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INTERNATIONAL CONSTITUTIONALISM AND CONDITIONALITY. THE EXPERIENCE OF THE VENICE COMMISSION[**]

Many recent scientific contributions in the field of public law are devoted to the *internationalization of constitutional law*. Notwithstanding the apparent plainness of the expression, its meaning is not clear and self-evident, even we can agree that the mentioned developments pertain to the epiphany of the transnational law. As a matter of fact, the legal literature has referred to at least two different phenomena. Both of them imply the expansion of the attention of the legal observers beyond the borders of the State.

On one side, internationalization of constitutional law can mean the progressive submission of the activities and the reciprocal relations of the subjects of the international legal order to the principles of constitutionalism. It is the phenomenon which Sabino Cassese recently dealt with in his paper " Oltre lo Stato " (Cassese 2006, 52), underlining the fact that the rigid separation between constitutional law and international law is decreasing and we are confronted precisely with the s.c. international constitutionalism. Also the regulation of matters which traditionally pertain to the field of the international law draws inspiration from the doctrines of the constitutionalism, from the separation of powers to the judicial guarantees of the personal rights included. But, on the other side, the authors frequently adopt another point of view to look at the internationalization of the constitutional law and pay their attention to different interesting trends, as the incorporation of international human rights into domestic constitutions, the convergence and comparativism of national constitutions, and the treaty-becoming constitutions (Wen-Chen Chang and Jiunn-Rong Yen 2012, 1167 ff.).

These new trends can be more easily understood in the light of the traditional legal experience when the establishment of new international institutions affecting the individual rights or the domestic implementation of international treaties are at stake, as it happens with the increasing of the international cooperation, with the internal incorporation of international

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human rights treaties and of the international instruments for the protection of the minorities, or with the establishment of a new state organization provided for by international agreements or peace accords. But we can go further, the phenomenon of the internationalization of the constitutional law is also specially interesting when it does not regard the immediate compliance by the concerned institutions with international treaties whose detailed and specific provisions have to be directly implemented through the establishing of a new international organization or their incorporation into a domestic constitution. It frequently depends on the functioning of the machinery of the s.c. conditionality which also implies the adhesion to a supranational treaty but requires a basic strategy through which international institutions promote compliance by national governments of the principles of constitutionalism or of the main elements of the economic free market (Checkel 2000, 1). It often happens that the content of the relevant engagements of the interested parties and, therefore, the yardsticks for the evaluation of the results of the conditionality offered by the relevant international documents are extremely vague and ambiguous as far as they summarily refer to some constitutional theories and doctrines which can be interpreted according to subjective attitudes and orientations. " Political consensus among States is easier to reach the vaguer the provisions under negotiation are " (Tuori, 2014, 19). If we want to summarize the developments in the field, we can say that, for example, in Europe the s.c. constitutional heritage and the circulation of the constitutional models are at stake. Even if they can draw inspiration from the European jurisprudence and from the elaboration of the European constitutions, the interpreters have a difficult task in filling the open texture of the relevant international documents.

Moreover a question has to be answered. Who has the authority of filling the open meaning of this reference to the traditional theories and doctrines of the legal thought and to their contemporary construction? The common theory according to which the States are always behind the growing up of the international law, is to-day frequently contested. There is a tendency to look further into the horizontal, spontaneous expansion of the international law and into the increasing public relevance of the international community, even when we are concerned with the existence of the international institutions supported by the States (von Bogdandy 2006, 183 ss.).

In this perspective many scholars underline the important role displayed by the international judges, for instance we cannot forget the processes of the growing up of the jurisprudence of the ECJ and of the ECHR. Recently, von Bogdandy and Venzke offered a new elaboration of the matter looking at it from a different point of view and starting from the question in whose name the judges of the international courts decide. The answer is that their legitimacy derives not from the member States of the relevant international institutions but from the existence of supranational or international *fora* which relates the citizens to a " cosmopolitan identity " (von Bogdandy 2011, 1359).

