as for normative and empirical guidance'[34] and those that analyse how frequently the ECtHR cited the Commission.[35] Even the VC itself provides up-to-date data on the references by ECtHR,[36] but no such data exists with respect to the use of the Commission's work by national constitutional courts.[37] There is neither systematic data nor comprehensive academic work on the influence of the VC on national constitutional courts. This section initiates such an attempt.

33 See Turkut (n 27) 227–234. It is argued that dealing with the ECtHR is the 'bread and butter business' of the Commission given that the ECtHR is the primary yardstick in the VC's work. Thus, the VC and the ECtHR cannot be considered as rivals, but rather each complements the other's work. See Bode-Kirchhoff (n7) 55–58.

34 Hoffmann-Riem (n 19) 585. The interaction between the ECtHR and the Venice Commission is reflected in the following quote illustrating how Strasbourg judges conceive the Commission: '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.' *Hirst v The United Kingdom (No 2)* App No 74,025/01 (ECtHR, 6 October 2005) Concurring Opinion of Judge Caflisch, para 8.

35 In a study analysing all ECtHR citations up to spring 2012, it is found that ECtHR cited the Commission 71 times in total which presents a low frequency compared to the total scope of the judgments and decisions of the ECtHR in the same period. Same study also observes that the vast majority of references refer to electoral matters (40 quotations), followed by references to political parties (16 quotations) and judicial systems (15 quotations). See Anna Schimke, 'Arbeit und Einfluss der Venedig-Kommission des Europarats. Die Gutachten der Venedig- Kommission in der Rechtsprechung des EGMR' (2013) 3 Hamburger Rechtsnotizen 14 <https://www.venice.coe.int/files/articles/Schimke_Arbeit_und_Einfluss_der_VC.pdf> accessed 22 September 2020. Moreover, according to the data by 2013, documents of the Commission had been quoted in more than 60 rulings and decisions of the ECtHR. See Bode-Kirchhoff (n7) 59.

36 According to data provided by the Commission, the ECtHR first referred to Commission's work after eleven years of the latter's establishment (*Banković and others v Belgium and others*, App no 52,207/99, ECtHR, 12 December 2001) and around 250 judgments/decisions of ECtHR refer to Venice Commission documents by February 2021, <https://www.venice.coe.int/WebForms/pages/?p=02_references&lang=EN#ECHR> accessed 7 November 2021.

37 A recent study reveals how often the Commission is cited by the UK courts. Despite that, it also examines the international and supranational courts to assess the impact of the Commission's work, the data on whether the Commission has provided significant guidance to the UK domestic courts is notable. See Richard Clayton, 'The impact of the Venice Commission on the UK and International Courts' in Simona Granata-Menghini & Ziya Caga Tanyar (eds), *Venice Commission Thirty-Year Quest for Democracy Through Law 1990– 2020* (Juristförlaget i Lund 2020) 177.

The analysis exclusively relies on the data accessed from the CODICES, the Commission's own case law database. The CODICES provide the leading case law of Constitutional Courts to the public. The database contains the full text of over 10,000 judgments from over 100 courts mainly in English and in French, but also in other languages, as well as summaries of these judgments (précis). In this regard, the database 'offers a resource to constitutional courts as to how endemic problems have been dealt with elsewhere, thereby fostering the trans-constitutional exchange of ideas.'[38]

According to the data on CODICES, in the available full texts, there are nineteen (19) references to the Commission in the decisions of various constitutional courts.[39] This is the result of the search by the keyword 'Venice' in the database. These references include decisions from the courts in Albania (1), Bosnia and Herzegovina (5), Croatia (8), Kosovo (3), Moldova (1) and Romania (1). Therefore, one should note that references to the VC are not that much frequent given the total number of decisions in CODICES. There are also cases described in academic works, but not appearing in the search mentioned above, from Russia and Ireland on the use of the Commission's advisory opinions. The first part of this section covers eight jurisdictions to reflect the general dynamics of engagement, whereas the second part exclusively examines the Turkish case to demonstrate the details of engagement between courts and the VC. Through this method, it will become clear whether constitutional advice in fact provides a strategic tool for reasoning in constitutional judges' decision-making process.

3.1 Dynamics of Engagement in Constitutional Advice

This part provides an overall picture with regard to the influence of the Commission on constitutional adjudication. The following analysis, in this context, explains how and when constitutional courts referred to the Commission through the case law from Kosovo, Albania, Moldova, Romania, Bosnia and Herzegovina, Croatia, Russia and Ireland.

There are three cases from Kosovo. In a case from 2019, when reviewing the merits of a challenged law, the Constitutional Court of Kosovo referred to the Commission comprehensively. In order to invalidate some of the applicant's claims regarding the immunity of public officials, the Kosovan Court relied on the

38 Paul P Craig, 'Transnational Constitution-Making: The Contribution of the Venice Commission on Law and Democracy' (2017) 2 UCI Journal of International, Transnational and Comparative Law 62–63.

39 Actually, the simple search results give twenty-nine (29) references in the full text section. Nine (9) of these references are, however, are irrelevant for the purpose of this article.

