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ARTICLE

Quod licet Jovi non licet bovi?: The Venice Commission as Norm Entrepreneur

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Abstract

The Venice Commission was created in 1990, as a part of a wider, generous project to help the former Communist countries with provision of Western expertise. The fledgling Eastern European democracies were meant to be able, in their effort to build constitutional, rule of law states, to tap at short notice on the knowledge and wisdom of an apolitical constitutional Areopagus. The Commission proved adroit at this task and its early track record generated a reputational snowball effect. More and more jurisdictions have joined it as members, observers or special status entities, spanning now almost all continents. Furthermore, the Commission has recently engaged in an intense, fast-pace effort at multi-layer cooperation, liaising with both other structures of the Council of Europe system and with counterparts in other international organizations (EU, OSCE/ODHIR, even the IMF). For instance, in the context of the recent EU 'populist crises', the EU Commission has increasingly relied on its Council of Europe colleague, in order to put out the populist fire with the help of a genuine expert in the field of 'democracy and the rule of law'. In its newer role, however, the Venice Commission has often displayed an unsettling degree of militancy, also by way of cross-hybridizing policy imperatives and normative criteria. Its country reports and guidelines are sometimes difficult to reconcile with traditional constitutional understandings of various concepts and institutions (and, frequently enough, with one another). By the same token, such determinations reinforce, in a vicious circle, preexisting deficiencies of procedural, methodological, and institutional design. The paper offers a critical assessment of the Commission's recent work, with a focus on recent Romanian developments, comparatively assessed.

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1 All Country Roads Lead to Venice

Once little known outside a small circle of initiates, the European Commission for Democracy Through Law has risen over the past decade as a significant constitutional entrepreneur.[1] The Venice Commission provides expertise to democratizing countries (for instance, the Tunisian Constitution of 2014 was drafted with substantial help from the Commission's experts),[2] umpires internal conflicts (for instance in Romania, in 2012 and 2018), assesses constitutional (Hungary, since 2011) and legislative reforms (Poland, since 2015), liaising industriously with germane structures of the Council of Europe (GRECO) or with counterparts in other international organization (EU, OSCE/ODIHR and, in the Ukrainian context, the IMF). Venice Commission positions have as of late been referenced by international courts, incidentally[3] or directly, as soft law sources,[4] with the intriguing effect of propping up revolutionary jurisprudential solutions otherwise not warranted by 'hard law' precedent.[5]

The new profile is reflected by significant growth in membership. In 1990, when the Venice Commission was established, its framework was one of limited cooperation embedded in the Council of Europe system. Only 18 of the then-23 member states participated in this sectorial structure. Current membership surpasses the 47 countries of the Council of Europe, with the 61 members counting also non-European states such as the US, Chile, Peru, Algeria, Tunisia, Morocco, and the Republic of Korea, one associate member (Belarus) and five observers (Canada, Argentina, the Holy See, Japan, and Uruguay).[6] The Palestinian National Authority, the European Union, and South Africa share in the Commission's work as 'special status entities.' This notable expansion of the Commission's membership and geographical reach both reflects and further bolsters the body's relevance as a repository and advocate of good practices in constitutional matters.

The role of Venice delegations in internal domestic politics, particularly in the Central and Eastern Europe, has been constantly reinforced, both as an effect of fragmentation or 'acceleration'[7] of the domestic political processes and by virtue of multi-layer cross-references with other organizations. In Romania, in the context of a constitutional crisis in 2012, the Venice Commission was relied upon by the Constitutional Court to defend it from internal attacks on its independence and by the

[1] On the notion of norm entrepreneurship, Sunstein (1996).

[2] Tunisia is only a particularly apposite example. See, on the constitution-making, expertise-provision work of the VC, a synopsis at https://www.venice.coe.int/WebForms/pages/?p=02_Reforms&lang=EN.

[3] C-216/18 (*Celmer/LM*), Grand Chamber Judgment of 25 July 2018. ECLI:EU:C:2018:586.

[4] ECtHR, 23 June 2016, *Baka v Hungary*, Application no. 20261/12.

[5] *See*, critical, Kosař and Šipulová (2018).

[6] The Statute of the Council of Europe was amended in 2002, to allow non-European states to join the Venice Commission as full members. Kosovo, although its statehood is firmly contested by a number of Council of Europe and EU member states, which is why it cannot be a member of the parent organization, is paradoxically a full *member (state?)* of the Venice Commission, http://www.venice.coe.int/WebForms/members/countries.aspx?lang=EN. The associate status of Belarus, which is undoubtedly a state, raises however even greater imponderables.

[7] *See*, on the concept and phenomenon of constitutional acceleration, Blokker (2017).

European Commission to provide honest brokerage and a neutral assessment of the state of play. In the aftermath, mentions of this institution in internal politics became commonplace. The European Commission in Brussels has footnoted with increasing frequency its Cooperation and Verification Mechanism reports[8] with accolades and references to the positions of its counterpart (which, in turn, reciprocated). To wit, a recent CVM progress report even mandates that no modifications of the constitutional provisions concerning the judiciary ought to be undertaken without prior consultations with the experts of the Council of Europe. Furthermore, *renvois* to the Venice Commission are now routine arguments in the domestic political battles over anticorruption and judiciary legislation. Romania is not exceptional in this respect; with the revival of conservative, 'populist' constitutional politics in Hungary and Poland, the Commission in Brussels has conscripted its Council of Europe partner in assessments of controversial legislative and constitutional reforms. For example, in the recent EU Commission rule of law recommendation to Poland, accompanying the Reasoned Proposal to the Council to trigger Article 7 proceedings (in EU hyperbole, "the nuclear option"), there are 22 references to the Venice Commission, in 19 pages of text.[9]

Somewhat counterintuitively, given the increasing importance of the Commission as a springboard for high-profile professional networking, a repository for guidelines, good practices and benchmarks in matters constitutional, and—last but certainly not least—a power broker in domestic constitutional conflicts, literature does not mirror current relevance. Reports, positions, codes issuing from the body are routinely referred to in academic and institutional discourse alike as axiomatically true, benefitting as it were from a strong presumption of orthodoxy. This conformism or dearth of critical inquiry may be a consequence of the fact that the bulk of the literature consists in descriptive accounts by insiders (former or current members) or perhaps the effect of the mere speed of developments.[10] Academic scrutiny proceeds with the usual lag, justified by the need for distance from the observed phenomena.

In what follows, I will argue that, while the steep rise of the Venice Commission as a constitutional player constitutes overall a positive phenomenon, its recent ventures into multi-layer constitutionalism are fraught with a number of problematic

[8] Romania and Bulgaria are under a form of post-accession monitoring via the Cooperation and Verification Mechanism. The initial goal of this instrument was to assess progress in terms of remaining judicial and anticorruption reforms for a limited period of time (the CVM was scheduled to lapse, unless extended, in 2010, 3 years after accession). In the meanwhile, it has been extended, seemingly for an indefinite duration.

[9] Commission Recommendation of 20.12.2017 regarding the rule of law in Poland complementary to Commission Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520 C (2017) 9050 final.

[10] Most articles on the topic are brief, descriptive, often encomiastic pieces authored by Venice Commission members. A handful of studies approach the institution in a normative, more sophisticated key (in this second category, *see*, notably, de Visser (2015), identifying procedural and methodological flaws in the Commission's work and Volpe (2016), arguing that a counter-majoritarian bias exists in the Commission's solutions, manifested in standardized preferences along a number of dimensions, for instance the role of international law in domestic orders, where the Commission advocates for monistic reception of treaties, with the primacy of international over domestic law). *But cf.* Craig (2017).

tendencies and risks, inasmuch as the body increasingly evinces a propensity for unjustified standardization and for translating policy and political imperatives into constitutional jargon. The more recent positions of the Commission exhibit, more precisely, two problematic tendencies. First, the Commission decontextualizes by standardization, in order to justify recommendations in newer democracies that would not be warranted by a more fine-grained analysis. The peril of oversimplification has always been, to a certain extent, intrinsic in the Commission's mandate to '*bring together* constitutional traditions.' Although it is true that constitutionalism has a universalistic component, evident for instance in the reference of art. 16 in the French Declaration of the Rights of Man and Citizen to rights and separation of powers as indispensable elements of *any* constitution, this cosmopolitan substratum does not require the same minute policy solutions across systems. One-size-fits-all solutions, in lieu of painstaking comparative assessments of norms and institutions in established systems and careful appraisals of the specificities of the respective jurisdictions, undoubtedly reduce complexity. But they do so at a significant price, raising legitimate suspicions of partiality and double standards and producing, when implemented, various aberrational consequences. Second, the body has taken on the habit of occasionally "viewing" traditional constitutional concepts through policy lens. A case in point, discussed below, in anticorruption seen as a *passe-partout* reform solution in new or emerging democracies. This second penchant is also worrisome. Since the language of constitutionalism is normative in nature, reinterpreting it to advance a policy imperative distorts the meaning of key concepts and institutions (rule of law, presumption of innocence, legality of incrimination, free speech, etc.). Furthermore, both of these approaches reproduce and reinforce, in a vicious circle, the body's own institutional and methodological deficiencies, generating inconsistencies (between reports across jurisdictions, between country reports across time, between general codes and specific country positions, between the policy solutions advocated or rejected and specific constitutional limitations).

In order to make this argument, I shall first assess the procedural and methodological limitations of the Venice Commission, upon the premise that an innate, latent inclination towards reductionism has been predetermined not only by the nature of 'constitutional epistemology' but also –'writ small'– by underdetermined institutional design and a paucity of methodological tools. A second juncture of the first section argues that strategic cooperation between the Venice Commission and other international organizations may, paradoxically, reinforce these genetic shortcomings, by encouraging the instrumental subordination of constitutional questions to policy imperatives. The dense 'transnational legal order' crystallizing at the interstices of national/international/supranational interactions bears tremendous potential and promise. By the same token, the unfolding developments present ambiguities and pitfalls that must be addressed and confronted. Due to the space limitations, I will briefly visit the cross-hybridization of standards and procedures in the specific context of intensified 'counter-populist' cooperation between the EU and the Venice Commission.

The second and third parts of the paper use opinions on Romania (2012, 2018) and a recent report on anticorruption reforms in the Ukraine to further substantiate, with case studies, these claims. The comparison is relevant, since, although Romania

is an EU member and a more consolidated democracy, similar reforms were (in the case of the Ukraine, are) imposed on the basis of analogous conditionalities. Romania, like Bulgaria, is, moreover, a 'one-foot-in the-door,' peculiar member of the Union, subjected to an idiosyncratic form of post-accession monitoring by the EU Commission in terms of judicial and anticorruption reforms[11]; therefore, similarities do exist to warrant the comparison. As I argue, Romania is in many respects "prototypical" for the purpose of illustrating my claims and could be in approached as a standalone case study.[12] Nonetheless, the brief Ukrainian sequel as well as the wider networking context in which the recent positionings of the Commission must be placed (the Rule of Law Checklist, the Polish reference concerning the public prosecutors, etc.) are necessary, since they reveal wider path dependencies, thus reinforcing the argument. Such path dependencies, especially the already crystallized international consensus on 'Ikea'[13] or prepackaged judicial reform templates, anticorruption as paramount conditionality in peripheral jurisdictions, and oversimplified rule of law discourses as 'countervailing measures' to the rise of populism, are relevant well beyond the idiosyncratic cases reviewed here. Rather, the specifics of the Venice Commission interactions with national jurisdictions and with international counterparts reflect the current limitations of multi-layer constitutionalism. The article closes with a conclusion, summarizing the critique and suggesting modest, potential avenues for change.