This conclusion looks acceptable from a substantial, ideological point of view as far as it gives a positive worthwhile content to the vindication of the authority of the international judges in coherence with a development of the international law attentive to the values of the fundamental guarantees of the freedoms and of the democracy. But, on the other side, this way of reasoning opens the door to the conception that the making of the legitimacy of the

international judges depends more on the development of the process of the circulation of the legal culture within the international community than on the exercise of a political power by the interested States. Therefore, according to this idea the establishment of an institutionalized and distinct formal source of law could be missing. We can correctly come back to our starting point and accept the idea that the epiphany of the results of the mentioned communitarian process is connected, in the normality of the cases, with the intervention of the international judicial bodies as far as their work implies the direct and independent recognition of the communitarian expansion of the international constitutionalism, and is only partially facilitated by the necessary reference to the documents they have to implement by guaranteeing the compliance with them of the interested institutions, notwithstanding those documents are ambiguous and unclear. Their choices and interpretative orientations are the fruits of a constructive elaboration through which the meaning of the relevant documents is clarified even by going further the existing principles and rules. It is this reasoned and justified approach that allow them to ground their decisions by finding and working out new principles and rules (Della Cananea 2011).

But if we are interested in focusing our attention on the functioning of the machinery of the conditionality and its connection with the expansion of the international constitutional law, we easily realize that it does not necessarily implies the presence of a judge and the exercise of judicial function. Specially when the compliance with the conditionality is connected with the adhesion to an international or supranational institution and with the observance of the obligations of their membership, the task of checking the acceptance of the required purposes in the shaping of the internal constitutional order of the States concerned or in the establishment of the main elements of an economic free market is entrusted to a political authority whose deliberations are frequently supported by the reports and opinions of advisory technical bodies. As a matter of fact, decisions which have apparently only a political relevance, produce important legal effects as far as they regard the compliance with the yardstick of the conditionality, and condition the shaping of the internal organization of a State, the solution of problems regarding the functioning of this organization or the interpretation of the relevant internal constitutional provisions. The results are no more the fruits of the mere internal decision-making processes of that State but are directly affected by the construction of the conditionality yardstick by international technical bodies which don't have a judicial qualification and whose members are experts (lawyers, economists, etc.) who are entrusted with the task of evaluating the solutions adopted or proposed by the States for the adoption of necessary and constitutional reforms in view of the StatÈs access to the membership of the relevant institution or of its continuity.

This process opens the way to the expansion of the international constitutionalism also. When they are interpreting the legal theories and doctrines which make up its content, that is the s.c. constitutional heritage, the politicians, the diplomats and the experts who are in charge of the functioning of the machinery of the conditionality, take part in a public forum whose results they share, and – at the same time - they provide the communitarian process with a substantial contribution. I mean that they greatly concur in the elaboration of the yardstick of the conditionality which they have to apply, while they are always ready to profit of

the development of the public discussion in which they participate. The starting points, the sources of this mutual exchange of ideas and opinions are obviously the experiences of the constitutional States, their constitutions, the relevant implementing statutory legislation and their constitutional jurisprudence. All these materials are evocated by the reference to the traditional doctrines and theories of the constitutionalism and to the spreading of the relevant culture. But through the mentioned process of elaboration those materials acquire an international relevance together, for instance, with the principles stated in the international documents for the protection of the individual rights. In this way the results of the public discussion in which international institutions, politicians, diplomats, experts and representatives of the interested Ngos are engaged, affect the relations between the international institutions and the States which aim to become their members, or the relations among the State themselves. They can produce effects which go further the single cases at stake.

Looking at these experiences, it is certainly difficult to talk about a new form of lawmaking. The results of this process of elaboration of the contributions of the mentioned cultural exchanges cannot be directly applied to the relevant relations. The intermediation of the internal decisions of the concerned States cannot be missed. Those results can be classified as legal principles and rules only after having been incorporated in the domestic legal orders. But it is in any case evident that they enter, with binding effects, in the making of the choices which the States have to make. They are part of the materials which are at the basis of the lawmaking and are specially important because their legal, binding relevance depends on the functioning of the machinery of the conditionality. The rationality of the States decisions is in a large way affected by them: the development of the process can be easily understood if we have in mind the pages devoted by Kaarlo Tuori to the rationality of the legal choices (Tuori 2010, 173 ff.).

