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VII.A.6 Guaranteeing Electoral Democratic Standards: The Venice Commission and “The Code of Good Practice in Electoral Matters”

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1. *Background*

Within the framework of Council of Europe (CoE) standard-setting activities, more than 200 international treaties have been opened for signature in order to harmonize the laws and legal systems of its member states in various fields.

Standard-setting through soft-law instruments has also been pursued by a specialized body of the CoE, the European Commission for Democracy through Law, better known as the Venice Commission (hereinafter, “the Commission”), which has made a strong contribution, both outside and within the European states’ borders, to the promotion of those “ideals and principles which are [the CoE’s member states] common heritage” (Article 1, Statute of the Council of Europe).

The Commission functions as the advisory body of the Council of Europe on constitutional matters. Created in 1990, the Commission’s first aim was to offer, by acting as a high-level forum for constitutional and legal dialogue, technical support to the Central and Eastern European states, who were then facing a delicate phase of democratic transition.

According to the revised Statute, the Commission’s “specific field of action shall be the guarantees offered by law in the service of democracy”. In particular, its efforts are aimed at “strengthening the understanding of the legal systems of the participating states, [...] bringing these systems closer; promoting the rule of law and democracy; examining the problems raised by the working of democratic institutions and their reinforcement and development” (Art. 1.1). The Commission must give priority to work concerning “the constitutional, legislative and administrative principles and techniques which serve the efficiency of democratic institutions and their strengthening, as well as the principle of the rule of law; fundamental rights and freedoms, notably those that involve the participation of citizens in public life; the contribution of local and regional self-government to the enhancement of democracy” (Art. 1.2).

The Commission was established in 1990 as a partial agreement of the Council of Europe (just 18 members of the CoE participated in its creation).

Within a few years, the remaining states of the current 47 members of the Council of Europe joined the Commission. In 2002, it became an “enlargement agreement”, thus opening the door to membership for non-European countries as well. Today, the Venice Commission is much more than a regional actor, counting among its 58 members many non-European countries as Kyrgyzstan, Chile, the Republic of Korea, Morocco, Algeria, Israel, Peru, Brazil, Tunisia, Mexico and Kazakhstan.

Inspired in its work by the pillars of the Council of Europe and principles of “Europe’s constitutional heritage” (i.e. democracy, human rights and the rule of law), the three key areas of the Commission’s work relate to: constitutional assistance; elections, referendums, and political parties; and co-operation with constitutional courts and ombudspersons. The Commission’s activities, although primarily focused on co-operation with single states, also includes transnational activities, comparative studies and international seminars.

Consistent with its origins as a body dedicated to constitutional engineering, the Venice Commission has since its creation been active in the electoral field, in particular in assisting many Eastern European states during the elaboration of their electoral legislation. Typically, national authorities submit draft laws to the Council’s experts for evaluation before final adoption, in order to receive advice during the elaboration phase and to reduce the likelihood of criticism in the course of later monitoring. In this way, expert technical guidance has helped ensure the consistency of Eastern Europe’s electoral laws with European standards. Countries like Albania, Armenia, Azerbaijan, Georgia, and Ukraine have regularly benefitted from the Commission’s assistance.

Since 2002, the active engagement of the Venice Commission in electoral matters has been confirmed by the creation of the Council for Democratic Elections (CDE), made up of representatives of the Venice Commission, the Parliamentary Assembly of the Council of Europe (PACE) and the CoE’s Congress of Local and Regional Authorities.

The first goal of the Council for Democratic Elections was to adopt a Code of Good Practice in Electoral Matters, (complemented, since 2007, by a specific Code of Good Practice on Referendums and since 2008, by a Code of Good Practice in the Field of Political Parties). This document was intended to define not only the fundamental standards of the European electoral heritage and traditional constitutional principles of electoral law, but also the framework conditions necessary for the implementation of those principles.

2. Materials

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3. *Analysis*

The Code of Good Practice in Electoral Matters (hereinafter, “the Code”) is – along with the concise “right to free elections” contained in Article 3 of the first Additional Protocol to the European Convention on Human Rights – the reference document of the Council of Europe in this area. The Council for Democratic Elections and the Venice Commission, following an explicit request by the Parliamentary Assembly, adopted it in 2002.

