RULE OF LAW ON THE INTERNATIONAL CONTEXT

30 Years of the Venice Commission

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1.The Venice Commission, formally referred as Commission for the preservation of the Rule of law through democracy is an advisory body of the Council of Europe in the constitutional and democratic areas. Its prime sponsor, the prominent Italian jurist Antonio La Pérgola, justified the creation of the Commission in May 1990 for giving support and advise to Eastern European countries in their design for their new constitutions, in a period where international order had serious challenges.

2. This fundamental collaboration of the European Union provided council to countries[1] that were in the process of emancipation from an array of nations starting on 1991. At that time, Europe was undergoing through important interim changes, for instance, the German reunification, the secession of Croatia, Slovenia, Bosnia and Herzegovina to the former Yugoslavia, and the division of Czechoslovakia in the Czech Republic and Slovakia; additionally, the creation of fifteen new countries with the division of the Soviet Union during the last decade of the 20th century were in need of assistance.

3. Grave constitutional matters were pending on their solutions in this parts of the world, however, these were of interest to the rest of other countries in Eastern Europe: the independence of the judicial power, the guarantees and reach of the fundamental rights, the development of the constitutional tribunals and different issues of electoral law. In 1993, the Maastricht treaty came into force, while in Latin America important events unfolded like the Hugo Chavez coup d'etat in Venezuela, the Augusto Pinochet extradition and the difficult electoral process in Mexico in 1994.

4. The 1990's decade was characterized by major changes that forged challenges for the Rule of Law in an array of countries that was not specifically circumscribed to Europe. This produced the necessity that a commission of experts would become available to

[1] These countries were Lithuania, Estonia, Georgia, Armenia, Azerbaijan, Belarus, Kazakhstan, Kirgizstan, Moldova, Russia, Tajikistan, Ukraine and Uzbekistan.

attend possible solutions in the constitutional sphere. A commission that could provide measures on the improvement or omissions to correct a constitutional institution, in the area of governmental powers or fundamental rights.

5. For that purpose, the Commission has been integrated by 61 members of top ranking professional level, representing countries from Europe, America, Asia and Africa.[2] Among its members there are judges, government officials and legislators which for a period of four years, they carry out their duties in the Commission by representing their respecting countries. Even though their decisions do not bind the nations which they represent, their opinions and rulings are binding to the designatory countries.

6. Originally, Mexico was part of the Venice Commission as an observer since the beginning on December 1st 1999, formalized by Resolution (99)32 of the European Council; and since 2001, our country has participated as an observer State in the Commission sessions. Afterwards, on February 3rd 2010, the Committee of Ministers approved unanimously the adhesion of Mexico to the Venice Commission as a rightful member.[3]

7. The Secretariat of Foreign Affairs of Mexico has reserved its right to credit individual representatives from the country, and therefore, exercise under a personal title its duties, before the plenary sessions of the Commission, as well as members of the standing Committees. These representatives have been designated by institutions like the Electoral Supreme Court or the Supreme Court of Mexico, in their capacity of Constitutional Courts of the Country.

8. In order to increase the Latin American participation in the Venice Commission, on June 2011, within the 87th plenary session, it was agreed to establish a sub committee under the name of *Latin American Sub Commission* due to constitutional matters and controversies rising on the region. Mexico, Peru, Bolivia, Chile and Argentina, participated actively and produced opinions, submitted *amicus curiae* briefs, and intervened in electoral observation missions, not only for the region but for rest of the countries.

9. Also it was signed a joint agreement between the Venice Commission and the Mexican Supreme Court for Elections on November 2011, in order to share the administration of the data base VOTA with the purpose to accomplish several objectives.[4]

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[2] The member States of the Council of Europe were: Albany, Andorra, Armenia, Azerbaijan, Belgium, Bosnia-Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Greece, Hungary, Iceland, Ireland, Italy, Lithuania, Liechtenstein, Lithuania, Luxemburg, Macedonia, Malta, Moldavia, Monaco, Montenegro, Norway, Netherlands, Poland, Portugal, United Kingdom, Romania, Russia, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, and Ukraine. And since 2010, new members were accepted: Kyrgystan, Chile, South Korea, Morocco, Algeria, Israel, Tunisia, Peru, Brazil and Mexico. Tribunal Electoral del Poder Judicial de la Federación. *Comisión de Venecia. 2009-2013. Informe.* 2014. P. 6

[3] In the meeting 1076 of the Committee of Ministers of the European Council, based on article 2nd 5th paragraph, of the Venice Commission statues, countries that were not part of the European Council were invited to be part of the Commission with an agreement by both European and non-European countries.

