Transnational legal institutions as source of European normative power: The role of the Venice Commission in two Rule of Law reversal attempt cases.1

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VERY FIRST DRAFT!

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1. Introduction

The EU is actually engaged in a unprecedented process of building a common and reliable Area of Justice based on cooperation and trust among members states and national judicial institutions. In doing this, the EU (namely the EC) together with the Council of Europe, is actively engaged in a process of externally promoting harmonization and cooperation among national judiciaries (Piana 2012). The existence and the enforcement of common Rule of Law (RoL) standards and principles is a pre-condition to foster these goals. The EU is founded on the ‘rule of law.’ The expression appears in the preamble to the EU Treaty and then again in Article 2 TEU as one of the Union’s key values together with democracy, freedom and respect for human dignity2. This is the reason why the respect of the RoL is one of the fundamental criteria candidates had to accomplish to join the EU and each member state has to guarantee.

In this context, the aim of this paper is to describe how some transnational networks or legal institutions act and intervene in this two-level game reinforcing and, somehow, replacing the external influence exerted by the European international organizations.

1 This paper is based on the preliminary version of Chapter 3 of the book “Networking the rule of law. How change agents reshape the judicial governance in the EU” (forthcoming) authored by Dallara and Piana.
2 As Pech (2009) reminds, the 2007 Lisbon Treaty, which entered into force on 1 December 2009, it merely reproduced the provision previously contained in the Constitutional Treaty, which means that the Treaty on European Union (TEU) now contains a provision known as Article 2 TEU and which provides that: “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”.
As Dallara and Piana (2014) point out, the RoL networking could be conceived as a process through which actors, located at different levels of governance, create, diffuse, enforce, and dismantle procedures, routines, policies and standards of RoL and quality of justice. Different instruments, which range over a wide spectrum, from advising to standard setting to training, are used and put in place by each of the actor to promote and, in some way, to protect the RoL.

With reference to the candidate countries to the EU membership, some scholars (Parau 2013) argued that translational legal and judicial communities exerted a sort of “extra-conditionality” on candidates in the field of judicial governance. In this respect, we would like to analyse in which way, and under which conditions, some of these transnational legal and judicial communities could act as “external agent of change” promoting and protecting the RoL principles.

From a wide-ranging perspective, judicial networks and communities could be conceived as groups, conferences, commissions or organizations of legal experts, judges and academics (coming from different countries) established at a transnational level. Overall, the activities of these networks can be summarized as an exchange of ideas and practices, in the production of recommendations, opinions and best practices, concerning different fields of law and the functioning of the judicial system, and in the organization of seminars, conferences and training of judges and legal experts (Amato and Dallara 2013).

In this paper our aim is to analyse a peculiar type of legal and judicial networks (or communities), the Venice Commission (VC), in acting as RoL promoter and its increasing “supplementary role” in protecting the EU funding values. The focus on this transnational commission will allow us to reflect on the determinacy of the external influence model and, on the other side, to assess how, under specific circumstances, these type of actors could become external change-agent able to introduce and maintain internationally-driven changes on the national judicial policies.

2. The Venice Commission: in between the CoE and the EU?

The Council of Europe Venice Commission, formally named European Commission for Democracy through Law, is defined as the Council of Europe's advisory body on
constitutional matters. By statute, “the role of the Venice Commission is to provide legal advice to its member states and, in particular, to help states wishing to bring their legal and institutional structures into line with European standards and international experience in the fields of democracy, human rights and the rule of law”. Moreover, “it also helps to ensure the dissemination and consolidation of a common constitutional heritage, playing a unique role in conflict management, and provides “emergency constitutional aid” to states in transition”. Countries representative members are “university professors of public and international law, supreme and constitutional court judges, members of national parliaments and a number of civil servants”.

Its permanent secretariat is located in Strasbourg, France, at the headquarters of the Council of Europe. Its plenary sessions are held in Venice, Italy, at the Scuola Grande di San Giovanni Evangelista, four times a year (March, June, October and December).

We are in front of a peculiar type of judicial network for several reasons: first of all for its composition mixing-up high courts judges, legal experts and some parliamentary members; Secondly, although formally placed under the edge of the Council of Europe, the VC had, starting from its creation in 1990, an independent and peculiar organizational development that will be describe in details later on; thirdly, not only Council of Europe member states are member but also a good number of North-African and Latin American countries. Moreover, OSCE and EU are official members the VC and, as the other member they are entitled to ask the VC to intervene on specific matters. On this last point, it has to keep in mind that, in the majority of the cases, the VC intervenes, upon request, of national institutions (be their governments, Constitutional Courts or other in institutions) or upon request of the CoE Secretary General or Committee of Ministers. This specific role of truly “advisory body upon request”, mainly differentiate the VC from the other groups acting in the EU space. This point will be the recalled later on, evidencing also the increasing connection between the VC and the EU (namely the EC and the EU Parliament) and in particular describing cases in which the EU institutions “officially” call for the VC intervention and advice.

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3 The analysis of this case is largely based on findings of the research project conducted by Cristina Dallara with the Jean Monnet fellowship (2011-2012) in the Global Governance Programme at the European University Institute of Fiesole, under the mentorship of Miguel Poiares Maduro. I would like to thank Antoine Vauchez (CNRS-Sorbonne) for his suggestions on the topic.

4 See the official web/site http://www.venice.coe.int/WebForms/pages/?p=01_Presentation.

5 The majority of the Venice Commission members, that the author of this chapter interviewed in 2012-2013, did not agree on defining the VC as “network”. They stressed its peculiar role and composition making it more similar to an international organization *latu sensu*. 

3
2.1 Foundation and institutionalization of the VC

The Venice Commission was created in 1990 and since its establishment it has played a crucial role in disseminating the European fundamental legal values and providing Constitutional first-aid to individual states. In fact, it was initially conceived as a tool for emergency constitutional engineering, as a partial agreement of 18 member states of the CoE. A focus on this generative momentum is crucial to deeply understand the peculiarity of this Commission.

La Pergola was the founding father and the key-actor of the entire VC project. The Fiche 3.1 resumes the main biographical information on La pergola that is particularly relevant to understand his role in the foundation and development of the VC.