The Code of Good Practice in Electoral Matters introduces into the CoE legal framework the concept of “European electoral heritage”. This concept stems directly from the notion of European Constitutional heritage (Venice Commission, 1996) and consists of those principles and legal standards shared by the constitutional traditions of the European countries in relation to electoral matters. The definition of the “European electoral heritage” has helped to lend some consistency to the general and often vague concept of “free and fair elections” adopted in several international instruments.

The “Guidelines on elections” included in the Code are divided into two sub-sections: the first is dedicated to the “Principles of Europe’s electoral heritage”, and the second to the “Conditions for implementing these principles”.

The introductory sentence of the Guidelines, which captures the essence of the European electoral heritage, states that: “[t]he five principles underlying Europe’s electoral heritage are universal, equal, free, secret, and direct suffrage”, to which is also added the principle of holding elections at regular intervals.

The universal suffrage rule states that, in principle, “all human beings have the right to vote and to stand for election” (Art. 1.1). Conditions related to age, residence, and nationality may be imposed, although the orientation of the Commission is towards an inclusive idea of democracy not based on a strictly national electorate. In line with the provisions contained in the Convention on the Participation of Foreigners in Public Life at Local Level adopted in the CoE framework in 1992, the Code advises allowing foreigners to vote in local elections after a certain period of residence (note here that the essentially “political” right to vote is treated as a human right *tout court*, enjoyment of which is not limited, at least at the local level, to citizens alone).

According to the Code, the equal suffrage rule entails equality in voting rights (the “one person-one vote” principle, Art. 2.1); equality of voting power (seats must be fairly distributed between the various constituencies at least for the lower house of parliament and for regional and local elections, with a partial exception for the purpose of protecting national minorities, Art. 2.2); equality of opportunity (equality before state authorities of candidates, including those with disabilities, and parties, Art. 2.3); equality and national minorities (parties representing national minorities must be permitted and can be subject to special and more favorable rules of representation, Art. 2.4); and equality and parity of the sexes (if foreseen by a *constitutional provision* quotas for candidates based on gender should not be considered in contrast with the principle of equal suffrage, Art. 2.5).

The rule of free suffrage (Art. 3) has two distinct and interconnected aspects. On the one hand, it entails the voters’ right to freely form an opinion *before* the elections; on the other, it outlines the means of expressing that opinion *through* the electoral process. To fulfil the first of these conditions, the Code imposes a general duty of neutrality on public authorities. The duty of abstention has particular relevance with regards to the media, billposting, the right to demonstrate, and funding of parties and candidates, areas potentially prone to the influence of state authority. The Code further adds a non-exhaustive list of positive obligations for the state to fulfil in order to allow voters to form their opinions (e.g. to present the candidatures received to the electorate and to enable voters to know the lists of candidates standing for elections; this also includes adequate attention being paid to respecting the linguistic rights of minorities).

In order to ensure that voters are able to express their opinion *through* the electoral process, voting procedures must be simple (Art. 3.2.i). The general rule states that voters should be able to vote in a polling station (postal and electronic voting should be used only if “safe and reliable”, while postal voting may be limited to people who are hospitalized or imprisoned and to those electors residing abroad). Polling stations must include representatives of a number of parties and the presence of observers must be allowed during both the voting and counting phases. During the latter, a media presence must be permitted. The state has a positive obligation to punish any kind of electoral fraud (Art. 3.2.xv).

The fourth element of a democratic election is secret suffrage (Art. 4), described in the Venice Commission’s Code as “a right but also a duty”, subject to sanction in case of violation. Voting must be individual, and the exercise of any form of control by one elector over another must be prohibited. Furthermore, at least one of the chambers of the national parliament, as well sub-national legislative bodies and local councils, “must be elected by direct suffrage” (Art. 5).

The frequency of elections is clearly stated as an element of the European electoral heritage. Elections must be held at regular intervals, which, for “a legislative assembly’s term of office must not exceed five years” (Art. 6).

These six articles summarize the interpretation given by the Venice Commission to “the European electoral heritage”. In the second part, the Code suggests the necessary “Conditions for implementing these principles” in a more active way.

