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The Venice Commission as a facilitator of the implementation of international law in domestic law

A. Some basic facts on the Venice Commission (VC)

Art. 1 of the Statute: An “independent consultative body”.

Legal basis: Council of Europe (Res. (2002) 3 = revised Statute, adopted by CoE on 21st February 2002, at 748th meeting (VC founded in 1990)).

Membership: 59 states (all 47 member states of the Council of Europe plus 12 states from other world regions). Independent experts sent by member states; act in individual capacity.

Objectives according to Art. 1(1) of the Statute:

1. “Bringing the legal systems of participating states closer.”
2. “Promoting the rule of law and democracy.”
3. “Examining the problems raised by the working group of democratic institutions and their reinforcement and development.”

Secretariat of jurists. Sessions four times a year in Venice.

B. Instruments

I. Research on own initiative (“think-tank”)

- Studies.
- Draft guidelines.
- Codes of good conduct/practices.

II. Opinions upon request (“constitutional first aid”)

Requested by:

- Committee of Ministers of the CoE.
- Parliamentary Assembly (PACE) of the CoE.
- The SG of the CoE.
- Any international organisation (e.g. the EU).
- The State (itself or any other state).

C. The standards

I. The internal constitutional law of the concerned state

II. “Higher law”

(1) Hard international law

- ECHR and case law ECtHR.
- Universal human rights instruments.
- International law in general.

(2) Soft international law

Self-referential further development of the yardsticks by the VC itself.

(3) Transnational law: “The principles of European constitutional heritage”

Identified through constitutional comparison, including practice.

→ Interaction between international law and domestic law:

“Horizontal” and “vertical”. Orientation at a body of “international constitutional law”.

D. Division of labour between VC and ECtHR

VC: Abstract scrutiny of laws and guidelines proprio motu.

ECtHR: Concrete cases.

E. The legitimacy of the VC

Consent and expertise.

F. The effectiveness of the VC

Acts are formally not binding; no direct effect possible.

Possible indirect effects:

- (1) Anticipation of VC opinions already in drafting of laws?
- (2) Interpretation of domestic law in the light of VC opinions.

Three dimensions of impact:

- (1) Quantitative (if legislation has been changed at all).
- (2) Qualitative: Quality of the amendments.
- (3) Whether the amendments are really implemented and applied.

Problem: no real follow-up.

Soft power of persuasion? Or hard economic advantages such as brought about by (EU membership)?

Paradox of carrots and sticks.

G. General problems of the adoption of international/European standards of rule of law and democracy in domestic law

- Meta-legal preconditions.
- “Margin of appreciation” needed.
- Double standards (in quantity and substance)?

H. Legal culture matters!

The Council of Europe is a “reputational community”.

Member states’ sovereignty as “good standing” in the international community.

References

Gianni Buquicchio, Simona Granata-Menghini, “The Venice Commission Twenty Years on”, in: Marjolein van Rosmalen et al. (eds.), *Fundamental Rights and Principles: Liber Amicorum Pieter van Dijk* (Cambridge: Intersentia 2013), 241-254; Finola Flanagan, “The Venice Commission and the Protection of Human Rights”, in: Marjolein van Rosmalen et al. (eds.), *Fundamental Rights and Principles: Liber Amicorum Pieter van Dijk* (Cambridge: Intersentia 2013), 255-265; Wolfgang Hoffmann-Riem, “‘Soft Law’ und ‘Soft Instruments’ in der Arbeit der Venedig-Kommission des Europarats: Zur Wirkungsmacht einer beratenden Einrichtung”, in: Michael Bäuerle et al. (eds.), *Demokratie-Perspektiven: Festschrift für Brun-Otto Bryde* (Tübingen: Mohr Siebeck 2012), 595-630.