2 Ecumenical Constitutionalism: 'Holy Grail' or Bed of Procrustes?

2.1 The Institutional Framework

The European Commission for Democracy Through Law (Venice Commission) originated in 1990, as a brainchild of Italian jurist and politician Antonio La Pergola. The new consultative body of the Council of Europe was initially designed to be composed of scholars in law and political science, whose collective expertise could be drawn upon by the states emerging from behind the Iron Curtain. The initiative rode a wave of interest in post-communist democratization, shared also by other international organizations, foreign public foundations like the German IRZ, private donors such as the CEELI program of the American Bar Association, and a number of transnational NGOs (most notably, the Open Society network). But, whereas the other structures pursued constitutionally-relevant reforms in the key of segmented, project-oriented policy advocacy and as an ancillary purpose, the new

[11] See Şerban 2015, arguing at p. 202 that "[t]he very existence of the CVM suggests that Romania and Bulgaria continue to be seen as 'bottom of the heap' and the only two countries in the EU that face problems of corruption and inefficient judiciaries" [reference omitted] and that (at p. 208) "[r]ule of law indicators in Romania are a political technology of control driven by EU's Cooperation and Verification Mechanism, which reinforces a rule of law discourse focused on corruption and institutional reform that is disruptive and silences alternative discourses".

[12] On the methodological implications (similar cases, prototypical cases), see Hirschl (2005).

[13] Frankenberg 2010.

commission would be institutionally anchored in the solid structure of the Council of Europe.[14] It was to function as a scholarly repository of constitutional knowledge and a conduit for exchanges between 'old Europe' and the fledgling Eastern constitutionalism. According to the statute, members were to offer expertise upon requests by both national governments and the Council of Europe institutions and also to study and systematize the constitutional systems (the 'constitutional heritage') of the European continent. A latent policy element was included in the mandate, since the Commission professedly pursues also standardization or rapprochement of the said heritage (it studies European systems, namely, "with a view to bringing them together").[15]

The commission issues country reports and general guidelines (codes of good practice) in three main areas, democratic institutions and fundamental rights, constitutional justice, and electoral processes, referenda and parties, respectively. Reports (formally titled opinions) are produced on the basis of relatively brief delegation visits to the respective countries, in the context of which the designated members meet with the representatives of the national institutions. Prior to the validation of an opinion by the plenary assembly, which meets once every trimester in Venice, preliminary drafts are circulated to the national governments for comments and sometimes published in advance. The procedure is professedly dialogical, in order to both eliminate suspicions of top–down sermonizing and reduce, inasmuch as procedurally possible, the cognitive disadvantages of the delegation members; these envoys must assess tremendously complex political and legal issues on the basis of, essentially, brief conversations with not fully impartial national stakeholders. Acknowledging such cognitive limitations, recent reports include also references to consultations with the "civil society".[16] Yet, given the fluid nature of the concept and the innate selectivity of such endeavours, the practice may simply generate additional occasions to incorporate and reproduce local biases (especially when the actors referred to are not specified in the reports other than by invoking the synecdoche itself).[17]

[14] Cf. Craig, *supra*, at p. 70: "[T]he Venice Commission did not have to build its legitimacy from scratch. Association with the CoE meant that the Venice Commission was not just another organization among many seeking to promote human rights.".

[15] http://www.venice.coe.int/WebForms/pages/?p=01_01_Statute.

[16] Sometimes, local civil society interlocutors are indicated, e.g., Opinion 833/2015, CDL-AD (2016)001 (on amendments to the act of the Constitutional Tribunal of Poland). Sometimes, general reference is made to discussions held by the delegation with "civil society" organizations, e.g., Opinion 892/2017, CDL-AD (2017)028, Poland-Opinion on the Act on the Public Prosecutor's Office as Amended. In the recently published Preliminary Opinion on Draft Amendments to the Judiciary Laws in Romania, CDL-PI (2018)007, the phrase appears for instance often outside the purely technical mention of the role of the civil society representatives in the Superior Council of the Magistracy, to substantiate the report's positions by reference to Romanian civil society positions or to indicate that parliamentary procedure must factor in not only the opposition but also 'the civil society' (par. 30). In polarized environments, given a multitude of non-governmental organizations which often speak with distinct voices or at least tonalities, the need to know transparently and with a minimal degree of accuracy, how and which views were selected or -respectively- should be integrated in the Commission's assessment, is legitimate.

[17] For example, the positions of Romanian professional magistrates' associations differ sometimes diametrically, with the National Union of Romanian Judges (UNJR) and the Association of Romanian Magistrates (AMR) or supporting most of the measures taken by the current coalition in terms of strictly judi-

A Bureau, comprising the President, three Vice-Presidents and four other members steers the general agenda. Experts themselves are designated by national governments, each country appointing a full member and a substitute. The original idea was to encourage a measure of interdisciplinarity (law and political science), yet a strong *Juristenmonopol* characterizes the current membership. Another, more problematic membership-related drift has marked the Commission. Although the mission statement indicates the desire to project an unattached poise and to create a body that would function as a kind of constitutional Areopagus, in practice countries sometimes nominate *sitting* or former dignitaries, in whose cases scholarly qualifications may operate in practice as an afterthought.[18] For example, the member in respect of Romania is the current Minister of Justice, former judge of the Constitutional Court, whereas the substitute is a former Minister of Foreign Affairs, currently serving as a Counsellor with minister rank in the Presidential Administration (both are also professors of criminal and international public law, respectively).[19] This reality may enhance the overall policy clout of the recommendations and the visibility of the Commission as a whole and has a definite bearing on the—admittedly important—practical experience of the rapporteurs. Conversely, the embeddedness of some of its members in the rough and tumble of national and European politics might affect the perceived neutrality of Commission positions and opinions. Moreover, the prevalence of the practical orientation (public officials, judges, constitutional justices) in the commission's membership may have the paradoxical potential of detracting from the depth of its methodological and analytical sophistication. High-ranking judges are not necessarily familiarized with comparative law and methodology; faced with practical problems they will often tend to rely on quick-draw practical solutions inspired by the system with which they are most familiar (their own) or by readily available vade mecums. With increase in numbers, such problems are compounded rather than alleviated. Constitutional scholars of the stature of, for instance, François Luchaire, are in the minority amid current members. This is not to say that eminent public law scholars cannot be found in the body,

Footnote 17 (continued)
cial reforms (discussed infra, Sect. 3), whereas the 'Judges's Forum' (*Forumul Judecătorilor*) routinely takes clearly pro-anticorruption, anti-governmental stands. This polarization duplicates, if translated into political divides, a center left/center right cleavage or a pro-presidential/pro-governmental division. Ideological polarization within the judiciary is of course common in the 'self-government' model of judicial organization (e.g., Italian *correnti*). The argument here is that selective citations, with a vague metonymical aureole ("civil society") reinforce biases, most especially when sources are not precisely indicated.

[18] With the exception of the Andorran and Montenegrin representatives, all current members are lawyers, usually Constitutional Court justices, sometimes members of the ordinary judiciary, sitting in the upper tier common or administrative courts (e.g., court of appeal of Tallinn, Estonia, supreme courts of Brazil, Cyprus, and Iceland, the Dutch Council of State). Mexico is represented by the President of the Federal Electoral Tribunal. http://www.venice.coe.int/WebForms/members/default.aspx?lang=EN.

[19] Romania is not an exception in this respect. Tunisia and Moldova are represented by Ministers of Justice, Serbia by its Deputy ("assistant") Minister of Justice, Poland by an undersecretary of state in the Justice Ministry, Ireland by the Deputy Director General in the Attorney General's Office, Montenegro by the Minister of Foreign Affairs, Kyrgyzstan by an MP, Kazakhstan by the Deputy Executive Director of the Foundation of the First President of the Republic of Kazakhstan, Israel by its former deputy PM (and former Minister of Justice, Finance, Intelligence in various Israeli governments).

since the contrary is true, but that excellence in constitutional scholarship *is not* the determinant appointment criterion. Furthermore, and relevant in this vein, the President of the Commission, a high-ranking Council of Europe bureaucrat,[20] has significant latitude with respect to the appointment of rapporteurs, which may be selected from a wide pool, comprising both current (full or substitute) and former members. According to the elliptic rules of procedure (six pages, nineteen articles), even outside experts and, somewhat vaguely, "representatives of other institutions and bodies" may be invited to take part in the working groups as members or advisers.[21] With a relatively heterogeneous and uneven body and relatively scant and pliable procedural standards, this degree of latitude raises justifiable suspicions of irregularity and partiality. Maartje de Visser has noted in this vein the questionable habit of appointing "repeat players".[22]

Deficiencies in institutional structure and procedure feed on and reinforce methodological shortcomings. The Venice Commission must provide, both in its opinions and in good practice codes, practical solutions. But, even though common denominators do exist in constitutional law and constitutionalism, they are often pitched at a level of generality that serves little practical purposes in terms of actual design. Separation of powers, for instance, is an essential constitutional principle but its usefulness, without a tremendous amount of local knowledge and comparative nuance, is close to nil in terms of advocating presidentialism, parliamentarism or semi-presidentialism as a 'best practice' for a particular country. Judicial independence is a paramount principle but its enunciation is of little help in answering questions about the exact place of prosecutors in the architecture of a given judicial organization system or the relative role of the President and the Minister of Justice with respect to high-ranking prosecutors. The list could go on. Standardizing solutions in a field so intimately linked with history, political and social context, and—last not least—sovereignty is, one can safely postulate, an exercise which demands the highest degree of deference, procedural rigor, candor, and caution.[23]

The Venice Commission itself is keenly aware of the overhanging epistemological dilemmas, since, even though it has developed strong preferences for particular arrangements, biases are usually presented in a discursively nuanced, ostensibly dubitative and subtler form. For instance, an opinion would say that bicameralism

[20] The current President has worked in the Council of Europe since 1971 and, upon retirement, in 2009, was elected President of the Venice Commission (reelected in 2011, 2013, 2015). http://www.venice.coe.int/WebForms/pages/?p=cv_1376.

[21] CDL-AD(2015)044 Or. Engl. Rules of Procedure (revised), art. 14 (1) "Draft reports and draft opinions of the Commission are as a general rule prepared by one or more rapporteurs appointed by the President. 2. For specific issues working groups of members of the Commission may be established to which outside experts may be added as advisers. Representatives of other institutions or bodies may be invited to participate in such working groups.".

[22] De Visser, *supra*, at pp. 995–996.

[23] De Visser, at p. 997: [T]he Commission has been known to reject institutional arrangements in place in mature constitutional orders as being inappropriate for younger democracies, with the argument that the latter lack the legal tradition that would allow such designs to work in a satisfactory manner. For such assessments to be accurately made, knowledge of the country's legal framework must be complemented by a good understanding of its constitutional and political culture.

is of course a legitimate choice in terms of constitutional engineering *but* the Commission is of the notion that this choice is primarily advisable in federalist or decentralized states or that judicial systems are in principle diverse and many arrangements would be permissible in theory *but* the Commission favors for purposes of Eastern democratization separate judicial and prosecutorial councils within which a significant part, preferably a majority of the membership comprises judges/magistrates elected directly by their peers.[24] Often enough, the Commission proceeds on the basis of *petitio principii* or *ipse dixit* (bicameralism best only in federal states, semi-presidentialism as the optimal separation of powers arrangement, monism with primacy of international law as the finest arrangement, separate prosecutorial council composed of elected prosecutors and members appointed by parliament as ideal option, etc.).[25] Thus, although the Commission's achievements, particularly in the area of synthesizing and commenting on national practices in key areas of fundamental law, are undeniable, the tendency to 'cut corners', emphasizing simplified policy solutions, *ex cathedra*, to staggeringly complex value conflicts, was problematic from the onset.

