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**Electoral Democratic Standards:
The Contribution of the European Commission for
Democracy through Law (Venice Commission)**

Keywords: electoral standards, democratic elections, Venice Commission, European Court of Human Rights

Słowa kluczowe: Standardy prawa wyborczego, wybory demokratyczne, Komisja Wenecka, Europejski Trybunał Praw Człowieka

Abstract

The European Commission for Democracy Through Law was created in 1990 and for the last three decades has adopted a number of documents of related to electoral standards in democratic states. They include legal opinions on national laws (or draft laws), as well as documents of a more general nature, concerning specific topics (studies, reports). In this article, the author aims at presenting the main documents that include the electoral standards developed by the Venice Commission. However, as the opinions of the Venice Commission are not binding, the second part of this contribution presents the way this contribution of the Venice Commission is taken into account in the jurisprudence of the European Court of Human Rights in cases concerning the alleged violations of the right to free elections.

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Streszczenie

Standardy demokratycznego prawa wyborczego w dorobku Europejskiej Komisji na Rzecz Demokracji przez Prawo (Komisji Weneckiej)

Europejska Komisja na rzecz Demokracji przez Prawo została stworzona w 1990 roku i w ciągu ostatnich trzydziestu lat przyjęła ona szereg dokumentów związanych ze standardami prawa wyborczego w państwach demokratycznych. Są to opinie prawne o krajowych aktach prawnych (lub ich projektach), ale także dokumenty o charakterze ogólnym dotyczące określonych kwestii (studia, raporty). Celem niniejszego artykułu jest przedstawienie podstawowych dokumentów zawierających standardy w zakresie standardów prawa wyborczego wypracowanych przez Komisję Wenecką. Biorąc jednak pod uwagę fakt, że opinie Komisji Weneckiej nie mają charakteru wiążącego, druga część niniejszego opracowania przedstawia w jaki sposób dorobek Komisji Weneckiej brany jest pod uwagę w orzecznictwie Europejskiego Trybunału Praw Człowieka w sprawach, w których zarzucono naruszenie prawa do wolnych wyborów.

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I. Introduction

The European Commission for Democracy Through Law was created in 1990 on the basis of a Council of Europe Resolution². The Commission (commonly referred to as “the Venice Commission” due to the location of its plenary meetings)³ initially focused mainly on the constitutional assistance for the post-communist countries⁴. Nowadays, the activities of the Venice Commission focus on three main thematic areas: democratic institutions and fundamental rights, constitutional justice, and electoral matters (elections, ref-

² Resolution (90)6 adopted by the Committee of Ministers on 10.05.1990.

³ H. Suchocka, *Opinion of the Venice Commission on the Place of the Constitutional Judiciary in a Democratic State*, “Ruch Prawniczy, Ekonomiczny i Socjologiczny” 2016, No. 1, p. 6; J. Marszałek-Kawa, D. Plecka (eds.), *Dictionary of Political Knowledge*, Toruń 2019.

⁴ H. Suchocka, *The role of Venice Commission ‘Democracy through Law’ and its cooperation with the European Union*, [in:] *EU engagement with other European organizations*, A.-L. Chané, A. Hauser et al., FP7 Collaborative Project FRAME, p. 111.

erendums and political parties)⁵. The Venice Commission stated in 2002 that human rights, democracy and the rule of law form the three pillars of Europe's constitutional heritage, and "democracy without elections is unthinkable"⁶.

The Commission issues two main types of documents: opinions on national laws (or draft laws) and more general documents (studies, reports etc.) on certain topics. These general documents serve two purposes: first, they help to identify "areas in which the elaboration of guidelines appears particularly useful" and then, to develop them, often with the cooperation of other international organizations⁷. In the field of electoral law, the Venice Commission works mostly through the Council for Democratic Elections, which comprises representatives of the Venice Commission itself, as well as the Parliamentary Assembly and the Congress of Local and Regional Authorities of the Council of Europe⁸. In practice, the OSCSE/ODIHR (Organization for Security and Co-operation in Europe Office for Democratic Institutions and Human Rights) often participates in the work of the Council.