Notwithstanding its legal and political relevance, it is correct defining this process as a cultural process. Even if the comparative constitutional perspective is not a recent discover, this phenomenon of public international discussion is strictly connected with the rise of the world constitutionalism described in a seminal contribution (Ackerman 1997). It is important to keep in mind that in the recent times we had the chance of witnessing successive waves of adoption of new constitutions which have certainly enriched the international constitutional debate and the connected circulation of ideas as far as the relative constitutional processes affected not only the internal developments of the States but also the relations between the States and international institutions. Step by step they became object of an international concern.

The European point of view is specially important to look at this evolution because the Western Europe – together with the Eastern Coast of North America - was, on one side, the cradle of the constitutionalism and, on the other side, has been interested by the growing up of the modern and contemporary implementation of the relative principles through the different experiences of the old and new democracies. After the Second World War the Council of Europe and the European Union have given a relevant contribution to the formation of the international constitutionalism by supporting the adoption of the constitutional legislation in

the new democracies and by offering the help of the technical bodies and commissions whose works offer many elements to have an idea of the mentioned processes.

Taking into consideration my personal experiences, I would like to concentrate my attention on the European Commission for Democracy through Law, better known as the Venice Commission, which was set up in 1990 under a partial agreement between the 18 States which were at that time the Council of Europe member States. It 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. Its members, appointed by the member States, are independent experts, judges, law university professors, diplomats, high officials of the States, and stay in office in their personal capacity without any representative link with the governing bodies of their States. At the moment the member States of the Commission are 58.

The coincidence of its establishment with the fall of the Wall facilitated the involvement of the Commission in the development of the democratic constitutional reforms in the Countries of the Central Eastern Europe as far as they moved in the direction of the adhesion to the Council of Europe and to the European Union and were and are interested, year by year, in keeping safe this membership. But its concern has not been restricted to the member States of the past Warsaw Pact and has interested also other European States and States of Asia, Africa and America.

The main function of the Commission has been the constitutional assistance: it adopts opinions about constitutions, constitutional amendments or other legislation in the field of constitutional law at the request of the concerned States or bodies of the Council of Europe (for instance, the Secretary General and the Parliamentary Assembly) which submit to its attention the relevant drafts in view of checking the observance of the engagements by the old members or the adequacy of the concept documents elaborated by the new members. The exercise of this function implies the choice of an accepted and commonly shared yardstick for the evaluation of the concerned documents in view, on one side, of the possible adhesion of the interested States to the European institutions, from the Council of Europe to the European Union, or, on another side, of the continuity of their membership. This yardstick has been identified with the European Constitutional Heritage, which is a concept whose content is not stated in clear and detailed form in any international document, but has to be elaborated on the basis of the constitutional experiences of the Western European States and of some international instruments in the field of the human rights. Therefore it implies an intellectual and interpretative activity aimed at comparing those different experiences and drawing principled conclusions from the domestic choices of the European Countries. It is the European traditions of the constitutionalism which have to be identified. The investigation is not always easy, specially when for historical reasons the concerned States did not participate in the process of the formation of the Western tradition of the constitutionalism (Bartole, 2012). But, at the same time, the results of this elaboration have to be updated in presence of the insurgence of new questions and problems. I mean that the Commission has to deal not only with the drafting of constitutional documents according to the usual models of the European constitutionalism, but also with questions and problems which are not covered by

legislative and judicial precedents. Therefore the Commission has had the responsibility of working out new constitutional answers which, by the way of the machinery of the conditionality, have entered in the practice of the European constitutionalism and are frequently helpful to other international bodies. We can conclude – according to our previous explanation - that the Commission has been in the position of taking part in a process which is connected with the national process of lawmaking of many different States even if it does not exercise formal normative powers.

