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"THE EXPERIENCE OF THE VENICE COMMISSION: SOURCES AND MATERIALS OF ITS ELABORATION OF THE INTERNATIONAL CONSTITUTIONAL LAW"

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The Venice Commission takes part in the international constitutional monitoring and elaborates the international constitutional law through the machinery of the conditionality[1]. The reference to the conditionality is an essential feature of these developments, it implies that the effects of the Commission's law-making don't depend only on the mere declaration or statement of its opinions, but it needs their acceptance by the institutions which required them and their following implementation in the making of the national constitutional or ordinary legislation at stake. Therefore, the compliance with the opinions is at the basis of the final production of the law-making effects. These are the result of the translation of the guidelines and principles proposed by the opinions in a repeated observance[2] which opens the way to the advent of a customary law, the main content of which are the basic elements of the doctrines elaborated or accepted by the Commission[3]. These developments may be specially observed when the Commission draws inspiration from the constitutional experience of the States. But sometimes the work of the Commission implies the elaboration of specific normative texts (treaties or conventions on human rights and fundamental freedoms or, in particular, for example, the *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE 1990)*: in this case there is a written point of reference, and the activity of the Commission favours the formation of the interpretative doctrines of the relevant documents in cooperation with that of other authorities (for instance, international judges, which frequently quote its opinions).

According to many authors it would be possible to classify these developments as epiphanies of transnational law. It is a terminology which correctly underlines the modalities of the formation of what we call here international law, because it emphasizes the extension of constitutionalism beyond the nation – state borders through cross – boundaries interpenetrative relations. However a recent contribution has demonstrated that the evolution of the transnational law is strictly linked to phenomenons of disconnection of the legal transborder experiences from their international foundations, and – therefore – its normative and institutional structure have distanced themselves from the background of the treaty - regulated relations between the States[4]. An important example is offered by the system of the ECHR and by the case – law of the ECtHR which is seen as a true instance of transnational law-making. As far as the results of the activity of the Venice Commission regard the safeguard of the human rights and draw inspiration from the elaboration of the precedents of the ECtHR, we could argue in favour of their inclusion in the developments of the transnational law, but when institutional issues of the concerned States are at stake, the reference to ECtHR caselaw is getting more tenous and the international law system could regain new space and relevance through the machinery of the conditionality.

As a matter of fact we find at the core of the experience of the Venice Commission Its advisory acts and its opinions on the drafts of constitutional implementations or reforms submitted to its examination by Countries which are interested in the adhesion to international or supernational institutions, or in maintaining their membership of them according to international treaties stipulated between States. By adopting the acts which are typical of its functions, it concurs in the elaboration and in the formation of principles, standards and guidelines whose observance is relevant in view of the purposes pursued by those Countries and by the Countries which are already members of the concerned

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[1] SERGIO BARTOLE; *International constitutionalism and conditionality. The experience of the Venice Commission, AIC Rivista* 4/2014.

[2] The Commission offers evidence of the continuity of its adhesion to the proposed doctrines by publishing studies and reports on the main constitutional items which have been dealt with in its activity.

[3] For similar conclusions but with regard the advisory opinions of the international judges OELLERS – FRAHM, *Lawmaking through advisory opinions,* in *German Law Journal* vol. 12 n. 5, 1033.

[4] TUORI, *Transnational law: on legal hybrids and legal perspectivism,* in MADURO, TUORI and SANKARI ed., *Transnational law: Rethinking European Law and Legal Thinking,* Cambridge 2014, 11, 20.

