matière de protection des droits fondamentaux. L'étude des cas de jurisprudences nous apprend que le juge international ne dispose pas des outils nécessaires pour un contrôle approfondi et spécifique à chacune des situations. Dès lors, la marge d'appréciation étatique peut être mobilisée pour déroger largement aux droits fondamentaux. Ici, c'est bien une érosion à l'État de droit substantiel qui se crée.

Pour éviter que le propos ne soit traduit en critique du travail de ces organes, il faut garder à l'esprit la place particulière qu'occupe le juge international dans l'ordre juridique international. Encore aujourd'hui, le juge international dépend dans une certaine mesure de la volonté des États – et ce qu'il s'agisse de la création de ces organes, du caractère obligatoire ou non du juge, du consentement à la juridiction, ou de la possibilité de dépôt de plaintes individuelles, l'État a toujours, à un moment donné, consenti à ce juge international. Enfin, il convient de prendre également en compte le rôle des organisations internationales qui favorisent, à travers la *lutte globale contre le terrorisme,* un recours de plus en plus large aux pouvoirs d'exception de la part des États[103]. Ces situations d'états d'urgence, représentant un point sensible entre le politique et le juridique, fondent certainement un des enjeux contemporains majeurs en termes de protection internationale des droits de l'homme.

---

mesures discriminatoires et de la protection des minorités, *Le rapport final du rapporteur spécial sur la question des droits de l'homme et des états d'urgence*, E/CN.4/Sub.2/1997/19, 23 juin 1997 accessible à l'adresse https://ap.ohchr.org/documents/alldocs.aspx?doc_id=6940; UN, Special Rapporteur for States of Emergency, The Administration of Justice and the Human Rights of Detainees: Question of Human Rights and States of Emergency, Final Rep., add., U.N. Doc. E/CN.4/Sub.2/1997/19/Add.1, 9 juin 1996.

[103] Voir sur ce thème Kim Lane Scheppele « Le droit de la sécurité internationale. Le terrorisme et l'empire sécuritaire de l'après-11 septembre 2001 », *Actes de la recherche en sciences sociales*, 2008, vol.173, n°. 3, p. 28-43.

Francesca MAURI
Università di Milano Bicocca

FRAMING THE RULE OF LAW: THE CONTRIBUTION OF THE VENICE COMMISSION TO THE IMPLEMENTATION OF THE RULE OF LAW IN EUROPE

Abstract

The Rule of law principle represents one of the most important pillars of the Common European Heritage. As expressed in the Preamble and in Article 2 of the Treaty on European Union, Rule of Law is one of the founding values shared between the European Union and its Member States. In its 2014 *A new EU Framework to strengthen the Rule of Law* the European Commission recalls that "the principle of the Rule of Law has progressively become a dominant organisational model of modern constitutional law and international organisations to regulate the exercise of public powers". Similarly, both in the Preamble of the Statute of the Council of Europe and the Preamble of the European Convention on Human Rights, the Rule of Law is recognised as one of the three "principles which form the basis of all genuine democracy" and an element of common constitutional heritage.

In the European scenario, both the European Union and the Council of Europe have acted in several respects with a view to promoting and strengthening the Rule of Law through many of their bodies. This paper intends to study the contribution offered by the Venice Commission, the advisory constitutional body of the Council of Europe, to the protection and strengthening of the Rule of Law principle among its Member States.

The added value of this research concerns the Commission's innovative methodological approach to the Rule of Law principle. Until now, the Rule of Law has been approached from a theoretical point of view, in an attempt to give it a definition that would include all the doctrinal theories elaborated on the principle. The Venice Commission, on the contrary, after identifying a consensus between its Member States on the core elements of the Rule of Law, the

Rechtsstaat and the État de Droit, has elaborated a checklist for evaluating the state of the Rule of Law in single countries, following a practical approach. This original approach aims to facilitate a correct and consistent understanding and interpretation of the notion of the Rule of Law and, therefore, to facilitate the practical application of the principles of the Rule of Law at a national level.

The research will first analyse the work conducted by the Commission in identifying and selecting the common European values constituting the implementation of the Rule of Law principle. In order to do so, it will concentrate on the study of the "Rule of Law Checklist", adopted by the Venice Commission in 2016.

After outlining the benchmarks of the Rule of Law principle in Europe, the paper will examine its practical implementation within the Commission's Member States. This analysis will be carried out by taking into account the standards defined by the Commission on the one hand and, on the other, by evaluating their practical application in the Commission's opinions.

For this purpose, it will be useful to proceed to a cross-study of the Venice Commission's Checklist and the relevant opinions.