Since the beginning of its activity the Commission has specially devoted its attention to the constitutional justice, supporting with its advise and proposals the establishment and the take-off of the Constitutional Courts in the new democracies. Its interventions have not only regarded the preparation and the adoption of the legislation on the organization and the procedures of the judgements of Constitutional Courts, but also the solution of specific, hard cases submitted to the Courts which frequently asked the opinion of the Commission about the possible solution of those cases. The common technical approach has facilitated the dialogue and the mutual cooperation. It is evident that the s.c. *amicus curiae briefs* of the Commission don't substitute for the judgements of the concerned Courts, the Commission does not pretend to offer the correct interpretation of the national law which has to be applied to the cases at stake. The construction of the internal law is the task of the national judges, whose choice the Commission only advises by suggesting ways of reasoning and approaching the cases which are to be coherent with the principles of constitutionalism.

Many Commission's opinions and other documents which summarize its " jurisprudence " offer useful evidence of the conception of the Constitutional European Heritage which is at the basis of the analysis of the cases, and the doctrine of the constitutional justice which supports the mentioned dialogue. For instance, in a case concerning Albania the Commission (CDL-AD(2009)044) suggested that the StatÈs interest in implementing a lustration act apparently affecting some judges of the Constitutional Court has to be balanced with the necessity of the continuity of the functioning of the judicial review of legislation. Therefore, if the lustration act did not provide for a mechanism of their replacement, the concerned judges had to stay in office and to refrain from abstention in view of insuring the presence of the required number of judges for the adoption of a decision on the constitutionality of the act itself. As a matter of fact, the advise is guided by an elaboration of the doctrine of the constitutional justice which implies its continuity in view of the exigency of insuring the functioning of the system through the compliance with the Constitution. Moreover the Commission put forward the idea that the Albanian judges had to fill the lacuna of the internal legislation by adopting a specific rule for the case at stake: they were supposed to be entrusted with a peculiar lawmaking competence to be exerted through the exercise of their judicial functions as it is commonly accepted by the legal literature in the matter of the judicial review of legislation.

Following a similar way of thinking the Commission (CDL-AD(2011)014) showed a clear preference for a possible solution of a Moldavian case which implied an intervention of that Constitutional Court aimed at completing the provisions of the Constitution by a functional elaboration of principles concerning the election of the President of the Republic which

met some difficulties in the application of the mere constitutional text. Also in this case the approach of the Commission was very interesting not only because it gave punctual suggestions about the solution of the specific problem dealt with by the State concerned, but also for its interpretation of the role of the constitutional justice as a participant in the process of the constitutional lawmaking. This interpretation is a clear and evident result of a direct elaboration of the recent experiences of the Western constitutionalism even in Countries which have a long civil law legal tradition.

In a case concerning Romania the Commission (CDL-AD(2012)026) proposed a solution which went beyond the letter of the relevant Constitution suggesting directly to the governing bodies of the State (that is, the President of the Republic, the Government and the Parliament and without the intermediation of the Constitutional Court) the compliance with the principle of the constitutional loyal cooperation in view of avoiding conflicts and intricacies in their mutual relations. The idea was that the principle has a general relevance and has to be observed in all the forms of government, presidential and parliamentary included, notwithstanding their differences and peculiarities and even in the absence of a clear constitutional provision.

Sometimes the Commission was confronted with the difficult problem of finding a conciliation between the principles of the constitutionalism and some traditional institutions of the concerned Countries which have not been updated through the participation in the processes of modernization. This is the case. for instance, of the Prokuratura in Russia or Ukraine and of the relevant draft-laws aimed at entrusting this national institution with functions not always connected with the judicial criminal prosecution of the misdemeanours and violations of the law only. Therefore, the legislative intention was to pursue the continuity of the larger role the mentioned institution had displayed since more than a century. But in the case at stake the Commission (CDL-AD(2005)014 and CDL-AD(2013)025) insisted to recognize the prevalence to the updated, modern international principles and refused to give the precedence to that historical national heritage. And again with regard to Ukraine, dealing with the connected internal legislation, the Commission (CDL-AD(2011)047) stated the principle that the protection of the minorities does not have an absolute relevance and its implementation has to be balanced with the protection of the StatÈs national identity and language when the concerned minority group has, for historical and political reasons, a *de facto* traditional strong position in the society and took and takes profit, as the Russian minority does, from the protection of a powerful kin-State.