[4] Among these objectives are 1) improve the systematic catalog in three languages, English and French which are the official languages of the Venice Commission, thus adding Spanish, in order to comply with the exigencies of the

10.On the other hand, Mexico entails an important international vocation from its constitutional origins. Since the 1857 Constitution, our country follows the principle of supreme law of the land based on article VI, second paragraph, of the United States Constitution, which "domestic" or national laws should be applied or interpreted in agreement to international law, or the "law of the Nations," and in accordance to the "costumes of civilized nations" according to the terminology in the precedents of *Murray v. Charming Betsy Schooner 6 US 64,118, 120 (1804)* [5] and *The Paquete Habana 175 US 677 (1900)*.

11. The most viable solution to tackle the complex relations between the United States and Mexico lays under the compliance of international law and, in principle, other European powers. Since Mexico's inception, the country accepted colonization of its territory and the universal acknowledgment of human rights to all the peoples, including foreigners and transient people.[6] Foreigners have always been acknowledged like nationals with full enjoyment of rights and properties. The freedom of religion which was restricted since 1824 in Mexico, was relaxed in favor of migrants and *empresarios* to them in order to favor colonization in our country. Freedom to use the language of their origin was also permitted in the Mexican province of Texas since1824.

12. Our fundamental constitutional institutions pretended to be inspired by the best practices of the most civilized nations. According to the principles of International Law where the term of "civilized nations," recognized from article 38 (1) c) of the International Statue of Justice.[7] Jaime Torres Bodet, as Foreign Affairs Secretary, expressed Mexico's consent to the jurisdiction of the International Justice Court since October 23th 1947 and Bernardo Sepúlveda Amor acted as judge of the International Justice Court from 2006 to 2015.

13. The International vocation of Mexico has been constant in order to achieve the equality of nations and people. Since Article 33 of the 1857 Constitution, Mexico established regulations towards foreign affairs, which foreigners were prescribed the same civil rights that apply to Mexican citizens.

14. Despite that during the second half of the 19th century, foreign nationals took advantage of the liberties which Mexico gave them, foreigners would argue in favor of a privileged treatment, in addition to manage being "protected" by their countries of origin.

Latin American subcommittee. 2) Improve the search engine and the graphical user interface (GUI). 3) Create a selection of judicial-electoral documents in Spanish, and 4), include the Mexican electoral legislature and systematize it, in accordance to the catalog of the VOTA data base and expand itself with legal documents from other countries of Latin America. *Informe. Op. cit. p. 26.*

[5] Michael P. Socarras. "International Law and the Constitution". 2011 Fed. Cts. L. Rev 1, 28

[6] Manuel Gonzalez Oropeza and César Camacho. *Constitucionalismo Mexico de las entidades federativas.* Colegio Mexiquense. *In print.*

[7] Frances T. Freeman Jalet. "The quest for the general principles of Law recognized by Civilized Nations-A Study." *10 UCLA L. Rev. 1041.* July 1963.

Foreign governments would intervene in the internal regime of Mexico to benefit the interests of their nationals in violation of equality of the law.

15. At the end of the 19th century, Japan joined with Mexico to eradicate the unequal treatment of their respective nationals. Due to the extraterritorial application of these laws and their jurisdiction in European and American (US) governments, not being able to submit those nationals to the laws and jurisdictions thereof respectively from Japan and Mexico in their own territory.[8]

16. Mexico has been subjected to the same unequal treatment as Japan, not only from Europe, but from the United States since their Independence. Migration and commerce were the engines that both countries pursue piece treaties. In that way, and proposed by Mexico, Japan accepted on November 30th 1888, the first agreement signed with absolute judicial equality between both countries: Mexicans would be under the authority to Japanese law and their judicial procedures, and vice versa, Japanese nationals would be subjected to Mexican law and tribunals in Mexican territory.

