Strasbourg, 24 March/mars 2016

**CDL-PL-PV(2016)001***
Or. bil

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

**COMMISSION EUROPEENNE POUR LA DEMOCRATIE PAR LE DROIT**
**(COMMISSION DE VENISE)**

**106th PLENARY SESSION**
**Venice, Scuola Grande di San Giovanni Evangelista**
**Friday, 11 March 2016 - Saturday, 12 March 2016**

**106e SESSION PLÉNIÈRE**
**Venise, Scuola Grande di San Giovanni Evangelista**
**Vendredi 11 mars 2016 - Samedi 12 mars 2016**

# SESSION REPORT
# RAPPORT DE SESSION

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## 1. Adoption of the Agenda

## 2. Communication by the President

The President presented his recent activities (see document CDL(2016)011).

## 3. Communication from the Enlarged Bureau

Mr. Helgesen presented the list of the new members of the Scientific Council. In line with the Commission's practice since the establishment of the Scientific Council, the new members were the Chairs of the Sub-commissions as well as the directors of research institutes. The Chairpersons elected in December 2015 and Ms Khabrieva were therefore members of the Scientific Council for the next two years.

## 4. Communication by the Secretariat

## 5. Co-operation with the Committee of Ministers

Ambassador Miroslav Papa, Permanent Representative of Croatia to the Council of Europe underlined that the past cooperation of Croatia with the Venice Commission, in particular in the fields of election, minorities and local governance gave good results for Croatia and that this co-operation was a good example of the Venice Commission's positive assistance to its member states in constitutional matters. He pointed out the current challenges in Europe, such as xenophobia, and emphasised the importance of the co-operation of the Committee of Ministers with the Venice Commission in particular in these problematic areas.
Ambassador Guido Bellatti Ceccoli, Permanent Representative of San Marino to the Council of Europe stated that, as a founding member of the Council of Europe, San Marino had always supported the work of the Venice Commission for the promotion of democracy, human rights and the rule of law. He underlined the importance of the Venice Commission's work for the promotion of law as an element of democracy. He informed the Plenary that he was the chair of the Committee of Ministers working group on Human Rights and that the opinions of the Venice Commission were constantly taken into consideration by this working group.
Ambassador Božikarda Krunić, Permanent Representative of Montenegro to the Council of Europe underlined that the co-operation of Montenegro and the Venice Commission dated back to many years before and had been growing since then, as the Venice Commission delivered an important number of opinions for Montenegro in the fields of constitutional justice, protector of citizens, prohibition of discrimination, election of counsellors and members of parliament, media, minorities, independence of the judiciary, etc. She also underlined that it had been with the great help of the Venice Commission that Montenegro paved its way to adopting and implementing the standards in the area of the rule of law and democracy enabling the country to advance steadily towards full-fledged membership of the European Union.
Mr. Buquicchio welcomed the long-standing co-operation of Montenegro with the Venice Commission and thanked in particular the Speaker of Parliament of Montenegro, Mr. Krivokapic, for the strengthening of this co-operation.

## 6. Co-operation with the Parliamentary Assembly

Ms Anne Brasseur, Former President of the Parliamentary Assembly of the Council of Europe emphasised that democracy cannot be considered as an acquis and that recent developments indicated a deterioration of democratic achievements. She pointed first to the dismantling of the Rule of Law and emphasised that all political decisions should be made within the framework of this principle. She also pointed to the calling into question of human rights, even by some member states of the Council of Europe, and stressed the importance of the work of the Venice Commission in these difficult circumstances. Ms Brasseur drew attention to the need to support

human rights defenders in the member states and considered that pressures made on civil society organisations are unacceptable.

