



Protecting Civil Society in Europe: Challenges and Opportunities for the Rule of Law
THE VENICE COMMISSION PERSPECTIVE

The role of the Venice Commission

1. To understand the work of the Commission, it is important to appreciate its history and working methods.
2. The Venice Commission is an advisory body of the Council of Europe, composed of independent experts in the field of constitutional law. It was created in 1990 after the fall of the Berlin wall, at a time of urgent need for constitutional assistance in Central and Eastern Europe. The Commission's official name is the European Commission for Democracy through Law, but due to its meeting place in Venice, Italy, where sessions take part four times a year, it is usually referred to as the Venice Commission.
3. Its justification is that many believed that the new democracies would be assisted by a more systematic approach to establishing constitutional norms than relying on the principles which emerge from individual applications to the ECtHR.
4. Starting with 18 member states, soon all member states of the Council of Europe joined the Venice Commission and since 2002 non-European states can also become full members. As of 13 July 2014, the Commission counts 60 member states – the 47 member states of the Council of Europe and 12 other countries. In last two years USA became full member. The Commission

extends to North Africa- Tunisia, Egypt, Morocco, so it had a role into Arab spring and extends to South America, to Chile and Brazil

5. Belarus is as associate member and there are five observers. The Palestinian National Authority and South Africa have a special co-operation status similar to that of the observers. The EU, Office for Democratic Institutions and Human Rights dealing with human rights etc for Organisation for Security and Co-operation in Europe in OSCE/ODIHR and IACL/AIDC (The International Association of Constitutional Law Association internationale de droit constitutionnel) participate in the plenary sessions of the Commission.
6. The members are "*senior academics, particularly in the fields of constitutional or international law, supreme or constitutional court judges or members of national parliaments*"- or even mere practitioners, like myself. Acting on the Commission in their individual capacity, the members are appointed for four years by the participating countries. The current and former members include, amongst other notable academics and judges.
7. The Venice Commission's primary task is to assist and advise individual countries in constitutional matters in order to improve functioning of democratic institutions and the protection of human rights. Specifically, the Commission advises on general issues of constitutional law, fundamental human rights and elections.

Commission's working methods

8. The working method adopted by the Commission when providing opinions is to appoint a working group of rapporteurs (primarily from amongst its members) which advises national authorities in the preparation of the relevant law. After discussions with the national authorities and stakeholders in the country, the working group prepares a draft opinion on whether the legislative text meets the democratic standards in its field and on how to improve it on the basis of common experience. The draft opinion is discussed and adopted by the Venice Commission during a plenary session, usually in the presence of representatives from that country. After adoption, the opinion becomes public and is forwarded to the requesting body.
9. Although its opinions are often reflected in the adopted legislation, the Venice Commission does not impose its solutions, but adopts a non-directive approach based on dialogue. For this reason the working group, as a rule, visits the country concerned and meets with the different political actors

involved in the issue in order to ensure the most objective view of the situation.

La Pergola's vision

10. The Commission's purpose and function reflects the vision of its first President, Antonio Mario La Pergola, the Italian jurist, an Advocate General and later Judge of the European Court of Justice of the European Union in Luxembourg and from 1990 the President of the Venice Commission of the Council of Europe in Strasbourg.
11. Antonio La Pergola always used his legal expertise, and the experience he has acquired in various public service posts, in the cause of European integration. He wrote extensively on issues in this field, and was professor of constitutional and public law at Padua University, and, subsequently, at the University of Bologna and Rome. He made a vital contribution to the legal problems of supra-national integration. He chaired the Venice Commission in assisting all the countries in central and eastern Europe on their path to democratic transition.