17. The first opposition resulted from Thomas Bayard, US State Secretary, whom addressed Matías Romero, Mexican Ambassador. Mr. Bayard reported to the ambassador on October 26th 1888 that he would not accept American citizens to be judged by Japanese or Mexican tribunals or procedures, depending on the case, under the basis that Common Law thrived for US citizens, regardless the country in which they stood. Nevertheless, the treaty between Japan and Mexico was subscribed between March and May of 1889, laying the basis of equality, justice and reciprocity in foreign affairs without the imposition of foreign law:

> Citizens or subjects of each of the contracting parties, permanent or temporary residents in the other territory, they will have free and easy access to the courts for upholding and defend their legitimate rights and interests, in all respect of application of the laws by administrating justice towards civil business and criminal trials, they will enjoy the same privileges and rights and they will be subjected to the same obligations as the nationals (Article VII).[9]

18. In this sense, Mexico was more keen towards equality and deference towards other countries like Japan, following the leading doctrines of Swiss jurist, Johan Kaspar Bluntschli (1808-1881), whose work *Codified International Law (1871)* was translated into Spanish and noted in Mexico:

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[8] María Elena Ota Mishima. *La política exterior de México y la consolidación de la soberanía japonesa.* Colección del Archivo Histórico Diplomático Mexicano. Serie Documental 1/14. Secretaría de Relaciones Exteriores. Tercera Época. Tlatelolco. 1976.

[9] As corollary, Japan offered on November 26th 1888, the following guarantee: "If Mexico would like to accept our laws and our jurisdiction, we will open the doors to our country for all Mexican citizens, additionally, the same holds for any other powers which choose to comply under the same conditions." This hold true until 1909 when United States acknowledged this principle in the *American Banana Co. v. United Fruit Co 213 US 347*.

> In the civilized world foreigners are respected the rights of humanity and they're [the foreigners] completely assimilated to the nations in all the important respects of private legislation (p. 29)

19. Bluntschli shared Immanuel Kant's notion of a "world citizen." Kant coined the term in his work "Cosmopolitan Law" (*Weltburgenrecht*), where He mentions the idea of universal citizenship. In this notion, the relationship between State and individuals in the global context, considered only as human beings and not in relationship to particular States, are analyzed in the same manner as International Law.[10]

20. This distinction has not been analyzed by the Unites States precedent in the case of *Foster v Nielson, 27 US 253 (1829),* where treaties are considered not in their dimension of humanitarian content, but only as a covenant between States. Consequently, these types of treaties required legislation in order to implement them. For instance, the definition of borders and their disregard of human rights consigned by them, it was until domestic legislature acknowledged these rights expressly.

21.If democracy is a form of government thrived and desired by a national state, it cannot solely be accomplished by political means or ideologies, but democracy is a legal process in its nucleus that is accompanied by constitutional norms that embeds a participative government and political rights.

22. The interdependence of countries in the international community is more evident in terms of public policy, electoral processes, human rights design of public policies and their attributes. These are objects of analysis and observation by international bodies.

23. Even though Mexico's experience is acknowledged in the Interamerican Community in such a way that the recommendations (ICHR) or sentences (ICourtHR) of those organizations influence in policies and decisions into the powers in Mexico.[11] Some of those resolutions are subject to confirmation by the internal organs, like the Supreme Court.

24. The Venice Commission, created 30 years ago, celebrates this joyful commemoration with the publication of a book where gathers the collaboration of the important community members that the Council of Europe has been collected for the betterment of the Rule of Law.

25. As aforementioned, the Commission is a conclusive body of the European Council in which authorities from its member States can provide expert opinions and studies on

[10] Paulen Kleingeld. "Kant´s Cosmopolitan Law: World Citizenship for a global order". *Kantian Review.* Volúmen 2. 1998. p. 72

[11] As per recommendations stated in the 01/90 Resolution or the 14/93 report of the Inter-American Commission of Human Rights towards Mexico, the Commission proposed the adoption of ideal mesures in order to guarantee due legal process within the electoral processes; everything culminated to the 1996 reform that implanted a national electoral system in Mexico.

reforms in Constitutional Law matters, human rights, national security and electoral legislation among others.

26. The opinions of the Commission are linked to the same member States and the strength of their arguments come from the reasoning and approval of the Commission's plenary session.