Mr. Philippe Mahoux, member of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly informed the Plenary that the Committee on Legal Affairs and Human Rights, in two recent reports concerning the protection and role of human rights defenders and the restrictions on civil society organisations respectively, had referred to the Venice Commission's opinions. He also referred to PACE's request for an opinion on the compatibility with the ECHR standards of the draft revision of the French Constitution aimed at the constitutionalisation of the rules on the state of emergency and the deprivation of nationality. He finally informed the Plenary that during its meeting in Paris on 9 March 2016, the Monitoring Committee of the Parliamentary Assembly had decided to request an opinion of the Venice Commission on the compatibility with the Council of Europe standards of the legal framework governing curfews in Turkey.

## 7. Co-operation with the Congress of Local and Regional Authorities of the Council of Europe

Mr Philippe Receveur, Chair of the Monitoring Committee of the Congress, informed the Plenary on the on-going discussions within the Monitoring Committee on the inclusion of the European Charter of Local Self-Government in domestic law of the member States. Recent decisions of the supreme courts of some of the member states raised questions about the status of international treaties in domestic law, since they resulted in not taking into account this treaty in domestic law. In addition, the first monitoring report on local and regional democracy in France, recently adopted, concluded in particular that there was a violation of one of the provisions of the Charter regarding the new delimitation of the French regions. The Plenary was also informed on the content of roadmaps signed in the framework of the Congress' post-monitoring dialogue, in particular on the points related to constitutional amendments.

## 8. Follow-up to earlier Venice Commission opinions

*Joint Opinion on the Electoral Code of "the former Yugoslav Republic of Macedonia" (CDL-AD(2013)020)*

This opinion was adopted by the Venice Commission in June 2013. A number of recommendations remain unaddressed in the revised Electoral Code which entered into force in November 2015. This included *inter alia* the following issues: withdrawal of candidates and candidate lists; restrictive campaign regulations; voting rights in local elections for long-standing foreign residents; decision-making process of the State Election Commission; complaints and appeals procedures. On a more positive note, the Electoral Code includes provisions which improve the text, related *inter alia* to stricter rules regarding the use and dissemination of the voters' list and more detailed financial reporting by parties. Finally, the Electoral Code contains a number of new provisions that have not been reviewed by the Venice Commission, especially following important changes: new constituencies abroad and consequently increased number of members of parliament; composition, method of election and term of members of the State Election Commission; maintenance of voters' lists; campaign coverage for media; and penal provisions dealing with electoral matters. Both the unaddressed recommendations and the new provisions would require an opinion of the Venice Commission and of the OSCE/ODIHR on the revised Electoral Code.

*Mémoire Amicus Curiae en l'affaire Rywin c. Pologne (requêtes n° 6091/06, 4047/07, 4070/07) devant la Cour Européenne des Droits de l'homme (sur les commissions parlementaires d'enquête) (CDL-AD(2014)013)*

En janvier 2014, la Cour européenne des droits de l'homme a demandé un avis *amicus curiae* dans le cadre de l'affaire *Rywin c. Pologne*. La Commission a adopté cet avis en mars 2014. L'arrêt a été rendu le 18 février 2016.

L'arrêt se réfère à l'avis de la Commission pour considérer qu'il n'y pas eu violation des articles 6 § 1 et 2 de la Convention. La Commission avait notamment considéré que la découverte d'une possibilité d'infraction pénale ne devrait pas en elle-même mettre un terme à une enquête parlementaire autrement légitime et que les membres de la Commission d'enquête parlementaire devaient se garder soigneusement d'exprimer tout avis ou de faire toute déclaration sur les questions de culpabilité, et d'enfreindre de quelque autre façon que ce soit le principe de la présomption d'innocence. En se référant à l'avis de la Commission, la Cour a considéré qu' « une distinction doit toutefois être faite entre les décisions ou les déclarations qui reflètent le sentiment que la personne concernée est coupable et celles qui se bornent à décrire un état de suspicion. » La Cour a considéré que ni la résolution portant création de la Commission d'enquête ni les conclusions de celle-ci ne revenaient à une déclaration de culpabilité, si bien qu'il n'y avait pas violation de l'article 6 CEDH. Trois juges ont émis une opinion partiellement dissidente qui, se fondant aussi sur l'avis de la Commission, a estimé qu'il y avait violation de la présomption d'innocence, car les mots employés par la commission d'enquête parlementaire et surtout le rapport final de la Diète affirmaient la commission d'un délit, et le tribunal avait employé des termes semblables.

