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Parliaments, Constitutional Transitions and the Venice Commission (*)

1. The Venice Commission: composition, functions and working methods. 2. The expansion of the Commission's activities throughout the parliamentary domain. 3. The Venice Commission's mission and the role of Parliaments. 4. The follow-up of the Commission's advices in hard cases. 4.1. The case of Hungary. 4.2. The case of Ukraine.

1. The European Commission for Democracy through Law ('Venice Commission') has been rightly defined "the brainchild of Antonio La Pergola"¹, who as Italy's Minister for European Affairs mooted the setting up of a body devoted to cultivating respect for democracy and the rule of law in Eastern European countries after the fall of the Iron Curtain.

The Venice Commission was founded in May 1990 by means of a partial agreement among 18 member states of the Council of Europe. Today 60 member states are represented in its board: the 47 Council of Europe member states, plus 13 other countries (Algeria, Brazil, Chile, Israel, Kazakhstan, the Republic of Korea, Kosovo, Kyrgyzstan, Morocco, Mexico, Peru, Tunisia and the USA). The European Commission and OSCE/ODIHR participate in the plenary sessions of the Commission, that are held in Venice four times a year.

The role of the Commission is to provide legal advice to its member states and, in particular, to help states wishing to bring their legal and institutional structures into line with European standards and international experience in the fields of democracy, human rights and the rule of law. It also helps to ensure the dissemination and consolidation of a common constitutional heritage, playing a unique role in conflict management, and provides "emergency constitutional aid" to states in transition. Its individual members are university professors of public and international law, supreme and constitutional court judges, members of national parliaments and a number of civil servants. They are designated for four years by the member states, but act in their individual capacity.

The Venice Commission is not an organ of the Council of Europe but instead a consultative body to it. Its own specific field of action are the guarantees offered by law in the service of democracy such as, inter alia, the promotion of the rule of law and democracy, the examination of problems raised by the working of democratic institutions and their reinforcement and development, fundamental rights and freedoms, most notably those that involve the participation of citizens in public life, and the contribution of local and regional government to the enhancement of democracy. According to Article 1 of its Statute "The Venice Commission may carry out research on its own initiative and may prepare studies, draft guidelines, laws, and international agreements. Any of its proposals can be discussed and adopted by the statutory organs of

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¹ M. de Visser, *A Critical Assessment of the Role of the Venice Commission in Processes of Domestic Constitutional Reform*, in *American Journal of Comparative Law*, Vol. 63, Issue 4, forthcoming, at 1.

the Council of Europe. The Venice Commission may supply, within its mandate, opinions upon request from the organs of the Council of Europe, or a State, or an international organization or body participating in its work. Any State, which is not a member of the enlarged partial agreement, may benefit from the activities of the Venice Commission by making a request to the Committee of Ministers of the Council of Europe”.

The working methods of the Venice Commission are manifold and flexible. It establishes sub-commissions on specific fields—such as constitutional jurisdiction, minority protection—special working groups, task forces, holds hearings, establishes expert groups for consulting on the spot in a respective country, undertakes transnational studies and reports, organizes seminars for specific problems and training courses for civil servants. It assists the Council of Europe in monitoring whether a State wishing to join the Council of Europe fulfils the specific requirements for membership, eg examination of the Russian constitution as part of Russia’s accession procedure to the Council of Europe, or, once a State has joined the Council of Europe, monitors whether it is living up to the requirements.

In all of its efforts, the Venice Commission aims to uphold the three elements of Europe’s constitutional tradition, namely democracy, human rights and freedoms, and the rule of law. It particularly works in the areas of constitutional assistance, minority protection, elections and referendums, and co-operation with constitutional courts. The Venice Commission has worked as a tool for emerging constitutional engineering, managing crises, and preventing conflicts through constitution building by disseminating European constitutional heritage. The Venice Commission’s opinions or recommendations are not binding but have been heeded quite often in the preparation of a final text.

During the first decade after its establishment, the Venice Commission was mainly concerned with advising the former communist countries in Central and Eastern Europe in their endeavours to draft new constitutions in compliance with the European heritage. All of them, from the Baltic States via the then Soviet Union to Albania, had approached the Venice Commission for advice.

When the Eastern-European constitutional transition reached its peak ten years ago, the Commission did face the risk of exhausting its *raison d’être*, but reacted to it by broadening the geographical spectrum of its action², that today is extended worldwide. Furthermore, while in the first decade of activity the Commission dealt regularly with constitutional transitions, namely transitions from dictatorship to democracy, further on it was confronted with situations which, for the different reasons that will be clarified, fail to be classified as transitory.

