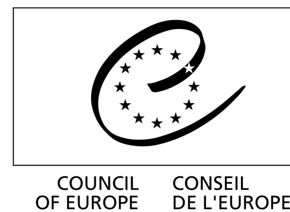

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THE ROLE AND CONTRIBUTION OF THE VENICE COMMISSION TO THE EU INTEGRATION PROCESS AND THE EU NEIGHBOURHOOD POLICY

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The Venice Commission as the European Commission for Democracy through law is known because of the connection of its functioning with Venice, where its plenary meetings take place in the Scuola Grande di San Giovanni Evangelista, was established immediately after the fall of the Berlin wall. Actually its statute was adopted by the Committee of Ministers on March 10, 1990. This historical relation deeply influenced the activity of the Commission, which immediately started assisting the new democracies of the Central and Eastern Europe to draft constitutions and formal or only material constitutional laws in line with the European constitutional culture.

But we have to keep in mind that the Commission was initially conceived as a tool for emergency constitutional engineering at a time of revolutionary change without explicit reference to the Countries of Central and Eastern Europe. This initial choice explains the quick extension of the scope of the attention of the Commission which from the very beginning was attentive to the constitutional developments outside Europe and to the establishing a constitutional conversation with Countries of Asia, Africa, and northern and Southern America.
The Venice Commission is established as a consultative body in the area of the constitutional law in the frame of the Council of Europe. It has been the result of a partial agreement among member States of the Council of Europe. It means that not all the member States of the Council of Europe are automatically members of the Commission, whose membership is reserved to the member Sates that have subscribed the agreement, only they take part in its activity and contribute to its budget.

As a matter of fact, all the member States of the Council of Europe are presently members of the Venice Commission. Since 2002 the Commission is also open to non European Countries which are at this very moment Algeria, Brazil, Chile, Israel, Republic of Korea, Kirgyzstan, Mexico, Morocco, Perù and Tunisia. Belarus is associate member, while European Commission, EU Committee of the Regions, OSCE/ODIHR and International Association of Constitutional Law participate in the activity of the Commission. Palestinian National Authority and South Africa have a special cooperation status.

If we look at the membership pf the Venice Commission we can easily distinguish States which have a long tradition of identification with the principles and values of the European constitutional heritage and States which identify themselves in different constitutional traditions but are encouraged to accept and follow the values and the principles of that heritage in drafting their constitutions and constitutional laws. Therefore a relation of cooperation was established between all these States. It has implied that the European constitutional heritage is a very useful basis for promoting the development of freedom and democracy not only in Europe.

A good example of these developments is given by the adoption of the Constitution of South Africa in 1996. The Venice Commission has firstly given its cooperation through the participation of its President Antonio La Pergola in the mission with- for example – Mr. Kissinger and Lord Carrington – entrusted to agevolate the bypass of the deadlock of the constitutional developments in that country due to the conflicts between South Africa political parties, and has later on contributed to the drafting of the Constitution by the advise of its members.

The main function of the Commission is assisting and advising individual States in constitutional matters. The intervention of the Commission is required in presence of a draft legislation which implies constitutional problems. The procedure is normally initiated by a body of the concerned State. Another State is not allowed to require the opinion of the Commission on a draft legislation of one State, but the Parliamentary Assembly of the Council of Europe and its Committee of Ministers are allowed to submit such a request to the Commission as well as the Secretary General. On the basis of the request the Commission appoints – among its members – two or more rapporteurs who are required to submit their comments on the draft. Sometimes they are invited to make a visit to the State concerned (a mission) to get in touch with the competent bodies of That Sate which prepared the draft or are affected by its provisions. The

visit frequently implies contacts with the social and civil society or with the political parties.
When the comments of the rapporteurs are ready, they are circulated among the rapporteurs themselves and the Secretariat prepares a draft opinion which is submitted to the plenary meeting of the Commission for its adoption. A previous examination by a subcommission is frequent, whose follow-up can be the introduction of amendments and corrections.

The opinion of the Commission can have political relevance but it is not the expression of a political choice. Venice Commission is a technical body whose members are appointed on the basis of their scientific and professional experience and work in their own personal capacity.
At the basis of the opinions you find the principles and values which are the constitutive elements of the European constitutional heritage. As a matter of fact this heritage is the yardstick that the Commission adopts in expressing its opinions on the drafts which are submitted to it. It is evident that the European constitutional heritage can be interpreted in different ways, different meanings can be attributed to it and these differences are at the basis of the discussions which take place among the members of the Commission. These conflicts are rarely settled by a vote, a solution through consensus is normally adopted. The results of this way of working can be appreciated if you read the compilations of the previous opinions of the Commission which are prepared by the Secretariat, for instance on the protection of the minorities, on the independence of the judiciary, on the role of the prosecutors. These documents are made up by quotations of the major or most important statements of the previous opinions.