*Joint Opinion on the Draft Act to regulate the formation, the inner structures, functioning and financing of political parties and their participation in elections of Malta (CDL-AD(2014)035)*

In October 2014, the Venice Commission adopted a joint opinion with the OSCE/ODIHR on the draft act to regulate the formation, inner structures, functioning and financing of political parties and their participation in elections. The OSCE/ODIHR and the Venice Commission welcomed the draft act, which constituted a significant step forward in ensuring the transparency of political party and campaign finance in Malta. Comprehensive legislation in the field of political parties in Malta, and, particularly, rules on the financing of political parties, had been recommended by numerous institutions in the past.

However, the draft act did not regulate many aspects concerning the financing of political parties, including election campaign financing, foreign funding of political parties, restrictions on the use of personal resources by candidates, the use of public resources or intra-party gender equality. The important roles of the Electoral Commission and of the Minister of Justice in the control, oversight and enforcement provided for by the draft act could also be problematic and had to be reconsidered. Finally, the sanctions had to be proportional and ensure compliance with the legislation.

The Act was adopted on 28 July 2015 and entered into force on 1 January 2016. It included some of the Commission's recommendations, such as the prohibition of anonymous donations, the publication of financing accounts and reports on the website of the Central Electoral Commission, the establishment of an independent audit and the introduction of a new regime of sanctions, although criminal penalties do not seem to have been revised.

*Joint Opinion on the draft Law on the Law on the Prosecution Service of the Republic of Moldova (CDL-AD(2015)005)*

The members were informed that the Draft Law on the Public Prosecutor's Office, examined in the 2015 Joint Opinion, had just been adopted by the Moldovan Parliament. While there was still scope for further improvements and clarifications - and some of the adopted arrangements would require the prior amendment of the Constitution - the adopted text was a significant step forward in the Moldovan authorities' efforts to reform the public prosecutor service. Its proper implementation will be instrumental for the success of the planed reform.

As recommended by the Commission, under the adopted law the scope of the prosecutors' powers was clearly limited to the criminal procedure sphere, thereby excluding any power of general control of legality or of the respect for human rights, which in the past used to be part of the prosecutors' competences. Furthermore, the adopted law contained more specific provisions on the independence of the prosecution service from the executive and the judiciary, as well as from any political or other interference; provided for additional guarantees for the internal autonomy of prosecutors in dealing with specific cases; it contained provisions aiming at substantially reducing hierarchical control over the work of the lower level prosecutors, and, notably, an improved mechanism for the appointment of the Prosecutor General. It was also positive that, in line with the Commission's' recommendations, the genuine participation - instead of mere consultation - of the authorities of the Autonomous Territorial Unit Gagauzia was now required for the appointment of the local Chief prosecutor.

*Report on the Freedom of expression of Judges (CDL-AD(2015)018)*

The Commission adopted the Report on the Freedom of Expression of Judges at its 103rd Plenary Session, at the request the President of the Inter-American Court of Human Rights. The request was related to a case pending before the Inter-American Court, *Lone and others v. Honduras*, which dealt with the disciplinary proceedings launched against several judges and their dismissal after demonstrating and expressing themselves against the coup which took place in Honduras in 2009. The Inter-American Court issued the judgment in this case on 5 October 2015. The Inter-American Court considered that Honduras was responsible for violating the rights of the applicants, mainly their freedom of expression and association, as well as their political rights. Moreover, the disciplinary proceedings against the victims were not legal and the actions of the High Judicial Council in the matter did not guarantee an independent procedure. In its judgment, the Inter-American Court extensively referred to the ECtHR case-law cited in the Report of the Venice Commission.