The rationale of the research will be to demonstrate the ever-increasing relevance of the Venice Commission as a soft law body not only in Europe but also in the international scenario and its fundamental contribution to the strengthening and implementation of the Rule of Law in Europe.

***

I. INTRODUCTION

The Rule of Law principle represents one of the most important pillars of the European Constitutional Heritage[1].

[1] For a definition see S. Bartole, "Standards of Europe's Constitutional Heritage", in *Giornale di Storia Costituzionale*, vol. 30, 2015, pp. 17-24. "*The European constitutional heritage is made up not only by the European treaties and conventions in the field of the human rights and rule of law, but also by those principles which have been at the basis of the historical process of gradual growth of the legal orders of the European States. Therefore, the concept covers at the same time the legal provisions which have been in force in those legal orders and the scientific elaboration of them which has supported their implementation and their development. This definition implies that the terms of reference of the concept are, on one side, the normative experience of the European countries and, on the other side, the doctrines and the theories which have prepared and supported this experience.*"

This appears particularly evident in the Preamble to the Statute of the Council of Europe, where Rule of Law is recognized as one of the three "*principles which form the basis of all genuine democracy*"[2] and in Article 3 of the Statute, which identifies its respect as a precondition for the accession of new Member States to the Organization[3].

Similarly, the Preamble and Article 2 of the Treaty on European Union define Rule of law as one of the founding values shared between the European Union and its Member States[4]. In its 2014 *A new EU Framework to strengthen the Rule of Law*[5] the European Commission recalls that "*the principle of the Rule of Law has progressively become a dominant organisational model of modern constitutional law and international organisations to regulate the exercise of public powers*" and states the importance of establishing a common European framework to "*ensure an effective and coherent protection of the rule of law in all Member States*".

In the European scenario, during the most recent years, both the Council of Europe and the European Union have acted in several respects with a view to promoting and strengthening the Rule of

[2] Preamble of the Statute of the Council of Europe, "*Reaffirming their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the Rule of Law, principles which form the basis of all genuine democracy*", https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/001, London, 1949.

[3] Art. 3 Statute of the Council of Europe, "*Every member of the Council of Europe must accept the principles of the Rule of Law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I*", https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/001, London, 1949.

[4] Art. 2 TEU, "*The Union is founded on the values of respect of 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*".

[5] European Commission, Communication from the Commission to the European Parliament and the Council, "A new EU Framework to strengthen the Rule of Law", Brussels, 11 March 2014.

Law to find a consensual definition of its notion. Even though a common understanding had been reached that "*the Rule of Law does constitute a fundamental and common European standard to guide and constrain the exercise of democratic power*"[6], in many European countries abiding by these standards appeared to be a more challenging task than expected at the initial stage of their accession to the Council of Europe. One of the serious obstacles towards making the Rule of Law effective and operative was to transform it into a directly applicable concept in the Member States[7].

This paper intends to study the contribution offered to the protection and strengthening of the Rule of Law principle among its Member States by the European Commission for Democracy through Law, also known as the Venice Commission.

The Venice Commission is the advisory technical body of the Council of Europe. It was established in 1990 as a partial agreement between 18 member states of the Council of Europe with the aim to provide constitutional aid to the Council's Member States. In 2002, it became an enlarged agreement, opening the door to membership for non-European countries such as Morocco, Tunisia, Algeria, Republic of Korea, Brazil and Mexico[8].

To better understand its significant value, it appears necessary to re-examine the purposes that led to the establishment of the Venice Commission. In his speech at the First Venice Conference in 1989, Antonio La Pergola, first President and Founder of the Venice Commission, defined it as a *"point of reference for studies of the rules which govern democracy and of its inspiring philosophy, a debating forum, and a workshop or a laboratory for law making provisions bound to and entwined with the reality of the individual countries involved"*[9].

[6] Venice Commission, Report on the Rule of Law, CDL-AD(2011)003rev, para. 69.
[7] Parliamentary Assembly of the Council of Europe, Resolution 1594(2007) on "The principle of the Rule of Law".
[8] Venice Commission, Revised Statute of the European Commission for Democracy through Law, Resolution (2002) 3, adopted by the Committee of Ministers on 21 February 2002.
[9] A. La Pergola, Speech at the First Venice Conference, 31 March - 1st April 1989.

This conception marked the beginning of a thirty-year span during which the Venice Commission provided assistance in drafting and amending constitutions as well as other legislative projects for more than 50 States.

According to its Statute, the Commission's field of action shall be the "*guarantees offered by law in the service of democracy*". To be specific, its efforts shall be aimed at "*strengthening the understanding of the legal systems of the participating states, promoting the rule of law and democracy and examining the problem raised by the working of democratic institutions and their reinforcement and development*"[10].