The interpretation of the European constitutional heritage is allowed to move with scientific and operational discretion: it implies distinguishing the relevant principles and the extension of the space of discretion which they leave to the States. The point is very delicate and requires specific attention. The Commission has to deal with sovereign States and , obviously, even the interpretation of the heritage can be seen as an exercise of sovereignty. Therefore the Commission should leave to the State a margin of appreciation in dealing with their own constitutional problems. But this is not always possible because some principles and values must be interpreted in a mandatory way, that is in a way which does not have alternative of choice.

As a matter of fact the Commission has not the power of adopting opinions which are legally binding the States concerned, which are free to follow or not the suggestions of the Commission. The efficacy of these is strengthened by the well known machinery of the conditionality.

After the fall of the wall the new democracies were looking for the legitimization of their new status through the adhesion to the Council of Europe (in view of the future adhesion to the European Union) or through the concession of the necessary financial help by the competent international institutions. In both cases the hoped advantages were promised and allowed only in presence of the adequate constitutional reforms of the internal legal order of the concerned States.

The adequacy of the reforms should be checked according to an yardstick which was identified in the European constitutional heritage. In the frame of the Council of Europe but also when the exigencies of other international institutions were at stake, a relevant role in evaluating the constitutional reforms of the new democracies was displayed by the Venice Commission. Its opinions were the terms of reference in view of the acceptance of the requests of adhesion to the Council of Europe or in the perspective of the concession of financial and social help. But the Venice Commission is still displaying this role when the monitoring of the compliance with the engagements subscribed by the States at the moment of the adhesion or the acceptance of those States as members of the European Union are at stake, or eventually their coherence with the principles of the Council of Europe has to be ascertained.

It is evident that also in these cases Venice Commission is confronted with the problem of the respect of the sovereignty and the freedom of movement of the concerned States. Specially interesting the question of the attitude that Venice Commission shall take in interpreting the text of the draft legislation which is submitted to its judgement. It is a legislation which is in itinere, which has not yet been adopted, therefore it does not appear as the expression of a clear and consolidated will of the State concerned. The Venice Commission is, in these cases, free to interpret the provisions of the draft. Without being conditioned by the declared will of the authors of the draft. It can be assigned to the text all the possible meanings which can be derived from it according to the usual rules of the interpretation of the legal texts. It is its task to be open to all the possible interpretations of the text because it is its duty envisaging all the possible effects which can be derived from the draft submitted to its judgement. It has the possibility of giving an exhaustive reading of the draft only if it takes in consideration all its possible interpretations. The principle of suspicion requires that it has to be free in dealing with the proposed draft.

Recently the Commission was confronted with a completely different situation. It was required to adopt, on behalf of the Constitutional Court of Moldova, an amicus curiae brief on the interpretation of art. 78 of that Constitution. This article provides for the election of the President of the Republic and requires the majority of three fifths of the Parliament for the election. If the Assembly fails to elect the new Head of State, the Parliament shall be dissolved and the newly elected Parliament is allowed to reopen the procedure for the election of the President at the same conditions and with the same required majority provided for the previous experiment. If also the new Parliament fails to elect the President, it shall also be dissolved.

The Constitutional Court of Moldova required the advice of the Venice Commission asking whether such a solution of a possible reiteration of the dissolution of the parliament is inescapable or whether there are other possible different alternatives, taking into consideration the fact that art. 78 entrusts the organic legislation of the Parliament with the competence of providing the rules concerning the presidential election and the development of its procedure. Has the Parliament the power of modifying the required majority at least after the election of a new Parliament, if it fails again to elect the Head of the State?

Sticking to the text of the constitutional provision the Commission could explicitly support both a textual interpretation of it assuming the requirement of the three fifths as mandatory in absence of a constitutional revision, or a functional interpretation suggesting that – after the election of a new Parliament and the reiterate failure in electing the Head of the State – the organic legislator should be authorized to reduce the mentioned requirement. But choosing only one of these two different interpretations would have implied an interference of the Commission in the exercise of the sovereign powers of Moldova substituting its decision for the free and independent interpretation of the Moldovan Constitutional Court.

