

VENICE COMMISSION
30TH ANNIVERSARY
1990 - 2020



COMMISSION DE VENISE
30^{IÈME} ANNIVERSAIRE
1990 - 2020



VENICE COMMISSION

THIRTY-YEAR QUEST
FOR DEMOCRACY THROUGH LAW

1990 – 2020

COMMISSION DE VENISE

TRENTE ANS DE RECHERCHE
DE LA DÉMOCRATIE PAR LE DROIT

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FOREWORD

« Il n'est pas indifférent que le peuple soit éclairé. Les préjugés des magistrats ont commencé par être les préjugés de la nation. Dans un temps d'ignorance on n'a aucun doute, même lorsqu'on fait les plus grands maux; dans un temps de lumière, on tremble encore lorsque l'on fait les plus grands biens. On sent les abus anciens, on en voit la correction ; mais on voit encore les abus de la correction même. On laisse le mal, si l'on craint le pire; on laisse le bien, si on est en doute du mieux. On ne regarde les parties que pour juger du tout ensemble ; on examine toutes les causes pour voir tous les résultats. »

Montesquieu, De l'esprit des lois

On 10 May 2020, the Venice Commission celebrated its 30th anniversary amidst a terrifying pandemic that prompted governments to declare a state of emergency and order lockdowns. Entire populations found themselves at home, afraid to die of this unknown disease. With the lockdown came extraordinary human rights restrictions, growing inequalities, inflated executive powers, diminished parliamentary oversight and a looming economic crisis. Democracy as we knew it, suddenly became unrecognisable. In its 30 years of existence, the Venice Commission regularly pondered whether its work was done and its 62 member States no longer needed its assistance. But new challenges keep emerging and the Commission's ultimate quest for democracy through law will continue to keep it busy.

Simona Granata-Menghini,
Acting Secretary of the Venice Commission, September 2020



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SECTION II

KEY TEXTS

FINAL DECLARATION OF THE CONFERENCE DEMOCRACY THROUGH LAW
10 APRIL 1989

RESOLUTION
ADOPTED BY THE CONFERENCE FOR THE CONSTITUTION OF THE
COMMISSION FOR DEMOCRACY THROUGH LAW
19-20 JANUARY 1990

VENICE COMMISSION STATUTE – RESOLUTION (90)6

REVISED VENICE COMMISSION STATUTE – RESOLUTION (2002)3

KEY FACTS / CHIFFRES CLÉS



STATEMENT BY GIANNI BUQUICCHIO
PRESIDENT OF THE VENICE COMMISSION

ON THE OCCASION OF THE
30TH ANNIVERSARY
OF THE ESTABLISHMENT OF THE COMMISSION

On 10 May 1990, eighteen ambassadors of Council of Europe member States took the decision to establish the European Commission for Democracy through Law, better known as the Venice Commission. What looked at the time like the creation of just another technical advisory body proved to be an event of major significance for the development of the rule of law and democracy in Europe and beyond.

In the 30 years of its existence, the Venice Commission:

- Played a major role in the preparation of the constitutions of the new democracies in Central and Eastern Europe, ensuring their compliance with international standards;
- Accompanied these and many other countries during their constitutional and legislative reforms;
- Has become a main reference with respect to the development of international standards on the rule of law, democracy and the respect for human rights;
- Has acquired a capital of trust in many societies, making its support crucial for public confidence in reforms;
- Assisted a large number of countries in fulfilling membership requirements of the Council of Europe and the European Union;

- Contributed to the establishment of constitutional courts in many countries and established a worldwide network of constitutional courts with 117 member courts;
- Reviewed a large number of laws, ensuring their compliance with international standards and, in particular, the European Convention on Human Rights;
- Developed standards for the holding of democratic elections and contributed to electoral reforms;
- Has become a partner of the countries in the Southern Mediterranean and Central Asia in their constitutional and legal reforms;
- Increased its membership to 62 countries, thus becoming a forum for worldwide constitutional dialogue.

Despite this success, many challenges remain and the current Covid-19 crisis reminds us that progress is never irreversible. We must safeguard pluralistic democracy and prevent its degeneration into an authoritarian regime, where the winner takes all.