27. Antonio La Pérgola (November 13 1931-July 19th 2007) presided over and propelled the Venice Commission since May 1990, as it was mentioned before, when it was created by 18 member States from the European Council. The Commission observes an intense series of activities in its Committees and the plenary sessions since its creation where their opinions and studies are objects of analysis. The Commission's work for 30 years compiles more than 900 opinions and studies, 700 seminars and conferences, 3,000 workshops with the help of authorized international organizations, such as the Office of Democratic Institutions and Human Rights (ODHIR) and the Organization for Security and Co-Operation in Europe (OSCE).[12]

28. In 2017, the Commission gathers representatives from 61 member countries, 47 from which are part of the Council of Europe and they sum more than 14 regions from the world. In the revision of its normative framework made in February 21st 2002, the Committee of Ministers of the Council of Europe agreed to receive non-member States of the Council in order to participate in the activities of the Venice Commission.[13]

29. The plenary sessions take place in the *Scuola Grande San Giovanni Evangelista* in the district of San Polo within the City of Venice. The sessions included the participation of experts from an array of backgrounds. These were jurist, politicians, diplomats, judges and University professors, where the participants discussed reports and opinions.

30. As described earlier, due to the increasing participation of Latin-American countries (Chile, Costa Rica, México and Perú) and their constant involvement, the Commission created a special sub-committee for Latin-America. The opinion on the matter of the electoral legislation (2012) in Mexico influenced the country's constitutional reform of 2014 and had a great impact to the electoral regime of Mexico.

31. The distribution of responsibilities in the Commission is partitioned, generally speaking, in three areas: a) constitutional assistance, b) constitutional justice and c) electoral missions. Let's review some examples:

a) Serbia submitted to an opinion the proposals for reforming its political financial activities law, and the Venice Commission, jointly with ODIHR,[14] provided resolution number 782/2014 on September 26th, 2014. This

[12] Between their opinions and studies, one can find expert findings about gender equality, media and elections, the ombudsman institution, constitutional justice, minority protection, liberty of association, liberty assembly and Rule of Law among others.

[13] *La Commission de Venice. Rapport Annuel d'Activities 2010. p. 20.*

[14] CDL(2014)048.

opinion was based on a previous ruling, which took place on 2011, about the need for detailing the registered accounts, itemized list of contributions, in addition to content specification of the reports submitted by political players.

32. In the aforementioned opinion, specific recommendations were made to the anti-corruption agency of Serbia, where it would have the competency to apply concrete measures in order to prevent illegal conducts. Additionally, the recommendation stated the application of proportional sanctions to the illicit conducts. The opinion added as well, the need to fix a limit for campaign expenditures and, at the same time, to reconsider the level of financing in the public and private sector.

b) A noteworthy instance was presented when the Constitutional Court of Peru requested the intervention of the Commission for providing an *amicus curiae* in the Santiago Brysón de la Barra case *et al.* which implicated to define the concept of crimes against humanity to the accused authorities in Peru. The opinion number 634/2011 was discussed and approved on October 24th 2011.[15]

33. The case derived from a riot in June, 18th 1986 which took place at *El Frontón* by inmates of said prison. The President of Peru declared prisons as military zones of limited transit, and with that instruction, the access thereto was forbidden even for judicial authorities. The reprisal of the armed mobilization was in charge by the Peruvian Navy on the 19th of June, where the Navy demolished a section of the prison, thus, killing 111 people and injuring 34 more. The total number of injured or killed people could have reached up to 152. The excessive force implemented by the Peruvian Navy was declared as a violation to the Inter-American Convention of Human Rights.

34. The Inter-American Court of Human Rights approved the case of *Durand c. Peru* in August 16th 2000, where it established that military tribunals were not an impartial instance to sanction the illegal conducts of the military agents involved in the homicide of inmates.[16]

35. Even though one could argue that concepts like crimes against humanity as an international high crime among States was based on massacres like the Armenian Genocide of 1915, such crimes are considered among the most serious under International Law. The Nuremberg trials of 1946 were the first time that such crimes were established as a valid indictment of military officials in a setting of a court. The Nuremberg trials and subsequent events led towards the creation of the International Criminal Court in 1998.[17]

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[15] CDL-AD(2011)041.

[16] In a similar instance, there was a precedent case judged by the same court, *Rosendo Radilla Pacheco c. Mexico* in December 15th 2009, where military jurisdiction was not considered to adhere the international standards of due process of Law in a case of forceful disappearance by the military upon a citizen.