As an example, in 2018 the Commission adopted 33 opinions[11] on constitutional reforms and legislative texts upon requests of Member State Representatives, other International organisations and the Parliamentary Assembly of the Council of Europe. Constitutional assistance plays a central role in the Commission's activities and the exercise of this function implies the choice of accepted and commonly shared yardsticks for the evaluation of national legislation.

For thirty years, the Venice Commission has played a crucial role in promoting constitutional harmonization on the European continent. Starting from the transition phase in Eastern Europe, after the fall of the Berlin Wall and the consequent new constitutional wave, its main function has been to identify and select the standards which constitute the European Constitutional Heritage[12] in order to *"provide a professional, objective assessment of the issues and viable proposals for solving such issues"*[13] to its Member States.

Its approach towards Member States, frequently defined as "non-directive", considering the non-binding nature of its opinions, is more pointedly intended to establish a dialogue between international

[10] Venice Commission, Revised Statute of the European Commission for Democracy through Law, Resolution (2002) 3, Art. 1.1.
[11] See https://www.venice.coe.int/WebForms/documents/by_topic.aspx?lang=EN.
[12] S. Bartole, "International Constitutionalism and Conditionality. The experience of the Venice Commission", in *Rivista AIC*, No. 4 (2014), p. 5.
[13] S. Granata-Menghini, S. Ninatti "The evolving paradigm of human rights protection as interpreted and influenced by the Venice Commission", in *The Fragmented Landscape of Fundamental Rights Protection in Europe. The Role of Judicial and Non-Judicial Actors*, edited by L. Violini and A. Baraggia, Edward Elgar Publishing, 2018, p. 212.

experts and national authorities whose purpose is obtaining the best constitutional result.

II. STRENGTHENING THE RULE OF LAW:

THE CONTRIBUTION OF THE VENICE COMMISSION TO THE CREATION OF A COMMON EUROPEAN FRAMEWORK

While for decades it had been relegated to the background of the three pillars of the Council of Europe, the Rule of Law principle has gained paramount importance in the 21st century.

Nowadays, this topic is of acute relevance, especially in Europe where the fundamental values that constitute the Rule of Law are under attack[14]. The Council of Europe, as well as other international actors like the European Union and the United Nations are reasoning on the concept of Rule of Law, in order to provide support to all its Member States and try to keep their sets of rules in line with the standards elaborated on the Rule of Law principle[15].

The contribution of the Venice Commission to the creation of a common European framework on the Rule of Law appears relevant for at least two reasons.

On the one hand, it represents an innovative methodological approach to the Rule of Law principle, shifting it from an abstract academic topic[16] to a pragmatic and operational tool.

[14] M. Cartabia, "The Rule of Law and the Role of Courts", *Italian Journal of Public Law*, Vol. 10, No. 1 (2018), pp. 1-2.

[15] See f.i. recent opinions on Montenegro, Serbia, Poland and Slovakia.

[16] The origin of the concept of Rule of Law can be traced to the English constitutional debate of the mid-nineteenth century. First elaborated by Hearn in 1867 (W. E. Hearn, *The Government of England: Its Structure and Development*), it reached its classic formulation with Dicey in 1885 (A.V. Dicey, *An Introduction to the Study of the Law of the Constitution*). When defining Rule of Law, Dicey has identified three meanings: "*We mean, in the first place, that no man is punishable or can lawfully be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land*", "*We mean, in the second place, when we speak of 'the Rule of Law' as a characteristic of our country, not only that with us no man is above the law, but (which is a different thing), that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals*" and "*We may say that the constitution is pervaded by the Rule of Law on the ground that the general principles of the constitution are with us the result of judicial decision determining the rights of private persons in particular cases brought before the courts; whereas under many foreign constitutions the security given to the rights of individuals results, or appears to result, from the general principles of the constitution*". For a more in-depth analysis of the topic see T. Bingham, *The Rule of Law*, London: Allen Lane, 2010.

[17] See for instance Case *Baka v. Hungary,* Application No. 20261/2012, Judgement 23 June 2016, paras 116-119, in which the Court discussing the applicability of Article 6 to the relevant case, even referring to Venice Commission documents on the topic of Rule of Law and judiciary, keeps the discussion on the applicant's individual level without intervening on the national system.

[18] Venice Commission, *Report on the Rule of Law*, adopted by the Venice Commission in its 86th Plenary Session, Venice, 25-26 March 2011, CDL-AD(2011)003rev.

[19] The Venice Commission, analysing the definitions of Rule of Law proposed by various authors coming from different systems of law and State organisations, considered that this definition by Tom Bingham covers most appropriately the essential elements of the Rule of Law: "All persons and authorities within the State, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts" (T. Bingham, *The Rule of Law*, 2010).

