

Drafting Counter-Majoritarian Democracy

The Venice Commission's Constitutional Assistance

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Abstract

Since its creation at the end of the Cold War, the European Commission for Democracy through Law (Venice Commission) has been providing technical-legal assistance in the area of constitutional reform to new or restored Central-European democracies. This article suggests that “constitutional assistance”, encouraging the adoption of supranational and European

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legal standards at the national level, favored the endorsement of a counter-majoritarian model of democracy in assisted countries, typical of European constitutionalism.

The article firstly introduces the Venice Commission's mandate, current developments and distinctive constitutional assistance activity, underlining its main strengths and weaknesses in terms of technicality and policy. It focuses in particular on four constitutional features that have a counter-majoritarian dimension, which the Venice Commission consistently promoted in assisted countries favoring their inclusion at the national level: 1. Primacy of International Law; 2. Respect for the European Convention on Human Rights Standards; 3. Checks and Balances; and 4. Constraints on Direct Democracy.

The potential paradox implicit in the idea of a technical body setting constitutional and democratic standards is addressed – and for the most part dismissed – in the final part of the article.

I. Introduction

Since its creation, the European Commission for Democracy through Law, better known as the Venice Commission, has been assisting and advising national authorities by providing constitutional support primarily, but not exclusively, to new and restored democracies of Central and Eastern Europe. This article argues that, over the years, the Commission's distinctive activity of "constitutional assistance" has been a powerful and original instrument of influence on national constitutional dynamics encouraging the adoption of supranational and European legal standards at the national level.

In particular, I am interested in investigating how the Venice Commission's constitutional assistance has been operating as an instrument for promoting an archetypical model of European constitutionalism (understood here as a "check" on democracy and popular sovereignty), encouraging the adoption of a counter-majoritarian model of democracy in assisted countries. Through constitutional engineering, the Venice Commission supported in fact a model of democracy in which supranational legal constraints and domestic checks and balances represent, respectively, externally and internally rooted constitutional bulwarks to national political majorities and domestic governments, weakening the majoritarian dimension of democracy.

The article introduces the Venice Commission's origin, mandate and current developments; it then presents the Commission's distinctive constitutional assistance activity, paying particular attention to its structural strengths and weaknesses related to its trademark of technicality and apolitical nature. Next it focuses on four key constitutional features, which operate as checks on national democracies that the Venice Commission consistently promoted during the transition phase in assisted Central and Eastern European countries, favoring their inclusion in national constitutions. More specifically, Primacy of International Law (1.) and Respect for the European Convention on Human Rights (ECHR) Standards (2.) represent two externally rooted constitutional limits for political majorities, while domestic Checks and Balances (3.) and Constraints on Direct Democracy (4.) exemplify internal *formulae* of constitutional checks. In the last paragraph, the article will deal with, and subsequently debunk, the inner paradox lying at the core of a technical, democratically unaccountable, body entrusted with constitutional assistance and democracy promotion.

II. The Venice Commission: A Global Actor with a European Heritage

The European Commission for Democracy through Law or Venice Commission (henceforth also “the Commission”) is the main advisory body of the Council of Europe (CoE) on constitutional matters. Since its establishment in 1990, the Commission's primary task and original *raison d'être* has been to offer a high-level forum for legal discussion and expert advice on the institutional reforms necessary to bring the countries of the former communist bloc – and new CoE members – in line with Western European standards of democracy, human rights and rule of law.¹ The natu-

¹ G. Malinverni, *The Venice Commission of the Council of Europe, The International Influences on National Constitutional Law in States in Transition*, in: ASIL 96 (2002), 390 et seq. Although the Commission has promoted, both beyond and within European borders, those “ideals and principles which are [the European States'] common heritage” (Art. 1, Statute of the Council of Europe), its fundamental role, especially during the Eastern and Central Europe democratic transition, is still largely unknown. Not entirely by chance, the main academic studies on the Venice Commission have been written by its own individual members, appointed experts, or by the members of its Secretariat. For a few examples see: P. Craig, *Transnational Constitution-Making: The Contribution of the Venice Commission on Law and Democracy*, in: University of California Irvine Journal of International, Transnational and Comparative Law, forthcoming; C. Pinelli, *Parliaments, Constitutional Transitions and the Venice Commission*, Report at the LUISS Summer School on “Parliamentary Democracy in

ral fulfillment of the Commission's mandate was thus providing direct assistance and technical guidance during the process of constitutional transition, promoting as well "the dissemination and consolidation of a common European constitutional heritage"² in the new democracies.

The so-called "European constitutional heritage" is "made up of the common principles and analysis of the experience of the Council of Europe Member States in constitutional matters";³ however its content

"is not stated in clear and detailed form in any international document [and it] has to be elaborated on the basis of the constitutional experiences of the Western European States and of some international instruments in the field of the human rights".⁴

It implies, on the Commission's side, an intense "intellectual and interpretative activity aimed at comparing those different experiences and drawing principled conclusions from the domestic choices of the European Countries".⁵ In this sense, defining the content of the European constitutional heritage is no less a normative activity (*sollen*) than a descriptive one (*sein*). It ultimately implies a creative dimension in the Commission's work, which at the same time both identifies and shapes the content of the "European constitutional heritage" through its constitutional assistance activity.

Since its creation, the Venice Commission was asked to give priority to

Europe", LUISS, Rome, 23.7.2015; W. Hoffmann-Riem, The Venice Commission of the Council of Europe – Standards and Impact, in: EJIL 25 (2014), 579 et seq.; G. Buquicchio/S. Granata-Menghini, The Venice Commission Twenty Years On: Challenges Met but New Challenges Ahead, in: M. van Roosmalen/B. Vermeulen/F. van Hoof/M. Oosting (eds.), Fundamental Rights and Principles – Liber amicorum Pieter van Dijk, 2013, 241 et seq.; S. Bartole, Final Remarks: The Role of the Venice Commission, in: Rev. Cent. & E. Eur. L. 26 (2000), 351 et seq.; G. Buquicchio/P. Garrone, Vers un espace constitutionnel commun? Le rôle de la Commission de Venise, in: B. Haller/H. C. Krüger/H. Petzold (eds.), Law in Greater Europe: Towards a Common Legal Area, 2000, 3 et seq.; G. Buquicchio/P. Garrone, L'harmonisation du droit constitutionnel européen: La contribution de la Commission européenne pour la démocratie par le droit, in: Uniform Law Review/Rev. Dr. Uniforme, 3 (1998), 323 et seq.; S. R. Dürr, The Venice Commission, in: T. E. J. Kleinsorge (ed.), Council of Europe, 2010, 151 et seq.; J. Jowell, The Venice Commission: Disseminating Democracy Through Law, in: P.L. (2001), 675 et seq.; G. Malinverni, L'expérience de la Commission européenne pour la démocratie par le droit (Commission de Venise), in: J. F. Flaus, Vers un droit constitutionnel européen: Quel droit constitutionnel européen?, in: RUDH 7 (1995), 386 et seq.; For an updated list of the publications on the Venice Commission, see Venice Commission webpage, <<http://www.venice.coe.int>>.

² Venice Commission, webpage, presentation.

³ G. Buquicchio/S. Granata-Menghini (note 1), 243.

⁴ S. Bartole, International Constitutionalism and Conditionality. The Experience of the Venice Commission, Rivista Associazione Italiana dei Costituzionalisti 4 (2014), 5.

⁵ S. Bartole (note 4).

“the constitutional, legislative and administrative principles and techniques which serve the efficiency of democratic institutions and their strengthening, as well as the principle of the rule of law; fundamental rights and freedoms, notably those that involve the participation of citizens in public life; the contribution of local and regional self-government to the enhancement of democracy” (Art. 1.2).⁶

The Commission’s specific field of action shall be indeed “the guarantees offered by law in the service of democracy”. This rather broad and sufficiently flexible mandate includes activities such as

“strengthening the understanding of the legal systems of the participating States [...], bringing these systems closer; promoting the rule of law and democracy; examining the problems raised by the workings of democratic institutions and their reinforcement and development” (Art. 1.1).⁷

Originally established as a partial agreement of the Council of Europe,⁸ the Commission is today much more than a regional actor, counting among its more than 60 members many non-European countries.⁹ In addition to the 47 Member States of the CoE, other members of the Commission include numerous countries of North and South America, Middle East, and Asia,¹⁰ while several other non-European countries and international organ-

⁶ Revised Statute of the European Commission for Democracy Through Law, Statute, Resolution (2002) 3, 21.2.2002.

⁷ Revised Statute (note 6).

⁸ Statute of the Venice Commission, (On a Partial Agreement Establishing the European Commission for Democracy through Law), Resolution (90)6, 10.5.1990. See Council of Europe, Glossary on the Treaties: “A partial agreement is a particular form of agreement, which allows some member States of the Council of Europe to participate in an activity in spite of the abstention of other member States”, <<http://www.coe.int>>. Originally just 18 of the then 23 CoE Member States participated in the Commission’s creation; within a few years, all remaining States of the current 47 members of the Council of Europe joined the body.

⁹ In 2002 the Commission’s Statute has been transformed into an “enlargement agreement”, allowing also non-CoE member States to join the body. Revised Statute (note 6).

