The Venice Commission and the Construction of European Constitutional Law

Brief Remarks on a Recent Book by Sergio Bartole

Giorgio Repetto
Department of Law, University of Perugia, Perugia, Italy
giorgio.repetto@unipg.it

Abstract

Moving from the emergence of a third layer of European constitutional integration, as embodied by those various agencies and institutions called to promote human rights and the rule of law, the article focuses on the role of the Venice Commission as described by a recent book of Sergio Bartole. In particular, it dwells on the evolution of the Venice Commission, on the different functions it has been entrusted with, on the relationship with other institutional actors, on its fields of intervention and, lastly, on the methodological contribution its action may give on the establishment of a European constitutional heritage.

Keywords

fundamental rights – rule of law – constitutionalism – national human rights institutions – Venice Commission

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A third layer of European constitutional integration?

Until today, the European constitutional space has been the outcome of a complex interaction of different actors and institutions, operating at different levels, that may be roughly related to the division between political and jurisdictional subjects, both national and supranational. The whole edifice of European constitutional law, despite of its shortcomings and inconsistencies, came out over the past decades mostly from the interaction of politics and judicial activity. For a long time, it was hard to find other sources for those principles, institutions and procedures which give shape today to Europe as a constitutional landscape.

In the last years, this constitutional edifice was progressively added with a third layer, in which institutions like agencies and commissions have been entrusted with technical and specialized tasks, like advising and monitoring functions, in constitutionally sensitive fields like the control of democratic standards, fundamental rights’ protection and the safeguard of the rule of law.

Within this newly forged ambit of European constitutional integration the main actors are the European Union (EU) Agency for Fundamental Rights (FRA), the national human rights institutions (NHRI) established according to the Paris Principles of 1993 and the European Commission for Democracy through Law (better known as the Venice Commission). These organs do act in a mainly piecemeal fashion and are rarely vested with direct regulatory functions. However, their advising and monitoring activity plays a growingly crucial role with regard to several ambits related to democracy, fundamental rights and the rule of law, particularly in a moment where these three pillars of European constitutionalism are under siége by the rise of illiberal democracies.

Despite of this growing importance, only few legal essays have been dedicated so far to these institutions and, even more importantly, a scarce attention has been paid to the impact of their work on the first two layers mentioned above, i.e. that of political activity and of judicial decisions. In particular, the Venice Commission had a crucial relevance, in the last thirty years, in the governance of constitutional transitions in Eastern Europe and in the monitoring of the enforcement of the yardsticks of liberal democracy.

All of these topics are now examined by Sergio Bartole, former member of the Venice Commission, who seeks to clarify the political and constitutional relevance of the Commission with regard to its manyambits of intervention and, from a deeper perspective, to its contribution to the internationalization of constitutional law.

The eight chapters of the book and its two Appendixes do offer a detailed survey of the many advising and monitoring procedures set up by the
Commission in its thirty years of activity, when it was called to intervene in many different moments of constitutional crisis and transition throughout (mainly) Eastern Europe. At the same time, the book emphasizes the contribution given by the Commission and by the general machinery of its institutional partners at the Council of Europe and the EU level in the construction of a European constitutional heritage. According to Bartole, this notion (which implies a clear reference to the work of Alessandro Pizzorusso) identifies both the methodological yardstick the Commissions has to refers to and the constitutional objective it is called to promote in the exercise of its functions.

Rather than engaging in a detailed discussion of the different book’s chapters, I will focus on the cross-cutting topics it deals with, with particular regard to the evolution of the Venice Commission, to the different functions it has been entrusted with, to the relationship with other institutional actors, to its fields of intervention and, lastly, to the methodological premises and consequences of its approach. These are, in my view, the fundamental perspectives that help clarify the main objective of the volume: to shed a light on the contribution of the Venice Commission to the constitutionalization of Europe and to explain the reason for the backlash reactions it has favored so far, that are largely dependant upon the faltering development of constitutionalism in some countries of Eastern Europe.

2 From Constitutional Transitions to Democratic Backsliding: the Changing Role of the Venice Commission

There is probably no better way to understand the role of the Venice Commission than focusing on the evolution of its main tasks, that have radically changed over the decades alongside the transformations of the European scenario.

The Commission has been established by a resolution of the Committee of Ministers of the Council of Europe in 1992, with the aim of offering assistance to those European countries that experienced democracy after the fall of the Berlin Wall, assuming that the activation of democratic processes would not have been successful “without a suitable legal framework providing rules for its fair exercise and for the correct functioning of democratic institutions” (p. 8). Bartole is fully aware that such a mission was strongly driven by the historical and political premises shared by liberal-democratic systems at the time, that is to promote the coherence to the Western tradition as a pre-condition for the accession of Eastern European countries to European supranational entities.
like the CoE and the EU. At the same time, such a pre-condition has been freely accepted once the countries formerly part of the Warsaw Pact have asked for the membership of these European organizations.

