

**T.Y. KHABRIEVA**

**THE VENICE COMMISSION AS A PERSON  
FOR THE INTERPRETATION OF LAW**

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**Т.Я. ХАБРИЕВА**

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КАК СУБЪЕКТ ИНТЕРПРЕТАЦИИ ПРАВА**

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About the author:

**Taliya Yarullovna Khabrieva** — Member of the Russian Academy of Sciences,  
Member of the Academy of Comparative Law,  
Doctor of Law, Professor, Honored Lawyer of the Russian Federation,  
Honored Lawyer of the Republic of Tatarstan,  
Director of the Institute of Legislation and Comparative Law  
under the Government of the Russian Federation,  
Member of the European Commission for Democracy through Law  
(Venice Commission).

Author of over 360 scientific papers revealing the actual problems  
of theory state and law, legal interpretation methodologies,  
the theory of the Constitution, its interpretation and legal protection,  
constitutional reform in the modern world, parliamentary system,  
federalism, legal regulation of ethno-cultural relations  
and migration.

**Khabrieva T.Y.**

**The Venice Commission as a Person for the Interpretation of Law:** Monograph. — M., 2018. — 302 p.

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The European Commission for Democracy through Law (the Venice Commission of the Council of Europe) was established almost 30 years ago and one of its priorities is to assist the various States of the world in modernizing their legal systems in accordance with international standards in the field of democratic development, human rights and the rule of law. The interpretation of international, regional and national law was the most important means of enabling the Commission to address a wide range of legal issues, although such functions were not provided by its constituent instruments.

Interpretation activities of the Commission need not only to be popularized, but also to be scientifically understood, that predetermined the subject and purpose of this book.

The structure of the work includes sections on the history of the formation of the Venice Commission, its current status, analysis of forms of interpretation.

The book is relevant for legal scholars and practitioners, representatives of human rights organizations, deputies, judges, teachers, students and postgraduates of law schools and faculties, as well as for a wide range of readers interested in the activities of international organizations.

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# PREFACE

The idea of this work appeared in February 2016 in the course of a scientific and practical conference at the Institute of Legislation and Comparative Law under the Government of the Russian Federation in commemoration of the famous Russian theorist and civilian of the late 19th – early 20th century E. V. Vaskovsky, who made a significant contribution to the development of the classical doctrine of the interpretation of law<sup>1</sup>.

An appeal to the national scientific heritage and analysis of its influence on the modern development of legal science in Russia allow us to evaluate newest processes in the global legal space. The establishment of a new international public order in the second half of the 20th century was accompanied by the emergence of new international interpreters of law, able to influence national legal systems. At the beginning of the last century it was impossible to imagine such situation.

These international interpreters include the European Commission for democracy through law (the Venice Commission of the Council of Europe), which exists for almost 30 years<sup>2</sup>.

One of the priorities of the Venice Commission as the Advisory body of the Council of Europe is to assist the States of the world to modernize their legal systems in accordance with international standards on democratic development, human rights and the rule of law. The Commission aims at cooperating not only with the States members of the Council of Europe, but also with non-member States and all interested international organizations and structures. In this regard, the Commission presents itself as an "independent forum for the exchange of ideas in the field of constitutional law".

As stated on the Commission's official website<sup>3</sup>, it organizes workshops and conferences in collaboration with constitutional courts and parliaments, central electoral commissions and universities, provides training for public officials from more than 20 Eastern European and Central Asian countries. Under the Commission's aegis are operating the World Conference of Constitutional Justice, the Joint Council for Constitutional Justice,

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<sup>1</sup> See: Vaskovsky E. V. The doctrine of interpretation and application of civil laws. Odesa, 1901; Id. The guide to interpretation and application of laws (for novice lawyers). M., 1997.

<sup>2</sup> Hereinafter referred to as "Venice Commission", "Commission" or "VC".

<sup>3</sup> URL: [www.venice.coe.int](http://www.venice.coe.int)

the Venice Forum of Constitutional Courts, the Council for Democratic Elections.