Predilections are increasingly outsourced justification-wise to other bodies, cross-cited (e.g., the Consultative Council of European Judges in the case of councils) or cross-referenced, also by including in the delegations representatives of distinct bodies (e.g., GRECO). Multi-layer networking by cross-citations becomes problematic when the concerned institutions speak with one voice and use 'interlocking' expert pools. Furthermore, cross-hybridization between constitutional law and 'good governance' criteria is not inconsequential: constitutional values, principles, institutions are normative in nature and reading them in a policy-oriented key will have a paradigm-changing effect.

2.2 Constitutionalism by Cross-Hybridization

A significant influence on the rising profile of the Commission, as mentioned already, has been the increasing need of the European Union to ground or footnote its 'rule of law' positions credibly. With the eastward enlargement came a new procedure, whereby the *acquis* had to be transposed fully *prior to accession*. Furthermore, according to the Copenhagen criteria, new candidate countries would need to demonstrate progress and stability also in terms of the political conditionality, i.e., "the stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities". These terms, albeit the word 'constitutional' was intendedly avoided, relate closely to fundamental law concepts, procedures, institutions. In the case of Romania and Bulgaria, the two countries continue to be monitored, as mentioned, within the CVM framework, along dimensions (e.g., judicial independence and anticorruption) with obvious implications and ramifications in the field of constitutional and infra-constitutional law. Yet, the

[24] CDL-AD(2010)004-e, Report on the Independence of the Judicial System Part I: The Independence of Judges adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12–13 March 2010).
[25] *See* generally Volpe, *supra*.

Commission in Brussels possesses neither the institutional tradition or capacity nor the legitimacy to address separation of powers issues (for instance judicial reforms), fundamental rights, and even meta-concepts such as the 'rule of law'[26] in a cogent, comprehensive and consistent manner. When it sought to proceed alone, the Commission usually proved less than adroit at the task.[27] Such congenital deficiencies were worsened in time, both as a result of the Union's own constitutional tensions and crises (eastward enlargement and the demise of the Constitution Treaty are near-simultaneous events) and as a consequence of newer challenges resulting from constitutional developments in the CEE member states (Hungary, 2011, Romania, 2012, Poland, 2015). Consequently, the two Commissions entered into an increasingly intense relation of cross-hybridization, which produces mutually beneficial institutional synergies. The impact of the Venice Commission's positions and its overall standing in the Eastern outposts of the Union is significantly bolstered by affiliation with the significantly wider resources in Brussels. By the same token, the European Commission can rely, as it were, on a genuine 'constitutional expert' to substantiate its stands bearing on national constitutional developments.[28]

The Commission of the Union needs, arguably like any autonomous bureaucracy, simplified and at least putatively objectivized assessments tools (in the recognizable form of benchmarks in country progress reports). The spillover effect of this need in what concerns the Venice Commission is evident in the 2016 Rule of Law Checklist, adopted in perfect sync with the ambitions of its senior institutional colleague to peg a Rule of Law mechanism on the structure of Article 7 (and include the Venice Commission in the assessment procedure).[29] Older good practice reference codes by the Venice Commission were drafted in narrative and analytical form, identifying the intricacies of a discrete institution across various systems and synthesizing commonality, real or preferred. Obversely, the checklist, as already indicated by its title, is a 28-page document replete with tables and numbered criteria, which seeks to provide an essentially bureaucratic guideline to one of the most debated and complex concepts of Western constitutionalism. The rule of law is a *meta-concept*, not a particular practice (referendum, electoral laws, political party regulation, judicial

[26] For all the ubiquity of the phrase in recent EU discourses and narratives, Eurocrats appear to be somewhat remiss when asked to elaborate on the meaning of this passe-partout concept. See the study by Burlyuk (2014), based on extensive interviews with high-ranking EU officials in Brussels and the Ukraine. An emblematic sample is provided at p. 31: 'The rule of law starts up here [points at the temples]. It concerns the whole of the society… It is the *unquantifiable* thing. You just know it.' (emphasis in original)).

[27] Often, the EU Commission translates fundamental law imperatives though the lens of policy imperatives, thus instrumentalizing them. An example should suffice. In pre-accession reports on Romania, the Commission insisted on the value of free speech and on decriminalizing libel and slander, since journalists, faced with criminal sanctions, would be less than effective in uncovering corruption (muckraking efforts had to be promoted, anticorruption rather than free speech in itself being the predicate value). After the accession, in its CVM monitoring, the Commission insisted a number of times on the lack of dissuasive sanctions and advocated various measures to rein in journalists attacking judicial independence (read: uncovering scandals in the anticorruption institutions, free speech having become in the meanwhile a liability in terms of the paramount EU good, namely, anticorruption).

[28] See Nergelius (2015).

[29] CDL-AD (2016)007.

organization, etc.) which could more legitimately form the subject of a 'good practice code'. Indeed, the intricacies are such that the notion is notoriously impervious to accurate translation, given that *Rechtsstaat*, rule of law, *État de droit* are synonymous only in an approximate and carefully qualified way. Terminological differences hide historical and institutional complexities. Last but not least, the rule of law or *Rechtsstaat* is arguably not an all-out reality but rather a slow process by virtue of which layer upon layer of meaning are directly correlated with incremental institutional and legislative changes.[30] In short, a checklist on a meta-concept leaves of necessity much to be desired, obfuscating a fine-grained reality and unduly reducing the epistemological burdens. Exemplifying the more general conundrums, at the end of the Checklist (section F) two instances of "particular challenges to the rule of law" are indicated, namely, surveillance and corruption. In strategic terms, it is easy to understand why corruption is singled out, given the increasing relevance of anticorruption conditionalities in the process of EU enlargement and within international structural adjustment programs. Anticorruption treaties have arguably become part and parcel if not the kernel of a crystallized good governance *qua* 'international rule of law' consensus. But, unlike the phenomenon of surveillance, that may be translated into constitutionally recognizable normative language (privacy, freedom of correspondence, chilling effects on free speech, due process, etc.), the combatting of corruption by repressive means is a newfangled 'good governance' policy goal difficult to encapsulate in classical frames of reference. Moreover, as one shall see in what follows, the "particular challenges" of combatting corruption and surveillance are not self-standing and isolated from each other at the level of practices.

The checklist is a revealing example of the Commission's present dilemma. In Paul Craig's apposite metaphor, the Commission was initially designed to complement the 'firefighting' activity of the Strasbourg Court by engaging in *ex ante* 'fire prevention'.[31] The need of the European Commission to put out the populist fire bolsters significantly the relevance of its CoE counterpart but also changes the latter's essential mandate. This is not to deny that the work of the Venice Commission in the context of the crises in Hungary (2011) and Poland (since 2015) has been valuable and useful overall or to question the fact that the recent practices of the Hungarian and Polish governments have strayed very far from any understanding of constitutional civility. But a steadily growing measure of combative activism may be read between the lines of high-stakes opinions. For instance, a 2017 report on changes to the Polish act on the prosecutor's office assesses amendments by virtue of which the office of the General Public Prosecutor is fused with that of the Minister of Justice. Apparently, prosecutors had always been subordinated to the executive in Poland, except from a short period of relative autonomy between 2010 and 2016. In order to prove a longer tradition of prosecutorial autonomy, the Venice report opens thus: "Following the amendment of the Constitution of the Polish People's Republic on 29 December 1989 and the subsequent changes made to the 1985 Act on Prosecuting Authority, *the existing quasi-independent position of the public prosecutor*

[30] Grimm (2009).

[31] Craig *supra* at p. 70.

towards the executive was ended and the public prosecution was linked to the executive power."[32] This assertion makes inferences that fly in the face of all existing evidence, namely, that during state socialism institutions were organized according to the liberal-constitutional theory of separation of powers and that prosecutorial autonomy from the Party line existed (in Poland or elsewhere in the Communist Bloc).[33] In the same vein, the Commission admits further in the same document that analogous practices can be found in other states (famously, federal prosecutors in Germany are bound by instructions (*weisungsgebunden*))[34] but argues that the current changes would run counter to a tendency toward prosecutorial autonomy identified by the Venice Commission also on the basis of the Polish 2010–2016 changes, for which the Commission had at the time praised the Polish authorities. It is true that Polish backtracking on public prosecution reforms may, in the wider context, prove to be problematic. But neither the outlandish stipulation that prosecutors had been autonomous from 'the executive' during Communism nor the statement that current departures from the 2010–2016 baseline are suspect since they go against the grain of a tendency that the Venice Commission had identified and praised also on the basis of a short-lived *status quo* do much to advance the best tradition of limited government. To put it differently, militant self-bootstrapping in lieu of analytical rigor clearly detracts from the credibility of the Commission at a time when and in contexts where its credibility is needed the most. This observation also applies to the recent creation of two *Honorary President* positions filled by Ms. H. Suchocka (former member, Poland) and Mr. P. Paczolay (sitting ECtHR judge in respect of Hungary). It is not difficult to understand that the creation and bestowal of these titles were meant to offset and counter political appointments made by the national governments. But Honorary President positions are not covered by the Statute of the Venice Commission (Art. 4).[35] All understandings of the rule of law presuppose that clear rules are constraining action and that public institutions function according to rules, within a bounded mandate. The question is worth pondering therefore, as to how will the Venice Commission credibly lecture on rule of law values the two 'rogue jurisdictions', while at the same time it acts *ultra vires* of its own organic statute.

Engagement in transnational constitutional politics has generated an unintended, certainly undesirable consequence. As I will show in the following two sections, this recent development induces additional incentives to reinterpret constitutional concepts in a procrustean manner. Instead of taming policies by recourse to

[32] CDL-AD (2017) 028, par. 7 (emphasis supplied, quotation omitted).

[33] The inference in the Venice Commission's report is so evidently wrong that no citation is needed to refute it. An extensive account of the quandaries of prosecutorial "independence" during the times of Polish "socialist rule of law" can be found in Krajewski (2012).

[34] This is not to deny the truth of Kim Lane Scheppele's 'Frankenstates' observation, particularly apposite in the Hungarian context. She argues that disparate Western institutions and practices, each of these functioning well in its respective context, may be combined in authoritarian jigsaw puzzles: "Legalistic autocrats become adept at culling the worst practices from liberal democracies to create something illiberal and monstrous when stitched together." In Scheppele (2018), at p. 567.

[35] http://www.venice.coe.int/WebForms/pages/?p=01_01_Offices&lang=EN.

constitutionalism, the Venice Commission has developed a troubling habit of instrumentalizing constitutionalism by reference to political/policy imperatives.