In my view, the Commission is needed now more than ever before, to defend and promote, in partnership with the organs of the Council of Europe and the European Union:

- Respect for the rule of law and, in particular, the independence of the judiciary;
- Checks and balances within a functioning democratic system;
- Free and fair elections;
- Respect for human rights, including in emergency situations.

30TH ANNIVERSARY OF THE
VENICE COMMISSION
1990–2020



SECTION I
CONTRIBUTIONS
MEMBERS AND FORMER MEMBERS¹

¹ The articles in this book were prepared by the authors in their personal capacity and do not necessarily reflect the official position of the Venice Commission or the Council of Europe.

AN EXAMPLE OF THE CONTRIBUTION OF THE VENICE COMMISSION TO THE EUROPEAN CONSTITUTIONAL HERITAGE: TRANSPARENCY OF POLITICAL PARTIES' FINANCING



I. The European constitutional heritage and the Venice Commission

On many occasions, critics of the European integration have pointed out that our continent falls short of the structural elements which keep political entities together, because history, culture and languages are too different to support more unity between states and peoples. Perhaps this opinion was true in the nineteenth century, in a Europe divided into sovereign states which were frequently at war with one another. However, the criticism is not appropriate either for the most remote past or for the present.

One of the most recent examples of the links between European countries is the European constitutional heritage. This notion is relatively new, because it began to gain influence during the eighties of the last century. It must be stressed that this is not the first time that Europe has spoken a common juridical language. After the bizarre “rediscovering” of the Justinian’s Digest in the twelve century in the Italian city of Amalfi and during many centuries, several countries – from Spain to Germany – shared the old Roman law which was mainly based on opinions and topics made up by jurists from the first century B.C. to the third century A.D. This common law was in use in many parts of Europe until the codification of civil law which began in France only in the aftermath of the French Revolution.

However, there are many differences between these old forms of Roman common law and the new European constitutional heritage. The main distinction is that the European constitutional heritage not only concerns the relationships between citizens, but also the relationship between political power and citizens. Furthermore, the new “common law” regulates these relationships taking into account the values and principles inherent to democracy, Rule of Law and respect for fundamental rights.

Hanna Suchocka has explained that the need to rediscover the common constitutional heritage became a kind of “founding myth” in the

¹ Substitute Member of the Venice Commission in respect of Spain.

new democracies in Central and Eastern Europe. After the fall of the Berlin wall, the restoration of constitutional tradition led to identify the principles which were inherent to European democracy and the antithesis of those existing under communist rule. The main challenge was to recuperate the original meaning of principles such as human dignity, separation of powers, political pluralism, independence of the judiciary and constitutional justice, which in the systems of real socialism had the same name but a completely different meaning.²

Thus, the constitutional heritage is neither an aseptic notion nor the result of the plain comparison between constitutional models. Although the constitutional heritage derives from the comparative experience, it adds strong ideological components. It assumes that the principles and institutions which characterized constitutional states are exigencies linked to human dignity, and the ground and goal of any political organization.

These beliefs are the same which had previously led to the creation of the Council of Europe which emerged for strengthening the unity between its member States and for promoting the ideals and principles that are precisely their common heritage.³ These convictions later inspired Article 2 of the Treaty of the European Union. This precept is a good example of the difference between the new political integration and the mere economic integration which had characterized the old three Communities. To this end, Article 2 enumerates the values that are the foundations of the Union, values which are “common to the member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”.

It is always possible to argue that these ethical aspects add political components to the constitutional common heritage and limit its juridical force. This criticism can be countered by recognizing that values are general and, for this reason, imprecise on certain occasions. However, values such as the above quoted can be used for the interpretation of national and international law because they give a more precise content to other norms. Furthermore, the European heritage not only serves at the moment of setting up new constitutions, but also as a parameter for evaluating if a state complies with the exigencies of democracy.

² Venice Commission, CDL-PI(2016)017, Constitutional Heritage and the Form of Government, Conference on Global Constitutional Discourse and Transnational Constitutional Activity.

³ Statute of the Council of Europe, Article 1.