Commission's various advice, and noted that 'the practice of granting immunity through the law, even though the Constitution has not explicitly envisaged such a thing, is also known in other countries and the granting of immunity regarding several state institutions is also encouraged by the Commission'.[40]

More recently, the Constitutional Court of Kosovo cited the Commission dozens of times in a case decided on June 1, 2020, with a lengthy judgment consisting of 580 paragraphs.[41] In this case, while reviewing the constitutionality of a presidential decree, the Kosovan Court considered both the relevant opinions of the Commission and the responses received from the constitutional/supreme courts as part of the Venice Forum.[42] The Court upheld the presidential decree and closely followed the Commission's advice in order to justify its reasoning, ruling that the contested decree is compatible with the constitution.

Lastly, the Constitutional Court of Kosovo referred to the Commission in a decision delivered on 6 January 2021.[43] This case concerns the constitutional review of a decision of the National Assembly of Kosovo on the election of the Government. Within more than 300 paragraphs, the Constitutional Court once again spared much time and place for taking the Commission's work into

40 Case No KO171/18 [2019] Constitutional Court of the Republic of Kosovo <http://www.codices.coe.int/NXT/gateway.dll/CODICES/full/eur/kos/eng/kos-2019-2-002> accessed 8 October 2020.

41 Case No KO72/20 [2020] Constitutional Court of the Republic of Kosovo <http://www.codices.coe.int/NXT/gateway.dll/CODICES/full/eur/kos/eng/kos-2020-2-003> accessed 8 October 2020.

42 Venice Forum an online platform within the Commission to exchange information among constitutional courts, with several questions for comparative analysis regarding the case at hand. According to official documents, by a decision taken in 1997, the Venice Commission 'established an Internet Forum for discussion. This Forum is open to liaison officers to discuss questions that arise in the participating courts' work and to request information from one another on relevant issues.' (Guidelines For The 'Classic' Venice Forum, CDL-JU(2015)006, 3 June 2015, <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-JU(2015)006-e> accessed 8 October 2020. The Forum 'enables a liaison officer to make quick requests for information to all other liaison officers participating in the Joint Council on Constitutional Justice. The classic Forum works through e-mail exchanges and the Venice Forum has an archive that contains all previous requests made since the establishment of the classic Forum in 1997. It is therefore a rich source of information on case-law and other aspects of the work of constitutional courts. The liaison officer from the requesting Court sends an e-mail to the Secretariat of the Venice Commission which is, in turn, forwarded to all other liaison officers. The replies are then sent to the requesting liaison officer.' Venice Forum–users' guide, 17 March 2015, CDL-JU(2015)003, <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-JU(2015)003-e> accessed 8 October 2020. Interestingly, even the Constitutional Court of South Africa used this opportunity to learn about comparative jurisdictions. South African Court requested comparative data through Venice Forum regarding a query about the detention of fleeing debtors. See *Malachi v Cape Dance Academy International (Pty) Ltd and Others* (CCT 05/10) [2010] ZACC 13; 2010 (6) SA 1 (CC); 2010 (11) BCLR 1116 (CC) (24 August 2010).

43 Case No KO95/20 [2020] Constitutional Court of the Republic of Kosovo <http://www.codices.coe.int/NXT/gateway.dll/CODICES/full/eur/kos/eng/kos-2021-1-001> accessed 8 October 2020.

consideration. Indeed, the Court cited reports of the Commission several times as well as the responses it received upon a request it sent to the Venice Forum. The Court received answers through the Forum from ten countries' constitutional/ supreme courts. In order to deal with the issues of constitutionality of the challenged legislative decision, the Court explained that it would refer to the views of the Commission on the impossibility (ineligibility) of running in parliamentary elections and the loss of the mandate of deputies of Parliament because of a conviction for criminal offenses. The Court also considered the answers delivered in the Forum to the questions sent by the Court in connection with the present case.

In fact, the Constitutional Court mainly cited a particular report of the Commission,[44] as well as two other related works to reflect its view. With respect to the former, given the fact that the case is an 'abstract review' of constitutionality against a decision of Assembly but does not concern violations of individual rights, the Court emphasized only the findings of the Commission which reflects the practice of CoE member states regarding the inability to run in parliamentary elections and the loss or invalidity of the mandate of a member of parliament. Consequently, the Court embraced the advice of the Commission that the ineligibility to run in the parliamentary elections, as well as the loss of the parliamentary mandate, is a restriction of electoral rights, guaranteed by the ECHR. In the end, the Court ruled that the decision of the National Assembly on the election of the government is not in compliance with the Constitution, due to the lack of the majority of votes in the Assembly. In this respect, the Court draws attention to the Report of the Commission, which states that 'the exercise of political power by people who seriously infringed the law puts at risk the implementation of this principle [rule of law], which is on its turn a prerequisite of democracy and may therefore endanger the democratic nature of the state.' In this respect, the Court noted that it is incompatible with the Constitution for a person to win and hold the mandate of deputy if convicted for a criminal offense, by a final court decision, as defined by these provisions.

The Constitutional Court of Albania cited the Commission in a 2005 case, concerning equal suffrage while deciding on an application for the annulment of a provision of the electoral code.[45] While the interested parties in the case argued that Albanian electoral law is consistent with the Albanian Constitution by claiming that criterion in the contested provision of electoral law is even recognised by the Commission. Nevertheless, the Constitutional Court, while

44 CDL-AD(2015)036cor-e, Report on exclusion of offenders from Parliament, adopted by the Council of Democratic Elections at its 52nd meeting (Venice, 22 October 2015) and by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015) <https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)036cor-e> accessed 8 October 2020.