Fiche 1. Biographical information on La pergola.

| Antonio La Pergola⁶ (1931-2007) was professor of constitutional and public law at Padua University, and subsequently at the University of Bologna and Rome. He was also visiting professor and honorary professor in several foreign Universities. La Pergola was member of the Italian Supreme Council of the Judiciary (1976-1978), judge at the Constitutional Court, acting as rapporteur for significant judgments in the field of relations between Community law and domestic law (1978-1986), then President of that Court (1986-1987) and Minister for coordinating Community policies (1987-1989). During this appointment he sponsored the law on fulfillment of the obligations resulting from Italy’s membership of the European Communities (1986-1989). Then he hold important position at EU level: firstly, Member of the European Parliament and Chairman of the Committees on scientific research and culture and of the Committee on Energy, Research and Technology (1989-1994) and then Advocate-General and judge of the European Court of Justice (1994-2006). In the EP he was appointed for the Socialist Italian Party and during his whole mandate he also acted as Delegate for relations with the countries of Central America and Mexico. He was member of a number of international expert bodies for constitutional and legal matters. Within the Council of Europe, he founded and chaired the Venice Commission from 1990 to 2007 when he died. |

As described in Fiche 1, La Pergola was Italian Minister for the Community policies from 1987 to 1989, thus participating within the CoE Committee of Ministers. In this context he proposed the creation of a specific group of constitutional experts within the CoE with the aim to maintain close relations with other constitutional judges and experts in Latin America and in the Communist area. This proposal was rejected two times as the dominant idea, at that time, considered constitutional justice as the “sancta-sanctorum” of the national sovereignty⁷. Actually, in 1989, he created anyhow an independent international group of constitutional experts that only had the patronage of the CoE. Then in 1990 an historical critical juncture

⁶ Information and data gathered by different public websites, in particulat the European Parliament website, the Academy of Europe website, the Enciclopedia Treccani. These were confirmed in an interview the author made with Gianni Buquicchio (President of the VC) La Pergolacollaborator and successor.
⁷ Interview with Gianni Buquicchio (President of the VC) La Pergolacollaborator and successor.
(Pierson 2000) turned in favor of the La Pergola idea. With the fall of the Berlin the CoE understood the need for an official body able to monitor and dialogue with jurists, legal experts and political actors from the Eastern Europe and then agreed on the creation of the VC. This was the “policy window” (Kingdon 1995) for the European international organizations (OSCE, CoE an EU) to play their game and to start with the massive international influence that the political science research had extensively analyzed and described. The VC was officially constituted in January 1990 in the occasion of the second ad hoc international conference held in Venice and organized by the Italian Government with the participation of the CoE member states. Then the CoE Committee of the Ministers formally recognized it with a partial agreement\(^8\) in May 1990 among the 18 member states (Bode-Kirchhoff 2013). During the 1990s the VC was actively engaged in the assistance and advice to the Eastern Europe countries transitions and in particular in the introduction or in the reforms of the constitutional review principle within these states. In order to understand how the VC gradually developed in this first phase of its activity it is important to keep in mind the roles that its founder La Pergola was playing at the EU level. This connections confirm the idea of an international community of lawyer and legal experts that was flourishing in the EU space starting from the beginning of the 1900s (Vauchez and De Witte 2013).

Although the original mission of the VC was specifically related to the “Constitutional assistance” and “emergency constitutional aid” to states in transition, during the last ten years, the number and the type of activities performed by the network have been significantly increased, behind its original function of advisor on constitutional matters. In fact, it is playing an increasing global role in producing knowledge, documents, opinions and guidelines on various judicial governance issues (Dallara 2012).

In this respect another critical juncture for the VC development could be seen in 2002 when, after the accession in the CoE of many other countries, among which almost all the post-communist countries and Russia, the Statute was modified and the VC was recognized as an enlarged agreement among all the CoE member states, allowing also the participation of some non-CoE member states. This was the final step for the institutionalization of the VC within the CoE and, more in general, in the EU international community.

Subject areas covered by the Venice Commission today are categorized in three official items: 1. democratic institutions and fundamental rights, 2. constitutional justice and ordinary

\(^{8}\) Resolution (90) 6, On a partial agreement establishing the European Commission for Democracy through Law, adopted by the Committee of Ministers at its 85th session.
justice and 3. Elections, referendums and political parties. It primarily task remains to help states wishing to bring their legal and institutional structures into line with European standards and international experience in the fields of democracy, human rights and the rule of law. As already mentioned, individual members are primarily academics professors of public and international law, supreme or constitutional court judges or members of national parliaments (and sometimes civil servants). In truth, also many of the academics appointed by the national government were judges in the Constitutional or Supreme courts. They are designated for four years by the member states, but act in their individual capacity. Thus, its first distinctive feature is this mixed-composition including legal experts, higher judges and parliament’s representatives. Today, 59 member states are member of the Commission has: the 47 Council of Europe member states, plus 12 other countries (Algeria, Brazil, Chile, Israel, Kazakhstan, the Republic of Korea, Kyrgyzstan, Morocco, Mexico, Peru, Tunisia and the USA). Since February 2002, the Commission allowed non-European states to become full members. The European Commission and OSCE/ODIHR participate in the plenary sessions of the Commission. The Council of Europe’s liaison office to the EU in Brussels facilitates and promotes working relations between the EU and the Venice Commission. A representative of the European Commission’s Legal Service regularly participates in the Venice Commission’s Plenary Sessions. Since March 2012 he/she is accompanied in the Plenary Sessions by a representative of the newly established European External Action Service, which is amongst the closer contacts of the Venice Commission within the EU framework, the others being the Directorate General for Enlargement and the EU missions in the field. On the part of the Venice Commission contacts depend on the substantial questions of the case at hand.

Since 2009, Gianni Buquicchio has been President of the Commission succeeded to La Pergola. He is the other founding father of the VC as he collaborated with La Pergola since the idea of the VC emerged. Also for this actor the biographical information are relevant to understand how much the professional and personal background matter in these transnational arenas.