The contribution of the Venice Commission to the construction of the constitutional heritage is beyond dispute. The impact of the work of the Commission comes from different sources. Firstly, it stems from the codes and reports adopted on issues such as independence of the judiciary, Rule of Law, electoral matters and political parties. It is true that, neither in these texts nor in other similar documents, the Venice Commission tries to be exhaustive, because many of them deal with very specific matters as, for example, constituency delineation and seat allocation⁴. It is also true that, in certain cases, these documents contain only minimum standards or principles which are very general. In spite of this appearance, this type of texts contains ideas which can be useful for facing hard cases or taking a position in matters which divide public opinion inside member States. Furthermore, the support of an independent and technical institution such as the Venice Commission can serve as an argument of authority for supporting solutions consistent with the European constitutional heritage.

Secondly, the influence of the Venice Commission comes from the opinions that the institution gives to the states that ask for advice in case of legal or constitutional reforms. On such occasions the work of the Venice Commission is apparently concrete because it results in specific recommendations aimed at improving national norms. However, the Commission also identifies the parameters which lead to its conclusions and, in doing so, it indirectly specifies the principles and the criteria that make up the constitutional heritage.

Frequently the opinions infer those elements from the jurisprudence of the European Court of Human Rights and international treaties or from the comparison of the Constitutions of the member States. It is true that, on certain occasions, the analysis of the Commission concludes that there are no European standards on the issues. Nevertheless, the opinion can face this lacuna thorough considerations of constitutional opportunity.

This was, for example, the case of the opinion on the reform of the Law on the Spanish Constitutional Court, which was very polemic in this country because it granted new powers to the Tribunal for executing its own decisions. The opinions recommended a change of the Law because, although there are no international standards on the issue, “in a system of separation of powers, the division of competences of adjudicating on the one hand, and of executing its results, strengthens the system of checks

⁴ Venice Commission, CDL-AD(2017)034, Report on Constituency Delineation and Seat Allocation.

and balances as a whole, and in the end, also the independence of the Constitutional Court as a decisive factor of the Rule of Law”.⁵

There are many other examples of the way by which the Venice Commission contributes to the construction of the European constitutional heritage. However, one of the most interesting is its contribution on transparency of political parties’ financing. It is true that perhaps the Venice Commission has analysed, in more depth, other matters also related to these political parties, issues such as freedom of association, structure or membership. However, transparency is a burning issue in democracies where cuts of the public spending have coincided with the explosion of major corruption scandals in which political parties or its members are involved.

II. From accountability to transparency

There are arguments for sustaining that the origins of the principle of transparency are as old as the Aristotelian Greece or the Chinese Empire. However, in the case of the financing of political parties, there is no need to go back that far. When analysing this issue, it is convenient to divide the evolution of transparency in two phases.

The first one started at the early 1990’s, that is, when countries began to regulate the income and the expenditures of political parties. In those years, the main worry was the “equality of arms” in the electoral contest, which led to establishing forms of public financing and limits to the expenses of political parties, especially during the electoral campaign. It was also the time of spectacular scandals which shook many countries, such as Italy, Germany, France and the United States. According to J. Robert, the previous lack of rules on financing meant that anything was permitted. As funds raised thorough the collection of membership fees were not enough to cover expenses, and no form of public funding was provided, each party had to find its own resources. In several countries the outcome was widespread reliance on dubious, undercover financing practices.⁶

The idea of transparency began to take shape precisely to confront these problems. The Guidelines and report on the financing of political parties adopted by the Venice Commission in 2001⁷ is a remarkable document

⁵ Venice Commission, CDL-AD(2017)003, Opinion on the law of 16 October 2015 amending the Organic Law No. 2/1979 on the Constitutional Court, para. 53.

⁶ Venice Commission, CDL-INF(2001)008, Report by Mr. Jackes Robert on the Financing of Political Parties.

⁷ Venice Commission, CDL-INF(2001)008, Guidelines and Report on the Financing of Political Parties.

on the issue. This text, and the laws which several states began to pass in those years, recommended that political parties disclose their accountability to citizens in order facilitate the knowledge of the internal situation of the parties without intermediaries. However, although these references are significant, they are scarce and quite general. For example, the Guidelines only recommend the publication of campaign accounts in order to achieve the transparency of electoral expenses.⁸

In those early years, the main way to ensure the effectiveness of transparency was the duty of political parties to provide detailed reports on their income and spending to specialized bodies, such as the court of auditors, parliamentary bodies, electoral commissions or even to constitutional courts. These institutions have the obligation of analysing the consistency of these accounts and informing on the result of their audits to parliament, and in certain cases, to citizens. This model of transparency is coherent with the eminently representative character of democracy. According to it, the principal way of accountability is not to inform citizens directly, but to report through institutions that are elected and are responsible to citizens.