The Commission's approach

12. The key to the Commission's work is its non-directive approach. The Commission cannot initiate a request for an Opinion on constitutional issues- but depends on a request from eg the country itself or frequently by PACE.¹
13. Importantly, the Commission cannot impose its views as expressed in its Opinions. It is a consensual body- which of course can create frustrations.
14. Unlike the film 'Casablanca' we cannot round up the '*usual suspects*'- although the Commission is closely looking at ways of monitoring follow ups to our Opinion work.
15. But the Commission's impact goes beyond any moral authority it exercises through prompting change or undertaking opinion work. The Commission's opinions have been cited and discussed in 124 ECtHR judgments (including 28 Grand Chamber decisions) and in 17 English decisions including various Supreme Court cases: *R (Barclay) v Lord Chancellor* on voting issues,² *AXA*

¹ The Parliamentary Assembly of the Council of Europe

² [2010] 1 A.C. 464

General Insurance on the Commission's important Rule of Law Report,³ *Moohan v Lord Advocate* again, on voting issues⁴ and in *Kennedy v Charity Commission* in relation to freedom of expression.⁵

The importance the Commission attaches to freedom of association

16. Article 11 confers protection both for freedom of assembly and association, and states:

(1) *Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.*

(2) *No restrictions shall be placed on the exercise of these rights other than such as are pre-scribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the state.*

17. Article 11 protects the freedom of individuals to form and join a legal entity in order to act collectively for the furtherance of the common interests of the members.⁶ The GC in *Gorzelik v Poland* stressed that:⁷

The ability to establish a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of freedom of association, without which that right would be deprived of any meaning

The Commission recognised in its 2011 Opinion into Azerbaijan that:⁸

It is a complex right which encompasses elements of civil, political and economic rights. Its civil right element protects individual against unlawful intervention by the state into the individual wish to associate with others. The political right element helps individuals defend their interests against the state or other individuals in an organised and hence more efficient way. Finally, the economic right element allows individuals to promote their interests in the area of labour market, especially by means of trade unions.

However, that Opinion went on to emphasise:⁹

³ [2012] 1 A.C. 868

⁴ [2015] A.C. 901

⁵ [2015] A.C. 455

⁶ *Zhechev v Bulgaria*, judgment of 21 June 2007, para 34; *Ramazanova v Azerbaijan* (2006) 22 BHRC 1 was less favourable to the rights of demonstrators also *Young, James and Webster v United Kingdom* (1984) B 39, 47, ECommHR; *Association X v Sweden* (1977) 9 DR 5, EComm HR.

⁷ (2005) 40 E.H.R.R. 4, § 88.

⁸ CDL-AD (2011)035 - Opinion on the compatibility with human rights standards of the legislation on non-governmental organisations of the Republic of Azerbaijan, §39

⁹ *Ibid*, §41

The combination of the three elements makes the freedom of association a unique human right whose respect serves in a way as a barometer of the general standard of the protection of human rights and the level of democracy in the country.

The Opinion rightly stressed that:¹⁰

Freedom of association should form the basis of any pluralist democracy. All groups in society should therefore have the freedom to participate in associative life as this contributes towards the development of a strong democratic civil society.

18. The Commission's approach is influenced by a number of international human rights instruments which underpin freedom of association:

- Article 20 of the Universal Declaration of Human Rights which states:
 1. *Everyone has the right to freedom of peaceful assembly and association.*
 2. *No one may be compelled to belong to an association*
- Article 22 ICCPR which states:
 1. *Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.*
 2. *No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.*
 3. *Nothing in this Article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning freedom of association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.*
- The Declaration on the Rights and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms which is non-binding.¹¹

19. When evaluating restrictions on freedom of association, the Commission takes the view that any restriction of these must meet a strict test of justification: *“Any restriction of the right to freedom of association must according to Article 11.2 of the ECHR be prescribed by law and it is required that the rule containing the limitation be general in its effect, that it be sufficiently known and the extent of the limitation be sufficiently clear. A restriction that is too general in nature is not permissible due to the principle of*

¹⁰ Ibid, §79

¹¹ General Assembly resolution 53/144 (A/RES/53/144), 8 March 1999

proportionality. The restriction must furthermore pursue a legitimate aim and be necessary in a democratic society."¹²