*Report on exclusion of offenders from Parliament (CDL-AD(2015)036)*

In October 2015, the Commission adopted the report on exclusion of offenders from Parliament following a request from the Albanian authorities. This report considered that serious offenders are excluded from elected bodies, either by the voters themselves or by specific legal mechanisms. The duration of ineligibility is subject to the principle of proportionality. Convictions abroad should have the same effect as convictions in-country as soon as they comply with the rules on fair trial.

On 17 December 2015, the Albanian Parliament adopted the "Law on Guaranteeing the Integrity of Public Officials". This text prohibits running and being elected to a high public function for a specific duration depending on the seriousness of the crime committed. The same prohibition applies subsequent to a number of convictions (even if non-final) and other measures, including evictions, taken in the EU, US, Canada, Australia, and other countries listed by a resolution of Parliament. This text takes into account the need to exclude serious offenders from Parliament, the principle of proportionality, as well as convictions abroad.

The law applies to officials who, at the time of its entry into force, hold a mandate or a public office, when the facts have occurred before the taking of public office. The issue of whether or not such retroactive restriction is acceptable is still to be decided by the European Court of Human Rights.

On 4 March 2016, the Albanian Assembly approved by-laws focusing in particular on the self-declaration form. This form shall include cases of arrest/conviction of the concerned person. The data included in the form are confidential. Every political party can initiate a "data verification" procedure by a request to the General Prosecution.

Whereas the new legislation appears to be generally in conformity with the conclusions of the Venice Commission's report, its effects cannot be fully assessed a priori. Its proper implementation, in conformity with the principles of equality and proportionality, will be crucial for establishing whether it is in line with the Venice Commission's recommendations.

*Opinions of 2015 on constitutional reform in Ukraine*

Mr Markert informed the Commission that the adoption of the constitutional amendments on decentralisation which had been adopted in the first reading at the summer session 2015 of the Verkhovna Rada and which had been very positively assessed by the Venice Commission, was in jeopardy. The second reading did not take place at the winter session 2015/16 of the Verkhovna Rada. According to the traditional interpretation the second reading had to take place at the next session after the first reading. The rules of procedure of the Rada were amended to provide that the second reading could take place at a next session. The Constitutional Court was currently reviewing the constitutionality of this amendment.

As regards the constitutional amendments on the judiciary, which were also very positively assessed by the Commission, the first reading had taken place at the winter session and the second reading could take place at the current session. The required two-thirds majority was, however, by no means ensured. One positive amendment had been removed from the text: the vote of no confidence by the Rada in the Prosecutor General, which was abolished in the previous draft, was now maintained. This could be explained by the dissatisfaction with the current Prosecutor General, who is considered a main obstacle to the reform of the service.

*Avis Intérimaire sur les aspects institutionnels du projet de loi sur les procédures spéciales concernant la réconciliation dans les domaines économique et financier de la Tunisie (CDL-AD(2015)032)*

En octobre 2015, la Commission avait adopté un avis intérimaire sur un projet de loi sur les procédures spéciales concernant la réconciliation dans les domaines économique et financier ; la Commission avait considéré que la procédure de réconciliation proposée par le projet de loi ne pouvait être considérée comme équivalente à celle d'arbitrage et conciliation de la justice transitionnelle et qu'elle devait par conséquent être révisée. De plus, le projet de loi sur la réconciliation devait être davantage harmonisé avec la loi organique sur la justice transitionnelle.

M Jeribi informe la Commission que depuis l'avis intérimaire d'octobre 2015, le projet de loi a été abandonné. Un nouveau projet de loi est à l'étude, envisageant de confier la réconciliation à l'Instance constitutionnelle de lutte contre la corruption, dont la création est envisagée par la nouvelle constitution. L'Instance pour la Vérité et la Dignité poursuit son travail avec un rythme plus soutenu.

