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СРАВНИТЕЛЬНЫЙ КОНСТИТУЦИОНАЛИЗМ — ВЗГЛЯД ИЗ ВЕНЕЦИИ. ВЕНЕЦИАНСКИЕ КАНАЛЫ ОТ НАЦИОНАЛЬНОГО ПРАВА К ТРАНСНАЦИОНАЛЬНОМУ / УНИВЕРСАЛЬНОМУ ПРАВУ

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Настоящая статья, в основу которой положен доклад автора на VII Международном конгрессе сравнительного правоведения «Национальное и универсальное в праве: от традиций к постмодернизму», посвящена роли Европейской комиссии за демократию через право (Венецианской комиссии) в процессе становления сравнительного конституционализма, влияния Венецианской комиссии на национальное конституционное право стран-участниц, а также способам или моделям, с помощью которых такое влияние оказывается. Автор осветил вклад основателя Венецианской комиссии Антонио ла Перголы в развитие конституционализма, в том числе сравнительного конституционализма, в Европе. Кратко представлены механизмы, с помощью которых Венецианская комиссия влияет на реформирование и совершенствование национального права, универсализирует его применительно к странам-участницам. Проанализированы стандарты правоприменения, роль «жесткого» и «мягкого» права в правовых системах различных стран; отмечено, что различия между «жестким» и «мягким» правом имеют гораздо большее значение для национального права, нежели для международного. Данная статья представляется актуальной также с точки зрения рассмотрения Венецианской комиссии как площадки для обмена опытом регулирования и формирования национального конституционного законодательства, а также рассмотрения различных проблем, возникающих на правовом поле государств-участников, со сравнительной точки зрения.

Данный материал будет интересен студентам, магистрантам, аспирантам, представителям юридической науки и юристам ввиду изучения истории и направлений деятельности Венецианской комиссии, взглядов и правовых школ, которых придерживаются ее представители.

Ключевые слова: сравнительный конституционализм, Европейская комиссия за демократию через право (Венецианская комиссия), страны-участницы, конституционное право, конституционное законодательство, национальное право, международное право, транснациональное право, универсальное право.

COMPARATIVE CONSTITUTIONALISM — AN INSIGHT FROM VENICE. THE VENETIAN CHANNELS FROM NATIONAL LAW TO TRANSNATIONAL / UNIVERSAL LAW

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The present article based on the author's report at the VII International Congress of Comparative Law "National and Universal in Law: From Traditions to Postmodernism" is devoted to the role of the European Commission for Democracy through Law (Venice Commission) in the formation process of comparative constitutionalism, influence of the Venice Commission on national constitutional law of participant states, channels of such influence. What's more the author accents the impact of founder of the Venice Commission, Antonio la Pergola, on development of constitutionalism, including comparative constitutionalism, in Europe. The author made a brief analysis of mechanisms included in the process of the Venice Commission influence at reforming and perfection of national law, its universalization in relation to participant states. Moreover, the author analyses the law-enforcement

standards, the role of “hard law” and “soft law” in legal systems of different countries, taking into account those facts that the difference between “hard law” and “soft law” is more significant for national law rather than international law. The article is actual research as well because of consideration of the Venice Commission as the platform for sharing experience in the sphere of regulation and formation of national constitutional legislation and solving different problems arising in the legal framework of participant states from the comparative point of view.

This topic can be interesting for professional society, researchers and specialists, as well as for students, master's degree students and post-graduate students who study history and ways of activity of the European Commission for Democracy through Law (Venice Commission), its views and schools of law that adhered to its representatives.

Keywords: comparative constitutionalism, the European Commission for Democracy through Law (Venice Commission), participant states, constitutional law, constitutional legislation, national law, international law, transnational law, universal law.

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Seen from Venice, the comparative perspective, between national, transnational and universal law is so to say the ratio, the heart, the very existence of the Venice Commission.

I will take you back to the founding father of the Venice Commission, Professor Antonio la Pergola. He was born in 1931 and had lived through the exciting, but difficult, times in European constitutional history. Antonio was very learned. He could give long and deep reflections on this period. Professor was visionary person wanted the European states to work together to learn from each other, to develop a “common European Constitutional Order”. The tool to implement this vision was, exactly, comparative studies.

Antonio's vision did not stop at the European borders, however. Antonio was a true internationalist. He wanted to address the whole world. And he was warmly received in different corners of the world. He was visiting professor in so many universities, spread out. And he had a very soft spot in his heart for Latin-America.