This model began to be challenged after the economic crisis that broke out in 2007, which endangered the legitimacy of institutions and called to claim new forms of direct participation. Citizens do not settle for the control carried out in their name by specialized institutions, because they do not trust the independency of their delegates. On the contrary, citizens claim their right to access the information directly in order to personally check the source and the use of funds handled by political parties. In short, citizens not only distrust intermediaries in the ascendant phase of democracy (that is, in the decision making process), but also in the descendant one, that is, in the exigency of responsibility. New technologies and the infinite possibilities offered by the internet play also in favour of these demands.

III. Some exigencies of transparency

The Venice Commission was sensitive to these new challenges and demands.

Firstly, the Plenary approved the Code of Good Practices in the Field of Political Parties⁹ in 2009. It was aimed “to reinforce political parties’ internal democracy and increase their credibility in the eyes of citizens”, and it was directly addressed to political parties, offering a repertoire of principles

⁸ *Ibidem*, para. 12.

⁹ Venice Commission, CDL-AD(2009)021, Code of Good Practices in the Field of Political Parties and Explanatory Report.

and values that does not have a mandatory character and does not require enforcement from public authorities. As the introduction of the Code says, “the only possible compulsory interpretation derives from what political parties and their members must do in following the law”.¹⁰ Secondly, the Venice Commission adopted the Guidelines on Political Parties Regulation¹¹ in 2010, which was addressed to states, clarifying key issues on the matter and providing examples of potential good practices.

Although these documents have different addressees and aims, both of them depart from the new claims on political participation, and they foresee new forms of transparency.

It must be underlined that the Commission is flexible on the issue, because it recognizes that the obligations imposed by accountability are dissimilar in each state. In fact, still now, certain states (as unlike as Switzerland, Monaco or the Philippines) are very liberal on the financing of political parties. For this reason, these systems do not impose on political parties the duty of informing on the way in which they are financed. Consistently, in these countries, political parties are submitted only to internal control.

Thus, the Venice Commission does not oblige, but only recommends, the reinforcement of public scrutiny of the financing because “transparency of political parties’ external activities and internal functioning is a fundamental principle to tackle the current crisis of legitimacy and restore public confidence in political forces and the whole democratic system as well as a precondition for real accountability and responsibility”.¹² Transparency is important because it is an essential instrument for fighting illegal corruption and improving the legitimacy of public powers. Furthermore, citizens also have a right to transparency, because the public must have enough information on the financial support given to political parties¹³ and on the policies which can be expected from them.

The documents of the Venice Commission not only underline the relevance of the principle, but also specify the exigencies that transparency imposes, in order to avoid that transparency becomes mere propaganda. In addition to the texts mentioned above, it is worth highlighting the compilation of opinions and reports concerning political parties, adopted

¹⁰ *Ibidem*, paras. 4 and 8.

¹¹ Venice Commission and OSCE/ODHIR, CDL-AD(2010)024, Guidelines on Political Party Regulation.

¹² Venice Commission, CDL-AD(2009)021, *op. cit.*, para. 104.

¹³ Guidelines..., para. 194.

by the Commission when member States require its intervention.¹⁴ This text shows the way in which the institution uses the general principles enunciated in the Code and in the Guidelines at the moment of analysing specific laws.

Although it is not possible to examine in detail each of these requirements, it is worth just identifying them and dealing with the more polemic issues. Speaking in general terms, the requirements imposed by transparency revolve around two main questions: firstly, what to disclose; secondly, how to disclose. Unfortunately, there are many other items, such as the nature and the force of the norm which should impose such exigency that must be set aside.

