Immunising the Venice Commission Against Autocratic Contamination

Unbecoming Members in a Rule of Law Institution

Adam Bodnar & Laurent Pech

04.02.2026 doi: 10.59704/916d035fe9278506

The Venice Commission, formally known as the European Commission for Democracy through Law, plays an important role in shaping standards of European constitutionalism. By providing expert advice to Council of Europe member states, but also a number of non-European countries; reviewing (draft) laws to assess their compatibility with European standards in the field of democracy, human rights and the rule of law; and by adopting important soft law documents such as its rule of law checklist, the Venice Commission (hereinafter: VC) has increasingly gained political salience and has influenced the lawmaking agenda in a growing number of countries. The EU's rule of law crisis has similarly shown the increasing importance attached to the VC at the EU level. To give a single example, the VC is mentioned more than 160 times across the 32 rule of law reports published by the European Commission in July 2025. By contrast, the VC was "merely" referenced 68 times in the first edition of the EU's rule of law report in 2020.

When it comes to specific instances of rule of law backsliding, the VC has acted as an important player and has been recognized as such by both backsliding authorities and EU institutions. From the very start of Poland's rule of law crisis, for instance, it was striking to see the Polish government promptly asking for an opinion of the VC regarding a law of 22 December 2015 concerning the Constitutional Tribunal (a few days later, however, this manifestly unconstitutional law was promulgated). Subsequently, the European Commission repeatedly recommended that Polish authorities work closely with the VC and made extensive references to its opinions within the framework of the pre-Article 7 and Article 7(1) proceedings it initiated in January 2016 and December 2017 respectively.

With greater influence, however, should come greater responsibility. As this post will outline, the VC suffers from one institutional flaw which concerns the method of selecting its members, a flaw which has been made worse by an unwillingness to enforce its own membership requirements and principles of conduct.

As per the (revised) Statute of the Venice Commission, it is for each member state concerned to appoint two "independent experts" (one member and one substitute). It is furthermore provided that these two members "shall have the qualifications required", i.e., "have achieved eminence through their experience in democratic institutions or by their contribution to the enhancement of law and political science". However, there are no mechanisms to review whether the appointees meet – or continue to meet – these qualifications.

The case of Poland shows the urgency of addressing this gap. With the term of Poland's two (unbecoming) members soon coming to an end, this post will reflect on the VC's failure to enforce the most basic standards when it comes to qualifications and behaviour, and further submit that the VC ought to make itself immune to autocratic contamination by (i) establishing a mechanism akin to the CJEU's "255 Committee" and (ii) enforcing its code of conduct without tergiversations. In essence, we urge the VC to assess its own resilience to autocratic capture, and compliance with its duty to take full account of relevant CJEU and ECtHR judgments. The VC's authority can only but suffer in a context where it is (rightly) stressing the

crucial importance of the obligation to execute judgments of international courts while failing to police VC members who engage in a systemic violation of this obligation.

Impact of Poland's rule of law crisis on VC membership

Prior to Poland's rule of law crisis, Poland's standing expert was Hanna Suchocka. A former Prime Minister and an eminent constitutional expert, she served in the VC between 1991 and 2016. In April 2016, the Polish government decided not to re-appoint her, in part due to the sharply critical VC opinion adopted in March 2016 in respect of the Polish government's legislative attempts to capture Poland's Constitutional Tribunal. This led the VC to (unusually) appoint Hanna Suchocka as its honorary president.

Mindful of the strategic importance of the VC with respect of its then ongoing attempts to implement the backslider's playbook, the Polish government appointed Bogusław Banaszak as VC member and Mariusz Muszyński as VC substitute. Although they were both professors of law and could meet the criteria of "contribution to the enhancement of law" on paper, their (lack of) independence could be seriously questioned. At the time of his appointment, M. Muszyński was already well known as one of the framers of, and participants in, the changes which made Poland the world's top autocratising country by 2020. He was also one of the irregularly appointed "judges" (so-called "double judges") to the Constitutional Tribunal. Even after the ECtHR in May 2021 found his appointment to violate the very essence of the right to a tribunal established by law, due to multiple irregularities amounting to grave breaches of relevant domestic law, the VC did not budge.

Given that active participation in activities which the ECtHR characterised as "an affront to the rule of law" was deemed insufficient to call into question M. Muszyński's VC substitute status, it is not surprising that B. Banaszak's membership was not called into question either. A well-established law professor and academic author, he was also one of the key supporters of the (unconstitutional) changes which led to the effective capture of Poland's Constitutional Tribunal. For example, he co-authored a July 2016 report that was highly critical towards the VC and the (not yet captured) Constitutional Tribunal. The combined efforts of M. Muszyński and B. Banaszak paved the way for the Constitutional Tribunal's transformation into a discredited body which no longer meets the requirements of an independent and impartial tribunal established by law, as most recently confirmed by the CJEU.

Unaccountability, no matter what

Following B. Banaszak's sudden death in January 2018, the Polish government decided to appoint Marcin Warchoł, a professor of law who served at that time as the Deputy Minister of Justice. His VC membership was so manifestly incompatible with the VC's basic qualification and conduct requirements that one of the present authors wrote to the then-President of the VC in July 2018 and January 2020. In his response dated 13 July 2018, Mr Buquicchio accepted that "some recent appointments … raise questions" only to indicate that "it is the task of the member states to ensure that the individual members fulfil the criteria defined by the [VC]'s Statute". In other words, there was seemingly "no procedure by virtue of which the [VC] can exclude or suspend" a member in any circumstances. In his response dated 27 January 2020 to the second letter which highlighted inter alia the Supreme Court of Ireland's severe criticism of M. Warchoł's behaviour in a specific case, Mr Buquicchio just repeated that "there is no procedure for excluding individual members if they act contrary" to the objectives of the VC, even when VC members challenge the legitimacy of the VC itself.