In adopting its opinion the Commission has chosen a different way explaining that it was only able to offer to the Moldovan Constitutional Court a suggestion about the way of reasoning in dealing with the problem of the interpretation of the mentioned art. 78. Textual interpretation should be given the priority because it appears as the preferable approach to the case. But, in presence of the state of institutional emergency actually existent in Moldova according to the opinion of the Constitutional Court itself, a way out from the deadlock in the election of the President could be found through functional interpretation by an enlargement of the powers of the organic legislation. Which could be authorized to reduce the required majority in conformity with the prevailing European trends which imply a progressive reduction of the initial requirements for the lection of the holders of the State's bodies (when it is not possible to get the initial higher majority) in view of insuring the continuity of the functioning of the State.

Choosing one of the alternatives was the task of the Moldovan Constitutional Court, the Venice Commission limited its intervention to the recognition that both of them are legitimate and

coherent with the European constitutional practice.

Sometimes the compliance with the internal deadlines of the procedure of the Venice Commission can create problems in view of a ready and quick adoption of the required opinions, specially when a State has an urgent need of the advisory help of the Commission. As a matter of fact the plenary meetings of the Commission take place only four times in a year in March, June, October and December. Therefore it happens that the Secretariat does not wait the formal adoption of an opinion by the plenary meeting but circulates the comments of the rapporteurs or the draft opinion in advance. In these cases, when the ordinary rules of the procedure are not complied with, the requiring State should take in consideration the delicacy of the choice made by the Secretariat and should avoid treating individual comments or draft opinions as formally adopted opinions of the plenary meetings.

As a matter of fact, because opinions are based on generally adopted and accepted constitutional principles, even the utilization of those comments and drafts should be facilitated as far as there are precedents in the “ jurisprudence “ of the Commission which make easier the reading of these preliminary documents.

On the basis of the collections of previous opinions of the Commission the interested parties are in the position of identifying the models of the constitutional institutions which coherently implement the principles and values supported by the Commission. It happens that in the European experience principles as the separation of powers, the representative form of government, the independence of the judiciary are implemented in different ways and according to different organizational models: the Commission sometimes expresses a preference for one or another model and adopts this choice as a guideline in offering its advice. For instance, with regard to the independence of the judiciary Venice Commission has evidently expressed a preference for the s.c. Mediterranean model of the organization of the judicial power. It has frequently suggested to entrust the functions of the administration of the judges to a body with members elected by the judges themselves and other members elected or appointed by authorities of other powers of the State. The members elected by the judges should be in the majority in that body which should be entrusted with the most relevant functions concerning the career of the judges. But Venice Commission does not exclude the division of these functions between different bodies, in any case explicitly requiring the compliance with the principles of the independence and the separation of the concerned bodies in respect to te authorities of the other powers of the State.

In this way the Commission distinguishes its position from the models of independence adopted, for instance, in 1) United Kingdom and 2) in Germany as far as it apparently prefers a model of appointment of the judges different 1) from that of their choice by the Executive among the professional lawyers and 2) requires the intervention in the relevant procedures of bodies different from those directly entrusted with the judicial functions.

In the matter of the organization of the prosecution service the commission, even if it does not refuse the collocation of the prosecutors in the frame of the Executive, explicitly requires that the independence of the prosecution office and of its holders is guaranteed even in relation with the government.

The activity of the prosecution service should always have a judicial destination. This is the reason why the Commission has some doubts in dealing with proposals aimed at reestablishing the old offices of Prokuratura in some countries of the Eastern Europe.

This is a very delicate problem as far as it touches an institution which has an historical tradition which preexists to the communist regimes. Sometimes it is not easy for the Commission to deal with matters which are greatly influenced by the history of the institutions of the concerned countries. This is the case, for instance, of the local government in Russia: the Commission

should avoid to require to the legislator an absolute and indiscriminate compliance with the western European models of the local government while –at the same time – it could not fail in advising the legislators about the need of complying with the main principles of the autonomy and selfgovernment of the local authorities.

Differences of models and principles have frequently suggested to the Commission the organization of the Unidem Seminars, specially in the field of the constitutional justice. These seminars offer to the participants the possibility of analysing the ways of the implementation of the European constitutional heritage in the different constitutional fields.

In this frame also the Seminars of the Unidem campus Programme, which are organized with the financial support of the Regione Friuli Venezia Giulia directly regard the functioning of the institutions of the interested countries as far as they offer to the participants who are young and promising officials of the administration, of the legislative assemblies and of the constitutional courts of those countries, to enrich their legal culture with special regard to the principles and values which are at the core of the activity of the Venice Commission.