45 Case ALB-2005-1-001 [2005] Constitutional Court of Albania <http://www.codices.coe.int/NXT/gateway.dll/CODICES/full/eur/alb/eng/alb-2005-1-001> accessed 9 October 2020.

acknowledging the Commission's findings, decided otherwise and ruled that the basis for the allocation of seats in the parliamentary elections is 'the number of registered voters rather than the votes cast.'[46] The Court justified its decision based on the interpretation of domestic law and the text of the Constitution and found the contested law unconstitutional.

The Constitutional Court of Moldova referred to a VC report (CDL-AD (2011) 003r) for the first time to define the requirements of the rule of law among many other international documents from various sources.[47] Therefore it was only a part of the effort to legitimise the process which does not make a real impact on the Court's adjudication. In 2016, the Constitutional Court of Moldova, in a review of a constitutional amendment, relied on the Commission's several opinions and found the amendment unconstitutional.[48] Apart from its controversial consequences in the government system of the country,[49] it should be noted that the Constitutional Court of Moldova recalled the Commission's various advisory opinions to declare an unconstitutional constitutional amendment.

In one case, the Constitutional Court of Romania referred to the Commission in both the majority and dissenting opinions.[50] The case concerned an application for resolving the legal conflict between different governmental bodies. The Court first reminded the Commission's Rule of Law Checklist (adopted by the Commission at its 106th Plenary Session, 11 - 12 March 2016), and then ruled that the resolution of the case could be achieved by appealing to the reasoning stated in the Report on the relationship between political and criminal ministerial responsibility (adopted by the Commission at its 94th plenary session, 8-9 March 2013). Lastly, the dissenting opinion, contrary to the majority's finding, which ruled there is a legal conflict of a constitutional nature between government bodies, argued that the amendment resulted in violation of the constitution and argued that the Commission's report does not in fact allow the majority's conclusion.

In 2007, the Constitutional Court of Bosnia and Herzegovina cited the Commission's advisory work in a case concerning a violation of the right to an effective legal remedy under the Constitution of Bosnia and Herzegovina in conjunction

46 Vendice Commission 2010, 21.

47 Case MDA-2013-1-001 [2013] Constitutional Court of Moldova <http://www.codices.coe.int/NXT/gateway.dll/CODICES/full/eur/mda/eng/mda-2013-1-001> accessed 9 October 2020.

48 Case MDA-2016-1-001 [2016] Constitutional Court of Moldova <http://www.codices.coe.int/NXT/gateway.dll/CODICES/full/eur/mda/eng/mda-2016-1-001> accessed 9 October 2020.

49 Anna Fruhstorfer, 'Back to the future: The abolition of the parliamentary system in Moldova', <http://presidential-power.com/?p=4588> accessed 15 October 2020.

50 Case ROM-2017-1-002, Decision No 68 [2017] Constitutional Court of Romania, <http://www.codices.coe.int/NXT/gateway.dll/CODICES/full/eur/rom/eng/rom-2017-1-002> accessed 15 October 2020.

with Article 13 of the ECHR.[51] Referring to the Commission's Opinion on the Constitutional Situation in Bosnia and Herzegovina adopted at the 62nd plenary session (11-12 March 2005), the Constitutional Court ruled that there is a violation, based on the exact findings of the Commission.

The Constitutional Court of Croatia referred to the advice of the Commission quite extensively in its decisions from 2009,[52] 2010,[53] 2011,[54] 2013[55] and 2014.[56] In these decisions, the Croatian Court recalled several opinions of the Commission to justify its reasoning. For instance, in the case regarding the constitutionality of a national referendum, the Constitutional Court referred to the view of the Commission which finds the systematic 'constitutionalisation' of legislation unacceptable in a democratic society because this undermines the principle of checks and balances.[57] The Court exactly quotes the VC as follows:

> Constitutional and ordinary politics need to be clearly separated because the constitution is not part of the 'political game', but sets the rules for this game. Therefore, a constitution should set neutral and generally accepted rules for the political process. For its adoption and amendment, a wide consensus needs to be sought.

Then, the Croatian Constitutional Court emphasized that 'the incorporation of legal matters into the Constitution must not become a systematic occurrence, and

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51 Case-2007-1-001 AP-953/05 [2006] Constitutional Court of Bosnia and Herzegovina <http://www.codices.coe.int/NXT/gateway.dll/CODICES/full/eur/bih/eng/bih-2007-1-001> accessed 15 October 2020.

52 Case CRO-2009-2-006 [2009] Constitutional Court of the Republic of Croatia <http://www.codices.coe.int/NXT/gateway.dll/CODICES/full/eur/cro/eng/cro-2009-2-006> accessed 15 October 2020.

53 Case CRO-2010-3-012 [2009] Constitutional Court of the Republic of Croatia <http://www.codices.coe.int/NXT/gateway.dll/CODICES/full/eur/cro/eng/cro-2010-3-012> accessed 15 October 2020.

54 Case CRO-2011-3-010 [2011] Constitutional Court of the Republic of Croatia <http://www.codices.coe.int/NXT/gateway.dll/CODICES/full/eur/cro/eng/cro-2011-3-010> accessed 15 October 2020; Case CRO-2011-2-009 [2010] Constitutional Court of the Republic of Croatia <http://www.codices.coe.int/NXT/gateway.dll/CODICES/full/eur/cro/eng/cro-2011-2-009> accessed 15 October 2020; Case CRO-2011-2-007 [2011] Constitutional Court of the Republic of Croatia <http://www.codices.coe.int/NXT/gateway.dll/CODICES/full/eur/cro/eng/cro-2011-2-007> accessed 15 October 2020.