On the other hand, upon close examination of the Council of Europe's internal mechanisms, it offers a new approach towards Member States, namely a systemic approach rather than an individual one, as it has always been through the ECtHR case law[17].

The Venice Commission first addressed the issue of the Rule of Law in its *Report on the Rule of Law*[18], adopted in 2011 in order to "i*dentify a consensual definition of the rule of law which may help international organization and both domestic and international courts in interpreting and applying this fundamental value*". From these premises the approach that the Venice Commission intends to adopt with respect to the principle is clear: give a definition that allows the Member States to enact an individual practical application of the Rule of Law principle. In other words, the goal is to create an operative tool that can be put at the disposal of the National Legislator to adapt its legislation to Common European Standards on the principle of Rule of Law.

While drafting the report, the Venice Commission reflected on the definition of the Rule of Law and reached the conclusion that it was indefinable. As a consequence, rather than searching for a theoretical definition[19], it took an operational approach and concentrated on

identifying the core elements of the Rule of Law referring to the common features of the principles of Rule of Law, *Rechtsstaat* and État de droit[20].

This was only the first step towards the implementation of a practical approach to the Rule of Law principle.

In order to facilitate a correct and consistent understanding and interpretation of the notion of Rule of Law and, therefore, encourage the application of the principles of the Rule of Law by all its Member States, the Commission decided to draft a Checklist[21] based on the six core elements of the Rule of Law, sub-itemised into detailed questions. These core elements are: Legality, including a transparent, accountable and democratic process for enacting law; Legal certainty; Prohibition of arbitrariness; Access to justice before independent and impartial courts, including judicial review of administrative acts; Respect for human rights; and Non-discrimination and equality before the law.

The Checklist is intended as a comprehensive tool to assess the degree of respect for the Rule of Law in a given State. One of the most innovative aspects lies in the identification of the recipient of this document: it has been conceived in order to be used by a variety of stakeholders, such as state authorities, international organisations, non-governmental organisations, scholars and citizens in general.

However, although the first addressees of the Rule of Law Checklist are the States themselves, the assessment of national legislations with the Rule of Law standards is a complex process which has to be conducted in successive steps.

[20] The English idea of the Rule of Law finds its correlative formulations in continental European concepts of *Rechtsstaat*, *État de droit, Stato di diritto, Estado de derecho* and so on. But it is evident that these phrases have different orientations, not least because in them the concept of the state forms its core. These continental formulations highlight a specific conundrum: although the state, as the source of law, is competent to define its own competences, the concept of the "state of law" means that the state acts only by means of law and is therefore also subject to law. The state that is the source of law is also, apparently, the subject of that same law. For more information about this topic see M. Loughlin, "*Rechtsstaat, Rule of Law, l'État de droit*", in *Foundations of Public Law*, Oxford: Oxford University Press, 2010, pp. 312-341.

[21] Venice Commission, *Rule of Law Checklist*, adopted by the Venice Commission at its 106th Plenary Session, Venice, 11-12 March 2016, CDL-AD(2016)007.

Assessing the level of compliance with the Rule of Law in a given State requires both insider knowledge and understanding of the system by national stakeholders and a global and impartial vision of the situation by external and expert bodies.

Here lies the strength of the Venice Commission's working method "*fostered and developed on the basis on one hand of the strong belief in the absolute value of constitutions and on the other hand on the refusal to impose external, ready-made solutions on the authorities seeking its help*"[22]. Its capacity to build constructive and fruitful relationships with its Member States, based on a tailor-made intervention, despite the "non-binding" nature of its recommendations, is one of the primarily reasons for its successful impact in the international scenario.

This leads to the second strength of the approach of the Venice Commission: the systemic one.

Before the implementation of the above-mentioned Checklist, the approach of the Council of Europe to the principle of Rule of Law had always been a partial one, mainly based on the appeals brought before the European Court of Human Rights by individual citizens of the Member States[23]. However, this approach was restrictive because it only allowed an analysis of the internal elements pertinent to the cause and did not allow a systemic and global analysis of the respect of the standards of the Rule of Law by the Member States.

The creation of the Checklist and the following work carried out by the Venice Commission in the evaluation of the compliance between the established standards and the national legislative system represent, once again, a completely new approach for the Council of Europe. This assessment conducted upon request of the

[22] S. Granata-Menghini, S. Ninatti "The evolving paradigm of human rights protection as interpreted and influenced by the Venice Commission", in *The Fragmented Landscape of Fundamental Rights Protection in Europe. The Role of Judicial and Non-Judicial Actors*, edited by L. Violini and A. Baraggia, Edward Elgar Publishing, p. 219.