3 Romania—Serenity and Crises

Since 2012, Romania has been repeatedly thrown in the 'populist backsliding' basket, together with Hungary and Poland. Yet, although a solid record of instrumentalism is a mainstay of all these jurisdictions (arguably of the 'post-communist' space more generally), a number of dissimilarities single Romania out. In 2003, the term of the president was extended to 5 years by the revision of the 1991 Constitution, and thus desynchronised from the 4-year parliamentary mandate. As a result, the local semi-presidential system has been rendered increasingly unstable. Since participation in presidential elections is significantly higher,[36] this change has generated a configuration within which centre-right presidents have very often 'cohabitated' with Parliaments whose majorities are left-leaning, including the Social Democratic Party (*Partidul Social Democrat*, PSD). The PSD, whose electoral basin is largely centred in smaller cities and the rural segments of the electorate, usually wins 30–40% of the parliamentary vote (in 2016, over 45% in both houses of the bicameral parliament), always shy of an absolute majority but enough to build fragile alliances. Romania is also subject to a protracted European conditionality whose centre of gravity is anticorruption by repressive means. Anticorruption discourses have become over the years a clear centre-right shibboleth. To be sure, in and of itself, anticorruption appears to transcend politics and lend itself to quantification and thus objective, quasi-scientific modelling,[37] which is part and parcel of its current appeal as a reform meta-criterion.[38] On a closer look, however, the discourse routinely walks hand in hand with conceptual-ideological representations to the right of the spectrum (market-centred, highly individualistic),[39] which may be labelled, for lack of a better word, neoliberal.

In Romania, anticorruption is fused at the hip with rule of law ideologies and latter-day anticommunism: the PSD is accused of being the heir of the Romanian Communist Party. The social democrats have been in government longer, have a much stronger territorial basis, and their patrimonial style of politics lends itself more easily to corrupt incentives of various kinds. Thus, although anticorruption could be said to target disproportionately social-democratic high-profile politicians, this discrepancy may also described as a mere reflection of reality. Anticorruption

[36] Presidential elections also mobilize segments of the electorate which disproportionally vote centre-right, for instance, the sizable Romanian diaspora. The diaspora vote has for instance tipped the balance in the 2009 presidential elections.

[37] https://www.greens-efa.eu/en/article/document/the-costs-of-corruption-across-the-european-union/ Such "estimates of corruption costs" are however rough extrapolations of (extrapolations of) perceptions.

[38] According to a study by Ginsburg and Versteeg, rule of law indicators (WB, Freedom House, etc.) converge and correlate saliently *only with the Transparency International CPI*, irrespective of the way in which these indicators are normatively conceptualized. Versteeg and Ginsburg (2017).

[39] *See*, e.g., Humphreys (2011).

indictments have over time targeted politicians pertaining to all factions, whereas both ideology and allegiances have occasionally been somewhat fluid among traditional parties. Nonetheless, the discourse of anticorruption has been exclusively appropriated by the centre-right. Moreover, new parties have emerged to the right of the spectrum, on platforms whose dominant element is integrity; one such party, the USR (Union Save Romania) has run nationally for the time in 2016, almost single-mindedly on an antigraft ticket, and won close to 9% in both houses. The PSD and its allies counter with allegations of collusion between the heads of state, prosecutorial and judicial elites, and the secret services, which they call, ominously "the parallel state." Appointments to the apex of the judiciary have until recently depended on the presidential pen, whereas the nominations of the civilian heads of all security services and advancements in these militarized structures are presidential prerogatives. Unlike the case of Hungary and Poland, an ideological dimension (aggressive Euroscepticism, nationalism, social conservatism) is marginal and subdued, at most a knee-jerk reaction to what social-democrats and their allies portray, not implausibly, as unconditional, one-sided EU support for anticorruption-derived, right-leaning discourses.[40]

Deep social divisions (rural/urban) overlap in Romania with institutional and ideological divisions and intersect external conditionalities, creating a perfect recipe for polarization along the fault lines. These cleavages and tensions fester and erupt in recurrent constitutional crises.

3.1 Serenity

In spring 2012, a recomposed majority in Parliament brought down a pro-presidential cabinet and vested a new executive backed by an unusual political coalition of social democrats and liberals. The coalition parties won local elections by a landslide and, strengthened by this victory, immediately sought to impeach the incumbent, center-right President Traian Băsescu. During the ensuing internal crisis, the Constitutional Court of Romania (CCR) appealed to the European Commission for Democracy Through Law (Venice Commission), seeking protection from alleged political pressures on its justices. The president of the Venice Commission, Gianni Buquicchio, obliged with a prompt expression of indignation and concern, which was in turn translated into Romanian and immediately recycled in the political discourses and segments of the local media close to the president, as an argument in the internal constitutional battle.[41] In the midst of a recent, ongoing crisis, another appeal was made by the Court to various bodies of the Council of Europe system,

[40] *See* Parau (2015), arguing that a degree of interlocking had existed from the onset, by virtue of the fact that the Commission delegation recruited its Romanian staff and experts from among key political appointees in the center-right, outgoing Justice Ministry staff, right after the Democratic Convention lost elections to the PSD in 2000: "Both the Commission and its transnational elite allies became interlocked with certain domestic ideological tendencies, and the political parties that embodied them, and not others." (at p. 428).

[41] Romania: Statement by the President of the Venice Commission, 07/08/2012 http://www.venice.coe.int/webforms/events/?id=1557.

among them the Venice Commission, to protect it from virulent attacks on its independence by politicians and segments of the media.[42] The Venice Commission had been previously consulted in local constitution-making and revision processes; the self-styled "Father of the Constitution", President of the Constitutional Drafting Committee and University of Bucharest Professor Antonie Iorgovan, consulted with the Venice Commission in 1990 and rhapsodized about it in his massive folio monograph of the constitutional-making process as the "Holy Grail of European Constitutionalism."[43] The 2012 crisis was however the first occasion for the wider public to become aware of the body's existence.

The Constitutional Court itself, which sought redress in 2012 by an appeal to Venice, has a relatively poor track record of neutrality in high-stake controversies, its jurisprudence mirroring often changes in membership.[44] In 2012, the impeachment depended on a referendum whose turnout validity requirement depended in turn on the vagaries of the Court's fluctuating jurisprudence. Whereas, in 2007, in the midst of a previous attempt to remove the President, the court had held that the constitution imposed no particular standard to the quorum and majority rules set by the organic law on referenda, in 2012 the jurisprudence metamorphosed into a constitutional obligation of the legislature not to reduce the quorum.[45] The latter decision footnoted the Venice Commission's Code of Good Practice on Referenda to substantiate this new position, to the effect that electoral legislation should not be changed in the midst of electoral processes. This principle is in its own terms unobjectionable, yet the citation was selective, conveniently ignoring the recommendation in the same document that high participation thresholds (i.e., turn-out or quorum requirements) should not be imposed for national referenda. In the court's

[42] *See* the (according to the press release) unanimous appeal made on the 5th of June 2018 by the Constitutional Court (Plenary Session) to the Secretary General of the Council of Europe, the European Commission for Democracy through Law and the President of the Conference of Constitutional Courts, at https://www.ccr.ro/noutati/COMUNICAT-DE-PRES-308 (in Romanian) In the meanwhile, another scandal occurred, with one of the justices declaring publicly that, although the press release uses the term unanimity, she had not signed the letter since it was not in accord with what had been discussed in the plenary session. This new appeal to Venice occurs in the midst of a scandal, occasioned by a 6 to 3, controversial CCR decision obliging the president to issue the decree removing the head of the anticorruption prosecutors' office. The procedure provided for by the Law on the status of judges and prosecutors, 303/2004, is that removal of a chief prosecutor before the end of the 3-year term can be requested by the minister of justice and is 'accomplished by the President of Romania', whereas the Superior Council of the Magistracy renders an advisory, non-binding opinion. According to the majority reasoning, the determining argument is that, according to the Constitution, Art. 132 (1), prosecutors are placed "under the authority of the minister of justice", who, unlike the President, would have an explicit constitutional competence, so that the law must be interpreted accordingly.

[43] Iorgovan (1998).

[44] The Court consists in nine justices, appointed for desynchronized terms of office of 9 years by the President, the Chamber of Deputies, and the Senate (a third of the Court is renewed every 3 years). The Court's jurisprudence often echoes the staggered reality of Romanian semi-presidentialism, with a judicature relatively favourable to President Băsescu in 2012, a Court less affable toward the current President, Klaus Iohannis, nowadays.

[45] *See*, on the vagaries of the Court's jurisprudence, Selejan-Guțan (2016), at pp. 123–124. A table at p. 123, comparing the two impeachment referenda (2007, 2012), reveals both the inconsistencies and their practical effects.

reasoning an obiter remark initially sanctioned the 50% threshold as an expression of sovereignty, which would be reinforced by high participation. A subsequent decision upheld however the suspended president's call to his supporters to boycott the referendum in order to sabotage its validity, as an equally meritorious exercise in democracy. In the end, a CCR-ordered recount failed to reach the number of voters needed to meet the turn-out threshold, also a result of the fact that one of the justices had surreptitiously inserted, for purposes of publication in the Official Journal, a paragraph ("errata") in the decision previously signed by the court members. The 'correction' stated verbatim that the recount would be based on the special electoral list, comprising the highest number of Romanian citizens, making thus sure that the turn-out would be impossible to reach. The referendum (46.24% participation, 87.52% votes to confirm impeachment) was invalidated in August and the suspended President resumed office and completed his term.

After the dust settled, in the fall, a delegation of the Venice Commission investigated the entire affair. The resulting report, on the compatibility of the *Parliament's and Government's* actions with 'the rule of law and constitutional principles' identified landmarks and benchmarks for the Romanians to follow in the future, in order to 'overcome similar crises with serenity'.[46] In the report, a few risqué, even formally incorrect remarks can be identified, for instance the observation that the Romanian Advocate of the People would be the only institution able to censor before the Constitutional Court the constitutionality of governmental emergency ordinances. The Advocate (Ombudsman) had at the onset of the crisis been revoked by the Parliament, most likely due to his perceived association with the impeached president, with the justification (or under the pretext) that the latter had exceeded his mandate, challenging before the Constitutional Court an ordinance reorganizing the Romanian Cultural Institute. Emergency ordinances may be attacked before the court via exceptions referred by parties or the judge in the course of ordinary litigation before a court (or arbitral tribunal). Following an amendment in 2003, an exception may also be raised directly by the Advocate of the People. In the Romanian legislative system, emergency ordinances are governmental decrees with the force of law, adopted by the Government on a plea of necessity and, as was to be expected, they have become the rule rather than the exception, in some years surmounting in number and importance parliamentary enactments. Unlike a formal statute, which enters into force within 3 days or at a subsequent date, an emergency ordinance takes effect immediately upon publication in the Official Journal. The Venice Commission was right to point out that the practice was highly problematic but the solution it proposed, namely, reinforcing the role of the Ombudsman in this respect, was also problematic, given the fact that the Constitution specifies, in Art. 58 (1), that the Ombudsman is appointed *to defend the rights and liberties of physical (natural) persons* (rather than to supervise chronic structural deficiencies in the legislative process). The Ombudsman may challenge any ordinance but, should he stray from the constitutional mandate of protecting *individual rights and liberties*, the parliamentary majority will be able to revoke the official with short ceremony and in a

[46] http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2012)026-e.

perfectly constitutional way. This is exactly what happened in 2012, with the imprimatur of the Constitutional Court.[47]

More questionable still was in the wider context the overall partiality of the way in which the entire episode had been analyzed, with the Venice Commission excoriating one side in the dispute (Parliament, Government) but blotting out any negative reference with respect to the many countervailing irregularities on the part of the President and, most upsettingly, the Constitutional Court itself. Whether selectivity resulted from lack of information, partial information, or a conscious choice, the analysis was toeing the line of the Brussels Commission, which had during the crisis thrown its full weight behind the center-right (austerity-friendly, then anticorruption-champion) President Băsescu.[48]

3.2 The Normalization of Crisis

Since 2012, cross-hybridization has resulted in frequent recourses by the EU Commission to the Venice Commission in the areas which form the main object of Romanian post-accession conditionality, anticorruption and judicial independence. Romania, under strict, 'take it or leave it' pre-accession scrutiny and protracted post-accession conditionality, has been a laboratory for implementing international anticorruption and judicial independence standards. In the Romanian context, the two issues are related, since judges and prosecutors (as 'magistrates', in the familiar logic of the Italian–French model, with a post-communist original twist) are under the general umbrella of the Superior Council of the Magistracy. The main anticorruption watchdog is a specialized division of the General Prosecutor's Office, the National Anticorruption Directorate (*Direcția Națională Anticorupție*, DNA). The DNA was created—ironically, by emergency ordinance—in direct response to accession conditionalities, as negotiated with Romania and its work and success constitute one of the four post-accession CVM benchmarks. Although in theory the head of this unit is subordinated to the General Prosecutor, in practice, since both officials have been until recently appointed in the same way (by the President, at the proposal of the

[47] DCC 732 din 10 iulie 2012, M.Of. 480 din 12.07.2012 (refusing to enter the merits of the revocation, holding that the resolution revoking the Ombudman was an "individual act" that concerned no constitutional values and principles, hence not subject to review). As mentioned, the Ombudsman was revoked by the Parliament with the argument that he had raised an objection against an ordinance unrelated to 'his' constitutional mandate.