**Fiche 2. Biographical information on Buquicchio.**

<table>
<thead>
<tr>
<th>Gianni Buquicchio (1944–)</th>
<th>is an Italian jurist.</th>
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<tbody>
<tr>
<td>From the mid-1970s, he was working within Directorate of Legal Affairs, Council of Europe, then he became Head of Section and was Responsible for a number of intergovernmental experts’ committees dealing with administrative law, international law, the free movement of persons, data protection, etc. From 1981 to 1994 he was responsible for the Conferences of European Ministers of Justice. From 1990 to 1996, responsible for the opinions requested by the Committee of Ministers, the Parliamentary Assembly and the Secretary General. He acted as Secretary of the Venice Commission from 1990 to 2009 when he officially retired from from the Council of Europe was elected President of the Venice Commission (re-elected in 2011).</td>
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2.2 The source of its prestige and the working-method

The description of the institutionalization process of the VC and the focus on its founding fathers and members contribute to explain how this Commission is considered so relevant and prestigious for the EU international community. We can say that the process throughout which the VC was created and subsequently institutionalized marked it as a neutral and independent body influencing positively its legitimacy. The fact that it originated from a spontaneous group of jurist and legal experts and that gradually acquired the imprimatur of the CoE and the status of international commission contributed to be perceived as an autonomous body without specific political goals. It is worth to mention that, especially in the first decade, the VC rarely was mentioned and included in activity promoted by the EU. Thus the institutionalization process took place quite independently from any other politically sensitive organization. The idea of a group of experts that could assist countries on constitutional issues and problems was welcomed and supported by many of the national governments that later on asked to be part of the VC. In institutional theory, legitimacy is critical for organizational survival and development. Legitimacy refers to the extent to which actors exist or act in accordance with the norms and the social expectations of stakeholders in its organizational fields (DiMaggio and Powell 1983; Meyer and Rowan 1977; Tolbert and Zucker 1983).

Another distinctive feature in this respect is the working method that could also explain the ability in influencing the RoL reforms within third countries. Here the link is within the broad literature on procedural justice (Tyler 2003) or on procedural legitimacy (Majone 1999) and credibility of the procedure with reference to independent agencies and experts bodies (Majone 2000; May 2007).

In term of inputs to the process of issuing Opinions, these could be requested either by individual countries, or by the CoE bodies. Table 1 resumes the three main groups of institutions that can request for Opinions to the VC.

Table 1. Bodies and institutions entitled to request for VC Opinions

<table>
<thead>
<tr>
<th>Member states</th>
<th>Council of Europe</th>
<th>International organisations</th>
</tr>
</thead>
<tbody>
<tr>
<td>• parliaments</td>
<td>• Secretary General</td>
<td>• European Union</td>
</tr>
<tr>
<td>• governments</td>
<td>• Committee of Ministers</td>
<td>• OSCE/ODIHR</td>
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The VC, at the request of a constitutional court or the European Court of Human Rights, may also provide *amicus curiae opinions*, not on the constitutionality of the act concerned, but on comparative constitutional and international law issues. The Commission also co-operates with ombudspersons through *amicus ombudsman opinions* mainly concerning the legislation related to their work.

### Table 2. Bodies and institutions entitled to request for VC Amicus Curiae Opinions

<table>
<thead>
<tr>
<th>National Constitutional Courts</th>
<th>ECHR</th>
<th>National Ombudsmans</th>
</tr>
</thead>
<tbody>
<tr>
<td>They could ask for amicus curiae Opinions on the compatibility of a specific act with comparative and international law issues</td>
<td>could ask for amicus curiae Opinions on the compatibility of a specific act with comparative and international law issues</td>
<td><em>amicus ombud</em> opinions mainly concerning the legislation that governs their work.</td>
</tr>
</tbody>
</table>

Source: Venice Commission web-site

The method through which Opinion are prepared and delivered is based on an accurate choice of the *rapporteurs* made by the Secretariat on the basis of the needed expertise to assess a specific topic, on the cultural proximity, on the languages skills needed to read official document from the country under assessment and to dialogue with the national authorities. Then, obviously, *rapporteurs* are chosen on the basis of their availability and disposal to work and to be included in the working group.

One of the key steps for the preparation of the Opinion is the official visit of the rapporteurs within the country to meet, first of all, official political authorities and then some non-governmental organization or local expert groups. According to members of the VC, this visit and permanence within the country is an important action that contributes to the legitimization by the national authorities of the whole process. The contact and the dialogue with the national actors is always accomplished before the final Opinion is prepared.

### Table 3. Working method for the Opinions preparation and delivering

Reference to the Commission of a (draft) constitutional or legislative text by a national or international body or the Council of Europe Request for opinion may be sent to the President or the Secretary of the Commission by email / fax / post.
Setting up of a working group of rapporteur members and experts assisted by the secretariat

Draft opinion on compliance of the text with international standards and proposed improvements

Visit to the country for talks with the authorities, civil society and other interested stakeholders

Final draft opinion

Submission of the final draft opinion to all members of the Commission before the plenary session

Discussion of the draft opinion in a sub-committee and with the national authorities (if necessary)

Discussion and adoption of the opinion at plenary session

Submission of the opinion to the body which requested it

Publishing of the final text of the opinion on the Commission’s website.

Source: Venice Commission web-site

This working method was maintained during the years and it is appreciated and fully accepted by the individual members representing the country within the VC9. Another important step of this working process is represented by the discussion of the Opinions both within a specific sub-committee, in which the national authorities are invited, and subsequently towards the Plenary of the VC in which Ministers and political representative of the state under scrutiny could intervene publicly evidencing if and how they disagree with the Opinion. This, although of a peculiar nature and form, is a way of stakeholder involvement (Borrás, Koutalakis and Wendler 2007) that could account for a positive evaluation and conception of the VC procedure in term of credibility and fairness.