[23] In the case *Baka v. Hungary*, for example, the European Court of Human Rights, while identifying a massive violation of the Rule of Law principle, had to limit its analysis to the *thema decidendum* of the cause, namely the termination of the judges' mandate, without being able to extend his judgment on the additional flaws in the Hungarian system.

Member States or the Parliamentary Assembly[24], takes into account the whole context, avoiding the risks resulting from a mechanical and partial analysis.

Even though, as expressly stated in the introduction, the Checklist is neither exhaustive nor final[25], it aims to cover the core elements of the Rule of Law which have to be fulfilled in order to ensure compliance with the Rule of Law principle.

During its three years of application, the Checklist has become a tool for assessing the Rule of Law in a given country not only in relation to a specific and limited issue but, more generally, from the viewpoint of its constitutional and legal structures, the legislation in force and the existing case-law. It has enabled, for the first time, an exhaustive, objective and equal assessment for all its Member States and has offered a unique opportunity for revitalizing the relationship between citizens and States under the aegis of a major international player: the Venice Commission.

In order to better understand these two innovative aspects of the Venice Commission's approach to the Rule of Law principle, it will be interesting to analyse some practical cases of the Checklist application by the Venice Commission in the following section.

III. IMPLEMENTING THE RULE OF LAW: THE CONCRETE INTERVENTION OF THE VENICE COMMISSION IN ITS MEMBER STATES

Since its creation, in 2016, the Rule of Law Checklist has been mentioned by the Venice Commission in several opinions dealing with issues concerning the Rule of Law[26].

Given the impossibility to analyse in this paper all the opinions referring to the Checklist, as an example of its peculiar approach,

[24] According to the Statute of the Venice Commission, an opinion can be requested by Member States represented by their parliaments, governments and head of states, by the Council of Europe, represented by the Secretary General, the Committee of Ministers, the Parliamentary Assembly and the Congress of Local and Regional Authorities, and by other International organisations as the European Union, and the OSCE.

[25] Venice Commission, *Rule of Law Checklist*, para. 30.

[26] From 2016 the Venice Commission has adopted several opinions referring to the Rule of Law Checklist regarding Poland, Turkey, Armenia, Republic of Moldova, Luxemburg, Hungary, Romania, Georgia, Malta, Montenegro and Albania.

we will focus on two of the most recent and significant documents adopted by the Venice Commission: the Opinion No. 924/2018 on Romania[27] and the Opinion No. 943/2018 on Hungary[28].

The selected opinions are both related to the topic of judiciary, which represents today one of the most problematic areas of implementation of the principle of Rule of Law. As recently stated by the European Court of Justice in the case *Associação Sindical dos Juìzes Portugueses,* there is a strong connection between the Rule of Law principle and the guarantee of an effective jurisdictional control within the national legal system[29].

While the opinion on Hungary focuses on the introduction of a separate system of administrative justice and, particularly, on the process of establishment of a National Administrative Judicial Council, the one regarding Romania focuses on the new law governing the status of judges and prosecutors and the law on the establishment of the Superior Council of Magistracy.

In recent years, many European States have been faced with several problems related to the lack of judicial independence due to the spread of biased, politicized and corrupt judiciary. Some of these States, as, for instance, Romania and Hungary, have started structural reforms of their judicial systems, relying on the expertise

[27] Venice Commission, Opinion on Romania on the draft amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organisation, and Law No. 317/2004 on the Superior Council for Magistracy, adopted by the Commission at its 116th Plenary Session (Venice, 19-20 October 2018), CDL-AD(2018)017.

[28] Venice Commission, Opinion on Hungary on the law on administrative courts and the law on the entry into force of the law on administrative courts and certain transitional rules, adopted by the Venice Commission at its 118th Plenary Session (Venice, 15-16 March 2019), CDL-AD(2019)004.

[29][132] European Court of Justice, Judgement of 27 February 2019, case C-64/16, *Associação Sindical dos Juìzes Portugueses*. The judgement provides an interesting starting point for a reflection on the possibility of introducing a European judicial control of compliance with the Rule of Law by the Member States. The Court of Justice, in relation to the present case, states that if a national judge considers a national measure to be in conflict with the principles of the Rule of Law, as provided for by art. 19 TEU, he may raise an interpretative preliminary question. In this way, for the first time, the Court of Justice comes to a direct involvement of national judges in the protection of the Rule of Law as a common value as provided in the art. 2 TEU.

of the Venice Commission in order to restore a national legislative framework compatible with the parameters of the Rule of Law[30].

In both cases subject to analysis, the request comes directly from the Member State that wishes an endorsement by the Venice Commission regarding the compatibility of the national legislative measures with the European common standards.