Not only the Eastern European Countries have been interested by the activity of the Commission. For instance in the case of Belgium it (CDL-AD(2012)010) stated the principle that a temporary derogation of the rules dealing with the revision of the Constitution was admissible in the light of the international standards as far as the necessity of facing the ongoing crisis in Belgium in a democratic and legally correct way was at stake.

And in 2002 the Commission (CDL-AD(2002)32) adopted a severely critical opinion about the revision of the Constitution of Liechtenstein which was supposed to distance that Country from the other European democracies.

It is evident that, according to the Commission, a special relevance has to be recognized to the constitutional yardstick which it adopts. It justifies decisions and opinions which produce binding effects which go beyond the restricted sphere of the Council of Europe and interest OSCE and European Union. Recently these developments are facilitated by the compilation of documents which collect the main elements of the opinions of the Commission according to thematic criteria. As a matter of fact, the choices which support the documents produced by the Commission don't imply the adoption of a corpus of law made up by detailed provisions, instead they are the result of the elaboration of an argued doctrine of the constitutionalism which is at the basis of the standards whose destination is the solution of the internal problems of the interested States through the national adoption of the necessary rules and principles. These developments remind us the opinion of von Bogdandy about the intermediate role displayed by internal political, administrative and judicial institutions for the production of the effects of the international constitutional law in the domestic legal orders (von Bogdandy, 2008, 401).

We can say that a doctrine is at stake because we are confronted with the reasoned development of models of constitutional relations and of the relative guidelines for their practical implementation. The Commission offers the frame for the interpretation and application of the internal law. Therefore we are in presence of materials which have a legal relevance in shaping the choices of the interlocutors of the Commission. I mean that the elements of the international constitutional law are elaborated taking into consideration the peculiarities of the national case at stake and with the purpose of facilitating the mediation of the StatÈs authorities. Von Bogdandy analyzed the elaboration required for the internal implementation of the international constitutional law which is the task of the domestic institutions, the practice of the Venice Commission emphasises the importance of the reasoned doctrinal contribution given at the international level.

The realization of this peculiarity of the activity of the Commission offers, on the other side, a correct way of approaching the connected problem of the legitimization of the role of the Venice Commission in the exercise of its functions. I underlined in the previous pages that, even if it is not a lawmaking body, it displays a substantial contribution to the expansion of the international constitutionalism and gives a relevant contribution to the establishment of an internal organization of the States which has to be in compliance with the principles of the constitutionalism. It is correct recognizing that the Commission's activity has a political relevance, but the ascertainment of this fact does not allow the conclusion that the body has to have a political legitimacy or proceeds according to political criteria of decisions. The States entrusted the Commission with the technical mandate of insuring the expansion of the constitutionalism and the Commission has to provide for the accomplishment of this mandate through the elaboration of juridical reasons according to the cultural and professional qualifications of its members. It is not bound to implement the interests of the States which appointed its members. Its decisions and opinions derive their authority from the correctness and the coherence of the legal methodology adopted by the body. They have to be adopted according to principles of neutrality in the full respect of the basic requirements of the legal reasoning. The compliance with the fundamental rules of the professional deontology of its

members is at stake and, as far as this compliance is guaranteed, the legitimacy of the activity of the Commission is beyond dispute.

The results are, frequently, in some way disconnected from the content of the concerned international treaties and assume an separate relevance. Therefore it is correct concluding that the hypothesis that they concur in the formation of the international constitutional law is based on good grounds.

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