Moreover, as Bode-Kirchhoff (2013) suggests, the VC in its Opinions refers massively and almost exclusively to existing legal documents, with preference to legal texts produced by CoE bodies and namely the ECHR. This aspects seem reinforcing that, as intensively stressed by its members, that the Commission is a “technical body, not a political one”, with its opinions always rooted in law10. Thus, it resembles a court in its way of legal argumentation, but it cannot impose solutions or rely on coercion with regard to the implementation of its opinions, where it is dependent – just like a political body – on the soft power of persuasion,

9 This was confirmed in three interviews held by the author between March and June 2012 to one individual member of an Observer Country (USA), one former individual member for Spain and one member of the VC Secretariat.

10 Ibidem.
instead (Idibem). It could be hypothesize that, in resembling a court by adopting legal argumentation, the VC could benefit of a sort of judicial legitimacy that contribute to reinforce the institutional legitimacy as a whole (Gibson and Cladeira 2011).

Concerning the topics, the VC has further enlarged its production elaborating Opinions not only concerning a specific country law, but also on European Standards of judicial independence, on European Standards of the Prosecution Service and on the judicial appointment11. The VC has also produced many Opinions on specific country laws related to the judicial system, judicial appointment and judges status. Focusing on these documents, it is possible to find out which is the soft “model of judicial system” they propose. Summarizing it in a roof way: the VC seems proposing a “Mediterranean model of organization of justice” with a judicial body with members elected by the judges themselves and other members appointed by other powers of the state. This body should be entrusted with the most relevant functions concerning the judges’ career and judges should be the majority in it. This body should be, consequently, in charge of the judges’ appointment. Concerning the prosecution service, the VC requires that the independence of the prosecution office and of its holders is guaranteed in relation with the government (Dallara 2012; Guarneri 2011).

As Magrassi (2011) pointed out, this is clearly a model based on self-government and separation from other legal professions, with a very limited links with common law elements and models of judicial governance in place in the Scandinavian countries. This model, proposed by the VC, was, in many cases, at the basis of the judicial reforms adopted in the Central and Eastern Europe countries during the EU accession stage. This is still the term of reference for the Balkans countries currently potential candidate for the EU membership12. Here the VC suggestions were, and are, spontaneously adopted by countries as a way of international legitimization of the national reforms.

The VC impact on judicial governance issues was ever more increased since, as already described in the previous chapter, VC Opinions and Recommendations were used as “relevant material” for the judgement in the ECHR rulings or suggested as “standards to apply” in some European Commission and European Parliament actions. In this respect, the next section will focus on two paradigmatic and vastly debated cases.

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3. The Venice Commission in two recent RoL reversal attempts

In order to assess the leverage of the extra-conditionality mechanism of external influence on the RoL reforms, we decided to focus on two quite know and debated cases that challenged the EU and its basis: the constitutional crisis in Hungary (2011-2013) and Romania (2012-2013). In both cases the VC tuned out as key-player and rather the “technical-executive arm” for the international community and namely for the EU. This is a very important and interesting aspect that we need to deepen in order to understand the role of transnational legal networks and communities in promoting the rule of law.

Moreover, the selection of these two countries allow us to investigate two very interesting cases in term of RoL performances: Hungary is one of the “new” members states entered in 2004 and performing very good evaluation during the pre-accession process (and in the immediate post-accession) in term of compliance with RoL standards; whereas Romania, entered in 2007, was defined the “permanent laggards” (Pridham 2007, Noutcheva and Bechev 2008, Dallara 2014) of the east EU enlargement scoring always negative assessment in RoL compliance before and, foremost, after the accession. In recent times, the two countries experienced similar and convergent political and constitutional crisis, affecting in particular the RoL aspects. Why the internationally-driven RoL promotion was not effective in inducing the countries to internalize the RoL principles?

Why, on the contrary, the VC mediation was finally accepted bringing countries in declaring (at least) his willingness follow its advice? Are the peculiarities of the VC and its working method causal factors that could explain the success of its mediation?

3.1 The frontrunner of the RoL reforms: Hungary before and after the 2004 EU accession

As Piana (2010) describes, Hungary was one of the first countries to join the CoE after the break-down of the non-democratic rule. The CoE membership has been since the very beginning a step in the direction of joining the EU. Due to its legacies and to the relatively smooth transition, in Hungary the gap to be filled in relation to EU requests was smaller in almost all policy fields. For this reason, several scholars argue that in the case of Hungary the external conditionality has been less persuasive and demanding than in other CEECs (Sasse, 2005; Vachudova, 2007). This holds also for the judiciary (Piana, 2010). The democratic
transition, in fact, has been marked by a clear move toward a reform of the judiciary, although without much discontinuity. Much of the staff appointed during the non-democratic rule kept its office, with the exception of high ranking judges and prosecutors. Therefore, as Piana (2010) describes, the Hungarian newly democratic State took fully benefit from the previous experiences of hierarchical (but not democratic) government, which in Hungary never reached the picks of totalitarianism as it did in other countries (such as Czech Republic, Bulgaria, and Romania). Thus, during all the pre-accession the Hungarian government has been quite effective in passing the laws requested by the EU. Then, a few years after its accession, Hungary, a front-runner in establishing a democratic regime, where a Constitutional Court was used to play a significant role in promoting democratic values and citizens’ rights, became a serious source of concern at the EU level in respect of the independence of its institutions (Coman 2013).

3.2 The 2012 Hungarian Constitutional revision and consequent developments.

In 2010, Fidesz, defined by Müller (2013) as a right-wing populist party, obtained a two-thirds majority of seats in the Hungarian parliament, which offers the Prime Minister Orban the opportunity to implement a series of reforms aimed at “rebuilding the rule of law” in the country (Coman 2013). Among the long list of reforms proposed, including the revision of the Constitution, were directly linked to the independence of the judiciary. Concerning the independence of the judiciary, the new Constitution, drafted in 2011, only established a very general framework for the judiciary, leaving to a cardinal law to define the detailed rules for the organisation and the administration of courts and the remuneration of judges (Ibidem). One of the first moves was directed to reforming the National Judicial Council, re-introduced in 1997. In order to face some deficits in the functioning of the NCJ, the Orban government decided to create a new institution - the National Judicial Office (Gyöngyi 2012). The National Judicial Office is an independent single-person office, run by the president of the office. The president holds all decision-making powers. Instead, only consultative powers regarding the activity of this new Office remained to the National Judicial Council (the body composed of judges). In this way the powers held by the former council of the judiciary were split in two. As Gyöngyi (2012) explains, these changes reveal problems of power imbalance as the tasks entrusted to