[17] These subsequent events are like crimes against humanity committed in Yugoslavia, Rwanda, and in Sierra Leone in the last decade of the 20th century. Domestic Courts have also determined increasing importance in solving crimes

36. The crimes against humanity are decided based upon two elements: objective and subjective. The objective criterion is relative to the inhumane conduct in casualties (i.e. homicide and genocide). On the other hand, the subjective criterion is the continuous transgression without halting or deviating from the misconduct; in other words, whoever that perpetrates the continuous conduct of homicide or genocide can be accused of committing crimes against humanity.

c) During the participation of Mexico (2010-2017) with the Commission, there were missions for electoral observation in Eastern European countries and Latin-America. The first mission was in Georgia and the last one in Armenia. The observations in Azerbaijan caused a reaction from the Committee of Ministers of the Council of Europe. On this mission, Azerbaijan did not acted on par with the recommendations formulated on September 24th , 2015 where elections therein were carried with systematic arbitrariness and fraudulent practices from 2008 to 2010.

37. Mexico participated in the joint opinion with the Commission in regard to the Electoral Code of Georgia (Opinion 617/2011). The opinion was approved on the 19th of December, 2011. The exhaustive analysis from the Commission and Mexico recommended the following: 1) eliminate restrictions that hindered voter's rights, 2) correct electoral district formation to guarantee equal suffrage, 3) diminish residency requirements for candidates, 4) correct the vices that were found in the regulation of the parties and, lastly, 5) facilitate voters' feedback (e.g. complaints and appeals).[18]

38. The favorable reaction of Georgia on their October 2012 parliamentary election culminated to a successful democratic transition. Former President Mikheil Saakashvili was replaced after nine years in office to Bidzina Ivanishvili, where the later was supported by a six party coalition.

39. Afterwards, on March, 14th 2016, the Commission issued opinion 834/2016 in regard to the amendments of the electoral Code of Georgia. The opinion shaped the electoral redistricting to protect equal suffrage.

40. In the opinion 749/2014, the Commission ruled on an electoral reform which was presented to the Moldovan Parliament. The reform converted the country to a mixed electoral system, it also delt on the autonomous territories of Gagauzia and Transnistria in particular, within the particular limits of Moldova.[19]

41. In the opinion 848/2016 referred particularly to presidential elections regulated in the Electoral Code of Moldova. The reforms undertaken lacked precision in regard to

against humanity, for instance: Touvier and Papon in France, Bouterse in the Netherlands, Kolk and Kyslyly in Estonia, Demjanjuk in Germany, Pinochet in Spain, Belgium and Great Britain in addition to several more cases as the exoneration of Luis Echeverría in Mexico and the exoneration of Henry Kissinger in the United States.

[18] CDL-AD (2011) 043

[19] Opinion CDL-AD(2014)003 was issued on March 24th 2014.

annulment in the instance of insufficient number of voters (Article 114 of the analyzed code). Moreover, the article lacked clarification on the recall of presidential elections, whose causes were poorly defined within the code. Finally, the residence requisite was very prolonged and it should be eliminated in order to guarantee universal suffrage.[20]

42. The principles entailed in the Moldova opinion were also applied to several electoral legislations from different countries, including Mexico, by which electoral legislation is not allowed to be reformed in less than one year before conducting elections in order to keep legal certainty in their respective electoral process.[21]

43. The multiplicity of electoral codes can be an obstacle towards the clarity of electoral principles. Despite the abundance of regulation, it may be flawed in guaranteeing fundamental principles of the electoral process. For example, the opinion that was detailed on the December 2011 elections of the Duma in Russia,[22] lacked the establishment of neutrality towards the electoral authorities.

44. The Venice Commission considered on the Law in regard to "massive" events in Belarus. This opinion was due to the reprisal conduct of Belarussian police towards peaceful protests during political meetings.

45. The principle of electoral equality was introduced to the Mexican Constitution within Article 134. The opinion of the Venice Commission highlighted the unlawful utilization of administrative resources in the elections (CDL-REF(2012)025rev). The aforementioned report was adopted in the session of December 6th and 7th of 2013, where it offered an initial new normative framework ad hoc for Mexico.[23]

[20] CDL-(2016)021 27 May 2016.

[21] The aforementioned principle applied in Mexico was the Code of Good practices for electoral matters. CDL-AD(2002)023rev and CDL-AD(2005)043.

[22] 657/2011 Opinion on Federal Law in the representative elections [author check] to the DUMA, Rusia on the 19th of March 2012.

[23] Manuel González Oropeza, Johan Hirscfeldt, Oliver Kask y Serhii Kalchenko. *Report on the Misuse of Administrative Resources during Electoral Processes.* Venice Commission. 2015. 56 p.