institutions. Day by day, the documents of the Commission make up an organic whole of principles and standards aimed at the implementation of the doctrine of constitutionalism in the different fields of the organization of the powers of the State, the safeguards of the human rights and fundamental freedoms, the judicial review of legislation and the relations between the States and their participation in international or supernational institutions. In this paper I'll try to deal with two main questions concerning the activity of the Venice Commission. On one side, it is certainly urgent and necessary to ascertain the geographical extension of the effectiveness of the principles elaborated by the Venice Commission. Today it is very frequent connecting the growing of the international constitutional law with the developments of the s. c. globalization, therefore we should investigate whether the activity of the Commission is affected by the expansion of the globalization, it regards a worldwide legal space, or its relevance has to be restricted to the European regional area as it could be suggested by the institutional connection of that body with the Council of Europe, notwithstanding this institution pretends to pursue universal values. On the other side, it is of great interest identifying the sources of the guidelines and principles whose observance the Commission requires to the Countries which look for its advice and help. The identification of these sources emphasises the historical matrices of the constitutional doctrines taken into consideration by the Commission. The two questions are evidently connected because the identification of the historical developments of the constitutionalism from whom the Commission draws inspiration, offers elements for the ascertaining of the geographic extension of the relevance of its "jurisprudence". The phenomenon depends on the historical formation of the European constitutionalism in the frame of the old national States, even if it implies the extension of constitutionalism beyond its nation – state confines[5].

The rationale of the analysis I want to develop, favours starting with the second question as far as the identification of the historical sources of constitutionalism indirectly gives sufficient indications of the geographical extension of the relevance of the activity of the Commission. An historical approach is obviously necessary. The investigations of the Commission are strictly connected with the idea of the Constitutional Heritage. It has to look at the traditional legal experiences of the constitutionalism, that is it has to ascertain, on one side, the origins of the shared values which make up the Constitutional Heritage, and, on the other side, the spreading of these values from one legal order to another one and the reciprocal exchange of experiences and suggestions which imply a common adhesion to common concepts of constitutionalism. From this historical point of view the starting point has to be the experience of those Countries which are usually identified as the cradle of constitutionalism, especially United Kingdom, United States and France. But we cannot forget the contribution of other Countries, from Belgium to Italy and to Germany.

If the starting point of our inquiry regards the general principles of the Constitutional Heritage, we have to look firstly to the *Magna Charta* with all the following amendments and integration of the initial document of the year 1215 aimed at insuring its updating to the social and economic developments of the United Kingdom. This move is certainly useful if we want to identify the matrices of the doctrine of the *rule of law*, but if we focus our attention on the models of the organization of the State and, in particular, on the doctrine of the separation of powers, we have to make reference to the *Declaration des Droits de l'Homme et du Citoyen* of 1789, whose art. 16 states that all the societies where the guarantee of the rights is not insured and the separation of powers is not established don't have a constitution. The correctness of this way of proceeding could be contested because we pretend to look at documents which have different origins and pertain to different legal systems. It could be objected that we are not in the position of a jurist who deals with the *Bill of rights* of the American Constitution and considers "the legal texts of other charters of liberty – Magna Charta, Petition of Rights, the English Bill of Rights, state constitutions, and

[5] TUORI, *Transnational law,* 39.

the like" as materials of his research[6]. As a matter of fact, the American jurist rightly makes reference to all the quoted English documents as far as the English system of law is at the origins of the constitutional developments of the American Colonies and of the United States. But our approach is equally correct when we quote the mentioned English and French documents, and appreciate their international and supernational relevance in the light of the intermediation of the legal constitutional culture and of the effects of its spreading through the borders of the States[7]. We cannot stick to the literal content of the legislative texts only. We have to consider that their historical relevance makes sense through their cultural elaboration which discovers their meaning by identifying the ideological basis of the relative choices and their political orientations. Therefore in some way we can enlist the legal constitutional culture between the sources of the object of our research. At least, we may say that the products of the legal constitutional culture are part of the materials we have to use in view of the identification of the Constitutional Heritage in an historical perspective. From this point of view the perception of the transborder reciprocal influences which are at the basis of the yardsticks adopted by the Commission, is getting more evident.