In this paper, the analysis of the Commission's work is limited to the general documents related to electoral standards in democratic states and the possible use of these documents by other international bodies, in particular, the European Court of Human Rights. It is important to note that the opinions of the Venice Commission are not binding⁹. In its document adopted in 2002, the Commission described its position vis-à-vis electoral law as pragmatic: it does not "seek to impose legislative uniformity. On the contrary, with the exception of the basic principles (...), the Commission

⁵ See also the Art. 1 of the Resolution RES (2002) 3 Adopting the Revised Statute of the European Commission for Democracy Through Law (CDL (2002)27).

⁶ Venice Commission, *Europe's Electoral Heritage*, adopted on 14.03.2002 (CDL (2002)7 rev.), p. 4.

⁷ G. Buquicchio, S. Granata-Menghini, *The Venice Commission Twenty Years On. Challenge Met but New Challenges Ahead*, [in:] *Fundamental Rights and Principles – Liber amicorum Pieter van Dijk*, eds. M. van Roosmalen, B. Vermeulen, F. van Hoof, M. Oostling, Cambridge-Antwerp-Portland 2013, p. 251.

⁸ R.S. Durr, *The Venice Commission*, [in:] *Council of Europe* ed. T.E.J. Kleinsorge, [in:] *International Encyclopedia of Laws: Intergovernmental Organizations*, ed. J. Wouters, Alphen aan den Rijn 2010, p. 162.

⁹ W. Hoffmann-Rien, *The Venice Commission of the Council of Europe – Standards and Impact*, "The European Journal of International Law" 2015, No. 2, p. 580.

makes no attempt at insisting upon a particular solution, but simply tries to highlight the pros and cons of the various options available”¹⁰. As H. Suchocka explains, the Venice Commission provides states with legal advice and the “legal authority of the Commission constitutes the foundations of its efficiency and efficacy”¹¹.

II. General Documents Regarding Electoral Law

The most important document of a general nature adopted by the Venice Commission in the field of electoral law is without a doubt the Code of Good practice in electoral matters¹², approved by the Parliamentary Assembly, the Congress, and the Committee of Ministers of the Council of Europe¹³. The Code itself comprises of two parts: the first one is dedicated to the basic principles of electoral law, described as the “Principles of Europe’s electoral heritage” and the second, to the conditions for the implementation of these principles. The Code is accompanied by a detailed explanatory report. However, as the Code of good practice was adopted in 2002, the Commission further developed its standards related to specific issues in the form of interpretative declarations. Current analysis of the Code of good practice should therefore take these documents into account. They concerned:

- Stability of the electoral law¹⁴;
- Women’s participation in elections¹⁵;

¹⁰ Venice Commission, *Europe’s Electoral Heritage...*, p. 4.

¹¹ H. Suchocka, *Opinion...*, p. 8.

¹² *Code of Good Practice in Electoral Matters. Guidelines and Explanatory Report*, Opinion No. 190/2002, adopted by the Venice Commission at its 52nd session (Venice, 18–19.10.2002), CDL-AD (2002) 23 rev.

¹³ V. Volpe, *Guaranteeing Electoral Democratic Standards: The Venice Commission and “The Code of Good Practice in Electoral Matters”*, [in:] *Global Administrative Law: The Casebook*, eds. S. Cassesa, B. Carotti, New York 2012, p. 63.

¹⁴ *Interpretative Declaration on the Stability of the Electoral Law*, adopted by the Council for Democratic Elections at its 15th meeting (Venice, 15 December 2005) and the Venice Commission at its 65th plenary session (Venice, 16–17 December 2005), CDL-AD (2005)043.

¹⁵ *Declaration on Women’s Participation in Elections*, adopted by the Venice Commission at its 67th plenary session (Venice, 9–10 June 2006), CDL-AD (2006)020.

- Participation of persons with disabilities in elections¹⁶;
- Publication of lists of voters having participated in elections¹⁷.

Apart from the Code of good practice and the interpretative declarations, the Venice Commission has also adopted a number of other general documents, reports and studies related to: electoral processes (e.g. choosing the date of an election), electoral systems (e.g. thresholds barring parties from access to the Parliament), the right to vote (e.g. out-of-country voting), affirmative actions and similar measures (regarding women and national minorities), political parties (e.g. financing of political parties), as well as election observations and assessments (including the cancellation of election results).