¹⁰ Kyrgyzstan joined the Commission in 2004, Chile in 2005, the Republic of Korea in 2006, Morocco and Algeria in 2007, Israel in 2008, Peru and Brazil in 2009, Tunisia and Mexico in 2010; Kazakhstan in March 2012, the USA joined in 2013 and Kosovo in 2014. Costa Rica was the last country that joined the Commission in July 2016. The profiles of the individual members of the Commission are varied. All members are “independent experts who have achieved eminence through their experience in democratic institutions or by their contribution to the enhancement of law and political science” (Art. 2.1, Revised Statute [note 6]), their backgrounds are nonetheless varied: they might belong to the academic world (especially professors of constitutional or international law); they may also be members of supreme or constitutional courts or individuals with a relevant previous political experience, such as for-

izations are involved in varying capacities in the Commission's activities.¹¹ One must only briefly browse the Venice Commission's website to grasp the degree of the Commission's involvement in the contemporary global legal debate (as promoter of transnational judicial dialogue, invited speaker in academic conferences, para-diplomatic actor in contexts of constitutional crisis),¹² and a quick look to the most recent Annual report of activities confirms this trend, reporting on the newest cooperation scenarios in Latin America, Central Asia and the Mediterranean Basin in the section "Sharing European experience with non European countries".¹³

The progressively broader extra-European projection of the Commission gives a new dimension to the Commission's constitutional assistance as well. When the Eastern-European constitutional transition, at least formally, reached its peak, the Commission faced the serious risk of exhausting its *raison d'être* and of progressively losing its leading role. Instead, over the years the Venice Commission has been able to reinterpret its mandate, broadening the geographical spectrum of action and bringing the lessons learned from the Eastern European constitutional transitions into new scenarios of democratic transformations (as the fruitful collaboration with Tunisian authority bears witness to).¹⁴ If the European constitutional *acquis* is

mer ministers, members of national parliaments or high-ranking government officials. The members, although appointed for a renewable four-year term by their respective governments, are independent and serve in an individual capacity.

¹¹ Argentina, Canada, the Holy See, Japan, and Uruguay enjoy "observer" status in the Commission's work. Belarus is the last "associate member" of the Eastern European wave of democratic transitions (all other countries have become, over the years, full members of the Commission). Observers and associate members have no right to vote, however "may make oral or written statements on the subjects under discussion". Venice Commission, Revised Rules of Procedure, CDL-AD(2014)045, Strasbourg, 16.12.2014, (Art. 2.2). The Palestinian National Authority and South Africa have a special co-operation status, while the European Union and the OSCE/ODIHR enjoy "participant" status. Venice Commission, Annual Report of Activities 2015, August 2016, 99.

¹² In the sole month of February 2015, the Commission participated in the follow-up to the 3rd Congress of the World Conference on Constitutional Justice (a body that the Commission contributed to create and that unites today one hundred Constitutional Courts and Councils and Supreme Courts with the purpose of facilitating judicial dialogue on a global scale), in several international conferences (e.g. in USA and Japan), and one of its delegations visited Ukraine – a country having a long history of cooperation with the Venice Commission – where the President of the Venice Commission, *Gianni Buquicchio*, met with the Ukrainian President *Petro Poroshenko* to discuss cooperation in the constitutional, judicial and electoral fields. Venice Commission, webpage.

¹³ Venice Commission (note 11), 11 et seq.

¹⁴ In 2012 the Venice Commission intensified its dialogue with the National Constituent Assembly of Tunisia organizing several exchanges of views with national authorities on the draft Constitution and other legislative texts. The exchange evolved in the first opinion deliv-

finding in this way a (potentially risky) global field of applicability,¹⁵ the results of these constitutional assistance experiences will need to be assessed concretely over a longer time scale. For this reason, the article will focus on Central and Eastern European examples of constitutional transitions, on which sufficient data exist today, in order to also underline the Venice Commission's understanding of democracy promotion through constitutional assistance.

III. A Dialogue Between European and National Legal Spaces: The Venice Commission's Constitutional Assistance

The unique historical phase in which the Venice Commission initially operated contributed in shaping its own international identity and role perception in the sphere of constitutional assistance. The complexity of the Eastern European constitutional transitions encouraged the Venice Commission to understand its technical mandate in broad terms from the very beginning. In addition to its key role of “*dépannage constitutionnel*”,¹⁶ which has traditionally consisted of providing advice on new or revised draft constitutions at the request of the concerned states or of bodies of the Council of Europe,¹⁷ the Venice Commission's constitutional expertise provided assistance on issues such as human and minority rights, laws on constitutional courts, referendum, and electoral law and more generally, on all laws dealing with the operation of democratic state institutions. Despite the breadth of constitutional assistance activity, the powers of the Commission are advisory only: “It cannot impose solutions, but it nevertheless gives forthright opinions which it seeks actively to implement through dialogue and persuasion”.¹⁸

ered by the Commission on a draft constitution of a country of the Southern Mediterranean. Venice Commission, Opinion on the Final Draft Constitution of the Republic of Tunisia, CDL-AD (2013) 032, Strasbourg, 17.10.2013.

¹⁵ Risks of “Eurocentrism” and Western bias should be taken seriously in the future activity of global constitutional assistance.

¹⁶ G. Buquicchio/P. Garrone, L'harmonisation du droit (note 1), 329.

¹⁷ Member States (Parliaments, Governments, Heads of State), bodies of the Council of Europe (Secretary General, Committee of Ministers, Parliamentary Assembly, Congress of Local and Regional Authorities) and International Organizations involved in the Commission's work (such as the European Union and the OSCE/ODIHR) are entitled to request the Commission's assistance.

¹⁸ J. Jowell (note 1), 676.

What is noteworthy in the working method of the Venice Commission's constitutional assistance is precisely this dimension of dialogue between international experts and national authorities and the consequent interaction between the European legal space and national legal orders.¹⁹ As the process of adoption of the new Eastern European constitutions demonstrated, national authorities generally ask for the Venice Commission's opinion during the drafting phase; the Commission's experts comment on the submitted drafts, highlighting strengths and weaknesses under a legal-technical point of view, and assess the conformity of the domestic text with European legal and democratic standards (see *infra*). Draft opinions are discussed and adopted during the Commission's plenary sessions, and then transmitted to the requesting states or CoE bodies. The processes, having an eye towards finding a consensual outcome with respect to CoE standards of democracy, human rights and rule of law, can also be seen as a sort of tug of war between national authorities and supranational experts, whose final outcome changes significantly according to the different variables at play, which include the Commission's interlocutors, the historical conditions of intervention and the different actors involved in the process.²⁰

IV. Between *Téchne* and *Politeia*: Limits and Strengths of the Venice Commission's Constitutional Assistance

Both the main limits and strengths of the Venice Commission's constitutional assistance deal with the ambiguous relationship linking "policy" and "technicality" as applied to constitutional matters. The Venice Commission

¹⁹ In this sense the activity of the Venice Commission is an example of the new and multi-dimensional global law field. See S. Cassese, *The Global Polity: Global Dimensions of Democracy and the Rule of Law*, 2012; S. Cassese, *Il diritto globale: Giustizia e democrazia oltre lo Stato*, 2009; S. Cassese/B. Carotti/L. Casini/E. Cavalieri/E. MacDonald (eds.), with the collaboration of M. Macchia/M. Savino, *Global Administrative Law: The Casebook*, 2012; A. Peters, *The Merits of Global Constitutionalism*, in: *Ind. J. Global Legal Stud.* 16 (2009), 397 et seq.; J. Klabbers/A. Peters/G. Ulfstein, *The Constitutionalization of International Law*, 2009; A. von Bogdandy/R. Wolfrum/ J. von Bernstorff/P. Dann/M. Goldmann (eds.), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law*, 2010; M. Bussani, *Il diritto dell'Occidente: Geopolitica delle regole globali*, 2010.

²⁰ For example: "When opinion requests come from the interested States themselves, it is the rule that the opinions are followed, in part or in full", instead, "[w]hen the request for an opinion comes from a Council of Europe body [generally in the framework of a monitoring procedure], the State concerned may be not interested and even reluctant to receive the Commission's advice". G. Buquicchio/S. Granata-Menghini (note 1), 250 et seq.

has always been very careful in presenting its role as merely a technical one. Indeed, one of the most relevant components of its success during the Eastern European democratic transitions has been its ability to present itself as a “technical” body, made of experts (mostly professors of international and constitutional law),²¹ which finds its legitimation in the legal value of its opinions. Over the years, the Venice Commission has been able to build the kind of “reputational authority” – of which professional independence is an essential component – that advisory bodies need in order to exert a persuasive influence on national public powers. As a matter of fact, state authorities trusted, and continue to trust, the Venice Commission (see the increasing number of requests for opinions from both CoE and extra CoE countries)²² and this confidence, rooted in the early years of the Eastern European democratic transition, is essential for further increasing the influence of the Commission’s constitutional assistance in a sort of virtuous circle.²³

However, is it indeed possible for international experts to contribute in “drafting” national democracy without crossing the threshold of the political domain? Constitutional and electoral matters lie close to the *sine qua non* of any democracy, i.e. its legal foundation and decision-making processes. Constitutional law “is necessarily close to issues touching upon state sovereignty”,²⁴ as it deals with sensitive questions like the distribution of competences between state powers, the range of recognized human rights, and the economic dimension of the state. Is it possible, then, to affirm that setting national democratic standards, through constitutional assistance, is purely a technical matter? As I suggested in an earlier paper,²⁵ assisting in the drafting of nation States’ constitutional or electoral choices, and super-

²¹ Members of the Commission are “independent experts who have achieved eminence through their experience in democratic institutions or by their contribution to the enhancement of law and political science”. (Art. 2.1, Revised Statute [note 6]). Law professors, supreme and constitutional court judges, members of national parliaments and a number of civil servants are designated by Member States for serving in the Commission. They act nonetheless in their individual capacity and are appointed for a (renewable) four-years mandate.

²² Venice Commission, Annual Report of Activities 2013, September 2014.