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13 This distinction draws from Linz and Stephan (1990) and has been reaffirmed in Sadurski (2003).
the new National Judicial Office are the central administration and central management of courts, appointment of judges, training and education of judges. In particular, the new president of the National Judicial Office holds powers to appoint judges, allocate cases to courts, and is responsible for the centralized management and administration of the courts. Moreover, in exceptional circumstances, the president of the National Judicial Office may assign a particular case to another court with corresponding jurisdiction. This new institutional solution has been presented by the domestic officials as a way to protect the judiciary from influence of the government. In spite of this, quite soon it emerged as having “such important powers been vested in a single person, lacking sufficient democratic accountability”. While the VC had voiced its concerns right from the beginning regarding even the first drafts of the Basic Law. In fact, its first VC opinion on the new Hungarian was released in June 2011, proposing several recommendations regarding the text. Many of these recommendations were echoed in the EU Parliament's resolution adopted on 2011, July 7.

In January 2012, when the Basic Law entered into force, the European Commission finally analyzed the Basic Law respect to their compatibility with EU law. Given that the European Commission's responsibility as guardian of the Treaties is to ensure that EU law is upheld, in January 2012 José Manuel Barosso launched legal action against Hungary under Article 258 TFEU. But once initiated, as Gyöngyi (2012) highlights, the procedure and the arguments advanced by the institution caused comments related to its legal basis. Even if the European Commission acknowledged that Hungarian democracy was in danger, the infringement procedure did not relate to the separation of power as a fundamental pillar of democracy, but to a breach of the EU legislation on equal treatment and the Hungarian decision to lower the pension age (Ibidem). On 17 January 2012 as a first step of the accelerated infringement procedure Viviane Reding, Vice-President of the European Commission and EU Justice Commissioner, sent a formal notice on behalf of the European Commission to the Hungarian Government. The main concerns were the excessive powers of the newly established President of the National Judicial Office, the transformation of the Hungarian Supreme Court into the so-called “Curia” and in particular the mandatory early retirement of judges and judges.

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14 See Act CLXI of 2011 on the Organization and administration of the courts adopted by the Hungarian Parliament, Section 76, [http://www.venice.coe.int/docs/2012/CDL-REF%282012%29007-e.pdf](http://www.venice.coe.int/docs/2012/CDL-REF%282012%29007-e.pdf).
15 Ibidem.
17 EU Commission Press Release, European Commission launches accelerated infringement proceedings against Hungary over the independence of its central bank and data protection authorities as well as over measures affecting the judiciary Reference: IP/12/24 Event Date: 17/01/2012.
prosecutors at the age of 62 instead of 70, which would allow the Government to replace roughly ten percent of the judges in Hungary. Within the set time limit of one month the Hungarian Government replied to the European Commission, but it could not reassure the latter and dispel the concerns.

The EU Parliament repetitively asked to the EU Commission to activate EU Treaty Article 7, which is used in the event of a clear threat of a serious breach of EU common values. On 7 March 2012 the EU Commission decided to continue accelerated infringement procedure\(^\text{19}\). In two areas Hungary failed to comply with the EU Law: the retirement age of judges – which would lead to the anticipated retirement of 236 judges in Hungary – and the independence of the country's data protection authority. The European Commission therefore decided to send two reasoned opinions – the second stage under EU infringement procedures after which the matter may be referred to the Court of Justice of the European Union. In two other areas, the independence of the central bank and further aspects concerning the independence of the judiciary, the Commission sent two administrative letters demanding further clarifications. In its administrative letter, the Commission is seeking further clarifications about the independence of the country's judiciary. The Commission has asked for explanations relating to the powers attributed to the President of the National Judicial Office, particularly the President's powers to designate a court in a given case and the transfer of judges without consent. The Commission also raised concerns with regard to potentially systemic deficiencies in Hungary's justice system. Hungary is reminded that national courts act as "Union courts" whenever they apply EU law, and therefore need to satisfy minimum standards of independence and effective judicial redress (Dallara 2012).

While the EU Commission’s approach in examining the quality of democracy in Hungary was based on a legal and technical analysis, the VC recommendations went far beyond. Without entering here in detail of a complex case for the EU governance, what it is relevant to notice as many of the concerns expressed by the EU Commission in its official communications and documents (especially the administrative letter) were drawn by the Opinion on the Constitution of Hungary adopted by the Venice Commission on 17-18 June 2011\(^\text{20}\) and on the Opinion on the Cardinal Acts on the Judiciary presented in March 2012\(^\text{21}\).


Looking at the EU Parliament and EU Commission press release on the Hungarian case, one can notice as great relevance is given to the VC work and documents on the Hungarian laws. This was the first case in which the EU Commission explicitly and frequently called for and referred to the VC as a relevant and crucial ally. In his speech before the European Parliament, in January 2012, José Manuel Durão Barroso, the President of the European Commission, stated:

“The issues at stake here may go beyond the European Union law matters that have been raised. These other issues should also be addressed. The Council of Europe is currently considering other points of the Hungarian legislation which are under its remit. The Council of Europe Venice Commission could play an important role in this respect.”

In response to the international actors’ remarks and recommendations, the Hungarian government sent around a 100-page response to the EU Commission concerning the infringement proceedings and expressed its willingness to reach a compromise on the retirement age of judges. Although maintaining a close dialogue with the VC, Viktor Orban rejected any form of divided sovereignty and he has been particularly vociferous in protesting against the incursions of the EU on domestic politics. As Blokker (2013) cites, in an interview with an international newspaper he underlined that ‘We do not need the unsolicited assistance of foreigners wanting to guide our hands’ (Guardian 15 March, 2012). In spite of this, the Hungarian government continued the exchange of documents and proposals with the VC trying to find a mediation. Before the summer 2012, the government submitted to the VC a proposal containing some changes to the issues addressed by the Venice Commission. The Hungarian government proposed that the overarching powers of the President of the National Judicial Office be reduced by transferring some of her competences to the council for the judiciary. Ultimately, on 25 April 2012 the European Commission announced that it would suspend the infringement procedure regarding the Hungarian National Bank but refer the early retirement of judges issue to the CJEU.