A detailed analysis of all these documents goes well beyond the scope of this paper. For the purposes of further analysis, only issues related to the conditions for the implementation of electoral principles are described.

III. Conditions for Implementing the Principles

In the Explanatory report to the Code of good practice in electoral matters the Venice Commission has stated that “the underlying principles of European electoral systems can only be guaranteed if certain general conditions are fulfilled”¹⁸. In the report, three conditions are identified: respect for fundamental rights (in particular, freedom of expression, assembly and association), certain stability of electoral law (protection against political manipulation) and lastly, procedural guarantees.

In respect of the condition related to fundamental human rights, the Code of good practice underlines that all restrictions of the rights and freedoms

¹⁶ *Revised Interpretative Declaration to the Code of Good Practice in Electoral Matters on the Participation of People with Disabilities in Elections*, adopted by the Council for Democratic Elections at its 39th meeting (Venice, 15 December 2011) and by the Venice Commission at its 89th plenary session (Venice, 16–17 December 2011), CDL-AD (2011)045.

¹⁷ *Interpretative Declaration to the Code of Good Practice in Electoral Matters on the Publication of Lists of Voters Having Participated in Elections*, adopted by the Council for Democratic Elections at its 56th meeting (Venice, 13 October 2016) and by the Venice Commission at its 108th Plenary Session (Venice, 14–15 October 2016), CDL-AD (2016)028.

¹⁸ *Explanatory report to the Code of good practice in electoral matters*, adopted by the Venice Commission at its 52nd plenary session (Venice, 18–19 October 2002), p. 13.

must meet several requirements: have a basis in law, be in the public interest and comply with the principle of proportionality (II. 1). The explanatory report further states, that these “restrictions on these fundamental rights must comply with the European Convention on Human Rights”¹⁹. This is particularly important in the case of rights and freedoms mentioned by the Venice Commission that have their own limitation clauses in the European Convention thus adding other requirements for restrictions (Art. 10(2) and 11(2) ECHR).

According to the Venice Commission, the second condition (stability of electoral law) requires that “rules of electoral law must have at least the rank of a statute” (apart from rules on technical matters), and that the “fundamental elements of electoral law, in particular the electoral system proper, membership of electoral commissions and the drawing of constituency boundaries, should not be open to amendment less than one year before an election, or should be written in the constitution or at a level higher than ordinary law” (II. 2). However, the Interpretative Declaration on the Stability of the Electoral Law provides that this one-year rule cannot take “precedence over the other principles of the code”, the condition of stability cannot be used to “maintain a situation contrary to the norms of European electoral heritage, or to prevent the implementation of recommendations by international organizations”²⁰.

The final condition, and the most detailed one, concerns procedural guarantees. It comprises of three elements: organization of elections by an impartial body, observation of elections, and an effective system of appeal (II. 3). The latter element is particularly complicated as there are different models of the appeal systems (by the Parliament, by courts or by the electoral commissions)²¹. The Venice Commission does not question these different solutions, but rather explains that the appeal to the parliament could potentially result in political decisions and should therefore be only acceptable “as a first instance in places where it is long established”²². In any case,

¹⁹ Convention for the Protection of Human Rights and Fundamental Freedoms open for signature on the 4.11.1950, ETS No. 5, henceforth as ECHR. *Explanatory report...*, p. 14.

²⁰ *Interpretative Declaration on the Stability...*, p. 1.

²¹ *Europe's Electoral Heritage...*, pp. 15–16.

²² *Explanatory report...*, p. 29.

even if the appeals system is based on the parliament or electoral commission, some form of judicial supervision should be guaranteed, at least at the second level of appeals²³.

The mentioned standards form the basis of the recommendations of the Venice Commission included in the legal opinions on laws and draft laws adopted at the national level. For example, in the recently adopted Opinion on the draft law on elections in Montenegro, the Code of good practice is referenced more than twenty times²⁴. Of course, the standards set out in the Code are not binding, but the Venice Commission builds on this general document in order to form specific recommendations for the law in question. The principles and conditions for their implementation described in the Code of good practice could be considered at the national level in order to assure compliance with international standards, even if they are not binding.