On the basis of this conclusion we cannot forget the contribution given to the elaboration of the doctrine of the European constitutionalism by the experience of the United States and by the American legal and political literature contemporary of the Philadelphia Convention, first of all *The Federalist.* The contribution of the first liberal and democratic Constitution of the Western World cannot be missed, especially if we look at the developments of that document and its legislative and judicial interpretations and transformations. And obviously the contribution of the liberal and democratic Constitutions, adopted since the French Revolution to recent times, is an essential part of the reasoning of the Venice Commission as far as the developments of the constitutional doctrines proceeded, step by step, a) in the first part of the XIX century, after the first and second World Wars, b) following the revolutionary changes of regime in the Mediterranean Sea and c) at the time of the fall of the Soviet Union and the Federal Republic of Yugoslavia. The passage from the initial historical declarations to the Constitutions allows a deep understanding of the necessary steps and measures to be adopted in view of the implementation of the general statements which are the typical content of the formal documents and bills which are at the origin of constitutionalism. For instance, the mentioned art. 16 of the *Declaration* of 1789 does not say many things about the institutional arrangements which have to be adopted to establish a correct relation between the powers of the State in compliance with the principle of the separation of powers. In this matter we can draw useful suggestions from the old Constitutions of the XIX century, but they obviously regard solutions which were compatible with monarchical regimes. Therefore, the reference to these past experiences has to be completed and integrated with the analysis of the more recent Constitutions of the past century which allows us to look at the problem from an operational point of view and to consider the alternative solutions adopted to comply with the principle of the separation of powers in the frame of the contemporary societies.

The developments of the contemporary constitutions are also at the centre of the attention of the Commission when it reminds that "since World War II, constitutional courts were typically established in Europe in the course of a transformation to democracy; first in Germany and Italy, then in Spain and Portugal and finally in Central and Eastern Europe." The purpose of overcoming the legacy of the previous regimes and to protect human rights violated by these regimes is connected with the substitution of the system of the separation of powers for the principle of the unity of power centralized in the Parliament and in the political bodies of the

[6] AKHIL REED AMAR, *The Bill of Rights,* New Haven – London 1998, 299

[7] KAARLO TUORI, *Critical Legal Positivism*, Farnham – Burlington, 2009, 121, and *Ratio and Voluntas*, Farnham – Burlington 2011, 173.

States[8]. From the very beginning a preference was expressed in favour of a constitutional jurisdiction exercised by a permanent special constitutional court[9], therefore the elaboration of the materials preferred the suggestions offered by the kelsenian model of constitutional justice instead of the American model which implies the entrusting of all the judges with the function of the judicial review. Therefore a new element of complexity was added to the doctrine of the separation of powers.

Sometimes the indications of the constitutional experiences are not univocal and it is necessary to find additional criteria to select them in view of their utilization. This is just the case of the separation of powers with regard to the independence of the judiciary. The Venice Commission distinguishes the systems which entrust the functions of the administration of the career of the judges to independent judicial councils, whose membership is made up by the election of judges by their colleagues and legal experts by the Parliament, from those systems which exist in some older democracies where the executive power has a strong influence on judicial appointments[10]. This solution could be considered dangerous for the independence of the judiciary, but the Commission has conceded that such systems work well because the executive is restrained by the legal culture and traditions, which have grown over a long time. The constitutional guarantee stays, in these ancient democracies, in old consolidated practices and in the adhesion to an established and shared whole of values, while the States where new democracies have been introduced, have historically missed a chance of developing these traditions which can prevent abuse. Systems which the old democracies are allowed to keep, are instead prevented to States where the introduction of the democratic and liberal institutions has been proceeding under the control of the Commission, in presence of historical experiences which did not comply with the reasons of constitutionalism. Therefore the evaluation of the practicability of the different solutions depends on the adoption of value - oriented and historical criteria whose practical relevance the Commission explicitly underlines.

It happens that in other situations the historical traditions cannot be accepted by the Commission as discriminating yardsticks in view of the evaluation of institutions which the States want to keep or introduce in their legal systems. For instance, while it looks acceptable that the constitutional history and legal traditions of a given country may justify the entrustment of non-criminal functions to the prosecution service, the Commission is of the opinion that this way of reasoning can only be applied with respect to legal traditions which are considered democratic and in line with Council of Europe values. This conclusion justifies the opinion that it is not acceptable the only historical model of prosecution service existing in Ukraine which is the Soviet and czarist model of prokuratura, because it reflects a non-democratic past and is not compatible with the European standards and the Council of Europe values[11]. And the Commission criticized the uniformity procedure which Hungary introduced entrusting the *Curia* with the function of adopting obligatory uniformity decisions applicable for courts, notwithstanding that this procedure has apparently its roots in the 19th century. Such a procedure may provide for an active interference of a “superior” body in the administration of the justice and the exercise of the judicial function by the lower courts and tribunals which conflicts with their independence[12].