[48] *Cf.* Avbelj (2015), accusing an ideologically-charged, partisan degree of attention in EU/Western narratives about democratization in the East-Central Europe: "What was really going on and the actual existing quality of the social capital on which the new liberal democratic frame was attached in these countries was of little concern, as long as the external interests were not threatened." (at p. 290) More on point, *see* Vassileva, Radosveta: *The Disheartening Speech by the President of Bulgaria's Supreme Court Which Nobody in Brussels Noticed, VerfBlog*, 2018/7/11, https://verfassungsblog.de/the-disheartening-speech-by-the-president-of-bulgarias-supreme-court-which-nobody-in-brussels-noticed/, Doi: https://doi.org/10.17176/20180711-152643-0 (arguing that in Bulgaria the Commission *downplays* in its CVM reports corruption scandals, because "Bulgaria's corrupt government does not challenge Brussels' authority"). Since Romania and Bulgaria are both under the CVM, and since benchmark are almost identically defined (Bulgaria is also monitored with respect to organized crime), comparisons and conclusions may be easily drawn.

Minister of Justice, with the advisory opinion of the Superior Council of the Magistracy), for the same 3-year, once-renewable terms of office, the two structures are fully autonomous from each other. Romania has one of the most autonomous judiciaries in Europe, by virtue of pre-accession requirements. These conditionalities resulted in the entrenchment in the Constitution, in 2003, of an overhauled Council, endowed with large powers over the functioning of the judicial system and composed now predominantly of judges and prosecutors elected by their peers (14 members, 9 judges and 5 prosecutors, out of 19). The Constitution was also amended to eliminate the immunity of MPs from prosecution but immunity from pretrial arrest, searches and detention remained (it can be lifted with the agreement of the House). Ministers continue to be shielded by immunity from prosecution for acts committed while in office, unless lifted by the Houses or by the President. The Brussels Commission perceived anticorruption to be the master-key solution to all problems Romanian and complete judicial independence to be the precondition of successful anticorruption, success being in turn measured in terms of numbers of high-level politicians convicted to stiff prison sentences.

The bone of contention nowadays revolves practically around the fact that, when the Constitution was amended in 2003, in line with the Commission's demands, the phrase was kept in the text (Art. 132 (1)) that prosecutors are *under the authority of the minister of justice.* With anticorruption becoming an overhanging meta-constitutional paradigm in Romanian politics,[49] any departure from the *status quo* is depicted by the center-right, for which the fight against corruption constitutes the dominant platform, as an infringement of the 'rule of law'. By the same token, the penchant of the Council of Europe on defining judicial independence in a corporatist key is well-known and thus the position of its bodies can be anticipated or at least approximated.[50] The efforts of the EU Commission have been directed at eliminated remnants of political check or resistance, by scrapping immunity from pre-trial arrest and by doing away with any role of the minister of justice in the appointment and removal of high-level prosecutors (the General Prosecutor, the chief prosecutor of the DNA, the head of the organized crime and antiterrorism division, and their deputies). Furthermore, the EU Commission clearly appears to believe that coopting Venice in these efforts would yield the desired outcomes.

To wit, in the aftermath of the 2012 crisis, observations by the EU Commission regarding the need for Romanian authorities to seek counsel from its colleague in Venice resurfaced in a clear crescendo in the CVM monitoring. In 2013, an approving cite is provided in passing with respect to the quandaries regarding emergency ordinances and their deficient control. In 2014, the prod is explicit and specific: *With the Constitutional debate expected to return this year, it will be important to ensure that the Superior Council of the Magistracy has the opportunity to comment on all areas relevant to the judiciary. In particular, care will be needed to exclude changes which increase the opportunity for politicians to influence the judicial leadership or*

[49] None of this is to deny that corruption is a problem in Romania but only to stress that anticorruption is not necessarily a master-key solution to the problem.

[50] Kosař (2016).

challenge judicial independence or authority. For this reason, the commitment of the government to consult the Venice Commission in particular is an important sign of Romania's commitment to base any future Constitutional change on European norms.[51] In 2015, we find out that the Superior Council and the Venice Commission were working on the judiciary law, seeking the best arrangement for appointing high-ranking prosecutors (namely, without any political involvement). The Brussels Commission opined now that the government should have simply taken the bill—drafted by the Council and the Venice Commission—to Parliament: *The Superior Council of the Magistracy (SCM) is working on an amendment to the law to change this, and to align appointment of prosecutors on the procedures used for judges, in line with the guidance of the European Commission for Democracy through Law of the Council of Europe (Venice Commission): if this were to be pursued, the next step would be for the government to propose this to Parliament.*[52] In 2016, the issue is presented in bullet-point, as a specific step to be addressed: *Subsequently, a more robust and independent system of appointing top prosecutors should be settled in law, with the support of the Venice Commission.*[53] In 2017, when the Commission temporarily revived its initial practice of issuing biannual reports, in January and in the summer, the Venice Commission is mentioned both with respect to its envisioned legislative drafting role in terms of depoliticizing prosecutorial appointments and in connection with overhauling ministerial immunity rules: *Adopt objective criteria for deciding on and motivating lifting of immunity of Members of Parliament to help ensure that immunity is not used to avoid investigation and prosecution of corruption crimes. The government could also consider modifying the law to limit immunity of ministers to time in office. These steps could be assisted by the Venice Commission and GRECO. The Parliament should set up a system to report regularly on decisions taken by its Chambers on requests for lifting immunities and could organise a public debate so that the Superior Council of Magistracy and civil society can respond.*[54]

Transnational cooperation has increasingly trickled down in internal politics (and vice versa). Most recently, in the context of an ongoing attempt by the current parliamentary majority to amend the judiciary laws, all referrals by the opposition to the Constitutional Court asked the court to remand the objections of unconstitutionality to Venice for an *amicus curiae* position. These reforms marginally chip away at the consensus on judicial independence understood as complete autonomy of the judicial and prosecutorial system. Following repeated refusals of the CCR to yield to this demand, the request was reiterated by the current President of Romania, Klaus Iohannis, who also announced consultations of the putative Venice delegation with 'civil society representatives' under the auspices of the Presidential Administration. Should the Romanian constitutional judicature had acceded to this arm-twisting, the

[51] Report from the Commission to the European Parliament and the Council on Progress in Romania under the Co-operation and Verification Mechanism (hereinafter CVM Report), COM(2014) 37 final).

[52] CVM Progress Report, Brussels, 28.1.2015 COM(2015) 35 final).

[53] CVM Progress Report, Brussels, 27.1.2016 COM(2016) 41 final).

[54] CVM Progress Report, Brussels, 25.1.2017 COM (2017) 44 final.

referral to the consultative 'expert' body would have functioned much like a preliminary reference to Luxemburg. The constitutional 'trial' would be frozen pending the answer of the body *ad quem*, the unstated implication in this paradigm being that the CCR would render itself, vis-à-vis Venice, in the equivalent position of a lower, *a quo* tribunal in an appellate or preliminary reference procedure. The Court is itself actively engaged in this byzantine power play, refusing to ask the Venice Commission for an *amicus curiae* opinion yet afterwards appealing to its protection from the very politicians that had sought, in the first place, a referral to Venice for a friend-of-the-court brief. Whether this increasing domestic interest in multi-layer, cosmopolitan constitutionalism was simply a dilatory internal tactic to forestall the entry into force of the judiciary laws amendments or a safe prediction of the Commission's ideological biases is impossible to discern with certainty.

A policy and an ideological tilt are however apparent in the Venice Commission opinion on recently adopted changes to the judiciary laws (Laws 303, 304, 317/2004, on the status of judges and prosecutors, judicial organization, and the Superior Council of the Magistracy, respectively). The main modifications concern the institution of another autonomous section in the General Prosecutor's Office, its purview being criminal investigation of crimes committed by judges and prosecutors; seniority conditions for access to high positions in the judiciary; material responsibility for bad faith or gross negligence resulting in judicial errors; the curbing of presidential powers over high judicial and prosecutorial appointments; the reinstatement of a recall procedure allowing judges and prosecutors to revoke 'their' representatives in the CSM by referendums organized at the level of the respective jurisdictional tier; new rules on recruitment increasing the duration of apprenticeship in the National Institute of Magistracy; and a 'lustration provision' by virtue of which judges and prosecutors collaborating with the intelligence services forfeit their office. An early retirement provision was also incorporated, which is on its face redolent of Polish and Hungarian unorthodox vetting practices but, in the Romanian context, was requested by the professional associations, whose members were eager to profit from the incentive of generous special pensions (the disincentive being enormous dockets and understaffed courts).