55 Case CRO-2013-3-016 [2013] Constitutional Court of the Republic of Croatia <http://www.codices.coe.int/NXT/gateway.dll/CODICES/full/eur/cro/eng/cro-2013-3-016> accessed 15 October 2020; Case CRO-2013-3-015 [2013] Constitutional Court of the Republic of Croatia <http://www.codices.coe.int/NXT/gateway.dll/CODICES/full/eur/cro/eng/cro-2013-3-015> accessed 15 October 2020.

56 Case CRO-2014-2-010 [2014] Constitutional Court of the Republic of Croatia <http://www.codices.coe.int/NXT/gateway.dll/CODICES/full/eur/cro/eng/cro-2014-2-010> accessed 15 October 2020.

57 Opinion of the Fourth Amendment to the Fundamental Law of Hungary, adopted by the Venice Commission at its 95th Plenary Session (Venice, 14-15 June 2013), Opinion 720/2013, CDL-AD(2013) 012, Strasbourg, 17 June 2013).

exceptional individual cases must be justified by being linked, for example, with deeply rooted social and cultural characteristics of society.' This argument exactly overlaps with the VC's opinion.

Russia provides a noteworthy context because the Commission's role there was rather ambiguous. In a case from 2013,[58] the Constitutional Court of Russia referred to the Commission by citing the Guidelines on Freedom of Peaceful Assembly, adopted in 2010. Interestingly, this decision is both welcomed and criticized by the Commission in a later opinion. The Commission was an active follower of this decision of the Russian Constitutional Court, and announced its concerns about the consequences of the decision, stating that it 'reflects many of the critical points seen by the Commission, though it does not solve all problems.'[59]

A year later, in April 2014, a dissenting opinion in a decision of Russian Constitutional Court referred to the Commission when the Court issued its decision concerning the amendments to the NGO Law requiring collaborators of NGOs receiving funding from abroad to register as 'foreign agents' and held it constitutional, except with respect to the disproportionality of sanctions proposed.[60] The

58 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 February 2013. For a comprehensive translation see Venice Commission, *Extracts of the judgment of the Constitutional Court of the Russian Federation of 14 February 2013 relating to the Amendments to the Law on Assembly of the Russian Federation*, Opinion no 686/2012, 26 February 2013, <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2013)012-e> accessed 22 September 2020.

59 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, adopted by the Venice Commission at its 94th Plenary Session, 8-9 March 2013, CDL-AD(2013)003, Para 10, available at <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)003-e> accessed 6 October 2020.

60 The case concerned a federal law conferring 'foreign agent' status on Russian non-governmental organisations (NGOs) funded from abroad. Under this law, NGOs engaging in political activities and funded from abroad will be subject to a special legal regime prescribing, in the event of an offence, a monetary fine or a criminal sanction of up to four years imprisonment for their managers. The applicants, private individuals, and the human rights ombudsman asked the Constitutional Court to examine the special legal regime applicable to this category of 'foreign agents'. In July 2012, amendments were made to the law on associations and NGOs. The legislator conferred the status of 'foreign agent' on Russian NGOs funded from abroad. Under the terms of this law, NGOs engaging in political activities and funded from abroad have since then been subject to a special legal regime and must therefore register with the Ministry of Justice or incur administrative sanctions for the organisations and their managers. The applicants in their submission argued that the impugned provisions do not meet the requirements of legal certainty, discriminate against NGOs, violate the presumption of their managers' innocence, offend against their dignity and compel them to testify against themselves. Furthermore, the applicants

Constitutional Court, therefore, held that the impugned law did not violate the Constitution.[61] In this case, Judge Vladimir Yaroslavtsev cited the opinion of Commission in his separate opinion[62] and argued that he disagrees with the majority opinion because the contested federal legislation is arbitrary, has no objective and reasonable justification, and contradicts Article 21 (part 1) of the Russian Constitution.[63] The Commission later published its opinion about the legal consequences of the upheld law, criticizing the Constitutional Court's reasoning on several grounds.[64]

Lastly, another engagement occurred between the Russian Constitutional Court and the Commission which includes the Commission's criticism of the Court and the Court's persistent ignorance of the Commission's advice. This is related to a series of decisions of the Russian Constitutional Court concerning the enforcement of ECtHR judgments. This first occurred when the Constitutional Court ruled in July 2015 that the Russian Constitution has priority over European human rights law, with the consequence that a decision from the ECtHR that contradicts the Russian Constitution cannot be executed in Russia. Following the ruling, a federal legislation was passed in December 2015 which empowered the Court to declare judgments of the ECtHR as 'unenforceable' if the ruling of the ECtHR is found to be incompatible with the 'foundations of the constitutional system of the Russian Federation and the human rights regime established by the Constitution of the Russian Federation.'

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submitted that the same provisions interfered with their freedom of expression, organisation and participation in public life. See <http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm> accessed 6 October 2020.

61 See International Commission of Jurists, 'Russian Federation: Report on the Constitutional Court Proceedings and Judgment on the 'Foreign Agent' Amendments to the NGO Law' (September 2014) <https://www.icj.org/wp-content/uploads/2014/09/RUSSIA-FOREIGN-AGENTS-elec-version.pdf> accessed 6 October 2020.

62 Venice Commission and Office for democratic institutions and human rights (OSCE), joint interim opinion On the Draft Law Amending the Law on Non-commercial organizations and other legislative acts of the Kyrgyz Republic, CDL(2013)049, Strasbourg/Warsaw, 7 October 2013, <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2013)049-e> accessed 6 October 2020.