This first phase of the Commission’s work ended when it was demanded to monitor the compliance with conditionality protocols for the accession to the new countries to the EU, according to the Copenhagen criteria laid down in 1993. The monitoring functions over the respect of democratic standards and on the safeguard of the rule of law, that are at the core of the conditionality enforcement mechanism, has been from then on the main task of the Commission. This called for the necessity to find a balance between its technical and political mandate and a certain flexibility in the drafting of yardsticks against which to measure the respect of those values. According to Bartole, this potential contradiction has been solved by the Commission once it decided to focus on effective institutional dynamics (p. 24 ff.) and to verify the enforcement of democratic standards in action, with regard to the different ambits it was called upon to decide (form of government, organisation of the judiciary, political pluralism, separation of powers, etc.).

The exercise of these monitoring functions over conditionality mechanism has favored the transition to the third phase of the Commission’s activity, that coincides with the broadest mandate it received in the last years, when the control over the respect of democratic standards, fundamental rights and the rule of law has been addressed to those countries where a process of democratic backsliding was at stake (like Hungary and Poland, but even Romania and Bulgaria). The evolutions that took place in these countries in the last decade show that their dissent to liberal democracy can be hardly counterbalanced by those technical institutions, like the Venice Commission, that are called to verify post-accession conditionality (p. 29). These reactions reveal a deeper project of refusal of the liberal-democratic model, that finds a source of legitimacy in the celebration of local constitutional (counter)traditions, whose main vehicle is the rhetoric of a national constitutional identity aimed at contrasting the convergence on supranational values.

In general, the three phases highlighted by Bartole (transition to democracy, pre-accession conditionality and contrast to democratic backsliding) reveal an itinerary of the Venice Commission that does not justify the several charges of militancy made by scholars like Iancu and Bobek. At the same time, that itinerary shows the risks of its action, that become even more serious once political authorities do not take sufficient measures in order to prevent the process of backsliding.
Standard-setting Activity and the Problem of European Constitutional Tradition(s)

A further cross-cutting topic that emerges from Sergio Bartole’s book is related to the specific functions that have been delegated to the Venice Commission. His constitutional law perspective, strongly indebted to comparative law, focuses in several pages on the criteria laid down by the Commission in order to take its opinions, that rely on yardsticks, guide-lines and standards rather than on binding rules and prescriptions. This is clearly connected with the institutional constraints of the Commission’s action, that is limited to an advising and monitoring role in the interest of political institutions like the Committee of Ministers. Beside this, attention has to be paid to the premises and to the consequences of this activity. On the one hand, the Commission has to cope the inputs of the political mandate with the necessity to constantly refer to the essential elements of the European constitutional heritage. According to Bartole, this requires a specific operational attitude in dealing with basic constitutional principles, that enables the Commission and its members to draw specific criteria in order to ascertain the violation of the principles of democracy and of the rule of law. This could be equated with a “new form of lawmaking” (p. 48), in that the decisions of political institutions would benefit from a technical survey demanded to an independent institution. On the other hand, with regard to the consequences of this standard-setting activity, the decennial activity of the Venice Commission has led to the emergence of a customary constitutional law, that deserves a close attention because it deals with topic like electoral systems and the organisation of the judiciary, that are rarely discussed in judicial decisions (p. 51 ff.).

In addition to the evolution and to the functions, a third topic extensively taken into account by Bartole concerns the several institutional actors whose action interferes with the opinions of the Venice Commission. He correctly highlights that the Commission’s activity “takes place between the Scilla of the European constitutional heritage and the Cariddi of the national constitutional identities of the European states” (p. 33). This requires that its activity remains constantly in touch with the political mandate issued by delegating institutions, but, as an independent entity, the Commission is under a duty to adjust its opinions depending on the specificity of the countries and of the problems at stake. Such a complex balancing is probably the most discussed topic of the volume and Bartole clearly states that the only possible solution for this problem is to look at the liberal-democratic European constitutional tradition as the Northern star that should drive the activity of the Commission. Moreover, he identifies this tradition with the canon of Western constitutionalism, that
basically coincides with the Euro-atlantic tradition. The absolute primacy of this tradition produces a series of concrete consequences for the standard-setting activity of the Commission. One may refer to the privilege accorded to those countries with an established democracy, that are enabled to derogate from some basic principles of constitutional doctrine, for example with regard to the relationships between the public prosecutor’s office and the executive power: whereas no institutional or functional dependance should exist for new democracies, since they “have historically missed a chance to develop those traditions that could prevent abuse” (p. 62), an exception is tolerated for those countries, like France, that show traditionally a high degree of compliance with democratic standards. In this case, judgment should be driven “not only by the law, but also by the legal culture and traditions that have developed over the years” (ibid.).

One should not be surprised by this double standard, that reflects the technical and advising role of the Commission. At the same time, the emphasis on the centrality of some traditions and on the peripheral nature of others (like, e.g., the absence of central constitutional review in some Nordic countries) risks to tighten up the Commission’s activity and to prevent it from establishing the European constitutional heritage in a dynamic and evolutive fashion.