These amendments were promoted by the alliance in power (PSD in coalition with a small liberal-conservative party, ALDE) and bitterly contested by the Presidency and the center-right opposition, the latter translating their criticism in ostensibly progressive newspeak, as attacks on 'judicial independence' and 'the rule of law'. Reality is, however, usually more complicated in the fledgling Eastern democracies. The overall Romanian picture of anticorruption as promoter of the rule of law, after a decade and a half, is complicated, with a worrying number of acquittals *in high-profile cases*,[55] increasing reliance on electronic surveillance

[55] For instance, a justice of the Constitutional Court was detained by the DNA and charged, 1 day after he voted in a unanimous decision (DCC 17/2015) declaring the Cybersecurity Law unconstitutional, in abstract, a priori review. The law, if promulgated, would have increased significantly the data retention powers of the SRI. The bill purported to 'transpose' the not yet adopted NIS Directive, although the directive insists on monitoring by a civilian data protection institution (the Romanian internal intelligence service, by evident contrast, is militarized). Three years later, in 2018, the justice was acquitted in first instance by the High Court. The two issues (arrest and vote) may of course hypothetically be fully unrelated and the rate of acquittals per se is *prima facie* unproblematic (Uzbekistan has a 0% acquittal

and wiretapping (and minimal to non-existent judicial review of the prosecutor's requests for warrants),[56] and (in lieu of political checks) extensive and partly surreptitious cooperation of the internal security service with the anticorruption prosecutors. This latter element resulted from a decision in the National Security Council (*Consiliul Suprem de Apărare a Țării* (CSAȚ)) declaring corruption a national security risk, based on which institutional protocols were concluded by the Romanian Intelligence Service (*Serviciul Român de Informații*, SRI) with the Prosecutor General's Office and thus with the DNA.[57] Protocols were concluded also with the High Court of Cassation and Justice, the Superior Council of the Magistracy, the Judicial Inspection (the disciplinary prosecutor) and the National Integrity Agency. Both the CSAȚ decision, adding to (effectively amending) the National Security Law 51/91 and these memoranda of understanding between SRI and the prosecutors were classified. A recent resolution adopted by MEDEL speaks of targeted, "soviet-type criminal investigation methods" in anticorruption cases.[58] This is strong language and treads a tad too heavily but intensive cooperation has existed and is not denied by SRI reports, although the full extent of the interactions is still unclear.[59] The situation is complicated by the fact that, until a 2016 CCR decision curbed the criminal investigation attributions of the SRI, all technical surveillance warrants (intercepts

Footnote 55 (continued)
rate, unindicative of a healthy democratic culture). But such high-profile coincidences abound. The more coincidences, the more they are hard to tabulate as accidental, incidental, anecdotal and one may establish correlations, causations, etc. The current rate of acquittals stands very high, at 36.3% but most of this percentage is attributed to partial decriminalization as a result of the abuse of office decisions recently rendered by the CCR (13.8 represent other grounds of acquittal). Conversely, one may wonder why such a large number of the indictments were based on the 'malleable' crime of abuse of office rather than standard corruption crimes (active and passive bribery, trafficking in influence, money laundering, and the like). A synthesis of the report is available at http://www.pna.ro/obiect2.jsp?id=376.

[56] According to data collected on wiretap warrants requested by the prosecution and approved by the county courts, tribunals, courts of appeal, and the High Court of Cassation and Justice by a human rights and constitutional law professor at the Babeș-Bolyai University in Cluj-Napoca, the total rate of approval is 93.44%, https://raduchirita.ro/interceptari.pdf At the High Court of Cassation, which issues national security warrants, the rate is 99.98% (4523 requests between 2010 and 2015, 4522 approved). 'Prosecution biases' are (rightly) castigated as problematic by the Venice Commission in its general report on prosecutors CDL-AD (2010)040) (reference, infra note 50 and associated text) but not in its special 2018 opinion on judicial organization in Romania.

[57] The a. conclusion of two recently declassified protocols, 00750/2009 and 09472/2016 (with respect to three specific provisions in the latter), between the General Prosecutor's Office and the SRI and b. the lack of effective parliamentary oversight of the SRI were held by the Constitutional Court to have generated a constitutional conflict of a constitutional nature. A practical implication of the decision is that all courts must verify breaches of competence rules in *pending* criminal cases. CCR decision of 16.01.2019, yet unpublished. See press release at https://www.ccr.ro/noutati/COMUNICAT-DE-PRES-356.

[58] http://medelnet.eu/images/2018/Medel_-_Resolution_on_Romania.pdf.

[59] A scandal occurred in 2015, when General Dumitru Dumbravă, then head of the legal department of the SRI, declared that the judicial system constituted "a tactical field" for the Service, from the moment a complaint is lodged with the DNA to the rendering of a final judgement on appeal. Available at: https://www.juridice.ro/373666/dumitru-dumbrava-sri-este-unul-dintre-anticorpii-bine-dezvoltati-si-echipati-pentru-insanatosirea-societatii-si-eliminarea-coruptiei-v1.html.

and wiretapping) were *legally* executed by the latter.[60] This relevant segment of reality has not registered at all in the European Commission's CVM progress reports, even though it is worth pondering how, under the guidance of EU conditionality, a puzzling institutional symmetry has been constantly reinforced. Romania had a relatively powerful prosecutors' office under communism and a feared intelligence service, the *Securitate*. It still has strong prosecutorial structures and a feared and very well-heeled domestic intelligence service, the SRI,[61] although, admittedly, both institutions are now in the pursuit of a nobler cause, that of eradicating political corruption.[62] To put it differently, the Commission in Brussels reinforces unflinchingly 'the fortress of judicial (and prosecutorial) independence'[63] from politicians (thus, implicitly, from democratic checks) but nothing has been said about other kinds of (path) dependencies, although abundant reasons for apprehension or at least for a measure of pragmatic scepticism exist.

The general standards of the Venice Commission recognize an essential difference between prosecutors and judges. In what concerns the judges, the commission in Venice reinforces the consensus on judicial self-government as a recipe for new democracies. With respect to prosecutors, however, the pertinent report underlines the special status of public prosecutors, uses quotation marks to refer to prosecutorial "independence", and explicitly favors the model of a separate prosecutorial council, with a mixed composition (elected members of the profession and external members, appointed by parliaments).[64] This preference concerns, admittedly, the ideal-type model to be adopted in the abstract and ab initio, for purposes of institution-building, not the interpretation of how a preexisting model, such as the

[60] DCC Nr. 51 din 16 februarie 2016, M.Of. Nr 190 din 14.03.2016. In 2014, the last year for which a full report is available on the SRI website, the institution implemented **44.759** authorization acts (out of which 2762 national security warrants, the rest being technical surveillance warrants (requested by prosecutors) and 48 h intercepts on the basis of prosecutorial ordinances). In 2007, the figure had been **10.272.** Available at https://www.sri.ro/rapoarte-de-activitate.

[61] The number of employees is confidential but, extrapolating from budgetary categories, is estimated often at over 10.000. Yearly budgets have constantly increased, to over 2,3 billion Romanian Lei in 2018 (approximately 492 million Eur, at the current exchange rate; *Serviciul de Informații Externe* (Foreign Intelligence Service) received in the same fiscal year 62 million Eur.). The amount compares favourably with the sensibly lower budget of the closest German equivalent of the SRI, the Office for the Protection of the Constitution (*Bundesamt für Verfassungsschutz*, 348.9 million Eur in 2017) or even that of the Federal Intelligence Office (*Bundesnachrichtendienst*, 832.8 million in 2017), particularly if figures are pondered for relative GDPs (1:17, nominal), populations (1:4), perhaps also security risks (https://www.bundeshaushalt-info.de/#/2017/soll/ausgaben/einzelplan/0414.html). The SRI has by law (L. 51/91) the right to operate commercial enterprises, which generate revenue. The actual degree of involvement in the justice system is not yet certain but a number of professional associations have in the past accused the Service of recruiting magistrates as undercover collaborators.

[62] The budget of the SRI has increased fivefold between 2002 and 2018, in lockstep with the entrenchment and spike in the fight against corruption (see Mendelski 2019, forthcoming, on file with the author).

[63] Cf. Bobek (2008). On the general problematic of past and current intersections and implications of post-communist 'juristocracy', Czarnota (2018).

[64] Two separate reports were in fact adopted, namely a REPORT ON THE INDEPENDENCE OF THE JUDICIAL SYSTEM PART I: THE INDEPENDENCE OF JUDGES, CDL-AD(2010)004, and a REPORT ON EUROPEAN STANDARDS AS REGARDS THE INDEPENDENCE OF THE JUDICIAL SYSTEM: PART II—THE PROSECUTION SERVICE, CDL-AD (2010)040).

Romanian one, should function. Moreover, anticorruption has already become a quasi-constitutional factor in light of which the Venice Commission assesses traditional, *stricto* sensu constitutional institutions and procedures.

In its opinion on the changes to the Romanian judiciary laws, the Venice delegation contradicts the Venice general report on prosecutors, essentially with the argument that even though the general report underlines the fact that the "independence" of prosecutors is not the same as that of judges "neither [that] report nor any Venice Commission document provides expressly or can be interpreted in the sense that the Venice Commission would question the systems, where the prosecutor's office is independent or would require the reform of such systems."[65] Trouble is, the prosecutor's office is not fully independent (except in the sense of the general report, with respect to the solutions on individual cases) and a recent Constitutional Court decision in an *Organstreit* proceeding interpreted Art. 132 to mean that the President of Romania was bound to implement the request of the Minister of Justice, under the existing organic law on the status of magistrates, to revoke the Chief Prosecutor of the National Anticorruption Directorate.[66] Thus the Venice report recommends changing the Constitution to eliminate the impugned article and strengthen "the independence of the prosecution service",[67] in addition to other legislative adjustments, so that the system would not run "contrary to the direction the Venice Commission has recommended to Romania."[68]

In essence, the opinion rejects almost all of the amendments seeking to micromanage the system by marginal changes to the organic laws and—'in exchange'—proposes as remedy revision of the Constitution itself, to eliminate the ministerial oversight over prosecutors but 'democratize' the Council as whole by reshuffling its membership to alleviate judicial corporatism and systemic opaqueness, making the judiciary more responsive and—hopefully—more accountable. This latter change would presuppose increasing significantly the number of political appointees ("civil society representatives", the equivalent of French "external personalities"). Such a revision is however impossible not only from a political standpoint but also in strictly legal-constitutional terms. The Constitutional Court of Romania has twice declared such proposals to be unconstitutional, under the 'eternity clause' (Art. 152-*Limits of revision*), holding that any such increase, if not matched by a correlative, proportional enlargement of the number of judges and prosecutors elected by their peers, would be unlawful. Overturning two clear, recent precedents based on interpretations of the entrenchment clause would be highly unlikely if not impossible and the

[65] CDL-PI (2018)007, at par. 67.

[66] DCC No. 358/2018, M. Of. nr. 473/7 iun. 2018.

[67] CDL-PI (2018)007, at par. 58. In the final report, Opinion No. 924/20 October 2018, CDL-AD (2018) 017, par. 61. The preliminary and the final reports differ marginally. In between, an ordinance (OUG 92/2018) was adopted, ostensibly to respond to criticism and placate the Commission before the final report. The implementation of the early retirement provision was deferred until 2020 and the recall procedure was mollified.

[68] Id., par. 69. Picasso reportedly remarked in retort to the observation that his portrait of Gertrude Stein did not resemble the model: "[N]ever mind, in the end she will manage to look just like it." Roland Penrose, *Picasso: His Life and Work* (Berkeley & Los Angeles: UC Press, 1981 (3rd ed.)), at p. 118.

Venice Commission should arguably have known this.[69] The vehement opposition voiced in the opinion with respect to the reintroduced recall procedure, which would have guaranteed at least a measure of professional accountability within the highly corporatist structure of the judicial council, is particularly hard to understand in the overall context. In other words, the report militantly advocates for the preservation of the status quo, also by virtue of its plea for an impossible alternative solution and even at the price of incoherence and inconsistency (e.g., contradicting the Commission's own general standards).