III. 1. What to disclose

The main idea, which inspires the content of the information that must be disclosed, is comprehensiveness. According to the Venice Commissions, reports must be exhaustive and include disclosure of incoming contributions and an explanation of all the expenditures made by all the organs of the party at national, regional and local level.¹⁵ The information must be organized in standardized categories as defined by relevant regulations.¹⁶ Reports should also include both general party finance and campaign finances.¹⁷ The Commission shows especial attention to the activities carried out during the pre-electoral period and through the use of third persons. For this reason, the Commission requires that electoral accounts must include all these activities¹⁸ and comprehend all the income that political parties have received, including in-kind contributions.¹⁹ Finally, the Venice Commission stresses that not only parties, but also candidates, should report on their incomes and expenses.²⁰

The Commission analyses in depth certain issues that are more complex than others. The first one is the loans to political parties and the cancellation of such debts. For the Commission it is important that rules on transparency deal consistently with this form of income in order to avoid debt forgiveness by the banks or third-person payment. In both cases the loan should be considered a form of contribution and be subjected to the limits

¹⁴ Venice Commission, CDL-PI(2016)003, Compilation of Venice Commission Opinions and Reports concerning Political Parties.

¹⁵ Guidelines... para. 202.

¹⁶ Guidelines... para. 203.

¹⁷ Guidelines... para. 204.

¹⁸ Guidelines... para. 205.

¹⁹ Guidelines... para. 198.

²⁰ Guidelines... para. 200.

and prohibitions established in the rules on financing.²¹ The second issue is the complex relationship between transparency and privacy of donors. The Venice Commission requires an equilibrium between both values.²² Indeed, the disclosure of small contributions could reveal the ideology of donors, and it could limit secrecy of vote and ideological freedom.²³ Lastly, the Commission dedicates special attention to transparency of private financing.

On this matter the Venice Commission follows closely the Recommendation Rec(2003)4 of the Committee of Ministers of the Council of Europe whose Article 1 envisages the financial support to political parties as a right of citizens.²⁴ In the same line, the Venice Commissions not only does not discourage this type of contribution but even recommends it. The Guidelines considers private funding as a form of political participation and declares that “all individuals should have the right to freely express their support of a political party of their choice thorough financial and in-kind contributions.”²⁵

Is not difficult to justify the disclosure of incomes and expenditures when funds come from public sources because, in this case, it is necessary to justify the proper use of funds that come from taxpayers. However, it does not mean that private financing is exempted from transparency. In this circumstance, transparency is equally important because it protects against undue influences on the political process. What is more, when financing is partially or solely private, the requirements of transparency should be higher. Comparative systems show that the absence of limits to this type of funding is compensated by reinforcing the disclosure of information about the identity of contributors, even in the case of small amounts.²⁶

III. 2. How to disclose

According to the Venice Commission, the information must be yielded in a timely manner in order to be relevant. The institution recommends that the

²¹ Guidelines... para. 171.

²² Guidelines... para. 206.

²³ Van Biezen, I., *Financing political parties and electoral campaigns-guidelines*, Council of Europe, Strasbourg, 2003, p. 57.

²⁴ Council of Europe, Recommendation Rec(2003)4 of the Committee of Ministers to member States on Common rules against corruption in the funding of political parties and electoral campaigns, (Adopted by the Committee of Ministers on 8 April 2003), <https://rm.coe.int/16806cc1f1>.

²⁵ Guidelines... para. 170.

²⁶ On this issue: OECD, *Financing democracy. Funding of political parties and election campaigns and the risk of policy capture*, OECD Public Governance Reviews, OECD Publishing, Paris, 2016, p. 74.

accounts be presented annually,²⁷ and that the reports on campaign finances be turned in to the proper authorities by a deadline of no more than 30 days after the elections.²⁸ Also the OECD insist on the time requirements, because information that is only available months or years after the election or at the end of the fiscal year is information less relevant for public discussion. Long delays in reporting also make the falsification of information possible.²⁹

Furthermore, the information must be comprehensible and accessible. It has been said above that, according to the Code, reports must be comprehensive, because they must contain data in the more exhaustive form. At this point is of interest to add that that the Code also requires that data be readable.³⁰ Nothing is more contrary to transparency than to overwhelm citizens with a large amount of data published in a disordered and unmanageable way. It is not enough for political parties to merely disclose their account, because data are not always information. The most accurate forms of transparency not only put ciphers at the disposal of citizens but organize the information in a user-friendly way. Reports must allow the public to search, to check, and to make comparisons between political forces.³¹

To follow these recommendations requires substantial human and material resources not only from political parties but also from monitoring bodies. However, this is not a reason to exempt them from the duty of facilitating the right of citizens to accede to an information that is vital for the public and for the effective control of elections.