The opening article of this second part recognizes “[r]espect for fundamental rights” as a pre-condition for any viable democracy: “[d]emocratic elections are not possible without respect for human rights, in particular freedom of expression and of the press, freedom of circulation inside the country, freedom of assembly and freedom of association for political purposes, including the creation of political parties” (Art. 1.a). As in the corresponding provisions of the European Convention on Human Rights (Arts. 10 and 11, and Art. 2 of Protocol No. 4), any restrictions of these freedoms must have a basis in law, be in the public interest, and respect the principle of proportionality.

Article 2 introduces the principle of the “stability of electoral law”. The explanatory report that accompanies the Code describes the “[s]tability of the law [as] crucial to [the] credibility of the electoral process, which is itself vital to consolidating democracy”. Among the possible ways to implement this principle, the Code suggests the option of enshrining the electoral system within the Constitution.

However, it would seem that this solution was not universally accepted. Mr. Lopez Guerra, a member of the Commission, in the initial comments on “*le patrimoine électoral européen*”, pointed out that “a Constitution cannot be an electoral Code”; and, even more interestingly, Georges Vedel, rapporteur at one of the first UniDem (Universities for Democracy) seminars organized by the Venice Commission in Istanbul in 1992, warned against the temptation to insert electoral choices in Constitutions, especially in the case of young democracies: “*Il serait imprudent de donner au choix d’un mode de scrutin, même en principe, une valeur constitutionnel. [...] En raison de l’imprévisibilité des résultats conjoncturels et structurels [...] il faut se réserver la possibilité de corriger rapidement les « effets pervers » et donc inattendues du système mis en place. C’est pourquoi [...] il sera sage de laisser le mode de scrutin dans la compétence du législateur ordinaire.*” [“it would be imprudent to imbue the choice of electoral system with constitutional value, even in principle. Indeed, because of the unforeseeability of the cyclical and structural results [...] it is essential to keep open the possibility of rapidly correcting any ‘perverse’ and therefore unexpected effects of the existing system. For this reason, it is wise to leave the electoral system to the ordinary legislature.”]

“Procedural guarantees” complete the conditions for implementation of the European electoral heritage (Art. 3): i.e. the impartiality of the body organizing elections and applying electoral law, with specific reference to the central electoral commission (Art. 3.1); the possibility for national and international observers to participate in an election observation cycle (Art. 3.2); and the presence of an effective system of appeal for electoral matters (Art. 3.3).

The Code concludes by stating: “[w]ithin the respect of the above-mentioned principles, any electoral system may be chosen” (art. 4).

The Code was approved by the Parliamentary Assembly and the Congress of Local and Regional Authorities of the Council of Europe in 2003.

The following year, the Code received the solemn endorsement of the Committee of Ministers, who established the relevance of its standards within the CoE framework: “[n]oting with satisfaction the adoption by the Venice Commission of the Code of Good Practice in Electoral Matters and its subsequent approval by the Parliamentary Assembly and the Congress of Local and Regional Authorities of the Council of Europe”, the Committee recognizes “the importance of the Code of Good Practice in Electoral Matters, which reflects the principles of Europe’s electoral heritage, as a reference document for the Council of Europe in this area, and as a basis for possible further development of the legal framework of democratic elections in European countries”; and “[c]alls on governments, parliaments and other relevant authorities in the member states to take account of the Code of Good Practice in Electoral Matters, to have regard to it, within their democratic national traditions, when drawing up and implementing electoral legislation and to make sustained efforts to disseminate it more widely in the relevant circles.”

4. *Issues: The Delicate Role of Global Technical Bodies in Setting National Democratic Standards: the Venice Commission between Técnica and Politeia*

Since its creation, the Venice Commission has exercised the crucial function of promoting constitutional harmonisation on the European continent. Particularly during the transition phase in Eastern Europe, it has, through its constitutional assistance activities, exercised significant influence over the internal legal orders of the new member states, and has contributed to spreading standards of democracy, human rights and the rule of law, based on the notion of the “European constitutional and electoral heritage”.

Despite its undeniable success in improving the democratic and human rights guarantees in the assisted countries, the role of the Venice Commission in

setting democratic standards, especially in the electoral and constitutional domains, raises several questions.