Literary, I take this as my point of departure for my participation at this Moscow conference, that since its inception in Venice in 1990, the Venice Commission has based all its activities on comparative research and analyses.

The Venice Commission does so via different Channels, if you can accept a metaphor:

“*Opinions*”. These are the documents containing advices to a specific state. When Venice Commission is called upon by a party which has the competence to ask, a group of rapporteurs will be appointed. The rapporteurs, and members of the Secretariat, visit the country, meets with the appropriate institutions and individuals. The draft Opinion passes through one of the standing sub-commissions, before it is adopted by the Plenary.

“*Studies*”. These are more general, theoretical works, analyzing an issue which the Venice Commission itself finds interesting and important to elaborate.

“*Seminars*”. The Venice Commission is organizing or co-organizing different kinds of seminars with national institutions. The best known series is UNIDEM-seminars, “Universities for Democracy”.

Standards:

There is division on “hard law” v “soft law”. “Hard Law” the legally binding conventions: ECHR, UN conventions

and “Soft law” is recommendations from European and Universal organizations and “best practices”.

However, the distinction is less important in international relations than in domestic law. Supervisory system is most important.

“European Standards” are not exclusively. There are 61 members in Venice Commission. The main focus is made on Europe, of course.

The comparative perspective implies that a state in focus learns from other states. However, the Venice Commission has always recognized that a legal regime, in order to survive, must be adapted into the social, economic, cultural and historical environment.

The actual manner in which the State is organised and functions, is primarily the expression of the culture, mentality, tradition, history of that State and its people. The general principles must therefore be translated into the legal language and form of the country in question. (*subsidiarity, discretion, margin of appreciation*).

This adaption will in most cases require that the institutions, the legislation and the legal culture of a State be *developed*. It may even entail the need to “import” principles which does not yet exist in a country.

But the transformation of a legal system can only be obtained by receiving the principles and letting them develop on the local soil. It cannot be successfully obtained through the mere transfer of substantive norms from other countries.

The experience of other countries can indeed be precious for a state. The Venice Commission is built on this very idea of sharing with other states one's experience with a view to identifying viable solutions. We have successfully done that on many occasions. The past experience of some states (with similar characteristics) has helped other States to avoid certain mistakes or overcome certain difficulties.

However, the Venice Commission supports the principle of “ownership”, whereby the people of a state should be responsible (and accountable) for putting in action the principles it has chosen to abide by.

The principle of ownership also refers to the approach of the International Community, which should not impose external solutions and should instead allow a democratic political culture to develop that will be sustainable in the long-term. There can be no sustainability without ownership. The experience of post-Dayton Bosnia and

Herzegovina is a disturbing example of the need to respect the principle of ownership.

“Ownership” will inevitably result in originality of solutions found. There exist no identical forms of government or piece of legislation from different countries, and rightly so. The common principles and values receive an original interpretation in each specific country. And here comes the challenging reflection which I think will animate our discussions in a few moments: to what extent can the principles be adapted to the local context?

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By taking such a position, do I exclude, do I close my eyes to the problems where we are reminded that there are close links between a legal system and the culture and traditions in a given country?

Certainly not. But, on the other hand, if we want to establish independent tribunals in a given state, certain main core elements must be respected, irrespective of the socio-economic conditions and cultural and historical heritage. There are obvious limits to the number of models for independent tribunals. If, for political reasons, a member of a governing political party serve on the bench, the tribunal is not independent. The same conclusion applies if the state prosecutor also is among the judges.

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There is a problem of double standards and relativism.

The Checklist Rule of Law can be named as an example.

Of course, this checklist is neither exhaustive nor final. It should not be taken as a sort of Bible of the Rule of Law. Indeed, the checklist covers the most important aspects of this important principle but it could and it should change over time, to face the challenges of an ever-changing world. Nor is the Rule of Law something that can be achieved once and for all. Implementing the Rule of Law is an on-going task, which requires the commitment not only of the State, but also of the citizens.

A mistake that should be avoided in the use of this checklist is the mechanical interpretation of the benchmarks in a given State. This has to be underlined, especially when addressing an audience of potential assessors — the assessment should not merely consist of counting the right answers, but is intended to provide a global overview of the situation, while focusing on the most important criteria. The Checklist enables and indeed aims at an individualised assessment. Indeed, whereas the Rule of Law is a global aspiration, this does not mean that its implementation has to be identical, without taking into account the peculiarities of the given State, such as its historical and political context, its constitutional order and its cultural traditions, without prejudice, of course, to respect for the fundamental principles.