²³ It is noteworthy that the countries that interacted the most in the past are generally those that are also more prone to request the services of the Commission today, as it has been the case for Albania and Ukraine. For an effective overview of the intense and almost uninterrupted dialogue between Ukrainian and Albanian authorities and the Venice Commission, see the pages of the Commission’s website dedicated to Albania and Ukraine, <<http://www.venice.coe.int>>.

²⁴ S. R. Dürr (note 1), 152.

²⁵ V. Volpe, Guaranteeing Electoral Democratic Standards: The Venice Commission and “The Code of Good Practice in Electoral Matters”, in: S. Cassese/B. Carotti/L. Casini/E. Cavalieri/E. MacDonald (note 19), 57 et seq.

vising the process of adoption of these choices, (which implies being in charge of suggesting which constitutional or legislative solutions to adopt or to exclude in a given legal order among all the acceptable alternatives), are, by definition, activities that involve more than just legal engineering skills.²⁶ In this sense constitutional assistance permits a large margin of maneuvering to international experts in order to help bring national constitutions in line with CoE standards.²⁷

“The constitutional law is, inherently and by definition, political law”²⁸ and the Venice Commission, like other technical international bodies involved in similar activities, seems to move necessarily between the realms of *téchne* and *politeia*, which, with regard to the impact of its constitutional assistance action, results in a paradox. The Venice Commission *téchne* allows an effective enforcement of its *politeia*, but this *politeia*, which in my understanding has at its core the promotion of a European counter-majoritarian model of democracy in assisted countries, ends up contradicting its pure *téchne*.²⁹

What *Casini* and *Carotti* underscore with regard to technological standards also applies to legal standards: technical “choices are not neutral: there are always political interests and considerations behind the selection of a particular standard” and ultimately the “technical is political”.³⁰

²⁶ For a critical point of view of the ostensibly apolitical nature of international legal assistance, see the study of *Puckett* who focuses his analysis on the American experience and on the Central Asian region, *B. K. Puckett*, “We’re Very Apolitical”: Examining the Role of the International Legal Assistance Expert, in: *Ind. J. Global Legal Stud.* 16 (2009), 293 et seq. Although it would be very ungenerous to apply the following passage to the work of the Venice Commission, it nevertheless points out some of the problematic aspects and paradoxes of international constitutional assistance, especially in the American experience: “A constitution is [...] not just a legal document. It is primarily a social and political construct of past troubles, current conflicts, and aspirations for the future. Only those who have lived, suffered, and survived within that society can, should, and will write it. Americans, on the other hand, usually don’t even know the language; many of us can barely find these countries on a map; and we certainly don’t know their legal systems. In addition, we come from a common law background, and these are generally civil-law countries with very different judicial structures and legal frameworks.” *H. Schwartz*, *Shaping the New Eastern Europe*, in: *Legal Times*, 10.2.1992, 19, quot. in *T. Carothers*, *Aiding Democracy Abroad: The Learning Curve*, 1999, 161.

²⁷ On the standards applied by the Venice Commission, see *W. Hoffmann-Riem* (note 1).

²⁸ *A. Stone Sweet*, *Governing with Judges: Constitutional Politics in Europe*, 2000, 150.

²⁹ *V. Volpe* (note 25).

³⁰ *B. Carotti/L. Casini*, *A Hybrid Public-Private Regime: The Internet Corporation for Assigned Names and Numbers (ICANN) and the Governance of the Internet*, in: *S. Cassese/B. Carotti/L. Casini/M. Macchia/E. MacDonald/M. Savino* (eds.), *Global Administrative Law: Cases, Materials, Issues*, 2008, 185 et seq., (191).

V. A Counter-Majoritarian Model of Democracy: Promoting European Constitutionalism Beyond Borders

In May 2003, the Venice Commission organized the seminar “European and U.S. Constitutionalism” in Göttingen.³¹ On that occasion, *Jed Rubinfeld* of Yale Law School presented the first of a series of articles on which I will draw upon henceforth, arguing that Europe and America (USA) have two radically different concepts of constitutionalism.³² What distances the two shores of the Atlantic on the matter, in particular, is the understanding of the relationship between democracy and constitutionalism. Unlike the American nation-based and “democratic” understanding of constitutionalism, the European ideal of “international” constitutionalism means “of course [...] a check on democracy”.³³ Although I normatively disagree with the author (power dynamics, as *Anne Peters* argues,³⁴ have a meaningful impact in defining the “US way”), I think *Jed Rubinfeld* is descriptively right in arguing that for well-known historical reasons, Europeans tend to fear popular sovereignty (read “democracy”) and its degenerations much more than Americans do, and conversely tend to trust (“undemocratic”) technical bodies and international law much more than Americans do.³⁵

³¹ Venice Commission, European and U.S. Constitutionalism, Göttingen, 23.-24.5.2003, Science and Technique of Democracy, No. 37, CDL-STD(2003)037. The conference’s papers have been later collected and edited in the volume by *G. Nolte* (ed.), European and US Constitutionalism, 2005.

³² *J. Rubinfeld*, The Two World Orders, in: *G. Nolte* (note 31), 280 et seq.; *J. Rubinfeld*, Two Conceptions of Constitutionalism, The International Influences on National Constitutional Law in States in Transition, in: *ASIL* 96 (2002), 394 et seq.; *J. Rubinfeld*, Unilateralism and Constitutionalism, in: *N.Y. U. L. Rev.* 79 (2004), 1971 et seq.

³³ *J. Rubinfeld*, Two Conceptions (note 32), 396.

³⁴ *A. Peters*, Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures, in: *LJIL* 19 (2006), 579 et seq.

³⁵ As *Müller* clearly explains: “[T]he whole direction of political development in post-war Europe has been towards delegating power to unelected institutions, most importantly, constitutional courts. And that development was based on specific lessons that Europeans, rightly or wrongly, drew from the political catastrophes of the mid-century: in particular, never again should a parliament abdicate in favour of a Hitler or a Marshal Pétain, [...] without any checks and balances standing in the way. Put another way: distrust of unrestrained popular sovereignty, or even unconstrained parliamentary sovereignty [...] are, so to speak, in the very DNA of post-war European politics”. *J.-W. Müller*, Should Brussels Resist Hungary’s “Putinization”? Or do EU Member States Have a “Democratic Over-Ride”?, *OpenDemocracy*, 30.12.2011, <<http://www.opendemocracy.net>>. *J.-W. Müller*, Contesting Democracy: Political Ideas in Twentieth-Century Europe, 2011.

Constitutions can accordingly be conceived primarily as the embodiment of universal law and human rights (European internationalist constitutionalism) or of national fundamental values, commitments and interests (American democratic constitutionalism). Following this line of reasoning, the Commission for Democracy through Law has undoubtedly been, through its constitutional assistance activity, an instrument for diffusing the paradigms of European, or internationalist, constitutionalism in new or restored Central and Eastern European democracies.³⁶ Under the constitutional engineering's perspective, the Commission's attention has been constantly addressed to preserve, at the internal level, a viable balance of powers in the constitutional design of assisted countries and, at the external level, to ensure compliance with international legal standards and regional obligations. I argue that the Venice Commission's constitutional assistance ultimately outlines an archetypical model of European constitutionalism, whose core ideal is to pose internally and – more distinctively – externally rooted constitutional limits to political majorities and popular sovereignty. Four key constitutional elements that the Commission has consistently promoted in assisted states favoring their inclusion in national constitutions will sustain this claim. On the one hand (1.) Primacy of International Law and (2.) Respect for ECHR Standards act as externally rooted limits for national democracies. On the other hand domestic (3.) Checks and Balances and (4.) Constraints on Direct Democracy represent internal *formulae* of constitutional bulwarks.³⁷ All these elements, in line with a European historically acquired distrust towards possible abuse of democratic popular sovereignty, actually operate as “*a check*” on political power at the constitutional level and help define a particular counter-majoritarian model of democracy which characterizes the Venice Commission's constitutional assistance.

³⁶ The term “European constitutionalism” has been mainly used in the literature with reference to the EU system. See *J. H. H. Weiler/J. P. Trachtman*, European Constitutionalism and Its Discontents, in: *Nw J. Int'l L. & Bus.* 17 (1997), 354 et seq.; *G. de Búrca/J. H. H. Weiler*, *The Worlds of European Constitutionalism*, 2011; *K. Tuori*, *European Constitutionalism*, 2015. I use it instead embracing comparatively, with a certain degree of generalization, the system of the Member States of the CoE. More commonly used to describe the Venice Commission's approach is perhaps the term “International constitutionalism”, see *S. Bartole* (note 4).

³⁷ Constitutional Justice should probably also be added to the list. The latter seems to be nonetheless a much more investigated issue in the literature than the four constitutional elements on which I focus in the article and for this reason it is not included in the following analysis. See Venice Commission, webpage.