[8] CDL-AD(2013)014.

[9] HELMUT STEINBERGER, *Models of constitutional jurisdiction,* Collection “Science and technique of democracy” no. 2, Council of Europe 1994.

[10] CDL-AD(2007)028

[11] CDL-AD(2009)048

[12] CDL-AD(2012)001

When we pay attention to the legal constitutional culture, the question arises about the relevance of some documents which are not frequently mentioned in the main texts of the doctrine of constitutionalism. I mean, for instance, the Polish Constitution of 3 May 1791, the Hungarian *Bulla Aurea* of the XIII century, the Lithuanian Statutes adopted in the XVI century, but other important texts could be mentioned if we look at the historical developments of the ancient statehood of the Crown of Bohemia, the Georgian statehood and that of the Croatia Kingdom, and so on. Did all these documents contribute to the elaboration of the European constitutionalism? Does their presence in the history of some European Countries authorize the interpreter to consider their historical traditional precedents useful for the elaboration of the yardstick to be used in view of the compatibility of constitutional reforms in the light of the European Constitutionalism? Or are we not allowed to treat those documents as constitutive factors of the European constitutional tradition?

As a matter of fact, we cannot deny that the mentioned documents are part of the European constitutional history, but, if we want to answer correctly to the questions advanced in these pages, we have to investigate the involvement of the concerned Countries in the building of the modern State and of its constitutional features. When we look from this point of view at the history of the doctrines of constitutionalism, we have to recognize that the statutes and the constitutions of the Central – Eastern Europe are very rarely mentioned as constitutive elements of the European constitutional tradition. We can find an explanation of this fact when we compare, for instance, the different historical meaning and relevance of the *Magna Charta* and of the *Bulla Aurea.* The first of these texts has been implemented, step by step, as a source of a general extension of the protection insured by the customs and freedoms of United Kingdom in connection with the enlargement of the powers of the Parliament, and opened, therefore, the way of a modern approach to the safeguard of the civil and political rights and freedoms, while the *Bulla Aurea* was always interpreted according to a restricted idea of the guarantees which it insured on the basis of the fruition of the land and in view of the protection and the prerogatives of the ruling class. Therefore the mentioned Hungarian experience as well as that of other Central – Eastern Europe documents are correctly described in the European historical legal literature as having had a peripheral character in respect to other documents of the European constitutional civilization[13].

A similar reasoning can be developed with regard to the constitutional statute of the judiciary. For example, in the art. VIII of the old Polish Constitution it was stated the principle that “as judicial power is incompatible with the legislative, nor can be administered by the King, therefore tribunals and magistratures ought to be established and elected”, but unfortunately the Polish history did not allow a satisfying elaboration of the organizational models for its implementation. Therefore the contribution of the Polish tradition of the constitutionalism in the judicial matter does not appear very conspicuous. And in Hungary the substitution of the constitutional developments of the Austro – Hungarian Empire for the experience of the exercise of the judicial power by the King and his *palatini comites* complied only partially with the doctrine of the separation of powers. It is true that the organization of the judiciary and the career of the judges depended on the Executive also in some Western Europe countries until the end of the second World War, but in the second part of the XX century – while the Central – Eastern Europe was under the communist regimes - France and Italy, and after Spain and Portugal adopted and implemented constitutional provisions which displayed a relevant role in conforming the new models of the judicial autonomy and independence. Therefore the States which suffered the experience of the communist regimes, have had to accept an updating of their constitutional doctrines, even if the new

[13] This conclusion is frequently mentioned in the legal literature as a result of the important contributions of EGIDIJUS JARASIUNAS concerning the European contest of the 1992 Constitution of Lithuania and the sources and archetypes of the constitutionalism.

developments imply that the reference to the old traditions is no more sufficient or completely inadmissible.