63 Russian Constitutional Court, Decision of 08-04-2014 available at CODICES (RUS-2014-1-001) <http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm> accessed 6 October 2020.

64 Opinion on Federal Law n 121-FZ on Non-Commercial Organisations ('law on foreign agents'), on Federal Laws n 18-FZ and n 147-FZ and on Federal Law n 190-FZ on Making Amendments to the Criminal Code ('law on treason' of the Russian Federation, 27 June 2014, CDL-AD(2014)025, <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad(2014)025-e> accessed 6 October 2020.

The Commission adopted an opinion in June 2016 (CDL-AD(2016)016) following the second decision of the Russian Constitutional Court in April 2016, in which the Court used its new power first time in a case related to the ECtHR's judgment of *Anchugov and Gladkov*. The Commission was highly critical of the Court but failed to persuade it afterwards. Following this opinion, the Russian Constitutional Court delivered a second judgment denying enforcement of an ECtHR ruling on 19 January 2017. This time the Court's verdict was even more sensational, given that it rejected the famous *Yukos* judgment.[65] In none of these decisions did the Constitutional Court refer to Commission in any respect. On the contrary, in these cases, it was the Commission that cited the Russian Court in a negative manner.

Lastly, Ireland provides interesting case for the use of constitutional advice in the sense that on constitutional matters, apex courts may use any advice they find meaningful. The Supreme Court of Ireland first referred to the Commission in 2006.[66] While considering the lower court's argument, the Irish Supreme Court made the following statement:

> In the very large number of countries on different continents referred to in the evidence it has been considered as an appropriate and necessary element in the electoral process that measures be put in place to ensure that the holding of orderly and democratic elections is not undermined by the unfettered participation of frivolous candidates or an excessive number of candidates. It is also incontrovertibly the case that measures of that nature are consistent with the code of good practice in electoral matters approved by the Commission.

Six years later, Irish Supreme Court used the Commission's advice with a stronger emphasis.[67] The Court justified its decision in 2012 arguing that principles laid down in a former judgment (McKenna principles) are consistent with the recommendations of the Commission (Code for Good Practice on Referendums) adopted in 2006. In a more recent unanimous decision, the Supreme Court of Ireland again cited the Commission.[68] This time the Court, after citing its reference to the VC in 2012, dealt with a case where the appellant appealed against an inferior court's judgment dismissing her challenge on the alleged incompatibility with the ECHR,

65 See Martin Kuijer, 'The Perspective of the Venice Commission' in Marten Breuer (ed), *Principled Resistance to ECtHR Judgments–A New Paradigm* (Springer 2019) 275–285.

66 Cooney v Minister for the Environment & ors; Riordan v Government of Ireland & ors; King v Minister for the Environment & ors [2006] IESC 61 <https://www.courts.ie/acc/alfresco/df96b44f-e96f-40e3-b64f-6f34d4ec547e/2006_IESC_61_1.pdf/pdf#view=fitH> accessed 2 October 2020.

67 McCrystal v Minister for Children and Youth Affairs & ors [2012] IESC 53 <http://codices.coe.int/NXT/gateway.dll/CODICES/full/eur/irl/eng/irl-2012-3005?f=templates$fn=document-frame.htm$3.0> accessed 2 October 2020.

68 Referendum Act & re: Jordan and Jordan v Minister for Children and Youth Affairs & ors [2015] IESC 33.

and consistency with the Commission's Code for Good Practice on Referendums. In his opinion, Chief Justice Denham found no breach of the Commission's standards, as well as noting that the Supreme Court 'is not required to take judicial notice of the Commission's opinion because it does not have any direct effect. However, it is a renowned international body, to which reference may be made in analysing an issue.[69] Similarly, Judge O'Donnel, in the same case, recalled that the Commission's work was referred in the case at hand and argued that although the opinions of the Commission are not 'necessarily advertent and directed to the precise issue which arises in this case', such an opinion would be 'instructive'.[70]

3.2 Close-up Engagement: Reflection from Turkey

Engaging with the constitutional advice provided by the Commission is not confined to the above-mentioned jurisdictions. Constitutional review in Turkey, in this respect, provides a rich but neglected experience from a comparative perspective. Established in 1961, the Constitutional Court of Turkey [*Anayasa Mahkemesi*] is one of the oldest constitutional courts in Europe. Moreover, the jurisprudence of the Turkish Constitutional Court (TCC) on fundamental rights and freedoms has a distinct engagement with the ECtHR. Even though the TCC frequently cites ECtHR, particularly with respect to individual application procedure, the constitutional review in Turkey seems to lack effectiveness. Despite the intense use of Strasbourg case law, there is a growing gap between the standards of ECtHR and the TCC. This highlights the need to inquire whether such a gap exists in the context of the Commission too.

Turkey is one of the eighteen founding members of the Commission as well as the CoE. In this regard, the jurisdiction of the TCC provides a micro yardstick to evaluate the impact of the Commission's work on constitutional adjudication in comparison with the jurisdictions explained above. In other words, the close examination of Turkey in this section is designed to reflect on the causes and effects of the engagement between courts and the Commission.