1. Primacy of International Law

In one of the first UniDem (University for Democracy) seminars organized by the Venice Commission and titled “Constitution Making as an Instrument of Democratic Transition”, *Georges Vedel*, rapporteur at the meeting, addressed the following question in the context of his analysis of the rule of law principle: “[S]hould the fact that the State and its organs are subject to the law be understood as meaning only national law or also international law?”³⁸ His reply was that

“no democracy can regard domestic law as superior to international law, since this is tantamount to making the State a God who is the master of international law which would be valid only insofar as it was recognised by the State, which could moreover withdraw its recognition at will”.³⁹

This same ideal has constantly guided the Venice Commission, which as early as 1993 stated in a study that:

“[I]l serait souhaitable et ce serait incontestablement un pas en avant, que les Etats, et notamment les nouvelles démocraties, reconnaissent de plus en plus, dans leurs constitutions et leurs législations, la supériorité du droit international sur le droit interne. De telles solutions, imbues d’esprit internationaliste, auraient, entre autres, l’avantage de rapprocher les Etats sur la base de la légalité internationale et de faciliter l’application du droit international dans les ordres juridiques internes”.⁴⁰

The same study, based on a comparative analysis, recognized nonetheless that “[l]a majorité des Etats suit la règle selon laquelle les traités ont simplement force de loi”.⁴¹ Problematically in this case, the “European constitu-

³⁸ *G. Vedel*, Fundamental Legal Options, in: Constitution Making as an Instrument of Democratic Transition, Proceedings of the UniDem Conference organized by the Venice Commission in Istanbul on 8.-10.10.1992 in co-operation with the Government of the Republic of Turkey and the Turkish Democracy Foundation, CDL-STD (1992) 003, Science and Technique of Democracy, No. 3, paras. 40-41.

³⁹ *G. Vedel* (note 38), para. 41.

⁴⁰ Venice Commission, *C. Economides*, Les Rapports entre le Droit International et le Droit Interne, CDL-STD (1993) 006, Strasbourg, 1993.

⁴¹ “Ainsi, en vertu du principe *lex posterior derogat priori*, les traités prévalent sur les lois antérieures, mais peuvent être affectés par des lois postérieures (Allemagne, Autriche, Danemark, Finlande, Hongrie, Etats-Unis, Irlande, Italie, Suède, Royaume-Uni, Turquie, Norvège, Islande, Liechtenstein, Saint-Marin, Roumanie, Albanie, Tchécoslovaquie, Pologne, Lituanie).” Nonetheless “[b]ien que ces pays ne reconnaissent pas formellement la supériorité du traité sur la loi nationale postérieure, ils l’admettent en fait et s’efforcent, par plusieurs moyens,

tional heritage” did not seem to be a sufficient source of inspiration. In this case, the Venice Commission took a proactive and transformative role with regard to the “European constitutional heritage”, reshaping its content through its constitutional assistance’s activities.⁴²

In this sense, the Venice Commission’s constitutional assistance keenly sought to promote the “constitutionalization” of the primacy of international law and thus the duty of conformity of national law to the international legal system. As one of its members recognized “[l]a Commission a [...] souligné dans tous ses travaux la nécessité d’accorder au droit international et européen (stricto et lato sensu) une place supérieure à la loi dans la hiérarchie des normes de l’ordre juridique national”.⁴³

This was the case, for example, in the drafting of the Albanian Constitution, one of the most successful patterns of constitutional assistance,⁴⁴ upon which I will draw extensively in the following analysis considering that it “revêt un caractère exemplaire”⁴⁵ in the Venice Commission experience.

With regard to the relationship between international law and domestic law, the constitutional project of 1994 stated in very general terms:

“[t]he Republic of Albania recognizes and respects the generally accepted principles and standards of international justice, as well as the international treaties and agreements to which it is party” (Art. 10).⁴⁶

d’éviter le conflit de la loi interne avec le traité international.” Venice Commission, *C. Economides* (note 40), para. 3.4.

⁴² A. Milosboski, Chairman of the Committee of Ministers of the Council of Europe, Address at the Ceremony to Commemorate the 20th Anniversary of the European Commission for Democracy through Law, 5.6.2010.

⁴³ C. Giakoumopoulos, La contribution du Conseil de l’Europe aux réformes constitutionnelles: l’action de la Commission de Venise, in: G. Amato/G. Braibant/E. Venizelos (eds.), *The Constitutional Revision in Today’s Europe/La révision constitutionnelle dans l’Europe d’aujourd’hui*, European Public Law Series/Bibliothèque de Droit Public Européen, Vol. XXIX (2002), 695 et seq., (705).

⁴⁴ P. Garrone, La Commission de Venise à la veille de son dixième anniversaire, in: *Riv. Stud. Polit. Int.* 264 (1999), 527 et seq., (531).

⁴⁵ P. Garrone (note 44). In July 2016, Albania adopted a major constitutional reform (mostly focused on the judicial sector), which amended almost 1/3 of the Constitution. Meaningfully, the Venice Commission has been involved also in this last process of constitutional reform. Venice Commission, Final Opinion on the revised draft constitutional amendments on the judiciary (15.1.2016) of Albania, CDL-AD (2016)009-e, Strasbourg, 14.3.2016. See also A. Vorpsi, Albanian Parliament Approved the New Constitutional Reform on Justice System, in: <www.constitutional-change.com>, 27.7.2016.

⁴⁶ Constitution for the Republic of Albania, 6.10.1994, draft submitted for popular approval, <<http://confinder.richmond.edu>>.

Referring to this point in its subsequent opinion, the Commission advocated “more precision”, stating that this provision “does not establish the rank of international law in the Albanian legal order” and instead, “it appears to establish only a general obligation to respect international law”.⁴⁷ In the coming years numerous constitutional drafts followed. In particular, the constitutional process, and the subsequent interaction between Albanian authorities and the Commission’s experts intensified in 1998, the year in which the first democratic Albanian Constitution was finally adopted. In the month of May 1998, one of the Venice Commission rapporteurs clearly suggested that the principle of the primacy of international law over domestic law should have been stated in the new Constitution “in a clearer and more convincing way”.⁴⁸ The following draft of July partially incorporated these suggestions, especially where it outlined a sort of hierarchy of law sources (“[j]uridical acts that are effective in the whole territory of the Republic of Albania are: a) the Constitution; b) ratified international agreements; c) the laws; d) normative acts of the Council of Ministers”, Art. 119.1)⁴⁹ but it still failed to enclose a specific provision ensuring the primacy of international law. The final version of the Constitution, adopted in October 1998, in addition to providing that “[t]he Republic of Albania applies international law that is binding upon it” (Art. 5), explicitly recognized that “[a]n international agreement ratified by law has priority over the laws of the country that are incompatible with it” (Art. 122.2).⁵⁰

The inclusion of the principle of primacy of international law in national constitutions has an important consequence: it in fact establishes that the parameters for constitutional judges will no longer be limited to the national constitution alone, but will also extend to international treaties duly ratified, being an especially meaningful device in the CoE area of human rights, in which “[l]e contrôle de constitutionnalité vient ainsi se doubler d’un contrôle de conventionnalité”.⁵¹

⁴⁷ Venice Commission, Commentary on the draft Albanian Constitution as submitted for popular approval on 6.11.1994, CDL(1995)005e-restr, Strasbourg, 16.1.1995, para. 4.

⁴⁸ Venice Commission, G. Malinverni, Comments, Draft Constitution of the Republic of Albania, Parts I & II, CDL (98) 47, Strasbourg, 12.5.1998, para. 2. a).

⁴⁹ Draft Constitution of the Republic of Albania and Appendices, as of 10.7.1998, available as Venice Commission document, CDL (98) 68, Strasbourg, 22.7.1998. See also the earlier comments, Venice Commission, C. Economides, Remarques sur les Dispositions du Projet de Constitution de l’Albanie du 9.6.1998 (CDL (98)64) Concernant les Relations Internationales, CDL (98) 71, Strasbourg, 17.7.1998.

⁵⁰ See Albanian Constitution, Approved by the Albanian Parliament on 21.10.1998, <<http://www.osce.org>>.

⁵¹ G. Malinverni, L’expérience (note 1), 389.

2. Respect for ECHR Standards

The standards that the Commission is called to apply in its constitutional assistance activity are, as already mentioned, those of democracy, protection of human rights and the rule of law, developed and accepted in the CoE framework. In order to substantiate these broad and often vague concepts, the Commission relies on a series of CoE's fundamental texts and on the shared practices of the Council's Member States, without neglecting, as mentioned, a creative contribution in the process of definition of the "European constitutional heritage".

In the human rights field, however, the European Convention on Human Rights, as developed in the case law of the European Court of Human Rights, is clearly the main reference document, and has been regularly cited by the Commission's experts in their opinions, representing the human rights parameter for its constitutional assistance activity. What is important to capture here is that constitutional assistance has been an effective instrument for "constitutionalizing" the ECHR and its protocols into domestic legal orders and for transforming international legal standards into constitutional norms. In this regard, two examples seem to be illustrative: the first deals with the Convention-based evolution of the principle of prohibition of discrimination in the Albanian Constitution, and the second with the incorporation and ratification of the ECHR international protocols in the Albanian legal order with regard to the abolition of the death penalty.

a) Prohibition of Discrimination (Art. 14 ECHR)

In 1993 the Commission had the opportunity to provide assistance to the Albanian national authorities on the part of the draft Constitution relating to fundamental rights.⁵² The draft revealed a number of *lacunae*, since it failed to include some fundamental rights or to provide sufficient guarantees for the rights contained in it. Of the latter omissions, the principle of equality before the law and the consequent prohibition of discrimination presented serious drafting deficiencies.

⁵² Venice Commission, Working Party on the Chapter of the revised Albanian Constitution relating to Fundamental Rights, CDL (1993) 013e-restr, Strasbourg, 8.3.1993.