IV. The Use of Opinions of the Venice Commission by the European Court of Human Rights

While the legal opinions and other documents adopted by the Venice Commission are not binding, they are more and more commonly referred to by international courts. In particular, the contribution of the Venice Commission is referenced by the European Court of Human Rights, especially in cases concerning the Art. 3 of the (First) Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms: the right to free elections²⁵. While the European Court of Human Rights has initially been reluctant to declare cases related to that right admissible, it now considers these cases particularly important from the point of

²³ Ibidem.

²⁴ European Commission for democracy Through Law (Venice Commission), OSCE Office for Democratic Institutions and Human Rights (ODIHR), *Montenegro. Urgent Joint Opinion on the Draft Law on Elections of Members of Parliament and Councillors*, adopted on 3.07.2020 (CDL-PI (2020)007). See in particular the recommendations concerning electoral dispute resolutions and penalty provisions, pp. 20–22.

²⁵ Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, open for signature on 20.03.1952, ETS No. 9.

view of effective political democracy and democracy governed by the rule of law²⁶. These cases concern violations of the Art. 3 of Protocol No. 1 itself or in conjunction with other provisions of the ECHR, in particular: Art. 13 (right to an effective remedy), Art. 14 (prohibition of discrimination), Art. 10 (freedom of expression), and Art. 11 (freedom of assembly and association)²⁷. It is interesting to note that the list of associated violations includes the elements identified by the Venice Commission in the first condition for implementing the principles of electoral law related to respect for fundamental rights.

The European Court of Human Rights (hitherto as ECtHR) reference the contributions of the Venice Commission in 229 cases: 182 judgments and 47 decisions²⁸. Among these, 55 cases concerned the Art. 3 of Protocol No. 1 (right to free elections). In most of these cases, the ECtHR references the Code of good practice (approx. 30 cases). This document had been used by the ECtHR for the first time in the 2004 Hirst case²⁹. That case was lodged by an applicant who, as a convicted prisoner, was subject to a blanket ban on voting in elections. However, in the Hirst case, the ECtHR referenced the Code of good practice only in the part of the judgment presenting the relevant international materials. In more recent cases, the ECtHR often cites the Code of good practice in the parts of the judgments concerning the Court's assessment³⁰. The ECtHR also takes into account other general documents adopted by the Venice Commission, for example the Report on the Method of Nomination of Candidates within Political Par-

²⁶ V. Berger, S. Bouchié de Belle, *The Code of Good Practice in Electoral Matters in the case law of the European Court of Human Rights* [in:] *European electoral heritage – 10 years of the Code of Good Practice in Electoral Matters*, “Science and Technique of democracy” 2012, No. 50, p. 51.

²⁷ Ibidem.

²⁸ HUDOC database: <https://hudoc.echr.coe.int> (31.07.2020).

²⁹ Judgment of the ECtHR of 30.03.2004, *Hirst v. the United Kingdom* (No. 2), Application No. 74025/01. This case was further referred to the Grand Chamber, which delivered its judgment on 6.10.2005.

³⁰ Cf. Judgment of the ECtHR of 11.01.2007, *Russian Conservative Party of Entrepreneurs and others v. Russia*, applications No. 55066/00 and 55638/00, para. 70 and judgment of the ECtHR of 11.06.2009, *Petkov and Others v. Bulgaria*, applications No. 77568/01, 178/02 and 505/02, para. 63.

ties³¹ or the reports on the Abolition of Restrictions on the Right to Vote in General Elections³².

The references of the documents of the Venice Commission by the European Court of Human Rights do not change their legal status: they remain non-binding. However, due to the authority of the Commission, its opinions on the democratic electoral standards are taken into account by the Court in the process of interpretation of the “free elections” as guaranteed by Art. 3 Protocol No. 1. It is particularly important to bear that in mind, as the judgments of the Court are binding, pursuant to Art. 46 ECHR. As P. van Dijk explains “the Venice Commission both distinguishes itself from, and supplements and facilitates the task of, the European Court of Human Rights. The two institutions do not duplicate but endorse and complement each other’s work”³³.