As in all the opinions adopted from 2016, the Commission's assessment takes as parameters of evaluation those enshrined in the Rule of Law Checklist, providing an example of practical application of the Rule of Law principle in the national framework of its Member States.

This approach is particularly evident when, defining the standards applicable to the Hungarian case, the Commission states that the opinion "*assesses the laws submitted for examination by the Venice Commission from the viewpoint of their compatibility with democratic principles, in particular the separation of powers and the balance of powers, notably the independence of the judiciary, which are defining features of the Rule of Law*", making explicit reference to the Rule of Law Checklist[31].

In the same light, when analysing the prosecution service provided by the new Law on the status of judges and prosecutors in Romania, the Commission, expressly referring to the Checklist, pointed out that "*There is no common standard on the organisation of the prosecution service, especially about the authority required to appoint public prosecutors, or the internal organisation of the public prosecution service. However, sufficient autonomy must be ensured to shield prosecutorial authorities from undue political influence"*[32].

After a general overview of the standards set in the Checklist applicable to the specific case, the Venice Commission proceeded in both cases with a specialised analysis of the national provisions, evaluating their compliance with the identified framework and giving specific advice according to the identified context.

[30] The Venice Commission has been involved in these processes at the urging of several States like, for instance, Albania, Bosnia and Herzegovina, Bulgaria, Georgia, Hungary, Montenegro, North Macedonia, Romania, Serbia and Ukraine.
[31] Venice Commission, CDL-AD(2019)004, paras 16-22.
[32] Venice Commission, CDL-AD(2018)017, para. 46.

This second step, which represents the core of the activity of the Venice Commission, requires a fair balance between the Commission's expertise and the state's willingness to conform to its recommendations. It is indeed important, given the non-binding nature of the opinions, that stakeholders and domestic authorities be involved in the project and provide an indispensable input to the Commission's findings. This synergy gives added value to the Commission's recommendations, which are not abstract and general, but *tailor-made to the specific domestic context*[33].

Analysing the opinion in greater detail, for instance, when evaluating the new prosecutorial system of Romania, the Commission found out, according to the current political context of tension between prosecutors and politicians in the fight against corruption, that the decisive role of the Minister of Justice in the appointment of prosecutors weakens, rather than ensures, *checks and balances*. Indeed, by adapting the general benchmarks to the specific case, it highlighted that "*if the leading prosecutors depend for their appointment and dismissal on a Minister, there is a serious risk that they will not fight in an energetic manner against corruption among the political allies of this Minister"*.

In this case, the analysis conducted by the Commission on the national system recalls the principle of separation of powers, which is considered a fundamental element for the compliance with the Rule of Law principle. Once again, the Commission's assessment referred to the Checklist where, in the chapter dedicated to the independence and impartiality of the judiciary, it says that "*The judiciary should be independent. Independence means that the judiciary is free from external pressure, and is not subject to political influence or manipulation, in particular by the executive branch. This requirement is an integral part of the fundamental democratic principle of the separation of powers*"[34]. This time, however, the reference had an added value which, as explained before, was the

[33] S. Granata-Menghini, S. Ninatti, "The evolving paradigm of human rights protection as interpreted and influenced by the Venice Commission", in *The Fragmented Landscape of Fundamental Rights Protection in Europe. The Role of Judicial and Non-Judicial Actors*, edited by L. Violini and A. Baraggia, Edward Elgar Publishing, p. 225.
[34] Venice Commission, *Rule of Law Checklist*, para. 74.

reference to the national context and consequently, the extrapolation of dedicated advice and recommendations in order to bring the national provision in line with European standards on the topic.

Therefore, in the conclusions of the opinion on Romania, when focusing on the topic of the appointment of high-ranking prosecutors, the Commission recommended to review the provision in order to "*provide conditions for a neutral and objective appointment process by maintaining the role of the institutions able to balance the influence of the Ministry of Justice*"[35].

The same can be said about the opinion on Hungary, where the Commission stressed the importance of an effective system of checks and balances and, directly referring to the Checklist, stated that "*it is an appropriate method for guaranteeing the independence of the judiciary that an independent judicial council have decisive influence on decisions on appointment and careers of judges*"[36].

In evaluating the reform process undertaken by Hungary, the Venice Commission highlighted its duty to "*examine the actual modalities of implementing the chosen model and, above all, to check whether the necessary safeguards are in place to ensure full respect of the principle of independence as regards the newly created courts and also the judges who will be members of those courts*"[37]. Once more, considering the attribution of a central role to the Minister of Justice in setting up and shaping the new system of administrative courts, looking again at the principle of separation of powers, the Commission recommended amending the recruitment procedure, increasing the powers of the judicial council while reducing those provided for the Minister of Justice.