IV. The complementarity of transparency

As we have seen, the Venice Commission, as well as other international institutions, recommend that political parties report directly to citizens on their incomes and expenditures and, if possible, that this information be disclosed via the internet.³²

However, following this advice is not enough because transparency imposes other duties. The information delivered directly to the public is necessary for the correct formation of the will of electors, for the creation of a free public opinion by the media, and for the debate between majority

²⁷ Venice Commission, CDL-AD(2009)021, *op. cit.*, para. 169.

²⁸ Guidelines... para. 202.

²⁹ OECD, Financing democracy..., *op. cit.*, p. 72.

³⁰ Venice Commission, CDL-AD(2009)021, *op. cit.*, para. 169.

³¹ OECD, Financing democracy..., *op. cit.*, p. 72.

³² Guidelines... para. 200.

and minority. Thus, it is fundamental for the political and social control, but there are other types of requirements.

An example of what has happened in Spain can be useful for explaining this idea. Transparency International published its evaluation of the level of transparency of political parties in 2017 using an assessment with a maximum score of 30 points.³³ Ironically, all political parties reach very good marks, including the party that was condemned for crimes related to corruption a short time later.

Thus, it is necessary to avoid a simplistic vision of transparency: this principle imposes not only the disclosure to citizens, but also the improvement of responsiveness and juridical control.

For this reason, the Venice Commission insists that political parties submit their accounts to specialized institutions that are the only ones able to oversee the consistency and regularity of political parties' incomes and expenses according to juridical parameter and the use of accounting techniques.³⁴ The Guidelines define some of the requirements that these bodies must meet in order to guarantee a proper supervision of political parties' accounts.

The first one refers to the structure of the supervisory body, and it imposes the independence of the institution and its members as a guarantee of impartiality. The Commission recommends that the law and state practices take effective measures to ensure the freedom of the supervisory body from any political pressure. Furthermore, the Commission strongly recommends that the law carefully draft the procedure for appointing members of the regulatory body in order to avoid any political influence over them.³⁵

The second requirement refers to the functions of the monitoring bodies. According to the Commission, they must be provided with sufficient authority, not only for supervising accounts and conducting audits, but also for imposing sanctions in case of violations of the rules on financing.³⁶ In order to comply with these tasks, states must guarantee that the supervisory bodies are provided with sufficient human and material resources to perform their work in the best possible conditions.

³³ Evaluación del nivel de transparencia de los partidos políticos (junio 2017) https://transparencia.org.es/wp-content/uploads/2017/06/evaluacion_nivel_transp_partidos-junio-2017.pdf.

³⁴ For example, Venice Commission, CDL-AD(2009)021, *op. cit.*, para. 168 and especially Guidelines... paras. 211-217.

³⁵ Guidelines... para. 212.

³⁶ Guidelines... para. 214.

The Venice Commission has had the opportunity to specify these requirements when it has been required by its member States to issue opinions on laws on political parties' financing. On such occasions, the Commission requires, for example, that the oversight bodies have the ability to investigate and pursue potential violations of rules on the issue. Thus, the European institution recommends giving the supervising bodies the power to call witnesses and the power to ask other institutions (tax authorities, anti-corruption authorities) for assistance in carrying out their work.³⁷

Many of the principles and requirements that have been analysed in these pages are "soft law", which does not have any legally binding force. It does not mean that they have no relevance. First of all, the suggestion of the Venice Commission to the States can have high impact on public opinion and on political forces inside the country that has asked for the opinion. However, the criteria stated by the Venice Commission have a more perdurable and general importance because they are gradually incorporated into the European constitutional heritage. Today, the principles on transparency of political parties' financing stated by the Venice Commission can be considered one of the most relevant parameters for measuring the respect shown by States toward a democracy based on openness and citizen participation.



³⁷ Venice Commission, CDL-PI(2016)003, *op. cit.*, p. 49-50.