The legal status and registration of an association

20. The Commission maintains that the right to form an association is an inherent part of the right set forth in Article 11 ECHR and that the ability to form a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of the right to freedom of association, without which that right would be deprived of any meaning.¹³ Burdensome constraints or provisions that grant excessive governmental discretion in giving approvals prior to obtaining legal status [of an association] should be carefully limited.¹⁴
21. As the recognition of the association as a legal entity is an inherent part of the freedom of association, the refusal of registration is also fully covered by the scope of Article 22 of the ICCPR and Article 11 of the ECHR.¹⁵ But the Commission accepts that making it mandatory for an association to register is not, in itself, a breach of the right to freedom of association.¹⁶ Such a legal requirement may not be an essential condition for the existence of an association, as that might enable the domestic authorities to control the essence of the exercise of the freedom of association.¹⁷
22. The Commission argue that NGOs should not be required to seek authorisation in order to establish branches, whether within the country or abroad, but foreign NGOs may be required to obtain authorization to operate in a country- other than the one in which they have been established. However, they should not be required to establish a new and separate entity for this purpose. Foreign NGOs may be subjected to the same accountability requirements as other non-governmental organizations with

¹² CDL-AD(2012)016 - Opinion on the Federal law on combating extremist activity of the Russian Federation, §64

¹³ CDL-AD(2011)036 - Opinion on the compatibility with universal human rights standards on the article 193-1 of the criminal code on the rights of non-registered associations of the Republic of Belarus, §71

¹⁴ CDL-AD(2010)054 - Interim joint opinion on the law on making amendments and supplements to the law on freedom of conscience and religious organisations and on the laws on amending the criminal code; the administrative offences code and the law on charity of the Republic of Armenia by the Venice Commission and OSCE/ODIHR, §68

¹⁵ CDL-AD(2011)036 - Opinion on the compatibility with universal human rights standards on the article 193-1 of the criminal code on the rights of non-registered associations of the Republic of Belarus, §52

¹⁶ CDL-AD 2011)035 - Opinion on the compatibility with human rights standards of the legislation on non-governmental organisations of the Republic of Azerbaijan, §54

¹⁷ CDL-AD(2011)036 - Opinion on the compatibility with universal human rights standards on the article 193-1 of the criminal code on the rights of non-registered associations of the Republic of Belarus, §77

legal personality in their host country, but these requirements should only be applicable to their activities in that country.¹⁸

The dissolution of an association

23. There must be convincing and compelling reasons justifying the dissolution and/or temporary forfeiture of the right to freedom of association. Such interference must meet a pressing social need and be proportionate to the aims pursued.¹⁹ But a warning preceding dissolution based on a broad interpretation of vague legal provisions, therefore, does in itself constitute a violation.²⁰

NGOs

24. The legal status of NGOs is also the subject of two non-binding Council of Europe instruments, namely the 2002 Fundamental Principles on the Status of Non-governmental Organisations in Europe and the 2007 Recommendation CM/Rec (2007)14 of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe. The two documents contain a comprehensive set of recommendations that should serve as minimum standards guiding member states of the Council of Europe in their legislation, policies and practice towards NGOs.²¹

Registration of NGOs

25. While NGOs can operate without legal personality, on an informal basis, the acquisition of the personality is the precondition for various benefits. However, the Commission believes that such a legal requirement may not be an essential condition for the existence of an association, as that might enable the domestic authorities to control the essence of the exercise of the freedom of association.²² The principles and protection laid down in the ICCPR and the ECHR consequently apply also to non-registered NGO'S. This implies that, as the recognition of the association as a legal

¹⁸ CDL-AD(2013)030 Joint Interim Opinion on the Draft Law amending the Law on non-commercial Organisations and other legislative Acts of the Kyrgyz Republic, §42,43

¹⁹ CDL-AD(2011)036 - Opinion on the compatibility with universal human rights standards on the article 193-1 of the criminal code on the rights of non-registered associations of the Republic of Belarus, §88

see also CDL-AD(2011)035 - Opinion on the compatibility with human rights standards of the legislation on non-governmental organisations of the Republic of Azerbaijan, §120

²⁰ CDL-AD(2012)016 - Opinion on the federal law on combating extremist activity on the Russian Federation, §52