Special attention has to be paid to other sources of the yardsticks adopted by the Venice Commission, that is many international documents, especially in the field of the human rights, from the Charter of the United Nations of June 26, 1945, and the United Nations Covenant on Human Rights to the ECHR. Their importance derives from the fact that they are the result of a common effort to summarize the main constitutional values and ideals which are largely shared in the contemporary world. It could be possible to read these quotations as an openness to a globalization – centred point of view of the problems dealt with by the Venice Commission with the adoption of an universal perspective. But it should be advisable to be careful in drawing such a conclusion. The terms of reference of the opinions of the Commission are always and especially the Countries of Western Europe, and the documents of the Council of Europe in particular, as it is confirmed by the examples mentioned in the previous pages. This attitude can be easily explained when we think about the developments of the constitutional doctrines in the XIX century and have regard to European political history. Taking into consideration these facts, we cannot help to underline the link which connects the take-off of the Council of Europe with the fall of the nazi and fascist dictatorships after the second World War and its enlargements following the advent of democracy in Spain, Portugal and Greece, on one side, and, on the other side, the fall of the Soviet Union and the Federal Republic of Yugoslavia, even if all developments took place under the umbrella of the UNO.

We can conclude that there is a great deal of sources and materials which are taken into account by the Venice Commission in the elaboration of the yardsticks for the evaluation of the documents submitted to its attention. On this basis it is probably convenient distinguishing the results of its activity, of what we could call its "case-law". First of all there are principles of law, which have a transnational relevance, they display their effects in the legal orders of all the concerned States as far as they are transplanted from one system of law to another through the channels of the constitutional culture, the international relations and the activity of the international and supernational institutions through conditionality. For instance, establishment of the independence of the judiciary frequently mentioned in this paper, is certainly affected by transnational principles as far as important provisions of the international treaties concerning the safeguard of the human rights are at stake as far as they connect the guarantee of the human person to specific institutional arrangements of the judiciary. These principles are strictly binding the legislators of the States even if they are not expressed - according to the suggestion of Ronald Dworkin[14] - in a "all or nothing fashion". Therefore they can be implemented according to different organizational solutions, which can be all covered by the normative spectrum of the same principle. For instance, the separation of powers is a principle which has to be complied with inescapably, but different models of implementation are admissible, from the self – government of the judiciary and the establishment of judicial councils to its administration through the Executive power necessarily bound to the observance of specific institutional and personal guarantees aimed at insuring the independence of the individual judges and the autonomy of their offices. The Venice Commission has an evident preference for the adoption of the judicial council model in the constitutions of the new democracies, but it is very prudent in suggesting the modalities of its application. In this case we are in presence of standards or guidelines of legislation which don't have the normative relevance of the principles, even if they are perceived as mandatory by the addressees of the opinions of the Commission through the machinery of the conditionality. In other cases the Commission recognizes the existence of different legislative solutions of the constitutional problems which the States have to deal with, but does not make an express choice and restraints its intervention to the identification

[14] RONALD DWORKIN, *Taking rights seriously,* London 1977, 22.

of the limits which cannot be bypassed by the legislators, who are free in choosing the more convenient solution but have to respect the general principles of law which are typical of a constitutional State. The principle of the rule of law is frequently mentioned in the opinions of the Commission which recognizes that “a challenge for the future is how the achievements of the rule of law can be preserved and further developed under circumstances where individuals are increasingly influenced by and linked to new modes of governance“ (CDL-AD(2011)003).

This attitude explains the position of the Commission with regard to institutions which have a more recent history and have found attention by the legislators only in the present days. This is the case of the ombudsman which has its origins in the experiences of the Nordic democracies and has been adopted sometimes in the European modern Constitutions. We have only occasional texts of elaboration of materials concerning this institution, even if – for example - the Venice Commission suggested it in alternative of the soviet and czarist prokuratura for the exercise of functions aimed at the safeguard of public interests which don’t fall in the scope of the criminal law (CDL-AD(2009)048). Another organizational model which is prudently dealt with by the Commission is that of the budgetary and financial judicial autonomy practiced by some Nordic Countries. Further evolutions in this direction cannot be excluded, but those experiences have not yet been elaborated, even if some opinions support similar choices made by the legislators. We cannot say that the Nordic Countries are in a peripheral position as the Eastern – Central Europe Countries are which have an history of authoritarian and dictatorial regimes behind their shoulders, but it is evident that in the past the reception of these experiences and their elaboration in the frame of the European Constitutional Heritage has proceeded very slowly.