4 Organisation of the Judiciary and Constitutional Justice: Models and Backlash

A closer look has to be given to a further cross-cutting topic of the volume, that is the one concerning the ambits of intervention of the Commission.

In particular, Bartole highlights that the organisation of the judiciary and constitutional justice are, first and foremost, the identifying elements of the European rule of law and of separation of powers’ doctrine. With regard to the judiciary, the book takes into account the question of judicial independence and its institutional consequences, like the different models of the judicial councils in Europe. This plurality of models is however mitigated by the existence of a model that is deemed to be considered constitutionally preferable: the Mediterranean model, that coincides with an ad hoc institution, composed for the majority of judges (so as to avoid corporatism and seniority) and far from representing the interests of a given category (p. 74 ff.). Against this background, the Venice Commission has contributed to the formation of an “international constitutional law of the judiciary” (p. 83), covering fields like councils’ organization, appointment of judges, procedural guarantees in disciplinary trials, organisation of prosecutor’s office. Each of these fields
has been threatened, in the last decade, by the democratic backsliding affecting countries like Hungary and Poland. In these countries, the organisation of the judiciary has been the first prey of illiberal forces, as is demonstrated by the pressures on retirement age for judges in Poland and by the reform of the National Judicial Council in Hungary, whose powers have been reduced in favor of organs appointed by parliamentary majority. Even in other countries (Bartole evokes similar evolutions taking place in Georgia, Albania and Montenegro), the perspective emerging from the monitoring activity of the Venice Commission is that judicial organisation is probably one of the currently most animated battle-fronts in Europe. For the solutions of these problems, Bartole does not invoke only the elaboration of common rules and organizational strategies, but even “the identification of the regulations that affect the individual status of judges and the content of the relevant administrative and disciplinary acts” (p. 89).

Even with regard to the organization of constitutional justice, Bartole admits the existence of a European model, i.e. the Kelsenian one, although this does not exclude “the possibility of different alternative solutions of strong or weak systems of judicial review” (p. 92). The analysis of both the appointment procedure of constitutional judges and of the different procedures for carrying out their tasks shows that constitutional courts should never lose their nature of “specific, permanent and independent judicial bodies” (ibid.). Despite of this, the concrete interaction of their organizational features reveals, even more clearly than with regard to the judiciary, many different variables, that are connected with constitutional traditions and with the relationships between political actors. One may refer to those systems that ignore a centralized constitutional court (like Finland or the Netherlands), but even to the preference of the Venice Commission for the a posteriori constitutional review (that calls into question the French tradition, with the recent exception of the question prioritaire de constitutionnalité) or for the ex nunc effects of judgments of constitutional courts, that are considered to be more respectful for legal certainty (p. 94 ff.). In addition to this, Bartole reminds us that the right to individual complaint before constitutional courts has been considered as a vital part of right to access to justice by the Rule of law checklist established by the Commission in 2015. These recommendations and standard-setting activity, as in many other ambits, proved useful to steer constitutional-making activity for younger democracies and to act like a yardstick for democracies experiencing a process of backsliding. The same standards are not able to act as a reference for established democracies that are enabled to derogate from the standards because of their democratic antibodies given by long-standing tradition, political pluralism, respect for rule of law.
5 A New Methodology for Comparative Constitutional Law?

One could not conclude a review of Sergio Bartole’s book without dealing with the methodological challenge that runs across the entire volume. Its title (*The internationalisation of constitutional law*) highlights that the fifth cross-cutting topic is related with the need to revitalise tools and methodology of comparative constitutional law. The “internationalisation” Bartole deals with is intended in a quite peculiar way: his main concern is neither whether there can be a constitutionalism beyond the state, nor to what extent the core content of national constitutional systems is influenced by supranational law.

The main methodological concern of Bartole is whether the development of European constitutional law can be enriched by the action of the Venice Commission, whose main task is to make founding principles of European constitutionalism concretely operational for steering political decisions, so as to confer to supranational law new dimensions of effectiveness. In order to do this, the methodology of this transnational constitutional law should be firstly comparative, and this could help comparative law to prevent the risks (emphasized by Tushnet) of a vanishing methodological identity. The objective of Bartole, in this perspective, is to promote a comparative approach that is more able than in the past to grasp the effectiveness of constitutional dynamics in order to promote the establishment of a *ius publicum europaeum*. The book refers to the well-known (and sometimes abused) metaphor of the living constitution (p. 24 ff.), that is recalled by the Venice Commission with the aim to clarify its methods of inquiry and the related need to “identify the peculiarity of the use of these sources by the Commission, which is frequently mixing legal data, practical experiences and the doctrinal elaboration of these materials” (p. 68). Against this background, the methodological challenge undertaken by Bartole could bring together the action of the Venice Commission and of the other agencies and institutions acting in the field of fundamental and human rights mentioned above, whose method of inquiry is more and more indebted to a sort of social law approach, that is able to reflect their distinctiveness from political institutions and judicial actors. It is a brand new methodological approach that deserves a close attention by scholars, for whose the book of Sergio Bartole is an excellent starting point.