My proposal is, first, to give an account of the Venice Commission’s relationship with parliaments in the course of constitutional transitions (§ 2 and §3), and second, to inquire into the Commission’s role vis-à-vis situations that escape such categorization (§ 4).

2. The Venice Commission’s connection with national parliaments during constitutional transitions is twofold. First, given the nature of its advices and further activities, the Commission is clearly in the position

² V.Volpe, *The Venice Commission’s constitutional assistance as (counter-majoritarian) tool of democracy promotion*, forthcoming on *Glocalism*, at 6.

of taking part in a process which is connected with the national process of lawmaking even if it does not exercise formal normative powers³.

A deeper connection with parliaments is content-based. Although the original issue was centered on the establishment of constitutional courts, since the beginning the Venice Commission's points of advice focused also on general, equal, and free elections of legislative bodies. Besides advising in constitutional drafting, the Venice Commission engaged in studies of various topics closely related to constitutional law and the rule of law, such as on parliamentary immunity; constitutional foundation of foreign policy; federal and regional state issues; guidelines on financing, prohibition, and dissolution of political parties. The activities of the Venice Commission have considerably expanded over time throughout the parliamentary domain, including code of good practice in electoral matters, electoral systems, election evaluation guide, guidelines on legislation on political parties, referendums, restrictions on the right to vote, women's participation in elections, the role of the second chamber, stability of electoral law, revised guide on the evaluation of the elections⁴.

Since 2002, a specific organ is devoted to the issue, "The Council for Democratic elections" (CDE), in charge of the analysis of draft opinions and studies of the Venice Commission in the electoral field before their submission to the plenary session. Made up of representatives of the Venice Commission, the Parliamentary Assembly of the Council of Europe (PACE) and the CoE's Congress of Local and Regional Authorities, the CDE aims ensuring co-operation in the electoral field between the Venice Commission as a legal body and the Parliamentary Assembly and the Congress of Local and Regional Authorities of the Council of Europe as political bodies in charge of election observation, in order to promote the European common values in this field – the principles of the European electoral heritage. It has also encouraged the European Parliament, the European Commission, the Office for Democratic Institutions and Human Rights and also the Parliamentary Assembly of the Organization for Security and Co-operation in Europe (OSCE) to join in its work in an observer capacity. The OSCE/ODIHR participates regularly in this work.

The CDE adopted a Code of Good Practice in Electoral Matters, and, later, a Code of Good Practice on Referendums and a Code of Good Practice in the Field of Political Parties. These documents were meant to define the fundamental standards of the European electoral heritage and traditional constitutional principles of electoral law, and also the framework conditions necessary for their implementation⁵.

The functions of these Codes consists, in my view, in giving guidelines in the field not only for the countries concerned, but for the Venice Commission itself while evaluating whether these countries have respected the already mentioned standards and principles. On the one hand, as Sergio Bartole has pointed out, the Venice Commission is a technical body active under the umbrella of political bodies such as the Parliamentary Assembly and the Committee of Ministers of the Council of Europe, and it cannot therefore

³ S.Bartole, *International constitutionalism and conditionality. The experience of the Venice Commission*, in Rivista telematica dell'Associazione italiana dei costituzionalisti, www.associazionedeicostituzionalisti.it, at 6.

⁴ H.Steinberger, *Venice Commission*, in *Max Planck Encyclopedia of International Law*, 2007, 1.

⁵ See V.Volpe, *Guaranteeing Electoral Democratic Standards: The Venice Commission and "The Code of Good Practice in Electoral Matters"*, in IRPA-IILJ, *Global Administrative Law: the Casebook*, 2012, III ed., 60 ff.

make political decisions concerning the interpretation of European constitutional heritage⁶. On the other hand, the Venice Commission should avoid solutions challenging the political discretion of the country concerned, especially while advising political bodies of the latter.

3. It is at this respect that the relationship between Parliaments and the Venice Commission becomes problematic. While confronting with domestic courts, the Venice Commission is likely to share a common language and legal education. Its relations with Parliaments, on the contrary, shed light on the differences. Being both a technical and an international body, the Venice Commission should constantly take into account that, while exerting their functions, Parliaments are provided with popular legitimacy, and might thus claim that the Venice Commission's advices run counter national sovereignty.