Firstly, is it possible to affirm that setting national democratic and electoral standards is purely a technical matter?

The Venice Commission has always been very careful in presenting its role as a merely technical one. Those participating in the Commission are “independent experts who have achieved eminence through their experience in democratic institutions or by their contribution to the enhancement of law and political science” (Art. 2, Revised Statute of the Venice Commission).

These elements of expertise and neutrality have been a trademark of the Commission’s work and a strong component of its success. Nevertheless, constitutional and electoral matters touch the *sine qua non* of any democracy, that is to say, its legal foundation and decision processes. Assisting in the drafting of a third state’s constitutional and electoral choices, or supervising the process of adoption of these choices (which implies being in charge of suggesting which constitutional or legislative solutions to adopt or exclude in a given legal order, among all the acceptable options), are, by definition, activities that involve more than mere “legal engineering” skills.

Secondly, is it possible to affirm that the principles and provisions contained in the Code of Good Practice in Electoral Matters are irrefutable legal standards?

In several sections, the Code sets forth detailed prerequisites for meeting the requirements of the European electoral heritage; however, at least two of these conditions appear more questionable than their presentation as legal standards would suggest. The requirement of a constitutional provision for making gender-based quotas legitimate and compatible with the principle of equal suffrage, and the principle of “stability of electoral law” (in the section suggesting the suitability of constitutional entrenchment of the electoral system) are particularly controversial, and find as many critics as supporters among European legal scholars. Furthermore, very different solutions to these issues can be found in the national constitutional traditions of CoE member states.

The Code is not merely a catalogue of shared principles in electoral matters prevailing on the European continent, but it also includes an important element of *de lege ferenda*. However, the absence of wider consensus seems problematic in relation to the Code’s goal of setting out the fundamental standards of the European electoral heritage, i.e. those “standards *recognized*” in the European continent. Is it still possible to speak of minimal, recognized, legal standards in the absence of a clear, shared position on a given legal problem among the nations involved, or within the diverse member states’ legal traditions?

Finally, is it not a paradox that, since its creation, a technical and non-representative body like the Venice Commission has been charged with setting constitutional and electoral standards for national governments aspiring to be democratically accountable?

This is a tricky question. The contemporary tendency has been towards an increased integration between the global legal space and national legal systems. Globalization, which is increasingly blurring states' borders, has made them progressively more permeable to international and supranational influences, weakening the classic dogmas of state sovereignty. Democracy stands in an ambiguous relation to this process. On the one hand, over the course of history, it developed in the political and legal framework of the nation-state, which remains today its only viable (although considerably weakened) setting. On the other hand, since 1989, democracy has acquired, in a "bottom up" process, an ideal global dimension that has made it an increasingly "universal value" (Sen 1999). Since then, the presence of a democratic form of government has been recognized as one of the better guarantees of human rights and international peace, and as a key element of economic development. On this basis, in a "top down" process, numerous states, international bodies and organizations have included democracy promotion among their main external goals. This process, given the absence of a "global scale democracy", poses theoretical challenges to classic democratic theory, and in particular to the principles of popular sovereignty and self-government. Nonetheless, in the case of technical legal bodies like the Venice Commission, this may be less of a problem in light of at least two considerations.

First, the approach of the Commission towards public authorities is typically a non-directive one. Its opinions are not legally binding on national governments, and are mainly aimed at establishing a "persuasive dialogue" between international experts and national authorities towards a shared sense of the best constitutional, or legislative, result.

Second, on the European continent, the democratic principle has always been interpreted in a counter-majoritarian sense. The "incomplete [democratic] ideal" (Walker 2010) is enhanced and limited by human rights and rule of law categories in the understanding of both the CoE and EU (to which their democracy-promotion activities bear witness).

The Venice Commission seems, like many other technical international bodies involved in setting democratic standards (especially in the electoral and constitutional domains), destined to move between the realms of *téchne* and *politeia*. However, the contemporary practice of technical bodies setting global or regional standards for national authorities does not seem to represent a real threat to democracy. On the contrary, global bodies, as the Venice Commission's

experience demonstrates, often have the capacity to enhance citizens' involvement in their own national decision-making processes and to harmonize different legal traditions, favouring, in the final analysis, the empowerment of the people.

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