## 9. Albania

The President of the Commission, Mr Buquicchio, recalled that in December 2015, at the request of the Albanian Parliament, the Commission had adopted an Interim Opinion on the Draft Amendments to the Constitution of Albania concerning the reform of the judiciary. On the basis this Interim Opinion, the experts of the Albanian Parliament prepared a revised text of the Draft Amendments. Mr Buquicchio congratulated the experts for their work and welcomed their readiness to follow the recommendations of the Venice Commission contained in the Interim Opinion. The revised text indeed created a solid foundation for the constitutional reform of the judiciary. Mr Buquicchio called on all political forces to hold a constructive dialogue on the basis of the recommendations contained in the Final Opinion.

Mr Bartole and Mr Hamilton introduced the Draft Final Opinion. The revised Draft Constitutional Amendments settled most of the questions raised in the Interim Opinion. An important remaining issue concerned the qualified majority needed for the election of the members of the governance bodies of the judiciary and of the prosecution service (the High Judicial Council and the High Prosecutorial Council, the vetting bodies, etc.). Either of the two solutions discussed domestically (election by a three-fifths or by a two-thirds majority) was legitimate; alternative models of election would be equally possible. The main concern of the Commission was to ensure a pluralistic composition of the governance bodies. It was also important to have a qualified majority of votes for the election of the "Parliamentary component" of the Constitutional Court. As to the vetting of all the sitting judges and prosecutors, proposed by the Draft Amendments, this extraordinary measure may be justified in the circumstances, but only as a temporary mechanism. The rapporteurs suggested shortening the duration of the vetting process. The role of the international observers in the process of vetting still needed to be clarified. The premature termination of the mandate of the Prosecutor General lacked justification.

The rapporteurs further recommended not depriving the vetted judges and prosecutors of their right of access to the Constitutional Court, but stressed that the proceedings before the Constitutional Court should not play an obstructive role.

Mr Traja, Chair of the High Level Expert Group on the Amendment of the Constitution of Albania, expressed their gratitude to the rapporteurs for their hard work and for the swift preparation of the Final Opinion which clarified certain points which had been left open in the Interim Opinion. Mr Traja stressed that the use of alternative (proportional) models for the election of the members of the judicial governance bodies might require adjustments in the nomination process; in any event, it was important to avoid appointments along political lines. The scope of review by the Constitutional Court of the vetting decision should not cast doubt onto the legitimacy of the whole process. The Final Opinion should now guide the future reform.

**The Commission adopted the Opinion on the revised Draft Constitutional Amendments on the judiciary (CDL-AD(2016)009). .**

## 10. France

M Velaers présente le projet d'avis sur le projet de loi constitutionnelle "de protection de la Nation" de la France, préparé dans un délai très court à la demande de l'APCE et déjà examiné par la Sous-commission des droits fondamentaux. Le projet de loi contient deux articles, visant l'inscription dans la constitution de l'état d'urgence et de la déchéance de nationalité, respectivement.

La constitutionnalisation de l'état d'urgence est à saluer ; alors que la constitution française contient deux dispositions sur des états d'exception – les pouvoirs exceptionnels du Président de la République (Article 16) et l'état de siège (Article 36), l'état d'urgence - qui est actuellement en vigueur en France suite aux attentats meurtriers du 13 novembre 2015 – est régi par une loi de 1955, révisée par le parlement à l'occasion de la première prolongation de l'état de siège le 24 novembre 2015. La constitutionnalisation de l'état d'urgence représente une occasion de d'accroître les garanties contre d'éventuels abus ; il est essentiel d'inscrire dans la constitution non seulement la possibilité et les modalités de déclaration et renouvellement de l'état d'urgence, mais également les limites formelles, matérielles et temporelles qui doivent le régir. Bien qu'il ne soit pas en soi contraire aux normes internationales, le texte du nouvel article 36-1 de la Constitution française, tel qu'adopté en première lecture par l'Assemblée Nationale, devrait par conséquent, selon l'avis, préciser que les deux causes de l'état d'urgence - le péril imminent résultant d'atteintes graves à l'ordre public et les événements présentant le caractère de calamité publique – doivent être « de nature à menacer la vie de la Nation » et que les autorités civiles ne peuvent prendre que les mesures d'urgence qui sont strictement justifiées par la situation. Pour la deuxième prolongation de l'état d'urgence par le parlement, on pourrait également envisager une décision à la majorité qualifiée.