Constitutional adjudication in Turkey has been shaped mainly by domestic parameters. In other words, until recently, the TCC has not been eager to engage with transnational dialogue. Although TCC has not yet requested *amicus curiae* from the Commission, and this seems unlikely to happen in the future, the opinions

69 Appeal No 432/13 Denham CJ [2015], para 147 <https://www.courts.ie/acc/alfresco/fffd6d94-8dfd-48a3-835d-0fd3a127fa10/2015_IESC_33_1.pdf/pdf#view=fitH> accessed 2 October 2020.

70 Appeal No 432/13 & 342/2014 O'Donnell J [2015], para 83 <https://www.courts.ie/acc/alfresco/c770a433-e14d-4039-8e31-9a3e6da1cdfc/2015_IESC_33_2.pdf/pdf#view=fitH> accessed 2 October 2020.

of the Commission are respected among the constitutional law scholars and constitutional judges. Indeed, the TCC refers to Commission's work, although its use of constitutional advice currently unavailable in comparative studies. As of today, there are twelve (12) decisions of the Court in which the Commission is cited, either in the judgment or in the dissenting opinion. Seven of these references are available in the decisions given upon individual applications,[71] three in cases of dissolution of political parties,[72] and the last two are cases of norm review (abstract and concrete review of constitutionality).[73]

3.2.1 Party Dissolution Cases

TCC has an unfortunate reputation for building a significant jurisprudence on the dissolution of political parties, although the last such decision was rendered in 2009. Since its establishment in 1961, the Court has dissolved twenty-eight political parties. Thus, it seems fair to claim that 'Turkish politics involves a graveyard of political parties' with a world record for dissolving so many political parties with communist, Islamist, or pro-Kurdish tendencies.[74] Only in three of these decisions was the Commission's advisory work mentioned. First in 2001, in the *Fazilet Partisi* decision, the Constitutional Court dissolved the party because of its anti-secular activities but made no reference to the Commission. Only one judge, who voted against the dissolution decision, cited the Commission in his dissenting opinion.

Second, in the decision of Turkey's ruling party *Adalet ve Kalkınma Partisi* (AKP), closure case in 2008, the Commission was referred in many instances of the

71 *Büyük Birlik Partisi ve Saadet Partisi* [TCC]; *Atila Sertel* [TCC]; *Metin Bayyar ve Halkın Kurtuluş Partisi* [TCC]; *Deniz Dönmez ve diğerleri* [TCC]; *Metin Birdal* [TCC]; *Adnan Şen* [TCC]; *Hamit Yakut* [TCC].

72 E 1999/2 K 2001/2 [2001] TCC; E 2008/1 K 2008/2 [2008] TCC; E 2007/1 K 2009/4 [2009] TCC. There are two other decisions where the Court reviewed the financing of political parties. See E 2014/51 K 2016/12 [2016] TCC and E 2014/18 K 2016/10 [2016] TCC. Reference to the opinion of the Commission appears in a dissenting opinion in the former decision while the Commission is cited in a concurring opinion in the latter.

73 E 2014/56 K 2015/22 [2015] TCC; E 2010/49 K 2010/87 [2010] TCC. In the latter case the Commission was cited in two separate dissenting opinions whereas in the former case the opinion of the Commission was cited in the judgment in which the Court reviewed the disputed rule in terms of the principles of rule of law and independence of judges.

74 Tolga Şirin, 'Legal Possibilities in the Dissolution Case against the Peoples' Democratic Party in Turkey' (*Int'l J Const L Blog*, 2 September 2021) <http://www.iconnectblog.com/2021/09/legal-possibilities-in-the-dissolution-case-against-the-peoples-democratic-party-in-turkey/> accessed 6 November 2021.

decision but not by the TCC. In this case, the Court ruled that AKP had become a focal point of anti-secular activities, and thus infringed the principle of secularism provided in Article 2 of 1982 Constitution. On 30 July 2008, instead of dissolution, the Court decided to deprive AKP of half of its financial aid from the state. Including the complicated reasoning, the 697-page long decision document (consisting of the allegations for closure with evidences, the defendant party's arguments and the transcript of oral hearing) includes almost 60 references to the Commission. Nevertheless, only one of these related to the reasoning of the Court, and the rest were asserted by the defendant party. Despite AKP's intense references to the Commission, the TCC cited the VC once relating to the justification of the dissolution request.[75]

In the final case in which the Commission's advice was called on, in 2009 the TCC dissolved a pro-Kurdish party, *Demokratik Toplum Partisi* (DTP), in 2009 on the grounds of infringing the principle of the indivisible integrity of the state, as a territory and a nation. In this decision, the TCC cited the Commission twice in its evaluation with respect to the substance of the case, whereas the defendant also referred to the Commission's work several times. The Court ruled that the provisions of the 1982 Constitution should be interpreted in conformity with the ECHR, ECtHR case-law, and the principles of the Commission setting the common European standard. Moreover, the TCC rather ambiguously stated that dissolving a political party would be reasonable in cases where it advocated the use of violence, or that in any way harms the rights and freedoms guaranteed by the constitution, or where violence was used as a political tool to overthrow the democratic constitutional order, or where the party cooperated with and supported organizations that use terrorism and violence to achieve the same goals. Yet, the Court was silent on why the advice of the Commission should be interpreted only in a certain way, and not in another. In dissolving DTP unanimously, some scholars argued that the Court acted 'contrary to ECtHR case law and the principles formed by the Commission'.[76]

75 'The concrete rules of the Constitution, the jurisprudence of the ECtHR on the closure of political parties and the Venice Criteria, which embody the European common standard, are ensured, on the one hand, to guarantee political freedoms, on the other hand, the sanction of political party closure considered as a last resort.'