The Venice Commission is fully aware of this possibility. As far as I know, Parliaments have never raised such kind of protests against its advices. On the contrary, in Europe and elsewhere, the Commission's contribution is generally welcomed from the countries concerned, as if it were a necessary condition, although only on factual grounds, for being considered respectful of the principles of human rights, democracy, and the rule of law at the international level.

Criticism is seldom raised from scholars on the ground that some advices failed to rely on previous Venice Commission advices or on the already mentioned Codes, as in the cases of the constitutional revision issued in Iceland in 2013, and of the 2012 Tunisia's Constitution draft⁷. First and foremost, the opinion given in 2012 on changes affecting the Belgian Constitution is brought as an example of the considerable discretion that the Venice Commission at present possesses to organize its work. In that case, the Commission was invited to release its opinion by the Council of Europe Assembly, following a complaint of members of the opposition parties before the Committee of Legal Affairs and Human Rights of such Assembly. However, the Belgian government actively sought to prevent the Commission from taking up the matter, with a view to avoid that domestic political actors might seize upon any critical remarks made by outside observers to re-open the debate on a carefully wrought institutional agreement. Notwithstanding this delicate situation, the Commission appointed three rapporteurs for releasing its opinion, although the latter was favorable for the government⁸.

It remains to be seen whether the Venice Commission's constitutional assistance "ultimately outlines an archetypical model of European Constitutionalism, whose core ideal is to pose internally and (more distinctively) externally rooted constitutional limits to political majorities and popular sovereignty"⁹. This arguing corresponds to the Commission's mission, to the extent that it translates international standards and provisions concerning human rights and the rule of law into domestic constitutional norms. However, when it comes to democracy, namely the 'third pillar' of the 'common constitutional heritage', things are more complicated. International standards and provisions concerning democracy, including elections,

⁶ S.Bartole, *Final Remarks: The Role of the Venice Commission*, 26 *Review of Central and East European Law* 2000 no.3, 353.

⁷ M. de Visser, *A Critical Assessment of the Role of the Venice Commission*, 9 ff.

⁸ M.De Visser, *A Critical Assessment*, at 17.

⁹ V.Volpe, *The Venice Commission's constitutional assistance*, at 13.

political parties, forms of government and the federal or regional structure of a state, are poor tools for 'constitutionalization' vis-à-vis those concerning human rights and the rule of law. Rather than on international provisions, the Venice Commission's standards of democratic structures and procedures rely in fact on common practices of constitutional democracies.

Opinions of the Commission affecting the third pillar might be viewed as exhibiting a deeper intrusion into the national sovereignty than those affecting the other two pillars, being widely held, and further confirmed by Article 4 of the Lisbon Treaty, that decisions concerning democratic structures and procedures lie at the core of national identity. Nonetheless, the Venice Commission's opinions regarding democratic standards are not meant to pose limitations on the democratic process, but rather to enhance its own functioning, or to avoid its potential gridlocks, in light of the experience of well-established and mature constitutional democracies.

Accordingly, although both fascinating and provocative, the definition of the Venice Commission as a 'counter-majoritarian' international institution fits only partially with the Commission's mission. It works nicely as long as such mission consists in putting checks on the national political power for the purpose of safeguarding human rights and the rule of law. The counter-majoritarian paradigm appears instead less suitable whenever the Commission suggests, e.g., that a certain device would be unfortunate for the good development of a federal state, or that the President of the Republic should not be provided with a certain power in a parliamentary regime. Similar suggestions have to do with the functioning of the political process, whose protagonists are likely to maintain their own discretionary powers.

4. A different issue is that of whether the countries concerned, and their Parliaments in particular, follow the Venice Commission's advices in the practice. Generally speaking, these are accepted, and tend to increase the Commission's authoritativeness worldwide.

Nevertheless, the Commission is now meeting challenges that fall uneasily under the label of 'constitutional transitions', such as those deriving from the rise of populism in the European political landscape and, on the other hand, from endemic internal conflicts combined with the geopolitical turmoil we are assisting at. Hungary and Ukraine might respectively exemplify these phenomena. Attention will thus be driven on whether the parliaments of these countries have complied with the Venice Commission's recommendations.