The European Court of Human Rights may also request the Venice Commission to provide *amicus curiae* opinion in a specific case. To date, only several *amicus curiae* briefs for the European Court of Human Rights have been adopted, the most recent one, in the *Mugemangano* case³⁴. The case brought before the ECtHR concerned a post-election dispute and the alleged violation of the Art. 3 of Protocol No. 1 and Art. 13 of the ECHR. It was related to the “procedure for examining a complaint by the applicant, who had demanded a recount of a number of ballot papers because of alleged irregularities in the election process. In particular, the applicant complained of the lack of safeguards against arbitrariness and the lack of a rem-

³¹ Judgment of the ECtHR of 8.11.2016, *Yabloko Russian Democratic Party and others v. Russia*, application No. 18860/07, para. 44.

³² Judgment of the ECtHR of 7.05.2013, *Shindler v. the United Kingdom*, application No. 19840/09, para. 63 and 64.

³³ P. van Dijk, *The Venice Commission on Certain Aspects of the Application of the European Convention on Human Rights Ratione Personae*, [in:] *Human Rights, Democracy and the Rule of Law: Liber Amicorum Luzius Wildhaber*, eds. S. Breitenmoser et al., Zurich 2007, p. 184.

³⁴ European Commission for Democracy Through Law (Venice Commission), *Amicus curiae brief for the European Court of Human Rights in the case of Mugemangano v. Belgium on the Procedural Safeguards which a State must Ensure in Procedures Challenging the Result of an Election or the Distribution of Seats*, Adopted by the Council for Democratic Elections, at its 66th meeting (Venice, 10 October 2019) and by the Venice Commission at its 120th Plenary Session (Venice, 11–12 October 2019) (CDL-AD (2019)021).

edy before an independent and impartial authority”³⁵. The President of the Grand Chamber invited the Venice Commission to intervene in the written procedure and asked the Commission “What adequate and sufficient procedural safeguards must a state ensure in procedures challenging the result of an election (in particular in case of allegations of irregularities during the electoral process) or the distribution of seats? In particular, what must be the characteristics of the body responsible for examining appeals concerning the result of an election?” In its *amicus curiae* brief, the Venice Commission underlined that its role will not go into the facts of the case or provide interpretation and application of the ECHR, but rather respond on the general nature of the questions and issues of general comparative law³⁶. Taking into account the Code of good practice, the Venice Commission examined the necessary characteristics of the body responsible for examining appeals concerning the result of an election. In particular, the Commission underlined that there is a “number of adequate and sufficient procedural safeguards which a state must ensure in procedures challenging the results of an election”, which include a mechanism for “verification of credentials”³⁷. The Venice Commission has stated that “the first requirement is for the appeal body to be impartial and sufficiently independent of parliament and the executive for the impartiality of its decisions not to be questioned. The requirement for impartiality concerns both the composition of the appeal body and the procedural and institutional safeguards against interference by other public or private players. Electoral appeals cannot be examined effectively and electoral law cannot be implemented properly unless the appeal body is impartial and independent”³⁸. The Commission further discussed the requirements concerning the procedure, time-limits, right to a hearing. As in the Belgian case, according to the Constitution appeals are dealt with by committees composed of members of the House concerned, the Venice Commission concluded that “unless they have been introduced in practice, there would not appear to be hearings by an independent and

³⁵ Judgment of the ECtHR of 10.07.2020, *Mugemangango v. Belgium*, application No. 310/15 para. 1.

³⁶ Venice Commission, *Amicus curiae brief...*, p. 2.

³⁷ *Ibidem*, p. 9.

³⁸ *Ibidem*.

impartial body or any procedural requirements such as a public and adversarial procedure”³⁹.

The use of the *amicus curiae* briefs of the Venice Commission allows the ECtHR to obtain a response on a specific topic, not on the alleged violation of the Convention. However, this procedure allows the Court to acquire the Commission’s stance regarding the specific requirements related to the standards of democratic elections if the general documents are not sufficient.

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³⁹ Ibidem, p. 10.

Volpe V., *Guaranteeing Electoral Democratic Standards: The Venice Commission and “The Code of Good Practice in Electoral Matters”*, [in:] *Global Administrative Law: The Casebook*, eds. S. Cassesa, B. Carotti, New York 2012.