Summing up the most important aspects of the Commission's work, it should be noted that the Venice Commission:

- is the only body of the Council of Europe that elaborates scientific and practical opinions on constitutional law issues;
- investigates questions of the rule of law, balance and separation of powers, operation of judicial systems, constitutional justice, decentralization, regionalism and federalism, as well as related issues of national and international institutions, encouraging, therefore, the development of comparative political and legal sciences;
- contributes to implementation of constitutional reforms in the countries concerned by giving recommendations about how to reconcile constitutions and constitutional acts with the standards of the European constitutional heritage in many European and non-European states;
- significantly specifies the development of European electoral law by codifying and harmonizing standards in the field of elections and referendums;
- helps solve legal problems in the field of human rights, in particular, in connection with the simultaneous existence of the European Convention on Human Rights (hereinafter – the ECHR), the CIS Convention on Human Rights and Fundamental Freedoms, and the Statute of Fundamental Rights of the European Union (hereinafter – the EU), taking into account several systems for the protection of human rights in Europe;
- contributes to the improvement of mechanisms for the protection of the rights of national minorities in Europe, including their participation in public life, regional and minority languages;
- has an impact on the development of various branches of the national law of the participating States and other interested countries.

In addition, the Commission has repeatedly played the role of an intermediary in preventing and resolving constitutional crises in participating States, i.a. through cooperating with constitutional courts, ordinary courts and ombudsmen.

The most important means for the Commission to solve a wide range of legal tasks is its ability to interpret international and national law. The research of the specificity of interpretation of law by the Venice Commission in a context of modern approaches to the notion of "legal interpretation" predetermined the object and purpose of this work. Obviously, the specific activity of the Commission in the field of interpretation of inter-

national, regional and national law needs not only popularization, but also scientific consideration.

Nowadays, one of the special features of international law formation is the growing influence of recommendatory norms, some of which are referred to as "international standards". Moreover, the interpretation by the Venice Commission of National Law is a new phenomenon of international and national legal orders. The Venice Commission's acts being a result of the interpretation of national law have a recommendatory and explanatory nature, but differ in a number of extraordinary characteristics, either previously not subjected to analysis, or insufficiently and incompletely disclosed in the legal literature.

Thus, the activity of present-day subjects of international law and their interpretative acts have a specificity that does not always correspond to the postulates of the classical theory of interpretation of law. In this regard, we believe that an in-depth study of the Venice Commission's work as an interpreter of law is scientifically useful, including for the modernization of legal interpretation theory, critical understanding of the practical activities of Commission and similar expert and advisory bodies.

It is worth mentioning that as the experience of the Venice Commission increased, especially after its 20th anniversary, has appeared a considerable number of works, that tend to analyse forms and methods of the Commission's work, its scientific contribution to the development of the modern legal space and practical results of its work<sup>1</sup>. However, there have not been

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<sup>1</sup> See: Buquicchio Gianni and Granata-Menghini Simona, *The Venice Commission Twenty Years on: Challenge Met but New Challenges Ahead // Fundamental Rights and Principles – Liber amicorum Pieter van Dijk*, Cambridge, Antwerp, Portland (Intersentia (2013). P. 241–253; Buquicchio Gianni, Granata-Menghini Simona. *Conseil de l'Europe – Commission de Venise*, Rep. eur. dalloz, avril 2014. P. 1–14; Sergio Bartole. *International Constitutionalism and Conditionality: the Experience of the Venice Commission // Rivista No 4/2014, Associazione dei Italiana Costituzionalisti*; Durr R. *The Venice Commission/ Council of Europe* (ed. by E.J Kleinsorge). The Netherlands, Wolters Kluwer, 2010; Craig Paul P. *Transnational Constitution-Making: The Contribution of the Venice Commission on Law and Democracy // University of Oxford – Faculty of Law*, October 1, 2016, UCI Journal of International, Transnational and Comparative Law; Pinelli Cesare. *Parliaments, Constitutional Transitions and the Venice Commission // Report at the LUISS Summer School on "Parliamentary Democracy in Europe"*, LUISS, Rome, 23 July 2015; Tuori K. *From Copenhagen to Venice - in Closa, C. & Kochenov, D. (eds.). "Reinforcing Rule of Law Oversight in the European Union"* // Cambridge 2016: Cambridge University Press. P. 225–246; Hoffmann-Riem Wolfgang. *The Venice Commission of the Council of Europe - Standards and Impact // The European Journal of International Law* (2014). Vol. 25. No. 2. P. 579–597; Limonnikova M.A. *The Venice Commission of the Council of Europe: legal aspects of creation and activity: diss.... D.Jur.. M., 2010 etc.*



any specific works concerning peculiarities of the Commission's interpretation activities.