In short, the VC leadership was unwilling to contemplate any formal action, even in a situation where rulings from both the ECtHR and CJEU had *repeatedly* found relevant VC members to have been illegally appointed to the roles listed on the VC's website and belonging to bodies found incompatible with basic rule of law requirements; bodies which remain mentioned to this day on the VC's website without any qualifications.

The lack of accountability in respect of both M. Warchoł and M. Muszyński, who served their full terms until 2022, has similarly characterised the VC's modus operandi in respect of their successors. To begin with law professor Joanna Lemańska, she was appointed to the VC while presiding over a body masquerading as a court and formally known as the Chamber of Extraordinary Control and Public Affairs, which is located in the (captured) Supreme Court. In this case as well, the VC failed to take any account of several CJEU and ECtHR rulings finding inter alia Lemańska's Supreme Court appointment to have been made "in blatant defiance of the rule of law", and of her role as president of a body which does not constitute a lawful court either in ECHR or EU law.

As for the new VC substitute member, Mr Justyn Piskorski, he is one of the so-called "double double judges" of Poland's "Constitutional Tribunal", i.e., he was irregularly selected when one of the original "double judges", elected in 2015, died. The current VC therefore includes not one but two pseudo judges belonging to two pseudo courts. And yet, the VC has just been quietly waiting for Mrs Lemańska and Mr Piskorski to finish their four-year term due to expire in March 2026.

Shielding the VC from unbecoming "experts"

Poland's episode of severe rule of law backsliding has brought to the fore many weak spots in Europe's rule of law ecosystem, which have been exploited by those seeking to undermine the rule of law while encountering little to no resistance from gatekeepers.

In the case of the VC, it is not the toolbox which has been blamed for the lack of action over its manifestly unbecoming members, but the absence of a procedure for excluding or suspending individual members. Leaving aside the validity of the arguments raised by the VC leadership to justify inaction, a more formal filtering process of national appointments ought to be prioritised. The current rule preventing a VC member from voting on issues concerning the country appointing him/her is evidently insufficient to prevent "autocratic contamination" via the participation of manifestly compromised "experts" or agents of backsliding regimes, to the work of the VC.

As early as 2019, a network of rule of law experts (including one of the present coauthors) cautioned against any systemic involvement of the VC in the EU's rule of law toolbox as long as the Council of Europe fails to establish a filtering panel akin to the Article 255 TFEU panel and starts "taking the vetting of aspirant [VC] members seriously". Instead, the VC has sought refuge in revised but unenforced "principles of conduct" while re-electing in December 2021 Mr András Zs Varga as a Vice-Chair of its sub-commission for constitutional justice, the "President" of Orbán's (captured) Supreme Court, who has since been busy threatening independent judges.

In 2013, PACE called for a reinforcement of the selection procedures for experts of key Council of Europe human rights monitoring mechanisms (such as the ECRI), at both national and international levels. Among the general minimum standards proposed by PACE, one may mention the need for transparent and competitive national selection procedures, as well as the possibility for the Assembly to reject lists of candidates who do not meet the criteria of competence, integrity and independence. While the Venice Commission was not explicitly referenced in this process, it seems obvious that the current status quo, coupled with a failure to apply to itself the standards it demands of others, endangers the VC's authority.

After undermining the VC on the back of repeated and manifestly unsuitable appointments, Poland has an opportunity to strengthen the VC by applying the general minimum standards for selection procedures advocated by the Assembly. In the past two years, Polish authorities have already organised the competitive and transparent selection of candidates for the roles of ECtHR judge, CPT member and ECRI member. The time has come to finally return to the VC genuine, eminent, and independent experts. It is furthermore suggested that relevant texts are amended to provide for an automatic membership suspension in any situation where a VC member has been found to have been illegally appointed or belongs to a body which is not – or is no longer – a lawful court as established by either

the ECtHR or the CJEU. Beyond the VC, we urge all relevant European associations, bodies or networks, such as the Presidents of the Supreme Judicial Courts of EU Member States, not to turn a blind eye on their illegal or compromised members. It is at the very least inconsistent to warn against rule of law regression and violations while failing to police one's own membership. We are where we are because too many in senior positions who had and have the power to act have failed to do so.

ABOUT THE AUTHORS

Adam Bodnar
Adam Bodnar is a Professor of Law at the SWPS University in Warsaw, a Senator of the Republic of Poland, and a member of the Parliamentary Assembly of the Council of Europe. He previously served as Polish Minister of Justice and Attorney General (2023–2025) and as the Ombudsman (Commissioner for Human Rights) of Poland (2015–2021).
Laurent Pech
Laurent Pech is Full Professor of Law, Dean of Law and Head of the Sutherland School of Law at University College Dublin. He is also a Senior Research Fellow at the CEU Democracy Institute in Budapest.

SUGGESTED CITATION
Bodnar, Adam; Pech, Laurent: Immunising the Venice Commission Against Autocratic Contamination: Unbecoming Members in a Rule of Law Institution, Verfassungsblog, 04.02.2026, doi: 10.59704/916d035fe9278506.

Licensed under CC BY-SA 4.0.

Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20260205-153214-0.