Art. 45 of the draft stated that “[n]o-one may be discriminated against on the basis of sex, race, religion, ethnicity, political opinion or parentage”.⁵³ The Commission highlighted that the list of grounds on which discrimination was prohibited diverged from Art. 14 of the European Convention on Human Rights and considered it desirable to set forth a non-exhaustive list on the model of the ECHR. “At the very least – stated the Commission – discrimination based on language or color would have to be prohibited.” In the following draft submitted for national referendum in 1994 and later rejected,⁵⁴ the Commission’s remarks found a first realization, based on the fact that the grounds of prohibited discrimination were broadened to include language and ethnicity according to the Commission’s suggestions, along with “sex, race, [...] religion, economic and social position, political convictions, or parentage.” It is nonetheless in the final version of the Constitution (approved in 1998) that the national and international grounds for prohibited discrimination coincided at the most. Using almost identical wording to the one utilized by Art. 14 of the ECHR,⁵⁵ the new version of the Albanian provision states that

“[n]o one may be unjustly discriminated against for reasons such as gender, race, religion, ethnicity, language, political, religious or philosophical beliefs, economic condition, education, social status, or parentage”.⁵⁶

The Venice Commission’s constitutional assistance acted as a legal “converter”, translating international standards and provisions into domestic constitutional norms. This practice enhanced a process of progressively closer integration between national and international legal orders, enabling provisions that belong to an international treaty to become part of a nation’s fundamental text and be, as a consequence, directly enforced by domestic courts. This device also allowed the Commission to “constitutionalize” standards enshrined in other international human rights instruments, such as the UN International Pacts (also quoted in the Commission’s opinions), favoring the enhancement of the traditionally weaker international system of guarantees with national enforcing mechanisms. In addition, this mechanism of “constitutionalization” of international human rights provisions

⁵³ Venice Commission, Draft Articles for the Constitution of Albania, Human Rights and Freedoms, CDL (1993) 006e-restr, Strasbourg, 27.1.1993.

⁵⁴ Venice Commission (note 47).

⁵⁵ ECHR, Art. 14, Prohibition of Discrimination: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

⁵⁶ See Albanian Constitution (note 50), Art. 18 (2).

effectively complements the principle of primacy of international law (see *supra*), especially considering that even in countries that recognize this principle “it is rather exceptional for [...] courts to directly apply international instruments, such as the International Covenant on Civil and Political Rights [...] and the European Convention on Human Rights”.⁵⁷

b) Abolition of the Death Penalty (Protocol No. 6 ECHR)

The abolition of the death penalty represents one of the main European political priorities in both the action of the Council of Europe and the European Union; it also represents an effective example of the European and internationalist model of constitutionalism promoted by the Venice Commission through its constitutional assistance.

In the interesting case regarding the abolition of the death penalty in Albania, which echoed the path followed earlier by Ukraine,⁵⁸ there has been a two-stage development. Firstly, the Commission supported the introduction of a constitutional provision explicitly abolishing the death penalty. In fact “[d]uring the drafting of the [...] Constitution of Albania, the members of the Venice Commission advocated the adoption of a provision specifically abolishing the death penalty”.⁵⁹ However, national authorities did not proceed with this recommendation, and this provision was not included in the final version of the 1998 Constitution. As a consequence, once called by the CoE Parliamentary Assembly to deliver an opinion on the compatibility of the death penalty with the new Albanian democratic Constitution, the Commission considered on an interpretative basis that “the death penalty must be deemed to be inconsistent with the Constitution of Albania”⁶⁰ according to both constitutional provisions and international obligations. The

⁵⁷ P. Sonnevend, *International Human Rights Standards and the Constitutional Jurisprudence of Transition States in Central and Eastern Europe: The International Influences on National Constitutional Law in States in Transition*, in: ASIL 96 (2002), 397 et seq.

⁵⁸ Venice Commission, *Opinion on the Constitutional Aspects of the Death Penalty in Ukraine*, CDL-INF (98)1R, Strasbourg, 17.4.1998.

⁵⁹ Venice Commission, *Opinion on the Compatibility of the Death Penalty with the Constitution of Albania*, CDL-INF (99)4, Strasbourg, 24.3.1999, 2. The Commission also promoted the adoption of abolition of the death penalty in a series of other opinions addressed to Armenia, Azerbaijan and Gagauzia (as a part of Moldova), see Venice Commission, *J. Klucka, Activities of the Venice Commission relating to the suppression of the death penalty presented to the Colloquy on “The Impact of the Case-Law of the European Court of Human Rights on the Activity of the Constitutional Courts of Central and Eastern Europe”*, University of Clermont-Ferrand, 15.-16.11.2002, CDL-JU (2002) 38, Strasbourg, 20.11.2002.

⁶⁰ Venice Commission, *Opinion on the Compatibility (note 59)*, 8.

reference to international obligations is strongly interrelated with the principle of the primacy of international law that the Commission itself contributed to introduce in the Albanian Constitution (see *supra* 1.). Not by chance, the Commission's opinion recalled, as part of a pro-abolitionist argument, "the importance assigned to international law in the Constitution and the provisions made for its direct applicability".⁶¹

In this case, in which the direct "constitutionalization" of the ECHR standards (i.e. the content of Protocol No. 6, abolishing the death penalty in peacetime) was impossible, the same result was achieved on an interpretative basis thanks to the mediation of the Constitutional Court.⁶² The Commission's legal arguments have in fact been adopted by the Albanian Constitutional Court, which declared capital punishment unconstitutional, paving the way for the effective ratification by Albania of Protocol No. 6 in 2000 and Protocol No. 13 (abolishing the death penalty in all circumstances) in 2007.

The abolition of the death penalty represents one of the best examples of the European ideal of "limited" and counter-majoritarian democracy, at the same time encompassing one of the greatest contradictions of the European model of democracy promotion.⁶³ As a survey confirmed in 2007, "ordinary European citizens favor the death penalty almost as much as do Americans".⁶⁴ Nonetheless, European institutions – and the Venice Commission's

⁶¹ Venice Commission, Opinion on the Compatibility (note 59), 2.

⁶² Constitutional Court of the Republic of Albania, Incompatibility with Constitution of Provisions of the Criminal Code of the Republic of Albania Providing for Death Penalty, Decision No. 65, Tirana, 10.12.1999, <<http://www.codices.coe.int>>; The Albanian Court anticipated by a few days the judgment of the Ukrainian Constitutional Court, which, on 29.12.1999, following a path similar to the Albanian one, declared the unconstitutionality of capital punishment in the Ukrainian criminal justice system. The Court, openly quoting the relevant Venice Commission's opinion in its judgment, was clearly influenced by the remarks of the international experts and underlined the role of the adopted judgment in honoring the commitments made by the country in 1995, at the moment of its entrance in the Council of Europe. See Constitutional Court of Ukraine, Decision on the case based on constitutional appeal of 51 People's Deputies of Ukraine regarding conformity with the Constitution of Ukraine (constitutionality) of the provisions of Arts. 24, 58, 59, 60, 93, 190 of the Criminal Code of Ukraine which envisage death penalty as a kind of punishment (the case on death penalty), Case No. 1-33/99, Kyiv, 29.12.1999.

⁶³ On the potentially paradoxical aspects of considering the death penalty as antithetical to democracy, see *R. Fawn*, Death Penalty as Democratization: Is the Council of Europe Hanging Itself?, in *Democratization* 8 (2001), 69 et seq.

⁶⁴ "In Britain, for example, opinion surveys consistently show that between two-thirds and three-quarters of the population favors the death penalty, about the same as in the United States. In Italy and France, which have dominated the international fight against capital punishment, roughly one-half of the population wants it reinstated." *S. Kern*, Europe, America and the Death Penalty, in: Strategic Studies Group (2007) <<http://www.gees.org>>.

action confirms this shared attitude – strongly reject capital punishment, promoting its ban on a global scale. This is an element that certainly separates the understanding of constitutionalism and democracy on the two sides of the Atlantic Ocean. As *Rubinfeld* points out, with regard to the Venice Commission opinion on the incompatibility of the death penalty with Albanian and Ukrainian Constitutions: “[i]n the United States it would not be acceptable for an international group of experts to assert that the constitution says that life should be protected by law and to say that the correct interpretation is that this prohibits the death penalty”.⁶⁵

3. Checks and Balances

A system of checks and balances, along with the principle of the separation of powers, represents the common core of any conception of constitutionalism, be it “internationalist” (European) or “democratic” (USA). The ideal of limited government, intrinsic to any form of constitutionalism, requires the adoption of a system of reciprocal control among different branches or decision-making centres of the State and rejects unwarranted concentration of power in the general State’s constitutional design.

These exigencies were felt *a fortiori* during the Eastern European democratic transitions, when heavy legacies of democratic centralism, weak traditions of “shared power” and a consolidated political culture of concentration of State powers cast a long shadow on the very possibility of a future democratic consolidation after the transition phase. For this reason, the research of a viable institutional design in the drafting of new democracies’ constitutional framework has been a constant concern in the Commission’s constitutional “chiselling” activity. In particular, the promotion of the multifaceted principles of the separation of powers and implementation of checks and balances has been a prominent priority in the Commission’s constitutional assistance in the CoE new Member States.

Both of these principles, inclusively understood, can operate along horizontal and vertical constitutional lines. The relation between central governments and the local, regional or federal components of the state, which finds a general recognition in the unicameral or bicameral character of national parliaments (unicameralism & bicameralism) develops along vertical lines; the separation of powers between the branches of the state, which in their different formulations, lies at the core of any democratic form of gov-

⁶⁵ *J. Rubinfeld*, Two Conceptions (note 32), 400.

ernment (parliamentarism & presidentialism) develops instead along horizontal lines.

All these elements aim to disperse state power, and in particular to harness the power of the executive – which is the expression of the majoritarian principle in a democratic state – along different constitutional axes and among different institutional centres. The idea that political democracy needs numerous legal boundaries in order to preserve itself will emerge clearly in the following sections as a distinctive trait of the Commission’s democracy promotion activity.⁶⁶

a) Unicameralism and Bicameralism

The bicameral or unicameral character of national parliaments represents an institutional feature capable of enhancing the principles of separation of powers and checks and balances in a democratic state. The Commission dealt with the issue of the preference for a unicameral or bicameral parliamentary system in several cases of constitutional assistance. In these experiences, the link between the parliamentary institutional choice and the federal or unitary character of the state has progressively emerged as a decisive element in orienting the Commission’s opinions on parliamentary matters.