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24 Id.
25 On the one hand, the European Commission could initiate action against the Hungarian Government only under Article 258 TFEU. Hence, it was focussing on the mandatory early retirement clauses. The EU rules on equal treatment in employment, in particular Directive 2000/78/EC100, prohibit discrimination at the workplace
Concerning judicial governance, 2012 ended with positive developments as the Hungarian government, following intensive exchanges with the VC amended the Cardinal Acts on the Judiciary (October 2012) diminishing, at least on the paper, the powers of the arguable National Judicial Office. This was a clear evidence of the VC impact as all the amendment process was agreed throughout the frequent visits and the continuous dialogue between the VC and national authorities.\(^{26}\)

A second stage of this troubled situation for the EU, occurred at the beginning of 2013 when the Hungarian government decided to pass a Fourth Amendment to the Hungary Constitution that signed a clear step backward especially with reference to judicial governance. The Government in fact modified again the rules on the National Judicial Office along the same line of improving the powers of the President of the National Judicial Office.

The VC was immediately activated by the Secretary General of the CoE in March 2013 to assess the compatibility of this Amendment with the CoE Standards and all the process re-started. Official communications with national authorities and two VC delegation visits were organized bringing to a new Opinion in June 2013.\(^{27}\) A citation of the Opinion is here necessary to summarize the situation and to offer a clear evidence of the VC role in this game.

**Fiche 3. Paragraphs 68 and 69 of the VC Opinion CDL-AD(2013)012 on the Fourth Amendment**

68. In two earlier Opinions the Venice Commission strongly criticized the extensive powers of the President of the National Judicial Office (PNJO) and the lack of appropriate accountability. The Commission emphasized the need to enhance the role of the National Judicial Council as a control instance.

69. While on the legislative level the situation had been improved in the framework of the dialogue between the Secretary General of the Council of Europe and the Hungarian authorities both by reducing the powers of the PNJO and by increasing those of the National Judicial Council and by making the PNJO more accountable the Fourth Amendment goes in the opposite direction and raises the position of the PNJO to the constitutional level. The PNJO now has the power to exercise the “central responsibilities of the administration of the courts” and “bodies of judicial self-government” merely “participate in the administration of the courts”. The supreme body of judicial self-government, the National Judicial Council, is not even mentioned in the Fundamental Law.

**3.3 The successful laggards: Romania before and after the 2007 EU accession**

For several reasons Romania can be considered as a case opposite to Hungary, both in terms of legacy and transition patterns and in term of compliance with the EU during the pre-

\(^{26}\) Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of the Opinion CDL-AD(2012)001 on Hungary, adopted (Venice, 16-17 March 2012)

\(^{27}\) See page 3 of the Opinion CDL-AD(2013)012 describing the process and listing names and date of the two delegation visits.
accession stage. Romanian democracy started its post 1989 life handling a more challenging institutional agenda. Romania submitted its application for the EU membership in 1995. In 1999 the EU open the pre-accession talks and the negotiations started officially in 2000. Political elites were quite convergent on the EU accession and rarely the issue was disputed. However, in spite of a formal commitment to enter the EU, the pre-accession process was characterized by fake-reforms and partial compliance with the EU requirements. Legacies of the past state organization were still present and deeply embedded in the political elites behaviour even during the decade after the fall of Ceausescu. Judicial reform was one of the fields in which the compliance with the EU was difficult and delayed (Dallara 2014; Piana 2010; Coman 2009). The legacies of the Ceausescu regime on the judiciary were deep as regime control over the judicial power - as in the other sectors of the state - was quite pervasive (Demsorean, Parvulescu and Vetrici-Soimu 2009). During all the 1990s, the legacies of the past were still present within Romanian society and several cases of political interference with the judiciary were reported by Romanian media and by various international or Romanian organizations (Ibidem). Also the excessively powerful role of prosecutors inherited from the communist regime has been maintained.

In term of RoL reforms Romania was considered a paradigmatic case (Pridham 2007; Dallara 2010) to explain how the influence of the EU conditionality is not enough to introduce stable and concrete changes. The case of Romania is well-known as the Example of country the entered the EU without completing the judicial and anti-corruption reform and respecting the EU requests. Romania was frequently defined as the successful laggard of the enlargement process obtaining the adhesion without the judicial reform (Pridham 2007; Bechev and Noutcheva 2008). In spite of this, the EU in 2006-2007 accepted a “fake-version” of the judicial reform as the accession day was approaching. Although some member states claimed the non-compliance of Romania with EU requirements, the EU was not able to find instruments to sanction the country (Dallara 2013). The judicial and anti-corruption reform was stalling at least until 2011, when only some partial measures were implemented. In the last three years, at least in term of functioning of the SCM and independence of the judiciary, the situation gradually improved. In Romania there are some powerful judges associations and many of the Romanian judges are actively involved in the Council of Europe committees of judges and in other international judicial networks28. This contributed to strengthen the

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28 Ibidem.
force of the judiciary as a whole and supported the diffusion of best practices and models for the courts organization (Piana 2010).

In spite of these positive signals concerning the functioning of the judiciary, the RoL supremacy continued to be undermined by the fragmentation of the political system and by difficult and challenging inter-institutional relations.

As Stânciulescu (2010) describes, the main problem affecting the political systems are the frequent contrasts between the head of state, the prime minister and parliament. For this reason the veto power of the non-governmental parties has been mainly exercised recurring to the Constitutional Court, a fact that has frequently blocked or delayed relevant RoL reforms. In this respect, a huge institutional crisis involving the Constitutional Court and undermining key RoL principles occurred in 2012.