²¹ CDL-AD (2011)035 - Opinion on the compatibility with human rights standards of the legislation on non-governmental organisations of the Republic of Azerbaijan, §52

²² CDL-AD (2011)035 - Opinion on the compatibility with human rights standards of the legislation on non-governmental organisations of the Republic of Azerbaijan, §58 See also CDL-AD(2011)036 - Opinion on the compatibility with universal human rights standards on the article 193-1 of the criminal code on the rights of non-registered associations of the Republic of Belarus, §120

entity is an inherent part of the freedom of association, the refusal of registration is also fully covered by the scope of Article 22 of the ICCPR and Article 11 of the ECHR.²³

26. To condition the views, activities and conduct of an NGO before allowing it to obtain the legal personality necessary for its operation, is contrary to the core of the values underlying the protection of civil and political rights. It clashes with the whole ideological framework underlying democracy such as pluralism, broadmindedness and tolerance.²⁴
27. The Commission takes the view that under international standards, a system of prior authorization of some or all of the activities of an association is incompatible with the freedom of association. In addition, the Commission finds such a system would almost inevitably be impracticable, inefficient and costly, as well as likely to generate a significant number of applications to courts, with a consequent unwarranted transfer of workload (and danger of clogging up) to the judiciary.²⁵

Funding

28. Foreign funding of NGOs has frequently been viewed as problematic by those States which have been subject to Commission opinions. The Commission acknowledges that there may be various reasons for a State to restrict foreign funding, including the prevention of money-laundering and terrorist financing. However, these legitimate aims should not be used as a pretext to control NGOs or to restrict their ability to carry out their legitimate work, notably in defence of human rights. The prevention of money-laundering or terrorist financing does not require nor justify the prohibition or a system of prior authorisation by the government of foreign funding of NGOs. The Commission believes that it is justified to require the utmost transparency in matters pertaining to foreign funding. An administrative authority may be entrusted with the competence to review the legality (not the expediency) of foreign funding, using a simple system of notification – not one of prior authorisation. The procedure should be clear and straightforward, with an implicit approval mechanism. The administrative authority should not have the decision-making power in such matters. This issue should be left to the courts.²⁶

²³ CDL-AD(2011)036 - Opinion on the compatibility with universal human rights standards on the article 193-1 of the criminal code on the rights of non-registered associations of the Republic of Belarus, §93

²⁴ CDL-AD(2011)036 - Opinion on the compatibility with universal human rights standards on the article 193-1 of the criminal code on the rights of non-registered associations of the Republic of Belarus, §120

²⁵ CDL-AD(2013)023 - Interim Opinion on the Draft Law on Civic Work Organisations of Egypt, § 61

²⁶ CDL-AD(2013)023 - Interim Opinion on the Draft Law on Civic Work Organisations of Egypt, § 40 and § 43

29. When considering the proposals put forward by Egypt in 2013, the Commission advised that against a system of prior authorisation for an Egyptian NGO to receive foreign funding and carry out the related activities, which as such is not in line with international standards. The Commission believed that a prior notification system would be satisfactory, but that there can be no discrimination among NGOs, notably on the basis of the nature of the activities which they carry out.²⁷

Liability and dissolution of NGOs

30. The Egyptian criminal code contained severely punish NGOs which carry out activities without having been specifically authorised to do so and the Commission urged the Egyptian authorities to proceed with the abrogation of the existing restrictive criminal provisions urgency.²⁸

31. Furthermore, Commission takes the view that the dissolution of an NGO is an extreme measure, which needs to be based on a well-founded rationale and it is well established under the international case-law that it can only be resorted to in exceptional situations.²⁹ In its Opinion on Azerbaijan in 2011 the Commission noted that the ECtHR has dealt with several cases relating to problems with NGO registration and dissolution; and held in a recent case against Azerbaijan the European Court of Human Rights stated that: *“A mere failure to respect certain legal requirements or internal management of non-governmental organisations cannot be considered such serious misconduct as to warrant outright dissolution. [. . .] The immediate and permanent dissolution of the Association constituted a drastic measure to the legitimate aim pursued. Greater flexibility in choosing a more proportionate sanction could be achieved by introducing in the domestic law less radical alternative sanctions, such as a fine or withdrawal of tax benefits.”*³⁰