It cannot be denied that the Commission’s choices are sometimes pragmatic and flexible. A similar inspiration justified the remarks made to the recent Hungarian constitutional revision which was criticized for some constitutional provisions which did not develop the main principles of the organization of the judiciary and left to cardinal laws (to be approved by an high qualified majority and not easily amendable) the adoption of the details of the regulation, which – according to the opinion of the Commission – should have been left to the ordinary laws (CDL-AD(2012)001). As a matter of fact, the criticized solution apparently increased the risk of long-lasting political conflicts and undue pressure and cost for society in the occasion of the future adoption of possible reforms. The conclusion was argued on the basis of art. 3 of the First Protocol to the ECHR, which was read as requiring a participation of all the political forces, that is the majority and the opposition, in the preparation and the approval of the acts aimed at implementing the Constitution. This opinion can easily be connected to the opinion frequently expressed by the Commission that constituent assemblies have to be elected according to a proportional electoral system to guarantee the presence of the representatives of all the political parties and movements. Special attention has been paid to the take-off of the emerging democracies, where the initial identification of the nature and degree of segmentation of the political spectrum is considered as “a necessary first step” and, therefore, a first general election under proportional representation should be required “for a constituent assembly for example” (CDL-AD(2004)0039).

The establishment of the new democracies also required fundamental choices about the system of government to be adopted at the approval of the Constitution. Somebody could think that it is helpful enlarging the scope of the research to this item. But the Commission has correctly abstained from expressing a preference in favour of a parliamentary, or presidential or semi – presidential government: general principles about this problem are missing, the choice which has to be made is a choice of opportunity in view of the peculiarities of the concerned societies, and the freedom of the States to select one solution instead of another solution has to be recognized. Notwithstanding these premises, the Commission has always evaluated the proposals submitted to its consideration paying regard to the traditional models of government of the Western European democracies and in

the light of these experiences. Therefore, the Commission has frequently underlined the exigency that a system of checks and balances between powers and the inter-institutional cooperation shall be insured and its approach certainly implies the reference to the models of the mentioned forms of government which the legal doctrine and the political science have elaborated. Attention has to be specially paid to these models as far as they offer suggestions about the possible equilibrium between powers and a fair distribution of powers between the State's institutions (important remarks concerning Romania in CDL-AD(2012)026). The Commission is attentive in suggesting solutions which favour the avoidance of the growing of the powers of the State's bodies, especially if an individual person is at stake and is endowed with them, as it is the case of the President of the Republic (see the experience of Ukraine, and in other Countries of the Commonwealth of Independent States[15]). In this perspective the Commission has positively welcomed constitutional reforms aimed at substituting parliamentary or semi-presidential governments for previous presidential governments as it recently happened in the case of Armenia and Tunisia[16].

At this stage we can summarize the conclusions of this research. On one side, the sources of the opinions of the Venice Commission have to be found in the mainstream developments of the European States which have adopted and implemented the doctrines of constitutionalism, and, on the other side, we have to identify the peculiarity of the use of these sources by the Commission which is frequently mixing legal data, practical experiences and doctrinal elaboration of these materials. It follows that the legal relevance of the opinions adopted is – as it was underlined – necessarily different according to the different basis of the reached conclusions. Moreover, it is evident that the contribution of the Venice Commission to the internationalization of the constitutional law is Europe centred as far as the main sources of its activity pertains to the developments of the European constitutionalism even if there are still difficulties for their reception by all the European States.

[15] SERGIO BARTOLE, *Final remarks: the role of the Venice Commission, Review of Central and East European Law,* 2000, n. 3.

[16] Look at the references to " Constitutional reforms " at the home page of the Commission..