Other factual inaccuracies can be found. For instance, in the adamant opposition to the creation of a special prosecutorial section, the Venice report reproduces an argument initially floated in the internal debates, namely, that the small number of cases involving magistrates does not justify such the measure. The Venice report suavely opines that anticorruption prosecutors would be best suited to prosecute crimes committed by other magistrates. The number of files concerning magistrates (also, all cases with magistrate co-defendants) is however relatively large, including a few hundred administered by the DNA. The reason for creating the section was precisely a fear that the anticorruption watchdog did (could) exert pressure, especially on the judges, by keeping open criminal files concerning them. Such suspicions of foul play are not fully unfounded. A Prosecutor General was forced to resign immediately after his appointment, in 2016, prosecuted by the DNA under a rather thin charge: the former, accused of committing an abuse of office (commuting to work in Bucharest, he used a police escort), was immediately replaced but subsequently acquitted. To be sure, the acquittal resulted from a redefinition by the Constitutional Court of the crime of abuse of office, to apply only to a clear infringement of a clear rule of primary law (legislation proper or ordinances). By the same token, the dogged local center-right opposition to this Constitutional Court decision, propped on the argument that the finding of unconstitutionality would cripple the possibility of the DNA to pursue "the corrupt" had little to do with "the rule of law" whose Romanian flagship is, supposedly, anticorruption. One of the few core, universal and uncontested components of the concept is the principle of *nulla poena sine lege scripta, praevia, clara, stricta*. Silences in the report are also telling. One could have expected the Venice Commission to note with concern the increasing reliance on wiretapping and surveillance of all kinds, particularly in light of the fact that surveillance and corruption were, as one remembers, considered equally problematic examples of threats to the rule of law in the 2016 Checklist. Surveillance has become a familiar facet of the fight against corruption, as has unfortunately, over the years, the steady stream of transcript leaks to the 'friendly press'.

All this is not to argue that the criticism in the report is fully irrelevant, that some legislative changes undertaken by the recent government cannot be assessed as

[69] This is not the first time when the Venice Commission requests impossible changes. In a 2003, the report on the revision bill strongly suggested deleting the word "national" in the definition of the state, although the Constitution forbids such amendments in no uncertain terms. According to Art. 152 (1) (at the time 148), "The provisions of this Constitution with regard to the national, independent, unitary and indivisible character of the Romanian State…shall not be subject to revision." *See* CDL-AD (2003) 4 *Opinion on the Draft Revision of the Constitution of Romania.*

abusing the public trust,[70] or that many changes to judicial organization legislation would be unassailable. But the flimsiness of many arguments and the all-out partiality in this particular context, where large room for debate exists, do reveal a problematic, recurrent tendency of thinly veiled side-taking.

Instrumentalism is unavoidable in and perhaps constitutive of politics but problematic in the practices of a body whose legitimacy rests entirely on expertise, sobriety, and neutrality. Moreover, by taking sides in politically environments such as Romania, where Manichaean scenarios (rule of law judicial angels and corrupt populists devils) are hardly applicable, the Venice Commission may playact the arsonist firefighter, making itself into part of a problem rather than the solution to it.

4 Path Dependencies: "Special", "Extraordinary", "Specialised" Anti-corruption Justice

Broader network synergies have developed in the context of the recent efforts by the IMF, seconded closely by the EU Commission, to implement anticorruption policies in the Ukraine. These policies are formally IMF structural adjustment conditionalities. As Ukraine is not yet a candidate, specific programs can be funded[71] but reforms may not be formally requested by the External Action Service of the Union. A pending structural convergence program of the IMF, with the support of the EU, requires the creation a set of self-standing anticorruption courts in the Ukraine; anticorruption investigating and prosecution offices –the Romanian model– have already been established. More precisely, a High Anti-Corruption Court is to be established in 2019, with an Appellate Chamber, staffed by judges vetted through a process which involves both internal institutions (the qualification committee and the High Council) and an external input (a six-member, international expert body with blocking powers).[72] At the end of the process, appointments shall formally be made by the President but the latter has no power to refuse. The clearing of the proposed changes by the Venice Commission presented itself as the most natural solution. If one believes in the redemptive powers of anticorruption, Ukraine is an

[70] *See* Opinion 930/13 September 2018, CDL-REF (2017)045 on draft changes to the Criminal Code and the Criminal Procedure Code, where the Venice Commission rightly points out deficiencies. The impugned provisions had by the time the opinion issued already been declared unconstitutional by the CCR. Some of those proposed changes to criminal legislation hewed very close to the current legal imbroglios of Social Democratic Party president (and House Speaker) Liviu Dragnea, currently undergoing trial on appeal, on a corruption charge. Likewise, an ordinance (OUG 13/2017) adopted in 2017 to redefine the crime of abuse of office by introducing a high damage threshold, clearly appeared to benefit the PSD President. Massive protests against the ordinance led to its abrogation. However, most of the recent amendments to the judiciary laws are, at least *prima facie*, different in nature. They do not profit a political faction but rather seek to reshuffle a *status quo* that has been demonstrably riddled with deficiencies (power aggrandizement, opaqueness, lack of accountability), by introducing internal checks and balances and increased stress on professional training and seniority.

[71] See for instance Ukraine's "first ever corruption park", opened by the External Action Service in Kyiv https://eeas.europa.eu/delegations/ukraine_en/43742/Corruption%20Park%20to%20open%20in%20Kyiv.

[72] https://www.coe.int/en/web/corruption/anti-corruption-digest/ukraine.

ideal candidate for this type of grand institutional engineering: its corruption 'track record' is nothing short of dismal[73] and its judiciary lacks both internal and external independence guarantees.[74] Nonetheless, as I shall argue in the rest of this section, experience teaches that the pursuit of vigorous, repressive anticorruption policies in settings that are institutionally comparable (independent judiciaries, fragmented political systems) eventually backfired. More relevant to this argument is the fact that constitutional expertise proper hardly exists to support this novelty. Thus, as it will be shown, the Venice Commission proceeded in reverse, by adjusting constitutionalism to the task at hand.

Anticorruption has over the past decade become the dominant criterion and policy for assessing new candidates to the European Union.[75] Initially, the countries that joined in 2004 were simply required to accede to the existing international instruments (UNCAC, the OECD convention, the two CoE conventions), even though older member states had not ratified the relevant treaties. Romania and Bulgaria are subject to post-accession monitoring, in the logic of which anticorruption is a dominant benchmark (Croatia implemented anticorruption policies but is not under the CVM or an analogous instrument), whereas in the case of the current candidates the effectiveness of combatting corruption is monitored both under a hard acquis chapter and under the political conditionality. The way in which the European Union has developed and projected this policy preference is itself a part of a wider 'international constitutional law' consensus, shared policy-wise by the IMF, the Council of Europe, and the World Bank.[76]

The Venice Commission has already incorporated anticorruption in its constitutional assessments, for instance in its 2014 Report on the Scope and Lifting of Parliamentary Immunity. The document, adopted by the Commission in collaboration with a GRECO expert, purports "to develop criteria and guidelines on the lifting of parliamentary immunity in order to avoid the misuse of immunity as well as selective and arbitrary decisions, and in order to ensure adequate transparency of the procedure."[77] GRECO and the Venice Commission are both organs of the Council of Europe system but they are tasked with distinct mandates. It is one thing to assess the various way in which constitutional systems regulate parliamentary immunity and another to study this institution of constitutional law with an instrumental, policy-driven cast of mind, namely, to reduce immunity in order to combat political corruption in the most effective way. The methodological slant is reflected

[73] In the 2018 CPI, the Ukraine ranks 120 out of 180 countries (up from 130 in 2017, however). To compare, Romania ranks 61st, slightly below Croatia (60), above Hungary, Greece and Bulgaria (among EU member states). At https://www.transparency.org/cpi2018.

[74] Popova 2012. In line with the tenor of my argument, however, Popova is sceptical of institutional solutions, especially in the short run: "[J]udicial independence is unlikely to come about through institutional engineering, especially in the short term. Independence-fostering formal institutions may trigger the expected response in behaviour if they are introduced in a brand-new system but they virtually never are." (At. p. 146). As I understand her argument, a brand new system would mean an overhaul of the constitutional, legislative, and institutional foundations.

[75] *See*, generally, Szarek-Mason (2010).

[76] Schroth and Bostan (2004).

[77] CDL-AD(2014)011.

in the report, the committee considering that, to the extent feasible, only immunity for votes and political opinions expressed in Parliament should be maintained (what the report defines 'non-liability'), whereas immunity from prosecution, arrest, detention, searches and seizures ('inviolability') ought to be discarded. In passing, a number of criteria are visited, such as the need to protect MPs when there is cause to suspect politically-motivated prosecution (*fumus persecutionis*). Nonetheless, the gist of the argument, predetermined by the imperative of combatting corruption, is that immunity should be restricted to protection from prosecution for political opinions and votes. The main premise in the logic of this paradigm is the belief in a corrupt political system as the cause of all dysfunctions. A correlative faith concerns as minor premise the trust in presumptively just but exacting judges and prosecutors which must be rendered autonomous from any democratic accountability mechanism, to the effect that the judicial system would be conclusively able to weed out political corruption. From the operation of policies based on these postulates economic growth and 'the rule of law' would inevitably ensue.[78]

Sufficient information exists however, as indicated also by the Romanian developments described above, to know that the adamant, unreflective imposition of anticorruption reforms, fused at the hip with original forms of judicial autonomy is of a nature to generate, politely said, irregularities.[79] Even without the anticorruption element, enough literature exists on the impact of 'sloganized' judicial autonomy to leave room for doubt and reflection on ready-made institutional and legislative recipes.[80] Indeed, in Italy, where only parts of the parcel aggressively pursued by international conditionalities existed (*internally generated* anticorruption campaign, autonomous judicial system), the dynamics set in motion by the *Mani pulite* campaign appear to have created, in retrospect, judicial politicization rather than a clean political system.[81] Even though events in Brazil are rapidly unfolding and connections are yet understudied in legal literature, a number of parallels can be, albeit cautiously, drawn with Romanian and Italian developments: radicalization of the public discourse, instrumental liberties taken by the judiciary in the name of the lofty ideal of combatting corruption (wiretaps without warrant, use of intercept transcript leaks to the friendly press, use of pretrial detention as surrogate punishment, excessive reliance on delation, and the like), far-right politics in strange bed-fellowship with the anticorruption discursive-ideological slant, and the like.[82] The hero of Brazilian anticorruption, judge Sérgio Moro, had for example praised Italian anticorruption

[78] *See*, for an authoritative academic rendition of this position, i.e., Rose-Ackerman (1999) and same (ed.), (2006).

[79] *See* Mendelski (2016).

[80] *See* Kosař (2016); Guarnieri (2013).

[81] Sberna and Vannucci (2013). *See*, on overlaps with Romanian developments, Mungiu-Pippidi (July 2018).

[82] *See* Perry Anderson, "Crisis in Brazil", *London Review of Books*, Vol. 38 (8), pp. 15–22 (April 21, 2016) and "Bolsonaro's Brasil", *London Review of Books*, Vol. 41 (3), pp. 11–22 (February 7, 2019). *Also see,* the public letter of a group of Brazilian academics, protesting against what they perceive to be the lionizing of Sérgio Moro in the Western discourse; Moro is the public face of Brazilian anticorruption. The letter, sent to the host of an event at the University of Heidelberg, is available at https://amerika21.de/dokument/165521/sergio-moro-kritik-heidelberg.

tactics in an article published in 2004, long before he actually managed to use such instruments in the *Car Wash* investigations.[83] In Moro's argument, pretrial detention used as coercion mechanism and as a publicity stunt ("arrests"), delation ("confessions"), and the use of the press to mobilize public support (by leaks?) would generate "a virtuous cycle".[84] This is not incidental information: the deficiencies that led to the more recent implosion or deflation of the Romanian fight against corruption are strikingly similar. The common denominator in all cases is instrumentalism, where the nobility of the policy aim (ridding the political system of its evils) is understood to justify problematic means. The problem with goal-driven instrumentalism is that it escapes any form of rational falsification, requiring a leap of faith that fits ill with the constitutionalism: one either *believes* or one does not that anticorruption will yield bountiful results in an indefinite future. The "econometric", pie-chart flip-side of anticorruption (success measured in man-years of imprisonment, number of high political figures arrested, indicted, convicted, acquitted, etc.) is also impossible to address in a normative key.[85] One should expect therefore of a constitutional expert body to moderate by a healthy dose of skepticism rather than reinforce unreflectively bureaucratic drives towards rudimentary and unidirectional answers to complex, polycentric questions.