For example, Albanian authorities considered for some time the possibility of introducing a second Chamber or a Senate with limited powers.⁶⁷ The Venice Commission, consulted on the point, acknowledged that this option, although perfectly admissible from the point of view of democracy, would have been a rather unusual choice in a small unitary state like Albania⁶⁸ and eventually, the 1998 Albanian Constitution maintained the preference for a unicameral parliament, in line with the Commission’s remarks. The experts’

⁶⁶ It is worth noting that this one is not an uncontroversial approach, especially in cases of state-building. With regard to this attitude of international actors, *Carothers* wrote: “With their frequent emphasis on diffusing power and weakening the relative power of the executive branch – by strengthening the legislative and judicial branches of government, encouraging decentralization, and building civil society – they were more about the redistribution of state power than about state-building”, see *T. Carothers*, *The End of the Transition Paradigm*, in: *Journal of Democracy* 13 (2002), 5 et seq., (17).

⁶⁷ *K. Imholz*, *Albania*, *Introductory Notes*, 1995, update in: G. H. Flanz (ed.), *Constitutions of the Countries of the World*, vii-xi.

⁶⁸ Venice Commission, *G. Buquicchio*, *Rapport sommaire sur la visite d’une delegation de la task force “Albanie” à Tirana (20-22 mai)*, CDL (1998) 053f-restr, Strasbourg, 8.6.1998. See also *D. Shell*, *The History of Bicameralism*, in: N. Baldwin/D. Shell (eds.), *Second Chambers*, 2001, 5 et seq.

position anticipated the results of the Report on Second Chambers in Europe drafted by the Venice Commission some years later, in 2006.⁶⁹ The study considered that “second chambers are particularly unlikely to serve a purpose in the smallest or least populated countries of Europe”. Under a comparative perspective, states with less than 15 million inhabitants seem to deem unnecessary the introduction of a second chamber. The report underscored instead that a state of 50 million inhabitants such as Ukraine (in which the introduction of a second chamber is often discussed) “must be considered to be well suited to a bicameral system”.⁷⁰

However, rather than the real dimension of the state, its federal character seems to be, in the eyes of the Commission, the feature that justifies the bicameral option. In more recent times, the Commission, contradicting indeed the conclusions of its previous report, questioned the merit and justification of the creation of a second chamber in Ukraine. In the Commission’s view:

“[T]he introduction of a bicameral system [...] is a political choice which has both advantages and drawbacks. Since the territorial structure of Ukraine is not based on federal or regional principles, a bi-cameral system is not a natural choice. Nevertheless, even in a unitary system, it can improve territorial representation [...]. [On] the other hand, bicameralism complicates legislative and budgetary processes and may introduce new causes for political dead-locks”.⁷¹

Bicameralism is thus a crucial device for institutional checks and balances in the case of federal states, where member states or sub-national entities need to find representation. A confirmation of this statement can be found in the empirical fact that “federal states in Europe and elsewhere in the world all have bicameral systems”.⁷² According to the 2006 report, the intrinsic characteristics of dialogue between centre and periphery – typical of these systems – presents, an element of broader representation of interests, which would enable second chambers to play a role in the future national institutional dynamics on the continent, also considering that “the Council

⁶⁹ Venice Commission, *Patrice Gélard*, Report on Second Chambers in Europe, “Parliamentary Complexity or Democratic Necessity?”, Study No. 335/2005, CDL (2006) 059rev, Strasbourg, 26.11.2006.

⁷⁰ Venice Commission (note 69), para. 31.

⁷¹ Venice Commission, Opinion on the Draft Law of Ukraine Amending the Constitution Presented by the President of Ukraine, Opinion no. 534/2009, CDL-AD (2009) 024, Strasbourg, 15.6.2009, para. 48.

⁷² Venice Commission (note 69), para. 32.

of Europe considers decentralisation [...] to be an essential component of democracy”.⁷³

On the other hand, bicameral systems in highly decentralized systems, question the democratic principle from another angle. The principle of democratic representation and accountability appears in weakened form in federal or comparable systems. These systems aim to ensure a stronger representation to smaller entities either by providing them with the same number of seats (Switzerland, USA) or by over representing them (Germany).⁷⁴ This mechanism raises the question of the basic democratic principle “one person one vote”,⁷⁵ which is part of the “European Electoral Heritage” and which is also enshrined in the Commission’s Code of Good Practice in Electoral Matters.⁷⁶

A similar concern can be found in the words of the former President of the Venice Commission, *Jan Helgesen*, who recommended providing the second chamber mandate with an objective justification and an institutional logic, especially in unitary states:

“Strong discrepancies vis-à-vis the representation of the population are natural in federal states [...], but are much more questionable in unitary states [...]. [O]ne of the questions which must be asked is: does it make any sense and, if so, how? The most traditional argument is that the second chamber helps reflexion, but would there not be other grounds?”⁷⁷

⁷³ Venice Commission (note 69), paras. 32-33.

⁷⁴ Venice Commission, Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative, CDL-AD (2005) 004, Venice, 11.3.2005, para. 35.

⁷⁵ Brazil and the United States are two very interesting examples of disproportionate representation that takes place in federal states: “In both countries, each state gets the same number of senators. Since Wyoming had a population of 453,000 and California had a population of 30 million in 1990, this meant that one vote for a senator in Wyoming was worth 66 votes in California. In Brazil, the overrepresentation is even more extreme. One vote cast for senator in Roraima has 144 times as much weight as a vote for senator in Sao Paulo.” *A. Stepan*, Federalism and Democracy: Beyond the U.S. Model, in: *Journal of Democracy* 10 (1999), 19 et seq., (24).

⁷⁶ Venice Commission, Code of Good Practice in Electoral Matters, Guidelines and Explanatory Report, CDL-AD (2002) 23, Strasbourg, 30.10.2002; see also Venice Commission, Europe’s Electoral Heritage, CDL (2002) 7, Strasbourg, 22.2.2002.

⁷⁷ *J. Helgesen*, Speech at the Congress “Bicameral Systems and Representation of Regions and Local Authorities: The Role of Second Chambers In Europe”, organized by the French Senate, the Congress of Local and Regional Authorities of the Council of Europe in co-operation with the Parliamentary Assembly of the Council of Europe and the Venice Commission, Paris, 21.2.2008, CDL (2008) 005, Strasbourg, 14.2.2008, 2.

These last remarks are particularly relevant here. The presence of a second chamber indeed entails that discussion of legislation tends to be more accurate, since it is conducted twice and it is generally true that “a second chamber may contribute to the quality of legislation,”⁷⁸ but more importantly, it represents an effective check on the majoritarian principle traditionally expressed by the first chamber.⁷⁹ This counter-majoritarian aspect of the second chamber is also emphasized in the Venice Commission’s report of 2006, which highlights how bicameral systems may offer representation to groups, such as minorities, whose presence in the lower house is limited or absent.⁸⁰

Over time, the Venice Commission’s attitude towards bicameralism has been rather ambivalent with regard to unitary states, oscillating between supporting the pros and emphasizing the cons of a second chamber in its constitutional assistance activity. In the case of federal or decentralized states, it has instead consistently supported the existence of the second chamber with broad and well-defined competencies as an element of vertical checks and balances for central government and as an instrument for representing the interest of regional and autonomous entities. This position seems to be consistent both with the idea of distribution of state power along numerous constitutional lines and decision making centres and with the notion of limited government, which the Venice Commission has consistently supported in its constitutional assistance activity.

b) Parliamentarism and Presidentialism

The classical understanding of the principles of checks and balances and separation of powers relates to the horizontal relations between the three branches of state government.

Intentionally leaving aside the “least dangerous branch”, it is on the relationship between the executive and the legislative powers that I would like to focus on in this section in order to illustrate one of the distinctive traits of the European model of constitutionalism developed and promoted by the Venice Commission in its assistance activity.

⁷⁸ Venice Commission, Constitutional Referendum in Ukraine, CDL-INF (2000) 11, Venice, 31.3.2000, para. 44.

⁷⁹ For an illustration of the arguments in favor of the bicameral principle see *D. Shell* (note 68), esp. 14 et seq.

⁸⁰ Venice Commission (note 69), para. 39.

The aim of preserving the necessary partition of powers among the branches of the state is a common goal of all modern constitutions and, as *James Madison* wrote more than two hundred years ago, the mutual relations among state powers represent “the means of keeping each other in their proper places”.⁸¹ Nonetheless, *Madison* himself acknowledged that the drafters of a constitution face a crucial dilemma in designing a democratic form of government. Drafters must in fact at the same time: “[E]nable the government to controul the governed; and in the next place, oblige it to controul itself”.⁸² This means that the drafters of a constitution must find a viable synthesis between exigencies of governability, which requires an executive strong enough to perform its functions, and the parallel necessity to limit this strength – constantly at risk of abuses – with checks and balances.

In the eyes of the Commission, it seems that these exigencies would be better fulfilled by a democratic system which could situate at “*mi-chemin entre la forme extrême du gouvernement parlementaire [...] et le présidentielisme pur et dur*”.⁸³

Officially, the Commission is open to different systems of government, be they presidential, semi-presidential or parliamentary. In reality, it is possible to recognize two symmetrical tendencies in the Commission’s constitutional assistance: on the one hand the emergence of a progressively more evident preference for a rationalized model of parliamentary democracy, and on the other a corresponding skepticism towards presidential forms of government, especially applied to transitional countries, the main beneficiaries of the Commission assistance.