76 Selin Esen, 'Constitutional Court of Turkey (Anayasa Mahkemesi)' in Rainer Grote, Rüdiger Wolfrum, Frauke Lachenmann (eds), *Max Planck Encyclopaedia of Comparative Constitutional Law* (Oxford Constitutions 2018) <https://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e540> accessed 6 November 2021 para 40.

3.2.2 Individual Applications

In none of the seven decisions given upon individual application the TCC did coherently and robustly consider the Commission's advice. Rather, the Court's attitude towards the Commission seems quite inconsistent. Moreover, although the low number of cases in which the Commission was considered is not a distinct deviation from the situation of the other courts explained above, it is perhaps disappointing that the number is as low as seven decisions out of more than 15,000 applications examined on merit delivered upon individual application.[77]

In 2015, the TCC cited two works of the Commission in three full paragraphs in a case concerning the freedom of political association guaranteed in Article 68 of the Constitution. In this case, the applicants alleged their various rights were violated since an administrative fine was imposed on the director of the political party which failed to reach the number of members that was sufficient for organizing a general assembly although no such fine was prescribed by law and the objection filed against the fine rejected by a court. The Court held that the applicants' freedom of political association was violated because the administrative fine, which is the subject matter of the application, did not fulfil the condition of 'lawfulness'. While discussing whether the intervention (administrative fine) constitutes a violation, the Court justified its position with the argument that one of the requirements of realizing the constitutional principle that 'political parties are one of the indispensable elements of democratic political life' (Article 68/2 of the Constitution) requires the clear definition of the boundaries and scope of the powers granted to public authorities, as specified by the Commission.[78] In this ruling TCC interpreted the Constitution and ruled that one of the requirements of materializing a particular constitutional principle (Article 68/2) is clarified by the Commission. This is quite remarkable given that the Court did not only cite the Commission's work to support its reasoning. Rather, the Commission's finding has exactly transformed into the Court's finding. The Commission's advisory work, therefore, became the *ratio decidendi* of the ruling.

In another decision rendered in the same year upon an application from a political party, the Court found no violation and provided a very brief citation of the Commission in its assessment on merits.[79] In a case concerning the violation of freedom of speech and association, the TCC referred to its former decision and

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77 For latest statistics see Constitutional Court of the Republic of Turkey, *Individual Application Statistics (23/9/2012 - 31/3/2021)*, <https://www.anayasa.gov.tr/media/7428/bb_istatics_2021_1_new_.pdf> accessed 6 November 2021.

78 *Metin Bayyar and Halkın Kurtuluş Partisi* (B No: 2014/15,220, 4/6/2015) [TCC] para 48–50, 66.

79 *Büyük Birlik Partisi ve Saadet Partisi* (B No: 2014/8843, 10/12/2015) [TCC] para 48.

stated that it had previously assessed the Commission's opinions on the authorities that would implement the regulations on political parties (*Metin Bayyar* case), and there was no ground to require the Court, in the present case, to depart from the principles set forth.[80] In a more recent case, the TCC referred to the Commission as a part of relevant international law. While deciding that there has been no violation of the right to hold meetings and demonstration marches, the TCC followed ECtHR rather than the Commission, and merely repeated what the Commission advised before, with no substantial effect.[81] In the case regarding the allegation that the cancellation of the candidacy for a deputy by the Supreme Election Board violated the right to be elected, the Court found the application inadmissible. One dissenting opinion cited the Commission, stating that ECtHR referred to the Commission's work (Code of Good Practices in Election Works) in its decision ruling that the excessive formalist interpretation of the legislation constitutes a violation of the right to be elected in the exercise of fundamental rights.[82]

More recently, the TCC cited the opinions of the Commission quite strongly compared to its previous attempts. In the two decisions ruled in 2021,[83] the Court explicitly referred to the work of the Commission under the section where it explained the relevant international law before analysing the merits of the case. In both cases, for the first time in its individual application jurisprudence, the Court explicitly took the advice of the Commission into consideration in its reasoning as a yardstick. These two decisions signal that the Court began to consult the Commission as an international reference on human rights.

Moreover, the TCC applied the technique of 'pilot decision' in the *Hamit Yakut* case given that the application is a result of a 'structural problem' emerging from the misguided implementation of a certain provision in the criminal code and declared that the violation of right to hold meetings and demonstration is an outcome the law itself. In this case, the applicant was sentenced to imprisonment for refusing to disperse despite warnings of the police officers in the course of the demonstration. The Court ruled that the relevant provision in the criminal code in which the sentence is regulated, as applied with regard to the applicant, cannot be said to be definite by its content, purpose and scope and thus fails to offer legal protection for the applicant against arbitrary interferences with his right safeguarded by Article 34 of the Constitution. Consequently, the Court has found a violation of the right to hold meetings and demonstration marches and held that

80 *Deniz Dönmez ve diğerleri* (B No: 2014/4663, 9/6/2016) [TCC] para 32.
81 *Metin Birdal* (B No: 2014/15,440, 22/5/2019) [TCC].
82 *Atila Sertel* (B No: 2015/6723, 14/7/2015) [TCC].
83 *Adnan Şen* (B No: 2018/8903, 15/4/2021) [TCC]; *Hamit Yakut* (B No: 2014/6548, 10/6/2021) [TCC].

the pilot judgment procedure would be applied.[84] The Court ruled to send its decision to the national legislature to encourage amending the relevant law in accordance with the advice delivered by the Commission in 2016.[85] It is also remarkable that, unlike its usual practice, the TCC cited the relevant VC opinion even before citing the ECtHR case law. Thus, TCC seems to deviate from its road-map for rights analysis by prioritizing the Commission's opinion over the ECtHR case law and follow the advisory opinion of the Commission in order to protect certain constitutional rights.