According to the researchers, the Commission is better known in Eastern Europe and Eurasia than in Western Europe<sup>1</sup>. This stems from the works of the Institute of Legislation and Comparative Law under the Government of the Russian Federation, where work Russian representative to the Commission – the director of the Institute, academician of the Russian Academy of Sciences T.Y. Khabrieva and the substitute representative, Professor A.I. Kovler<sup>2</sup>. At the Institute there is also a Secretariat of the Russian delegation to the Venice Commission, which is engaged in the analysis and preparation of material on the cooperation of the Institute and the bodies of the Council of Europe.

The structure of this work includes sections on the history of formation and evolution of the Venice Commission, its contemporary status, forms of interpretation analysis and evaluation of the results of such work. A brief history of this body of the Council of Europe, as well as analysis of the peculiarities of its status, are necessary for a better understanding of the specificity of the Venice Commission's interpretation of international and national law.

This study is one of the first steps in the process of comprehension and demonstrating of the Commission's results in the Russian scientific literature. Among its goals is to specify modern methods and principles of legal interpretation, as well as to find ways to modernize concepts of development of international law and to create interaction between "transnational" and national legal orders.

The author expresses her gratitude to the Secretariat of the delegation of the Russian Federation to the Venice Commission and its head, the associate professor S.V. Chirkin for help in material selection.

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<sup>1</sup> See, e.g.: Hoffmann-Riem W. Op. cit. P. 585.

<sup>2</sup> See: The Venice Commission: one hundred steps to democracy through law. M., 2014; The Venice Commission: Constitutions, Constitutional Amendments and Constitutional Justice. M., 2016; Khabrieva T.Y. The Venice Commission as a subject of interpretation of national law // Journal of Russian Law. 2016. № 8.

# Chapter 1

## THE HISTORY: ESTABLISHMENT AND FUNCTIONS OF THE VENICE COMMISSION

The Venice Commission would not be able to study peculiarities of the interpretation of law without analysing its legal status and main activities. Specificity of interpretation, its methods and results is intertwined with the subject of interpretation. Moreover, it is often directly determined by its legal position. An object of interpretation is of no less importance for revealing specific features of interpretation. In this regard, it is advisable to review main types and spheres of the Commission's activity in which its fundamental interpretative acts are formed.

### §1. Genesis of the Venice Commission of the Council of Europe

The European Commission for Democracy through Law (Venice Commission of the Council of Europe) was established in 1990. In modern European history this time is usually referred to as the milestone of two eras. The famous historian F. Stern in his memoirs "Five Germanys I Have Known"<sup>1</sup> points out that for the first time the idea of creating an organisation of this kind was generated in the early 1980s by the judge (subsequently – President) of the Constitutional Court of Italy (1978–1987), and then by the Minister of the Italian Republic for European Affairs (1987–1989), the famous scientist Antonio La Pergola<sup>2</sup>.

Antonio La Pergola supported the idea of creating an international organization of lawyers and judges in order to make the judicial system of one country feel its belonging and in some ways even accountability to a community of like-minded professionals<sup>3</sup>.

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<sup>1</sup> See: Stern F. Five Germanys I Have Known: a History & Memoir // Farrar, Straus and Giroux, 2007. URL: [http://goo.gl/RmJVL4content\\_copy](http://goo.gl/RmJVL4content_copy)

<sup>2</sup> Later A. La Pergola became the head of the Committee for Scientific Research and Culture of the European Parliament (1989–1994), but was better known as an Advocate General and then a Judge of the Court of Justice of the European Union (1994–2006).

<sup>3</sup> See: Stern F. Op. cit.

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