



Presidency of Ireland  
Council of Europe  
May - November 2022  
Présidence de l'Irlande  
Conseil de l'Europe  
Mai - Novembre 2022



Strasbourg, 11 Octobre 2022

**CDL-PI(2022)037**  
Engl.only

**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**In co-operation with**

**OSCE/ODIHR**

**and**

**THE PRESIDENCY OF IRELAND OF THE COMMITTEE OF MINISTERS  
OF THE COUNCIL OF EUROPE**

**International round table**

**CIVIL SOCIETY:  
EMPOWERMENT AND ACCOUNTABILITY**

**Council of Europe, Strasbourg  
Tuesday, 13 September 2022**

**(Hybrid format)**

**CONCLUDING OBSERVATIONS**

**by**

**Mr Kaarlo TUORI**

**Honorary President of the Venice Commission  
Professor of Jurisprudence, Department of Public Law,  
University of Helsinki**

## Concluding observations

I want to make three points: about checks and balances, globalization and transparency.

1.

First about checks and balances. The rule of law backsliding which we have been observing in some CoE and EU member states and which has in recent years occupied so much the Venice Commission has also been democracy back-sliding. The two aspects can hardly be separated. One of the common, unifying elements in democracy and the rule of law is a system of checks and balances. The last ten years or so have taught us how crucial checks and balances are for democracy; that democracy cannot be reduced to majoritarian decision-making and that the-winner-take-all is not a democratic principle. Democracy necessitates independent, non-majoritarian institutions, which discipline majoritarian decision-making and keep the prerequisites for democracy intact. At the same time, non-majoritarian institutions such as an independent constitutional court and an independent ordinary judiciary, are an indispensable element of the rule of law, too. Regularly, the first steps in democratic and the rule of law black-sliding have consisted of attacks at the independence of the constitutional court and the ordinary judiciary.

However, checks and balances, necessary for both democracy and the rule of law, should not be approached merely from the point of view of inter-institutional relations between state bodies. A functioning and efficient system of checks and balances also includes non-institutional actors which contribute to controlling and restricting majoritarian political decision-making: primarily free press and an independent and robust civil society with its NGO's and social movements. In a democratic state, civil society organizations are not only a vital for society-large debates on important legislative project and an inclusive law-making process, the importance of which the Venice Commission has also emphasized in its Rule of law checklist, but also for the system of checks and balances.

So, let us not forget the pertinence of an independent and active civil society as a leg of the system of checks and balances, crucial for both democracy and the rule of law. This is my first point.

2.

Then about globalization. Globalization – or, to use a less pretentious term, denationalization – is not only about economy, culture and law; it is also about civil society. Civil society too is in the process of globalization or denationalization: Amnesty International, Human Rights Watch, Helsinki Committees, Greenpeace, Greta Thunberg ... The reason for this development is obvious: the issues which NGOs and social movements tackle, to which they want to draw the attention of both global decision-makers and the global public, and to whose resolution they want to contribute, are increasingly of a cross-border nature: climate change, cross-border pollution, preservation of indigenous cultures, refugee and immigration crises, human rights violation. To restrict the activities of transnational civil society by, for instance, labeling local associations of transnational NGOs "foreign agents", is to deny the obvious: to deny the cross-border character of the major issues facing present and future decision-makers, and the important contribution of transnational civil society both to enhancing awareness of these issues and to providing proposals for solving them. It is also important to note that transnationalization extends to human rights violations, which no longer can be treated as purely internal matters. Indeed, post-World-War-II international human rights instruments testify to the cross-border character of human rights abuses.

It is contradictory for a state to remain signatory to international human rights treaties and, by the same token, to impose restrictions on transnational NGOs which also react to the cross-border nature of human rights violations and participate in monitoring observance of these treaties. This is my second point.

3.

Finally, about transparency. I am concerned about the turn the debates on the funding of NGOs and on auditing their finances has taken. I am concerned both about the application of the term “transparency” to civil society organizations and about the description of finding the optimal middle way between civil society independence and state monitoring as balancing. “Transparency” is related to control. If the transparency of state bodies, their activities and their financial arrangements is increased, the possibilities of civil society – both NGOs and individual citizens – to keep watch over public power and its wielding are increased as well. Applying “transparency” to civil society organizations reverses the relationship of control: civil society organizations are made “transparent” for auditing and controlling state bodies.

“Transparency” has a positive connotation, and the use of the term tends to shift the burden of proof to those who oppose increased “transparency” of civil society organizations and, correspondingly, increased possibility for state bodies to monitor these organizations. But this does not work, or at least should not work. What should be the starting point and the main principle in the relationship between civil society and state bodies is not “transparency”, facilitating control of the former by the latter, but external *and* internal autonomy, including confidentiality in matters concerning internal organization, membership and financing. Legally speaking, this starting point derives from the right of association, guaranteed both by international human rights instruments – such as the European Convention on Human Rights and the UN Covenant on Civil and Political Rights – and also involving the dimension of internal autonomy. In the context of civil society organizations, what should be justified is not limitations to “transparency” but limitations to internal autonomy and confidentiality, in exactly the same way as every limitation to a fundamental and human right is in need of a justification, and not the right to be limited itself. In turn, the image of “balancing” implies two approximately equal principles – a principle and a counter-principle – which in a given situation must be weighed against each other. But this is not the constellation when we discuss potential justifications – other than other rights! – for restricting a particular fundamental and human right.

Let me make a proposal which may sound radical but which, so I think, is strongly warranted. Let us stop talking about “transparency” in the context of civil society organizations. “Transparency” belongs to the vocabulary favoured by those who want to impose impediments to the free functioning of organizations which are indispensable for an efficient system of checks and balances, and which often possess a transnational character. Adoption of this vocabulary by institutions and organizations whose task is to promote respect for fundamental and human rights, as well as democracy and the rule of law, entails the danger of abandoning the line of argument which arises from the way international human rights instruments treat rights and limitation to these rights.

This is my third and final point.