3.3 The 2012 Romanian constitutional crisis

As already done in 2007, during the summer of 2012, a renewed attempt to impeach president Băsescu was undertaken. This time was by a newly elected social-democratic government headed by a young leader, Victor Ponta. As Blokker (2013) describes, Ponta government not only called for the impeachment procedure against the supposed unconstitutionality of Băsescu’s actions but also went further into a clearly unconstitutional direction by using Emergency Ordinances, dismissing the speakers of both chambers of parliament, as well as the Ombudsman and issuing a decree on the Referendum rules, in order to drastically increase the probability of a successful impeachment of Băsescu. Moreover, they managed to restrict the powers of the Constitutional Court and intimidated its judges with the proposal of introducing an impeachment for judges. Blokker (2013) reminds that the actions of the Ponta government have been strongly criticized internationally, as well as in the progress report on Romania of the European Commission. In response to this international mobilization, the CoE Secretary General asked for a VC Opinion on the compatibility of the actions taken by the Romanian Government with the constitutional principle of the RoL. It was worth to

29 In term of number of parties (24 parties in 6 elections). Source: Comparative Manifestos Project Data set.
30 The executive-legislative relations fall under the premier-presidential category (Shugart and Carey 1992) with a directly elected president who may dissolve the parliament, a cabinet responsible only to the parliament and a president who may be impeached by the parliament.
31 In 2007, the Parliament suspended Basescu as president and called a referendum on the grounds he had exceeded his authority and pushed the country into a political deadlock. In this occasion, 74 percent of Romanians voted against impeaching Basescu on charges that he overstepped his authority. See http://www.reuters.com/article/2007/05/20/us-romania-referendum-idUSL2026723720070520.
notice that Mr. Ponta, just after, send himself a request to the VC for an Opinion regarding the two Emergency Ordinances he issued. Given that the two requests overlap, the VC decided to prepare a single document. Then the usual process for an Opinion preparation was undertaken and in December 2012 it was issued.

The severity of the Ponta government attack to the Constitutional Court was confirmed by two very unusual complaint letters (in July and August 2012) sent directly by the Court to the VC, as well as to European Commission officials to ask for help against “virulent attacks” on its independence by the government (Blokker 2013). As Blokker (2013) explains, the Constitutional Court also showed some strength in resisting the attacks issuing a decision on the invalidity of the referendum held on the impeachment of Băsescu. This referendum was held on 29 July, but failed to reach the quorum of 50% of the electorate. Therefore, the Constitutional Court ruled that the referendum was void, which meant that Băsescu was re-installed.

This was discussed and presented in the Plenary Session of December 15th. As expected the VC evidenced huge problem in respect to many issues that, according to the VC, strongly affect the inter-institutional accountability dismantling the RoL core principle: the idea of restricting the competences and jurisdiction of the Constitutional Court using an Emergency Ordinance, the action taken by the Government creating a Commission within the Senate to investigate abuses of the Public Prosecutors and, more generally, the idea (denounced by the VC in a specific paragraph: VII. Pressure against the Judiciary) of publicly disrespect judges of the Constitutional Court asking explicitly for their dismissal.

Further interesting and useful explanations were provided by the VC President and Rapporteurs during the public discussion of the Opinion that took place in the Plenary Session held in December 2012, in which the author of this paper was attending. A vast delegation of the Romania government was present that day, together the national individual members of the VC: the Ministry of Justice, the Ministry of Foreign Affairs and some other government officials. After the preliminary discussion of the Opinion in a private sub-committee (as the working method allows for), Mr. the President Buquicchio gave the floor

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35 See Opinion CDL-AD(2012)026 on the compatibility with constitutional principles and the rule of law of actions taken by the Government and the Parliament of Romania in respect of other state institutions and on the government emergency ordinance on amendment to the law no. 47/1992 regarding the organisation and functioning of the constitutional court and on the government emergency ordinance on amending and completing the law no. 3/2000 regarding the organisation of a referendum of Romania adopted in Venice, 14-15 December 2012.
to the two rapporteurs\textsuperscript{36} who resumed the VC Opinion on the Romania situation evidencing how “There is a lack of respect among Romanian institutions. There is something missing in the implementation of the RoL, that is not only a provision of the law, but moreover the implementation of the RoL is embedded in the relations, mutual respect and legal cooperation among institutions in Constitutional practice. The problem in Romania is the practice of Constitutional culture. I’m not saying it is missing but, it needs to be improved in practice”\textsuperscript{37}. Then, “The problem of Const practice is typical of the new democracies. This is could be seen as an example of how new political majority tries to diminishing the power of the Const Court when enters in power”\textsuperscript{38}.

After these comments the Romanian ministers took the floor and replied that they were profoundly committed in respecting RoL and the Constitutional Court but some specific issues need to remain in the hand of the national government and evaluated considering in details the national context. They also added a lot of technical information about the administrative and legal procedure in Romania. After that the EU Commission Delegate asked to intervene and his words are resumed in the Fiche 3.

\textbf{Fiche 3. Transcription of the speech of the EU Commission Delegate in the VC Plenary Session held on 2012 December 15\textsuperscript{th}.}

| Firstly, thank you very much for this intervention. You (VC) have a tortuous task. Thank you also to the Romanian authorities. The EU welcomed that fact the VC analyzed the Romanian situation as the events of last summer in Romania also attacked the functioning of the EU itself. The EU is in fact worried about the fact that in an EU member state judicial independence was not respected, as also the RoL. The EU will insist on the need of this respect to the judicial cooperation in EU. Constitutional Court is the core of the RoL thus the EU commission asked to respect it at all!! The EU Commission asked to Romania government to respect the July 2012 advices on cooperation and verification mechanism. All the Constitutional amendments in each member state of the EU must to respect the values of the EU; in part RoL and separation of power. Each member state need to respect RoL and separation of power as these are at the basis of the Treaty of adhesion that Romania has signed. The EC will intervene with a report on Romania exactly on this point. In this document the VC opinion will be explicitly taken in consideration. |

\textbf{Source: transcription made by the author attending the Plenary Session.}

What it is particularly interesting is the reaction of the Romanian Minister of Foreign Affairs to the EC Delegate speech. He asked to Mr. Buquicchio to underline that the Opinion is a document of the VC that is a technical body and cannot be used by other political body such

\textsuperscript{36} Mr. Bartole and Mr.Tuori were the two speaking in the name of the delegation. Please note that these two rapporteurs are among the most experienced and active member of the VC.