S'agissant de la déchéance de nationalité, les normes internationales interdisent que la déchéance ne soit prononcée de manière arbitraire et proclament la nécessité d'éviter l'apatridie (sans que ce soit une interdiction absolue). L'introduction d'un régime unique pour tous les Français – d'origine ou naturalisés, mononationaux ou binationaux – n'est pas contraire à ces normes, à condition que toute déchéance soit prononcée à la suite d'un procès équitable et dans le respect du principe de proportionnalité. L'avis cautionne par conséquent l'intention des autorités françaises de transformer la déchéance de nationalité en peine accessoire et d'attribuer la compétence de la prononcer au juge pénal. Cette intention pourrait se traduire en une modification de l'article 34 correspondante.

M Thomas Campeaux, Directeur des Libertés Publiques et Affaires Juridiques au Ministère de l'Intérieur français, remercie la Commission pour la préparation d'un avis approfondi et de qualité. Il explique que la constitutionnalisation de l'état d'urgence répond tout d'abord à l'exigence de renforcer la solidité juridique de l'état d'urgence, jusqu'à présent régi par une loi de 1955, précédent à la Constitution de 1958 et n'ayant pas fait l'objet à l'époque d'un contrôle de constitutionnalité. Le fondement constitutionnel renforce les garanties qui doivent accompagner les mesures exceptionnelles : selon la jurisprudence du Conseil constitutionnel, elles doivent être « adaptées, nécessaires et proportionnées », ce qui veut dire qu'elles ne peuvent être prises que « dans la stricte mesure du nécessaire ». L'élément de la proportionnalité est dès lors déjà fortement ancré dans le régime actuel de l'état d'urgence. S'agissant de la nécessité de préciser que les causes de l'état d'urgence soient « de nature à porter atteinte à la vie de la Nation », M Campeaux souligne d'une part, que l'article 36-1 emploie la même terminologie que la loi de 1955 qui fait désormais partie de l'histoire juridique de la France, et, d'autre part, que cette formule pourrait faire penser que le péril ou la calamité publique ne puisse menacer une partie seulement de la population ou que des mesures ne puissent être prises sur une partie seulement du territoire. M Campeaux souligne néanmoins l'absence de divergence de fond entre la position des autorités françaises et l'avis de la Commission. Sur la prorogation de l'état d'urgence par une décision à la majorité qualifiée, M Campeaux souligne la complexité de la procédure d'adoption d'une loi organique, qui se concilie mal avec la nécessité que le parlement agisse vite.

S'agissant de la déchéance de nationalité, M Campeaux affirme que tant le choix de permettre la déchéance pour les seuls nationaux naturalisés ou également pour les nationaux d'origine, que le choix de la permettre pour les seuls binationaux ou également pour les mononationaux reviennent à l'Etat. Les normes internationales exigent d'éviter l'apatridie, et la France entend respecter ce principe mais dans un souci d'universalité il ne serait pas inscrit en tant que tel dans la Constitution ; la France envisage néanmoins de ratifier la Convention des Nations Unis

sur la réduction des cas d'apatridie de 1961. M Campeaux fait valoir que déjà selon le régime du Code Civil actuellement en vigueur, la déchéance est une mesure non automatique et individualisée. La transformation de la déchéance en sanction accessoire ne nécessite pas d'inscription dans la Constitution.