In recent positions adopted by the Venice Commission, the anticorruption consensus, once integrated in the conceptual vocabulary of the body, has proved not only to be resilient but also bolder in its formulation. At the request of the IMF, a motley working group was appointed by the President of the Venice Commission (comprising two former members, two current members, Ms. Hanna Suchocka as 'Honorary President', and a GRECO expert) to assess proposed changes to the Ukrainian judicial organization legislation. The resulting report was adopted by the Plenary Assembly in 2017.[86]

Even though separate military justice is an accepted exception from general due process guarantees, separate courts for specific offenses have traditionally been anathema to constitutionalism. Such institutions conjure deep fear of kangaroo tribunals, going back in time to the Star Chamber. English constitutionalism is rightly praised for its essential contribution to the conceptual architecture of normative, 18th century written constitutions. It is telling in this sense that one of the first acts of the Long Parliament was the abolition of the *Camera Stellata*. The Habeas Corpus Act of 1640 scrapped a hated symbol of Stuart absolutism and in so doing foretold

[83] Moro 2004. Available at: https://www.conjur.com.br/dl/artigo-moro-mani-pulite.pdf.

[84] Id., at p. 59. As it eventually happened, Moro did shift to a political career, accepting to serve as Minister of Justice and Public Security in the government of newly-elected President Bolsonaro. Judge Moro had disqualified Bolsonaro's main opponent, former President Lula, by pursuing anticorruption justice with all its accoutrements (the dawn arrest with press in attendance, the unauthorized phone tapping, the occasional leaks to the friendly media).

[85] See, supra, FN 55 and associated text.

[86] Ukraine-Opinion on the Draft Law on Anti-Corruption Courts and on the Draft Law on Amendments to the Law on the Judicial System and the Status of Judges (Concerning the Introduction of Mandatory Specialization of Judges on the Consideration of Corruption and Corruption-related Offences), CDL-AD(2017)020.

the onset of the Civil War; needless to say, formally speaking the Star Chamber was a specialized tribunal adjudicating political offenses. In the report by the Venice Commission such imponderables are dispelled, however, by recourse to a nominalist word-play, namely, that special, specialized and extraordinary courts are different things: "While it will ultimately be up to the Constitutional Court, in a given case, to decide on the constitutionality of the law, the Venice Commission takes the view that the [High Anti-Corruption Court] has clear characteristics of a specialized court, rather than a special or extraordinary court, and that it does not jeopardize the unity of the judiciary."[87]

Understanding that one cannot extrapolate from contemporary European and international practices or from constitutional history or theory any common standard justifying the new institution, the Commission embroiders an imaginative soft law tapestry. The Ukrainian report summons support primarily from GRECO and Council of Europe's Consultative Council of European Judges (CCJE) recommendations. For instance, the autonomy of the anticorruption court is defended as reflecting a CCJE Opinion, according to which specialist judges "should always remain a part of a single judicial body as a whole"[88] The CCJE Opinion, however, does not refer to something as revolutionary as creating a supreme anti-corruption judicature with no right to appeal to ordinary courts but to traditional areas of specialization (immigration, trademarks, military, administrative, etc.). Moreover, the definition that the Venice Commission gives to an unconstitutional "special or extraordinary" jurisdiction is conveniently tailored to suit the needs, as "[a court] set up to handle one single or a limited number of specific cases."[89] Should this narrow definition be accepted as valid, most kangaroo courts in history would pass the test, simply because they had been set up for indefinite duration, from the Star Chamber down. To take extreme examples, in order to better illustrate the cognitive problems, the *Volksgerichtshof* or its Communist version, the People's Tribunals, would surely pass muster.[90] Conversely, the only comparative constitutional reference provided in support of this claim refers to an unproblematic hypothesis, a German Federal Constitutional Court decision upholding the constitutionality of the disciplinary body of a liberal profession (Courts of honor in the German bar), in the context of solving a complaint concerning a reprimand (*Verweis*) issued to an attorney[91]

Wordplays ('special', 'specialized', 'extraordinary') cannot therefore hide the fact that the innovation of creating a fully isolated set of anticorruption courts runs not only against the grain of inherited constitutional wisdom but also counter to the European constitutional practices in the Commission's institutional guardianship. To

[87] CDL-AD(2017)020, par. 72.

[88] https://rm.coe.int/16807477d9#_ftn9.

[89] CDL-AD(2017)020, par. 23.

[90] By the same token, should one accept the interpretation of the Commission concerning the Ukrainian High Anti-Corruption Court, the position fits uneasily with the recent Venice report on Romanian judiciary laws amendments, particularly in what concerns the newly-established Special Prosecutorial Section for Investigating Crimes Committed by Magistrates. The latter is only a specialized prosecutorial body, with redress against almost all its solutions readily available in courts of general jurisdiction.

[91] BVerfGe 26, 186-Ehrengerichte.

wit, in the European Union there are only two countries which have instituted specialized anti-corruption judicatures. Slovakia has created a special court competent to try corruption and organized crime but appellate redress to the Supreme Court is available. In a more minimalist key, four 'USKOK courts'[92] have been established in Croatia; in effect, these are however not real courts but three-judge panels, composed of county courts judges, appointed by the courts presidents to 4-year terms to try cases brought before the courts by the national organized crime and anticorruption watchdog (USKOK).[93] Admittedly, a few countries around the world have anticipated the international/Ukrainian model but they are neither members of the CoE system, nor—usually—beacons of constitutional democracy, e.g., the Philippines, where the 'oldest anticorruption court in the world' still operates (with apparent inefficiency).[94]

In order to make sure, however, that the Constitutional Court of the Ukraine understood the semantic subtleties, the report hastened to conclude by stressing that specializing ordinary judges in corruption crimes, as an alternative draft law proposed, was not in line with the Ukraine's international obligations: "As far as draft law No. 6529 is concerned, the Venice Commission wishes to stress that it deviates from the current law and international obligations of Ukraine to set up a specialized anti-corruption court."[95] Nonetheless, the role of the Venice Commission should arguably not be that of a skilled mouthpiece for policy preferences issued by its senior counterparts (Mr. Tungay echoing Headmaster Creakle). As its Statute proclaims, the Commission should first and foremost be the guardian of the European constitutional heritage.

5 Conclusion—The Perils of Instrumentalism

The Venice Commission was designed as a scholarly forum for systematizing and imparting European constitutional knowledge to newer democracies. Some institutional deficiencies marked from inception its optimal operation, notably a high degree of procedural and methodological looseness, resulting in occasional tendencies towards reductionism and ad hocism. Nonetheless, the overall contributions of the Venice Commission, especially in the field of providing guidelines and information to the fledgling post-communist democracies are undeniable and praiseworthy. The Commission's slow and sedulous 'fire prevention' work is precisely what has built its reputation.

More recently, largely as a result of multi-layer interactions following protracted crises in the European Union and its vicinity, the Commission received reinforced recognition as constitutional expert *en titre,* new impetus, and thus a much more

[92] http://rai-see.org/judiciary-croatia-anti-corruption-institutional-framework/.
[93] http://rai-see.org/wp-content/uploads/2015/06/Legislation__Office-for-the-Suppression-of-Corruption-and-Organized-Crime.pdf.
[94] https://www.cmi.no/publications/5884-specialised-anti-corruption-courts-philippines.
[95] CDL-AD(2017)020, par. 75.

visible profile as anti-populist 'firefighter.' This change in status appears to have come at the price of relaxed analytical burdens and neutrality. As I have shown on the basis of concrete examples, a more active engagement in constitutional politics has often resulted in missteps and overreaching (as in the case of the report on prosecutors in Poland or on the 2012 and current crises in Romania). Overreaching, in turn, is evident in poor reasoning (the 'autonomous Communist prosecutor' in Poland; the Romanian ordinance-controlling Ombudsman), contradictions between general standards and concrete country opinions (the position of prosecutors in Romania), varieties of the post hoc-ergo-propter-hoc fallacy (as in: 'the current reforms contradict a tendency we have identified also on the basis of the status quo ante you are now changing') or downright self-bootstrapping (reforms contradict "the direction the Commission has recommended for Romania"). This latter stance, reflected by variations along the Münchhausen trilemma, is perhaps the most problematic, arguments from authority being a last line of defense in common logic and constitutional theory alike. Sometimes, instrumentalism translates in integrating wholesale policy imperatives that sit uneasily together with constitutional law, as evidenced by the attempt to force Romanian judicial reforms into the straitjacket of anticorruption or by the enthusiastic advocacy for creating separate anticorruption courts in the Ukraine, when neither the comparative constitutional law of liberal jurisdictions (European or otherwise) nor constitutional theory or history warrant this particular type of institutional design. It is true that anticorruption forms the object of a CoE instrument (GRECO) but cross-hybridizing standards may not function at the expense of the essential core of a given domain.

The methodological deficiencies chime with procedural shortcomings. Although the task of scholarship is to identify problems and not to propose solutions, it could be argued that a revision of the Commission's statute may streamline its functioning, probably with beneficial effects on its output. One could imagine, for instance, stricter criteria regarding neutral nominations imposed on the member states and—conversely—more clear rules constraining the Strasbourg Secretariat/Presidency in their choice of rapporteurs and/or clear rules prompting the latter's selection and evenhanded treatment of national sources. The intuition behind the initial aim to include political scientists as well, could also be vindicated; increased attention to context, drawing on legal or political sociology, would probably benefit the work of the commission. The current practice, whereby repeat players may be easily identified and the usual 'task force' in a high-stake evaluation expresses a readily familiar 'melting pot' of interests and stakeholders (e.g., two former members, one current member, one substitute member, one GRECO expert, an Honorary President and an 'independent expert') will in the long run detract from the institution's credibility. An evident remedy for this ailment is increased reliance on clear procedures and generally more attention to form.[96] Lots could be drawn for example, perhaps within selected pools of members with expertise in particular fields and/or jurisdictions, in order to form the delegations.

[96] "Procedure is to law what 'scientific method' is to science." In Re Gault, 387 U.S. 1, 21 (1967).

An erosion of the Commission's credibility could only be deplored, in a time of clear and general diminishment of liberal-constitutional standards. This article has argued that, although the growing relevance of the Venice Commission in constitutional politics bears potential and promise, the body has not heaved itself to the level of the expectations or, indeed, to the current challenges. Concretely, the Commission's sedulous engagement in transnational constitutional networking, without increased attention to principles, method, and procedure, carries the peril of subordinating constitutionalism to instrumental considerations. The related tendencies of defining constitutional concepts and procedures through the lens of policy imperatives (notably, the international consensus on anti-corruption as a panacea in unstable democracies), of unduly emphasizing counter-majoritarian elements where such emphasis is not warranted, and of taking 'black and white' stands in grey domestic disputes are worrying in this respect. Instrumentalism at the international level can only reinforce, in a vicious circle, national instrumentalism, particularly in jurisdictions with a historically poor record of internalizing constitutional values. Should the direction not be changed, the Commission's unprincipled approach, different in degree and purpose but not in kind from the instrumentalism of the 'populists' in Hungary, Poland or Romania, would contribute to the slow creation of a world without stable limits and distinctions. This is precisely the kind of reality liberal constitutionalism is most inimical to.

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