As these two practical examples demonstrate, the Rule of Law Checklist can serve as a useful tool for the Venice Commission to evaluate the compliance of national legislation on general or specific topics with the Common European Standards without proceeding every time with their identification. However, as expressly stated at the time of its adoption, this is neither the sole nor the main function the Checklist was created for.

[35] Venice Commission, CDL-AD(2019)004.
[36] Venice Commission, Rule of Law Checklist, paras 81-82.
[37] Venice Commission, CDL-AD(2019)004, para. 112.

IV. A CROSSROADS: A POSSIBLE POINT OF CONVERGENCE BETWEEN THE EUROPEAN UNION AND THE COUNCIL OF EUROPE

In 2019, the Council of Europe, together with the European Union, started a new project called "Horizontal Facility for Western Balkans and Turkey"[38], a co-operation initiative of the European Union and Council of Europe for the Western Balkans and Turkey. It is one of the results of the Statement of Intent signed on 1 April 2014 by the Secretary General of the Council of Europe and the European Union Commissioner for Enlargement and European Neighbourhood Policy, in which both organisations agreed to further strengthen their co-operation in key areas of joint interest.

The objective of the project was to enable the Beneficiary States to meet their reform agendas in the fields of human rights, rule of law and democracy and to comply with the European standards, including where they are relevant within the framework of the EU enlargement process.

The Horizontal Facility relies on the Council of Europe's unique working methods, whereby tailor-made technical co-operation activities are based on conclusions and recommendations of the Council of Europe's monitoring bodies and highlight areas where improvements are needed in legislation and policies of the Beneficiary States to comply with the organisation's treaties and other standards.

The Venice Commission, as advisory technical body of the Council of Europe, is expressly included in the list of the monitoring bodies whose expertise is involved in the realisation of the project.

This idea of cooperation between two of the most important organisations in Europe through the work of the Venice Commission in the field of Rule of Law is interesting for at least two reasons.

First, extending the work of the Venice Commission to the European Union's sphere of action undoubtedly constitutes an enlargement of the frame of reference for the identification and selection, as well

[38] For more information about the project see: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/ipa_ii_2018_040-113.05_mc_eu-coe_horizontal_facility.pdf.

as an extension, of the aforementioned Common Constitutional Traditions that are at the base of the Commission's activity.

Second, the fact that the European Union uses the experience of the Venice Commission to assist those States that have started the accession process and will be potential Member States, suggests a possible way of contact between the two organisations and, to a greater extent, the possible creation of a set of shared standards and values directly applicable to their Member States[39].

To see it from a practical point of view, a virtuous example of collaboration between the two organisations within the aforementioned Project is that of North Macedonia.

The accession of North Macedonia to the European Union has been on the current agenda for future enlargement of the EU since 2005, when it became a candidate for accession. North Macedonia submitted its membership application in 2004, thirteen years after its independence from Yugoslavia. It is one of five current EU candidate countries, together with Albania, Montenegro, Serbia and Turkey.

Since 2005, the Venice Commission has worked closely with the European Union in order to bring the Macedonian Constitution in line with European standards in view of a possible accession. After several "negative" opinions[40], finally, in two opinions adopted in 2018 and 2019, North Macedonia received a positive assessment of (near) compliance with the values of the Rule of Law identified in Europe.

[39] See K. Tuori, "From Copenhagen to Venice", in *Reinforcing Rule of Law Oversight in the European Union*, edited by C. Closa and D. Kochenov, Cambridge: Cambridge University Press, 2018, p. 243 ss.

[40] Venice Commission, *Opinion on the Draft Constitutional Amendments concerning the Reform of the Judicial System in the "Former Yugoslav Republic of Macedonia"*, CDL-AD(2005)038; *Opinion on the Seven Amendments to the Constitution of the "Former Yugoslav Republic of Macedonia" concerning, in particular, the Judicial Council, the competence of the Constitutional Court and Special Financial Zones,* CDL-AD(2014)026; *Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of the "Former Yugoslav Republic of Macedonia*", CDL-AD(2015)042; *Opinion on the Draft Law on the Termination of the Validity of the Law on the Council for Establishment of Facts and Initiation of Proceedings for Determination of Accountability for Judges*, CDL-AD(2017)033.

North Macedonia, as a state emerging from the former Soviet bloc, was one of those countries in which the Venice Commission immediately played a key role. Indeed, the constitutional assistance provided to the Macedonian authorities has been very intense over the years and has led to excellent results.