The disfavor of the Venice Commission to presidential forms of government is visible in several opinions delivered during its constitutional assistance activity. For instance, in Kyrgyzstan, as affirmed by the Commission itself, the new form of government adopted after the revolution of March 2010 has been largely modeled on the recommendations given by the Commission’s experts in 2005.⁸⁴ In particular, the Commission lauded the Constitutional draft of May 2010 for being “a step towards improving the system of the separation of powers,” deserving “serious praise for its intention to introduce, for the first time, a form of a parliamentarian regime in

⁸¹ *J. Madison*, The Federalist No. 51, 6.2.1788, in: A. Hamilton/J. Madison/J. Jay (1787-1788), The Federalist, J. E. Cooke (ed.) (1961), 347 et seq., (347).

⁸² *J. Madison* (note 81), 347.

⁸³ *G. Malinverni*, L’expérience (note 1), 391.

⁸⁴ Venice Commission, Annual Report of Activities 2010, August 2011, 17.

Central Asia [...]”.⁸⁵ Similarly, in 2004, the Commission considered the proposed amendments to the Ukrainian Constitution, which were designed to “increase [...] the parliamentary features of the political system” as “positive changes”.⁸⁶

Consistent with the idea that presidential systems *tout court* should be discouraged in new or unstable democracies, even the move from a purely presidential system to a mixed one is favorably evaluated. For example, in the opinion on the draft amendments to the Constitution of Georgia, the Commission explicitly encouraged a change in the form of state government, affirming that “replacing the present purely presidential system of the present Constitution by a semi-presidential system in accordance with the French model [...] brings Georgia closer to the usual European practice and can only be welcomed”.⁸⁷

It was nonetheless in an August 2012 interview that the President of the Venice Commission outlined the Commission’s position with regard to presidential forms of government in the context of countries having weak liberal traditions. President *Buquicchio* was called to comment on the possible amendment of the Turkish Constitution in a presidential or semi-presidential direction. Beyond self-restraint formulas of institutional politesse, the President affirmed quite clearly that the adoption of a presidential system would be “a risky step [for Turkey] to take.” In his words, “such a change in the political system, which moves away from the parliamentary system used in the majority of European countries, would be a far-reaching step that requires a very convincing justification.” He stressed in particular that while the spirit of the constitutional reform is to move the country away from authoritarian structures, a presidential or semi-presidential system could possibly do just the opposite, underlining that “strong presiden-

⁸⁵ Venice Commission, Opinion on the Draft Constitution of the Kyrgyz Republic, version published on 21.5.2010, Opinion no. 582/2010, CDL-AD (2010) 015, Strasbourg, 8.6.2010, paras. 8, 65.

⁸⁶ Venice Commission, Opinion on the Amendments to the Constitution of Ukraine Adopted on 8.12.2004, Opinion no. 339/2005, CDL-AD (2005) 015, Strasbourg, 13.6.2005, para. 14.

⁸⁷ Venice Commission, Opinion on the Draft Amendments to the Constitution of Georgia, Opinion no. 281/2004, CDL-AD (2004) 008, Strasbourg, 29.3.2004, para. 4. The Commission confirmed this approach also in the following opinions: Opinion on Four Constitutional Laws Amending the Constitution of Georgia, Opinion no. 503/2008, CDL-AD (2009) 017rev, Strasbourg, 19.3.2009, and Opinion on a Draft Constitutional Law on the Amendments to the Constitution of Georgia, Opinion no. 519/2009, CDL-AD (2009) 030, Strasbourg, 16.6.2009.

tial powers in countries that do not have a strong liberal tradition often leads to an authoritarian government”.⁸⁸

This more or less undisclosed institutional preference⁸⁹ is thus grounded in the experience acquired by the Commission in the difficult Eastern European constitutional and political transitions. In the former communist countries, the latent risk of an augmentation of presidential powers leading to a return to a system of concentration of state power has been proven on several occasions. In a similar way, the rigid separation between legislative and executive powers typical of presidential systems and their distinct democratic legitimations often brought about institutional paralysis and frontal contrapositions between executive and legislative powers.⁹⁰ In these contexts, the direct popular legitimation of the Head of the State has been an element of institutional friction, given also the recurrent tendency to make use of plebiscitary appeals to the electorate in case of institutional crisis (see *infra* 4.), and it has also been an obstacle to preserving a viable system of checks and balances between state powers.⁹¹

All these elements pushed the Commission to prefer a system of rationalized parliamentary democracy. The element of rationalization, which reduces the risks of incurring degenerative forms of parliamentarism, is evident in the strong support that the Commission provided to the motion of constructive censure, which is considered “part of the constitutional heritage of Europe”.⁹²

⁸⁸ S. Gültaşlı, Interview to Gianni Buquicchio, President of the Venice Commission, Venice Commission not Consulted in Drafting of New Constitution, in: “Today’s Zaman”, Brussels, 7.8.2012.

⁸⁹ See once more the statement of the official position in the article by G. Buquicchio/S. Granata-Menghini (note 1), 244.

⁹⁰ With regard to the most suitable model of separation of powers, in a seminar devoted to the issue in 1998, a specific approach emerged, which seems to reflect a typical parliamentary model of democracy. In fact: “*La répartition des pouvoirs entre les organes de l’Etat, [...] ne doit plus aujourd’hui être conçue comme une séparation au sens strict, mais comme une distinction des fonctions et des organes, appelés néanmoins à coopérer étroitement.*” P. Garrone (note 44), 544.

⁹¹ For example, Hannah Suchocka, former Prime Minister of Poland and member of the Commission, clearly expressed the idea that in the Ukrainian constitutional framework providing the Head of the State with a position of superiority “could lead to an authoritarian turn, especially if the Cabinet is supposed to be subordinated to the President”. See S. Bartole, Presentation at the “Public Forum: Constitutional Reform: The View of the Civil Society”, Odessa, 16.-18.2.2007, 3.

⁹² For example, on the occasion of the Opinion on the Draft Revision of the Constitution of Romania, the Commission considered the constructive motion of censure proposed in the draft as “the only means of avoiding the constitution of heterogeneous oppositions which would agree only to bring the Government down [...]. [And as] a means of ensuring that the

The preference for a parliamentary system, especially for democratizing countries, has a persuasive body of literature supporting it led by the work of *Juan Linz*, who was also one of the distinguished speakers at the key UniDem seminar “Constitution Making as an Instrument of Democratic Transition” organized by the Venice Commission in 1992. According to *Linz*, not only “the vast majority of the stable democracies in the world are today parliamentary regimes, [...] [whereas] the only presidential democracy with a long history of constitutional continuity is the United States”, but “a careful comparison of parliamentarism as such with presidentialism as such leads to the conclusion that, on balance, the former is more conducive to stable democracy than the latter”.⁹³

This lesson seems to have been deeply internalized by the Venice Commission in its constitutional assistance activity. In particular, the distrust it expresses towards presidential systems goes hand in hand with another potential instrument of misalignment between democratic constitutional provisions and authoritarian political developments: abusive recourse to direct democracy.

4. Constraints on Direct Democracy

In a democratic state based on the rule of law, both the human rights of individuals and the constitutional framework of the state represent fundamental limits to the will of the majority. However, the principle of popular sovereignty, which is at the basis of democracy, challenges the ideal of limited constitutional government in several respects. Indeed, why should a

ministerial crisis consequent upon the dismissal of a government is short-lived [...] forcing the political groups not merely to dismiss a Prime Minister but also to agree on the name of his successor. In this way a certain stability of government is ensured [...], concluding that “it is difficult to do more than approve this suggestion in principle.” See Venice Commission, Opinion on the Draft Revision of the Constitution of Romania, (Unfinished texts by the Committee for the revision of the Constitution), Opinion no. 169/2001, CDL-AD (2003) 4, Strasbourg, 18.3.2003, para. 5.

⁹³ On that occasion *Linz* delivered a speech about the “Political and Social Consequences of the Choice between a Presidential and a Parliamentary System” and it is not improbable that he could have exerted an influence on the members of the Commission. See Proceedings of the UniDem Conference (note 38), paras. 40-41. The quotation in the text is taken from *J. J. Linz*, The Perils of Presidentialism, in: *Journal of Democracy* 1 (1990), 51 et seq. (51-52); see also *J. J. Linz*, The Virtues of Parliamentarism, in: *Journal of Democracy*, 1 (1990), 84 et seq.; *J. J. Linz/A. Valenzuela* (eds.), *The Failure of Presidential Democracy*, 1994; for a different point of view, in the same historical period see *D. L. Horowitz*, Comparing Democratic Systems, in: *Journal of Democracy*, 1 (1990), 73 et seq.

sovereign people comply with a set of received rules when historical conditions change?⁹⁴

This tension appears even clearly in the case of direct democracy, when people have the formal opportunity to express a preference on a given issue and the result of this consultation may in turn contradict the outcomes of representative democratic processes or established constitutional procedures. Direct democracy thus raises problematic issues for both constitutional theory and practice, especially considering that in numerous Eastern European countries, the referendum has been an instrument that has been used against the legislative power harnessed by the executives to overcome the constitutional limits of their mandate.