3.2.3 Norm Review

In the norm review decisions, TCC referred to the Commission in both the majority and minority opinions. In the first case regarding the unconstitutionality of the 2010 constitutional amendment, two dissenting opinions cited the Commission's Code of Good Practice On Referendums[86] while arguing that the fact that amendment law included a specific provision which requires if in a given referendum it is only possible to accept or reject the amendment as a whole, this is incompatible with the criteria of the Commission.[87] The Court partly annulled the 2010 constitutional amendment but rejected the annulment claim about the provision which stipulates that the amendment will be put to a popular vote as a whole if it is submitted to a referendum. One of the dissenting judges explicitly emphasized that 'the Commission issues an opinion as an advice' and hence, she dissented.[88]

In the other decision[89] concerning the issue of independence of judges at military courts, the TCC referred to an opinion of the Commission[90] to reject the

84 See <https://www.anayasa.gov.tr/en/news/individual-application/press-release-concerning-the-judgment-finding-a-violation-of-the-right-to-hold-meetings-and-demonstration-marches-due-to-conviction-for-committing-an-offence-on-behalf-of-a-terrorist-organisation-due-to-attendance-at-a-demonstration-march-p/> accessed 9 January 2022.

85 Opinion on articles 216, 299, 301 and 314 of the Penal Code of Turkey, adopted by the Venice Commission at its 106th plenary session (Venice, 11-12 March 2016), CDL-AD(2016)002-e, <https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)002-e)002-e> accessed 6 November 2021.

86 Venice Commission, 'Code of Good Practice on Referendums' (25 October 2018) <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)008rev-cor-e> accessed 29 April 2021.

87 E 2010/49 K 2010/87 [2010] TCC.

88 See Judge Kantarcıoğlu's dissenting opinion, E 2010/49 K 2010/87 [2010] TCC.

89 E 2014/56 K 2015/22 [2015] TCC.

90 Venice Commission, 'Report on the Independence of the Judicial System Part I: The Independence of Judges (CDL-AD(2010)004-e' (2010) <https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)004-e> accessed 29 April 2021.

annulment claim. In this case, the Court ruled that determining the retirement age for military judges according to their military rank does not affect judicial independence. Therefore, the regulation of the retirement age of military judges by law is suitable for ensuring the independence of the judiciary. With a highly selective attitude, the Court referred to the Commission because the Commission's opinion supports the argument that the independence of the judiciary can be achieved with a constitutional or statutory guarantee even though the Commission's opinion does not say a word about military judges. Thus, TCC's attitude could be considered as an example of cherry picking in the sense that it simply surveys international bodies 'to find a source to achieve the desired end'.[91] This allows arguing that strategically citing a certain finding of a constitutional advice might be advantageous for any court that wishes to be recognized respectfully in among judges and courts for its international cooperation.

3.3 Analysis

Case law from nine jurisdictions examined above reveals remarkable results in terms of how exactly constitutional courts have used the VC's advisory work in their decision-making. These results can be summarized from two perspectives regarding whether VC has really become a strategic tool for reasoning in constitutional adjudication.

First is the fact that VC's work is cited by constitutional courts both in majority and minority opinions which makes it fair to argue that today's opinions referred by the dissenting judges might become the verdict of the respective court in the following years. Thus, the advisory work of the Commission seems to speak to the future as well as trying to resolve present time's constitutional tensions.

Second, constitutional courts make use of various types of works that the VC produces. It seems that constitutional courts do not give a different legal value to particular publications of the Commission. The reasonings of the Courts do not show a clear distinction for the authority of the VC's advisory works. In this respect, constitutional courts rely on opinions and reports more frequently compared to guidelines and checklists.

4 Conclusion

Constitutional advice is more apparent than ever with greater transnational engagement and dialogue between judicial and non-judicial institutions. In this

91 Andrew Friedman, 'Beyond Cherry-Picking: Selection Criteria for the Use of Foreign Law in Domestic Constitutional Jurisprudence' (2011) XLIV Suffolk University Law Review 875.

context, this article reveals an ongoing engagement between constitutional courts and the advice produced by the Commission. Constitutional adjudication, in this respect, should be considered a process in which non-judicial factors might shape the decision-making.

The article's scope is limited to understanding which courts interacted with the Commission, as well as defining the issues concerned. For practical reasons of data access, the question of how the relevant courts interpreted and applied the advisory opinion of the Commission is illustrated mainly within the scope of the analysis regarding TCC. It is, of course, possible to examine the consequences of all aspects of the engagement between the aforementioned courts and the Commission, but this falls beyond the scope of this article.

The Commission's role in constitutional adjudication is developing across Europe in which constitutional courts have entered 'a phase of global discourse, with mutual cross-references and common data-banks, building up a global font of constitutional case law'.[92] In this context, to accurately evaluate the genuine value of constitutional advice, further studies with expanded case law on the engagement between the constitutional courts and the Commission are necessary. Such work can shed more light on whether the Commission should be regarded as part of the constitutional courts' decision-making strategies.

92 Tuori (n 13) 4.