As far as the reform of the judiciary is concerned, starting from 2005, the Commission has released six opinions, each time trying to refine the national legislation more and more in an attempt to bring it within the confines of the Common European Standards regarding the Rule of Law.

Since 2005, numerous reform attempts have been made regarding the judiciary. Each time, at the request of the Macedonian Minister of Justice, the bills have been subjected to prior scrutiny by the Venice Commission. This is precisely one of the key successful points of the reform process.

The Commission's approach towards the Member States, which has always been proactive – even considering the non-binding nature of its opinions – is in fact mainly aimed at establishing a dialogue between international experts and national authorities, in order to obtain the best constitutional result. The positive outcome of the adjustment process, therefore, depends largely on the State's willingness to reshape its legislation according to the indications and recommendations that the Commission experts deem necessary in the specific case.

Northern Macedonia, thanks to the help of the Venice Commission over the last two years, has proven to be a country capable of intervening on its own set of rules, reshaping them towards a complete satisfaction of the principles of the Rule of Law, in accordance with the so-called "Copenhagen criteria".

In the opinions analysed, the revision of the eligibility criteria for the access to the judicial offices based on an ever increasing independence and impartiality of the judiciary, the modification of the rules on dismissal and transfer of magistrates in favour of greater stability of the office or the revision of the criteria to become member of the Judicial Council, are clear examples of this tendency.

The case in question also demonstrates the complexity of the work of the Venice Commission, which requires a long time and numerous efforts from national authorities, which must intervene with internal regulations in order to make them progressively compliant with common standards.

The opinions adopted in 2018 and 2019, while still reporting small recommendations and proposals for amending the legislation in question, highlight a general positive feedback from the Commission towards a constantly evolving framework[41].

This is just one example of the potential that derives from the cooperation between the European Union and the Venice Commission in the field of the Rule of Law. During its twenty-five years of existence, the Venice Commission has gained expertise and authority within the constitutional landscape and has proved that it possesses the necessary independence to work as an advisory technical body inside and outside the European borders.

Some scholars, reflecting on possible ways to strengthen the Rule of Law in Europe, hypothesised an opening of the European Union to the Venice commission. Given the absence of relevant differences between EU and Venice Commission standards, the creation of a new European body (the so-called "Copenhagen Commission") would only mean institutional duplication, without any guarantees that it would really contribute to the strengthening of constitutionalism in Europe[42].

Maybe, this could be a possible way to reinforce the Rule of Law oversight in Europe. Certainly, it is something worthy of attention that must be taken into consideration for the future.

V. CONCLUSIONS

The Rule of Law Checklist, besides being an important tool in the hands of the Venice Commission, also represents a fundamental

[41] Venice Commission, CDL-AD(2019)008, para. 63 "*The constant efforts of the authorities of North Macedonia to bring the rules governing the judicial system in line with the international standards and best practices are praiseworthy. Those efforts in the past two years went mostly in the right direction*".

[42] See K. Tuori, "From Copenhagen to Venice", in *Reinforcing Rule of Law Oversight in the European Union*, edited by C. Closa and D. Kochenov, Cambridge: Cambridge University Press, 2018, p. 227.

instrument for Member States. In the view of the Venice Commission, indeed, the document is meant as a tool for a number of actors such as parliaments and other state authorities when addressing the need and content of legislative reform, civil society and international organisations, including regional ones – notably the Council of Europe and the European Union.

As shown in this paper, the originality of the conception of the Checklist itself and the novelty of the Venice Commission's approach to the concept of Rule of Law are unique within the landscape of European Constitutional Law for at least two reasons.

On the one hand, as widely demonstrated, there is the practical and systemic approach to the Rule of Law principle, which offers a new point of view to deal with this topic and a new instrument for its implementation by all Member States.

On the other hand, thanks to the Venice Commission's increasing importance in the European scenario and beyond, the Rule of Law Checklist is getting more and more relevant as an official and widely recognized document within Member and non-member States. During the years it has been applied, it has become progressively more important for the States themselves and for other international organisations, such as the European Union, which are now relying on its benchmarks for building or rebuilding democratic systems compliant with European Common Standards.

Moreover, this shows the ever-increasing relevance of the Venice Commission as a soft law body in the identification and application of standards not only for European Countries but also – as upheld by some recent opinions – for those countries from the international scenario trying to get their sets of rules in line with European Standards[43] or, as we have seen, for those aspiring to become European Union Member States[44].

[43] i.e. Opinion 931/2018 on Kazakhstan, Opinion 929/2018 on Tunisia, Opinion 923/2018 on Georgia, Study on the Rule of Law in Korea, CDL-JU(2018)003.

[44] Like, for example, North Macedonia, Albania, Montenegro, Turkey and Serbia.