4.1. The 2011 Hungary's Constitution was drafted with the sole participation of representatives of Hungary's governing political parties, without any scientific or social debate. Concerns were promptly expressed from the Venice Commission about a document drawn up in a process that excluded the political opposition and other civil organizations. Further opinions were later released from the Commission concerning alleged violations of the rule of law emerging from the new constitution and the related 'cardinal laws' with respect to the independence of the Constitutional Court and the exercise of certain fundamental rights. In the meanwhile, also the OSCE, the U.S. administration and the EU Commission had raised similar objections, which were however contrasted by the Hungarian government without causing further reactions in spite of the provisions contained in Article 7 TEU.

As scholars pointed out in an amicus brief for the Venice Commission, "as this new system, with an extended number of cardinal laws, was rushed through the Parliament and came into effect, the worries of

the Venice Commission unfortunately turned out to be well-founded. We regret to report that there was almost no consultation either with opposition parties or with civil society groups during the preparation of the cardinal laws. Parliamentary committees speeded approvals of the laws on party-line votes, often without even having a text before them to determine for certain what they were voting on. The opposition parties received drafts of laws only when they were published on the parliamentary website, often with little time to systematically study the proposals. Consequential amendments to draft laws were made on the floor of the Parliament minutes before final votes. Almost never did the ruling party permit discussion of opposition proposals. When the Constitutional Committee of the Parliament, which determines whether the rules of parliamentary procedure were violated, was asked for its opinion on these tactics, the committee always ruled that no violations had occurred – and those decisions within the committee were made on party-line votes¹⁰.

The situation has not changed yet, in spite of the Venice Commission's enduring pressures on the Hungarian authorities to redress the perpetrated violations of the rule of law. The point is that, rather than a 'constitutional transition', Hungary is experimenting a period of 'illiberal democracy', or of a populist regime, that is unlikely to be reversed within a short time.

Illiberal democracies, whose number is ever increasing worldwide, should be distinguished from dictatorships on the ground that free elections are held in the country, and people are given at least some opportunity of expressing their political opinion. But illiberal democracies should not be confused either with constitutional democracies. In the former, rights such as freedom of expression and freedom of association are not granted by independent courts, with the effect of jeopardizing even the true exercise of the right to vote. In constitutional democracies, on the contrary, the rule of law, including separation of powers and particularly the independence of the judiciary, is connected with democracy in a way that citizens' political rights are mutually interconnected with the civil and the social ones¹¹.

The rise of illiberal democracies represents an entirely new challenge for independent and international bodies such as the Venice Commission. Populist governments not only tend to abolish independent courts and counter-majoritarian authorities within the country. They also nourish among the people a politics of fear against foreigners, and a correspondent suspicion for whichever suggestion coming from international technical bodies.

4.2. The Ukrainian case is also unlikely to be classified under the label of 'constitutional transition', although for reasons that differ strikingly from those of Hungary. Ukraine is affected from an endemic constitutional instability, especially due to a deep political and cultural division between the Western and the Eastern part of the territory, that has recently driven the attention of rival global players such as the US and Russia.

¹⁰ *Opinion on Hungary's New Constitutional Order: Amicus Brief for the Venice Commission on the Transitional Provisions of the Fundamental Law and the Key Cardinal Laws*, February 2012, at 3.

¹¹ C.Pinelli, *Populism and Illiberal Democracies: The Case of Hungary*, in Z.Szente-F.Mandak-Z.Fejes (eds.), *Challenges and Pitfalls in the Recent Hungarian Development. Discussing the New Fundamental Law of Hungary*, L'Harmattan, Paris, 2015, 211 ff.

These elements should be taken into account while evaluating the constitutional developments occurred since the 1996 Constitution's enactment, and the related Venice Commission's opinions. The 1996 Constitution adopted a semi-presidential system that proved to be unstable, with the result that *de facto* powers shifted strongly to the president, giving the system an authoritarian character. In turn, the constitutional revision following the 2004 Orange Revolution shifted power from the President to Parliament (the Verkhovna Rada) with a view to restore a balance between state institutions according to previous Venice Commission's recommendations. However, in a controversial decision in 2010, the Constitutional Court overturned the 2004 amendments, restoring strong presidential powers. On 22 February 2014, the Rada reinstated the 2004 amendments.

Within such political turmoil, the sole benchmark of a workable constitutional democracy was afforded from the 2005 Venice Commission's opinion. The Commission suggested *inter alia* that a stable parliamentary majority could be reached through the adoption of a German-style "constructive non confidence vote" whereby parliament could only vote no confidence in a government if a sufficient majority also exists for electing a new prime minister¹².