\textsuperscript{37} Author transcription attending the Plenary Session.

\textsuperscript{38} Ibidem.
as the EU Commission. Mr. the President, on the contrary, evidenced how the EU Commission is absolutely entitled to use the VC Opinion as it is an official member of.

After this episode, the Romania government did not officially replied to the VC Opinion but, starting from 2013, initiated a broad project of Constitutional revision announcing in several occasion that the recommendation of the VC would have been taken in account along with all the process. Since mid-March, an informal Constitutional Forum has also been established. The Forum tries to brand itself as a ‘partnership between civil society and the parliament’, some scholars evidence that “there has been very little consultation of the general public. This is hardly indicative of good things to come.” (Kanterian and Arion 2013). The Constitutional Forum recommends the modification of many points among that concerning the impeachment of the president, the Constitutional Court, the limitation of political migration of parliamentarians and the structure of the Parliament. Without entering in details of the work and the composition of the Constitutional Forum, for our purpose could be sufficient to evidence that the Prime Minister Ponta officially asked (with a visit in Strasbourg) to the VC to assist the Romanian government along with all the process of Constitutional revision declaring his willingness to accept and respect all the VC suggestion³⁹. An important visit of the VC to Romania was organized in July to assess and discuss the results of the Constitutional Forum.

4. Conclusion: which impacts and which mechanisms?

In term of concrete impact on the judicial governance issue the two cases analysed present quite clear evidences.

As described, recently, with the Fourt Amendment, the Hungarian government tried again to intervene strengthening the power of the highly criticized National Judicial Office, but soon after the VC replied with several and explicit critics. The result was that just after the Opinion was made public, with another consequent mobilization of the international organizations and NGOs, the Hungarian Justice Ministry filed a bill that would revoke the law which allows the head of the National Judicial Office to reallocate trials to other courts. The Foreign Minister had announced recently that the change would be made in response to the VC Opinion and to the European Commission, which has launched infringement proceedings against Hungary (The Budapest time 2013).

Similarly, in Romania, the Prime Minister declared his willingness to follow the VC advices. These are, at least, the results in term of official declaration. However, the description of the two troubled cases show as the VC was continuing monitoring the two situations guarantying its ability to quickly intervene when requested.

Which factors could explain this ability to act as “technical-executive arm” of the EU international community?

In spite of the considerations already advanced concerning the perceived legitimacy of the VC and its working method that surely account for its positive impact, other causal factors could be find out.

First of all the VC is strictly related with the ECHR both formally and informally. As for the formal connections, we already described how the VC documents are used in the ECHR judgments. As for informal connections it is worth to notice that the personnel of the ECHR and the Venice Commission is closely connected. As Bode-Kirchhooff (2013) evidences, whereas some of the judges of the ECHR have also become members of the Venice Commission at a later stage, the same is true vice versa. The author lists as, in the first years, it was the VC which would benefit from the expertise and experience of former or even still active judges of the ECHR - namely Franz Matscher (Austria, ECHR Justice 1977-1998), Peter Jambrek (Slovenia, ECHR Justice 1993-1998), Pieter van Dijk (the Netherlands, ECHR Justice 1996-1998) and Marc Fischbach (Luxembourg, ECHR Justice 1998-2004). Then also in the reverse direction, straining with Giorgio Malinverni (Switzerland, ECHR Justice 2007-2011), who was a member of the Venice Commission before being elected as judge at the ECHR. Finally, on 1 February 2008 three former Commission members were appointed as ECHR judges: Ledi Bianku (Albania), Mirjana Lazarova-Trajkova (Former Yugoslav Republic of Macedonia) and Luis López Guerra (Spain). In 2011, Angelika Nussberger (Germany).

Secondly, a part from the formal participation of the EU in the VC as member in the last ten years increasing formal ties with the EU could be identified. In the context of the enlargement policy, the EU has several times invited the Venice Commission to take part in certain activities, e. g. the negotiations on the State Union of Serbia and Montenegro and its dissolution, judicial reforms in Serbia and Turkey or constitutional issues in Bosnia and Herzegovina, Moldova and Ukraine (Bode-Kirchhooff 2013). Accession states are required to achieve inter alia stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities. As the Council of Europe standards, in particular, those used by the Venice Commission, resembled, and in some ways are
complimentary with, the EU’s Copenhagen Criteria, these finally layered upon them. In fact, membership in the Council of Europe became, for many countries, one of the first steps on the long way to membership in the EU. There are many examples on how the EU made use of the Council of Europe and its Venice Commission activity in order to help the accession states in fulfilling the required criteria, especially in the RoL field (Piana 2010, Dallara 2014). In the ongoing process of the accession of Serbia, for example, the VC was involved in the drafting the majority of legislation, starting with the Constitution, but also the election legislation and, above all, the laws on the judiciary. Many of the requests for opinions of the VC was initiated by the Government of Serbia, perhaps upon invitation of the EU.

The example of Hungary, and in some way also the one of Romania, are other evidences of formal ties and official cooperation among the VC and the EU.

The idea that could be advanced is that the VC is functioning as a sort of external change agent that could penetrate the national domain in virtue of the participation of each country as members. The fact that frequently are the countries member themselves that ask the VC to intervene for Opinions on specific national laws, as the VC is surely used as an anchor to legitimize internationally new national laws (Magen and Morlino 2009), makes more accessible and permeable the national domain also for the Opinions that are requested by other international bodies, even if in case of negative assessments. The cited interview of the Hungary PM Orban is quite telling in this respect as he speaks about the other international organizations as “unsolicited assistance”, while in the case of the VC it was the Hungarian government itself that asked for dialogue and advice along all the process. The same is for Romania in which is the government that, in spite of the negative assessment, continued to ask the assistance of the VC. Indubitably, it is worth to notice that the analyzing the activity of the VC one should confirm the existence of the highly debated EU “policy of double standard” (Grabbe 2006) towards the newly democratic or transitional countries. In fact, the list of the Opinions produced by the VC in the last ten years include very few EU old member states.

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