The Venice Commission's constitutional assistance has consistently discouraged the adoption of *formulae* of direct democracy both as forms of general democratic rule and as a means for constitutional amendment in assisted Eastern European countries.⁹⁵

The Commission had the opportunity to express its point of view on the first of these aspects at a very early stage of the Ukrainian transition, on the occasion of its opinion regarding the institutional Agreement joined between the President and the Parliament of the country. On that occasion the Venice Commission noticed that the Agreement, following the doctrine of self-government which prevailed during the perestroika period, put a strong emphasis on direct democracy. However, in the Commission's eyes, this option "may threaten the constitutional character of the system of government and endanger political stability".⁹⁶ In the following drafts, Ukrainian authorities followed the Commission's recommendations and in the opinion on the Ukrainian Constitution of 1996, the international experts openly welcomed the fact that "the text no longer contains provisions inspired by a

⁹⁴ On the point see, S. Holmes, Precommitment and the Paradox of Democracy, in: J. Elster/R. Slagstad (eds.), *Constitutionalism and Democracy*, 1993, 195 et seq.

⁹⁵ The latter experiences have nonetheless been much more frequent than the former in Eastern transitions. Despite the fact that communist legacies may have left a certain attraction towards direct democracy as the most authentic form of expression of the principle of popular sovereignty, the idea that "democracy" means representative democracy is today widely shared also in Eastern European countries.

⁹⁶ Venice Commission, Opinion on the Present Constitutional Situation in Ukraine Following the Adoption of the Constitutional Agreement between the Supreme Rada of Ukraine and the President of Ukraine on the basic principles of the organisation and functioning of the state power and local self-government pending the adoption of the new Constitution in Ukraine, CDL (1995) 040e-restr, Strasbourg, 11.9.1995, para 10.

too radical concept of direct democracy but provides for an adequate balance between representative and direct democracy”.⁹⁷

The previous example still represents a marginal case even in the former communist political landscape. It was linked with the unique conditions of the Ukrainian transition and heavy soviet legacies, revealed once again on the occasion of the referendum of 2014.⁹⁸ The most relevant and problematic application of direct democracy in the context of new democracies has been indeed the use, or abuse, of popular referendum in the process of constitutional revision.

In the Guidelines for Constitutional Referendums at National Level adopted in 2001, the Venice Commission clearly affirmed:

“The use of referendums must comply with the legal system as a whole and especially the rules governing *revision of the Constitution*. In particular, referendums cannot be held if the Constitution does not provide for them, for example where constitutional reform is a matter for Parliament’s exclusive jurisdiction.”⁹⁹

The use of the referendum has been a common practice in Eastern Europe for overcoming constitutional limits, especially in countries in which Presidents could count on direct democratic legitimation emanating from the people. This element has often been interpreted as the institutional justification for establishing a sort of preferential dialogue between the people and the President, beyond the structures and limits of representative democracy. As the Venice Commission pointed out in its Report on Constitutional Amendment of December 2009:

“[I]n the last 15 years [the Commission] has been confronted with several referendums on constitutional reform in countries of Central and Eastern Europe and Central Asia, which have had as the main aim to strengthen the powers of the Head of State and to weaken the position of parliament – notably in the countries of Belarus, Ukraine, Kyrgyzstan, Azerbaijan and Moldova. In all these cases the Commission voiced criticism both of the texts submitted to the vote of the people and of the procedure followed.¹⁰⁰ These cases indicate that there is a

⁹⁷ Venice Commission, Opinion on the Constitution of Ukraine, CDL-INF (97) 2, Strasbourg, 11.3.1997, 5.

⁹⁸ Venice Commission, Opinion on “Whether the Decision Taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to Organise a Referendum on Becoming a Constituent Territory of the Russian Federation or Restoring Crimea’s 1992 Constitution is Compatible with Constitutional Principles”, CDL-AD(2014)002, Venice, 21.3.2014.

⁹⁹ Venice Commission, Guidelines for Constitutional Referendums at National Level, CDL-INF (2001)10, Strasbourg, 11.7.2001, II B. 3, 3.

¹⁰⁰ These cases cover the constitutional amendment proposals successfully submitted to referendum by President *Lukashenko* in Belarus in 1996 (CDL-INF (96) 8) and 2004 (CDL-

strong risk, in particular in new democracies, that referendums on constitutional amendment are turned into plebiscites on the leadership of the country and that such referendums are used as a means to provide legitimacy to authoritarian tendencies. As a result, constitutional amendment procedures allowing for the adoption of constitutional amendments by referendum without prior approval by parliament appear in practice often to be problematic, at least in new democracies.”¹⁰¹

These experiences of authoritarian backlash confirmed the Commission’s distrustful judgment towards presidential forms of government (see *supra* 3. b) and direct democracy. In its constitutional assistance and democracy promotion activity, the belief that democracy needs numerous institutional limits in order to remain viable was indeed reinforced, considering that in a “true” democracy, the majoritarian principle has to be a recessive trait within the state system.

VI. Democracy by Whom?

There is an intrinsic paradox in the idea of a technical and non-representative body in charge of setting constitutional standards for (often) democratically accountable state governments. Indeed, the role that the Venice Commission, along with other global actors and international institutions has assumed, challenges the principle of popular sovereignty under different angles and – in a world that does not recognize any form of higher political legitimation than the democratic and popular one¹⁰² – it may indeed seem a paradox that non-democratic institutions may “teach” democ-

AD (2004) 029); the constitutional referendum in Ukraine of 14.4.2000 (CDL-INF (2000) 011), which was never implemented; the new version of the Constitution of the Kyrgyz Republic approved by referendum on 21.10.2007 (CDL-AD (2007) 045); and the amendments to the Constitution of Azerbaijan approved by referendum of 18.3.2009 (CDL-AD (2009) 010). A consultative referendum called by President *Lucinschi* of Moldova in June 1999 also had a result favorable to the strengthening of the powers of the President but was never implemented (see Interim Report on Constitutional Reform in the Republic of Moldova – CDL (99) 88). See also Venice Commission, Co-Operation between the Venice Commission and the Republic of Moldova on Constitutional Reform, CDL-INF (2001) 3, Strasbourg, 24.1.2001; Venice Commission, Report on Constitutional Amendment, Study No. 469/2008, CDL-AD (2010) 001, Strasbourg, 19.1.2010.

¹⁰¹ Venice Commission, Report on Constitutional Amendment (note 100), paras. 190-191.

¹⁰² As *Giovanni Sartori* wrote: “The only legitimate power to which free obedience is due – is the power deriving from popular investiture elected from below. [...] The legitimacy that comes down from above has finished to legitimize.” Author’s translation, *G. Sartori*, *Democrazia: Cosa è*, 2007, 269 et seq.

racy to accountable public powers. Nonetheless, as *Sabino Cassese* wrote, several elements have to be kept in mind when we analyze the complex dynamics investing democracy in the contemporary “legal brave new world”.¹⁰³ As he wrote:

“The global legal order changes the criterion of democracy. If the latter depends on political sovereignty, it is undermined by the presence of global institutions. If a State is subject to the will of foreign powers, it is no longer governed according to the standards of its own Constitution. [However] this order of concerns does not take into account an important feature of the global order. In fact, it operates by placing limits on state orders, and therefore increasing, not decreasing, the guarantees for those who belong to them. Its strength lies in its capacity to be rights-expansive.”¹⁰⁴

The Venice Commission constitutional assistance is a paradigmatic example of these developments. Supporting the introduction of numerous constitutional bulwarks for national governments, it ultimately endorsed the advancement of citizens’ rights and the framing of a stable political system at the national level. Global actors may indeed enhance people’s empowerment within their own national decision-making processes, providing stronger instruments of participation and a better understanding of individual rights, especially to the weakest segments of society.¹⁰⁵ In this sense, the existing theoretical tension between democracy as a domestic process and democracy promotion as an externally driven phenomenon has to be measured and evaluated in concrete terms.

The counter-majoritarian ideal of democracy that the Venice Commission’s constitutional assistance constantly promoted represents one of the most distinctive features of European constitutionalism. In contrast with the US symmetrical paradigm, European constitutionalism means “*of course* [...] a check on democracy”.¹⁰⁶ Democracy, as the (political) will of the majority, expressed through “free and fair elections”, needs numerous (legal) diaphragms at the national, but also at the international, level in order to remain viable and not deny itself.

¹⁰³ *S. Cassese*, *Il mondo nuovo del diritto*, 2008.

¹⁰⁴ *S. Cassese* (note 103), 34 et seq. Author’s translation.

¹⁰⁵ Moreover, global actors’ democracy promotion tools, as the Venice Commission’s constitutional assistance illustrates, often have intrinsic limitations that make their work more persuasive than coercive. Their approach towards public powers is not a strictly directive one, but aims mostly at establishing a “persuasive dialogue” oriented towards a shared constitutional, or legislative, result.

¹⁰⁶ *J. Rubenfeld*, *Two Conceptions* (note 32), 396.

In the words of one of the Commission's members:

“[O]ne cannot have democracy without law: law is not a precondition for democracy, or indeed a facilitating factor in carrying out democracy. *Law is democracy*. [...] [O]ne cannot have a true democracy without a suitable legal framework providing rules for the correct functioning of democratic institutions. It should also be noted that democracy is only true if the will of the people is properly expressed in the form of law. The adoption of legal forms provides a guarantee against the arbitrariness of the exercise of power.”¹⁰⁷ (emphasis added)

The fear of abuse of popular sovereignty is indeed the common denominator of all the constitutional features recalled in this article. Promoting the introduction of (1.) Primacy of International Law, (2.) Respect for ECHR Standards, (3.) vertical and horizontal Checks and Balances and (4.) Limits on Direct Democracy in assisted Central and Eastern European countries, the Venice Commission helped “to draft” a counter-majoritarian model of democracy at the national level, typical of European constitutionalism, whose core ideal is to pose internally and – more distinctively – externally rooted constitutional limits to political majorities and popular sovereignty.

¹⁰⁷ S. Bartole (note 1), 351.