The proposal of introducing the German model of parliamentarism confirms that, in hard cases such as that of Ukraine, the Commission is brought to suggest choices that go beyond the commonly held observation that democracy can be ensured *vis-à-vis* different forms of government, provided that certain general principles are respected. These choices, being grounded on technical arguments, do not transform the Venice Commission into a political body. But their impact on the political arena of a deeply divided country might altogether challenge the impartiality surrounding the Commission's traditional image.

After Russia's occupation of Crimea, coupled with Russian demands that Ukraine should become a federation (March 2014), the Ukrainian case raised further challenges even for the Venice Commission.

Being asked by the Secretary General of the Council of Europe to provide an opinion on "whether the decision taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to organise a referendum on becoming a constituent territory of the Russian Federation or restoring Crimea's 1992 Constitution is compatible with constitutional principles", the Venice Commission gave an advice whose final remarks were that "The Constitution of Ukraine, like other constitutions of Council of Europe member states, provides for the indivisibility of the country and does not allow the holding of any local referendum on secession from Ukraine", nor does the Constitution of the Autonomous Republic of Crimea "allow the Supreme Soviet of Crimea to call such a referendum. Only a consultative referendum on increased autonomy could be permissible under the Ukrainian Constitution"¹³.

This conclusion appears acceptable in strictly legal terms, and it is hard to see how could the Commission depart from them. But does the Ukrainian Constitution afford sufficient ground for solving the dilemmas arising in that country? In particular, as it has been asked, "Who counts as 'the people'? What is the

¹² See Venice Commission, Opinion no. 339/2005, Opinion on the Amendments to the Constitution of Ukraine adopted on 8.12.2004, adopted by the Commission at its 63rd plenary session (Venice, 10-11 June 2005), at 6.

¹³ Venice Commission, Opinion no. 762/2014 on "Whether the decision taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to organise a referendum on becoming a constituent territory of the Russian Federation or restoring Crimea's 1992 Constitution is compatible with constitutional principles", adopted by the Venice Commission at its 98th Plenary Session (Venice, 21-22 March 2014).

meaning of its self-determination? How should we interpret the devices used to detect its will? To what extent can, and should, 'the people' be shackled by the provisions of an existing constitution? The conflict in Ukraine is the most recent in a series of political conflicts with a territorial component and continues to raise endemic theoretical, doctrinal, practical, and moral questions¹⁴.

These issues require of course an overall reflection on the uncertain post-Westphalian features of our world. As for Ukraine, a strongly centralized State, a political solution respectful of the people's will might still be reached through constitutional revision. Before Russia's occupation of Crimea, decentralization had not been a key element of the Venice Commission's opinions regarding Ukraine, although, politically speaking, it resembled to "the elephant in the room"¹⁵. After Russia's occupation of Crimea and the following conflicts in the Eastern part of the country, Ukraine's strong centralization became untenable. Finally, due to international pressures, the Verkhovna Rada adopted draft constitutional amendments aimed at introducing a form of regionalization, that met a favorable opinion from the Venice Commission¹⁶.

Will such solution be the first step for reaching a peaceful assessment in Ukraine? Accordingly, will the Venice Commission acquire a pivotal role in the achievement of peace in deeply divided countries? In that event, it might also be called "Commission for Peace through Law", where "Peace through Law" corresponds to the title of a book written after World War II by Hans Kelsen¹⁷, who was Antonio La Pergola's teacher.

These, admittedly, are hopes coming from the author, as expert of the Venice Commission, and Professor La Pergola's pupil. The author must also advise that, for the moment, Ukraine's extreme constitutional fragility raises questions affecting the international/constitutional law divide, including peoples' self-determination, not less than geopolitical balances. Together with Hungary, Ukraine demonstrates that the time of the seemingly quiet constitutional transitions of the 1990s is behind us.

¹⁴ Z.Oklopčic, *Introduction: The Crisis in Ukraine Between the Law, Power, and Principle*, in *German Law Journal*, 2015, at 361.

¹⁵ See Democracy Reporting International, Briefing Paper 46, March 2014, www.democracy-reporting.org

¹⁶ See Venice Commission, Opinion no. 803/2015, Preliminary Opinion on the Proposed Constitutional Amendments Regarding the Territorial Structure and Local Administration of Ukraine, Strasbourg, 24 June 2015.

¹⁷ H.Kelsen, *Peace through Law*, The University of North Carolina Press, Chapel Hill, 1944.