32. Both the Commission and OSCE/ODIHR³¹ stress that the principles and protection laid down in the ICCPR apply also to non-registered NGOs. While it is legitimate for states to sanction violations of their legal order, the sanction always needs to comply with the principle of proportionality. As the Committee of Ministers stated in the Recommendation CM/Rec(2007)14, *“the appropriate sanction against NGOs for breach of the legal requirements applicable to them (including those concerning the acquisition of legal personality) should merely be the requirement to rectify their affairs and/or the imposition of*

²⁷ CDL-AD(2013)023 - Interim Opinion on the Draft Law on Civic Work Organisations of Egypt, §§ 48, 51-52

²⁸ CDL-AD(2013)023 - Interim Opinion on the Draft Law on Civic Work Organisations of Egypt, §§ 67-68

²⁹ CDL-AD(2011)036 - Opinion on the compatibility with universal human rights standards on the article 193-1 of the criminal code on the rights of non-registered associations of the Republic of Belarus, §107

³⁰ CDL-AD(2011)035 - Opinion on the compatibility with human rights standards of the legislation on non-governmental organisations of the Republic of Azerbaijan, §85

³¹ The Office for Democratic Institutions and Human Rights (ODIHR) is the principal institution of the Organization for Security and Cooperation in Europe (OSCE) dealing with the "human dimension" of security.

an administrative, civil or criminal penalty on them and/or any individuals directly responsible. Penalties should be based on the law in force and observe the principle of proportionality".³² The ECtHR has indicated that a mere failure to respect certain legal requirements or internal management of non-governmental organisations might justify sanctions such as a fine or withdrawal of tax benefits.

33. However, the dissolution of an NGO is an extreme measure, which needs to be based on a well-founded rationale. It is well established under the international case-law that dissolution can only be resorted to in exceptional situations. Interfering with financial transactions of a structural unit of a foreign non-commercial organization is a serious interference with the work of such organizations, and should be limited only to the most serious offences affecting national security, the public order, health and morals, or the rights and freedoms of others.³³

Supervision and reporting obligations

34. Both the Commission and the OSCE/ODIHR acknowledge that, under current human rights standards, *"states have a right to satisfy themselves that an association's aim and activities are in conformity with the rules laid down in legislation", provided they do so "in a manner compatible with their obligations under the /European/ Convention "*and other international instruments. While it is understood that state bodies should be able to exercise some sort of limited control over non-commercial organizations' activities with a view to ensuring transparency and accountability within the civil society sector, such control should not be unreasonable, overly intrusive or disruptive of lawful activities. Excessively burdensome or costly reporting obligations could create an environment of excessive State monitoring over the activities of non-commercial organizations. Such an environment would hardly be conducive to the effective enjoyment of freedom of association. Reporting requirements must not place an excessive burden on the organization."
35. Overall, the State has the duty not to interfere with the crucial activities of any established association. Once the association is set up, the essential relationships are between this body and its members and between this body and non-members. State supervision and intervention should only be limited to cases in which this is necessary to protect the members, the public, or the rights of others. Non-commercial organizations should, therefore, not be subject to direction by public authorities. The corollary to the principle of the independence of associations from the government is that they should be entitled to decide their own internal structure, to choose and manage their own staff and to have their own assets. The State may not issue instructions on the management and activities of the associations. State supervision should be limited to cases where there are reasonable grounds to suspect that serious

³² Recommendation CM/Rec(2007)14 § 72

³³ CDL-AD(2013)030 Joint Interim Opinion on the Draft Law amending the Law on non-commercial Organisations and other legislative Acts of the Kyrgyz Republic, §42,43

breaches of the law have occurred or are imminent. In the absence of evidence to the contrary, the activities of associations should be presumed to be lawful.³⁴

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³⁴ CDL-AD(2013)030 Joint Interim Opinion on the Draft Law amending the Law on non-commercial Organisations and other legislative Acts of the Kyrgyz Republic, §69,75,76