Suivent des nombreux échanges entre les rapporteurs, les membres et le représentant des autorités françaises, notamment sur l'opportunité de réfléchir à une reforme de toutes les dispositions constitutionnelles et législatives en matière de pouvoirs d'exception, in primis l'article 16 de la Constitution.

**La Commission adopte l'avis sur le projet de loi constitutionnelle « de protection de la Nation » de la France (CDL-AD(2016)006).**

## 11. Georgia

Mr Kask introduced the draft joint opinion on amendments to the Election Code of Georgia, previously examined by the Council for Democratic Elections at its meeting held on 10 March 2016.

The opinion examined in the first place the amendments to the Election Code introducing new delimitations of the single-member constituencies for the majority component of the election of members of parliament; it also dealt with amendments to the threshold to elect members of parliament under the majoritarian system.

The opinion assessed positively the redistricting of the single-member constituencies, reducing the deviation between single-member constituencies and consequently satisfying the principle of equal suffrage. These amendments followed long-standing recommendations of the Venice Commission and the OSCE/ODIHR and were initiated following a decision of the Constitutional Court of 28 May 2015 declaring the previous delimitations of single-member constituencies unconstitutional for breaching the principle of equal suffrage.

The opinion was however critical on a number of issues. Despite the reduction in deviations in the number of voters, significant concerns were noted relating to how the boundary delimitation process had been undertaken and managed. In particular, the detailed delineation of 30 constituencies located within the four largest cities had yet to be finalised. Furthermore, there had been a lack of inclusive consultation among political stakeholders and the amendments had been adopted less than one year before the forthcoming parliamentary elections, in breach of the recommendation of the Code of Good Practice in Electoral Matters in this respect. There remained limited time to finalise the redistricting and to ensure that all potential contestants as well as voters were sufficiently informed of all changes.

Lastly, the opinion assessed positively the increase of the threshold from 30% to 50% to be elected in the first round in single-member constituencies, which was broadly supported by electoral stakeholders.

**The Commission adopted the Joint Opinion on Amendments to the Election Code of Georgia (CDL-AD(2016)003).**

## 12. Poland

Mr Grabenwarter introduced the draft opinion on the amendments to the Act on the Constitutional Tribunal. He informed the Commission that the constitutional crisis in Poland had

started with a provision in the June 2015 Act on the Constitutional Tribunal, which allowed the 7th Sejm to elect judges for all vacancies at the Tribunal that opened in 2015. In October 2015, the 7th Sejm elected five judges but only three of these vacancies occurred during the mandate of the 7th Sejm. In December, the 8th Sejm elected five other judges. This resulted in overlapping mandates of three "October judges" and three "December judges". As the problem of the composition of the Tribunal was intrinsically linked to the amendments of 22 December, the opinion also had to deal with this issue.

The main problems of the amendments were the introduction of a quorum of 13 out of 15 judges for the full bench, the requirement of a two-thirds majority for decisions by the full bench, a rule that the dates of hearing should follow the order of registration of cases, a minimum delay of three months before a hearing could be held, the introduction of disciplinary proceedings against the judges of the Tribunal by the President of Poland and the Minister of Justice and the dismissal of the judges by Parliament rather than the Tribunal itself. The draft opinion established that these provisions, notably taken together, were not in line with European and international standards and would risk blocking the Tribunal. On 9 March 2016, the Tribunal – composed of the 12 sitting judges - had found the amendments to be unconstitutional. The Government had indicated that it would refuse to publish that judgment. For the issue of the appointment of judges, a solution had to be found on the basis of the judgments of the Tribunal. The rapporteurs proposed changes to the draft opinion, which also called for the publication of the 9 March judgment.

Mr Konrad Szymański, Secretary of State at the Ministry of Foreign Affairs, reminded the Commission that it had been the Minister of Foreign Affairs who had requested the opinion. The goal of the Government was to make the Constitutional Tribunal more transparent and effective. Mr Szymański admitted that the amendments could raise some doubts and such doubts could be expressed by the Commission but the opinion was too one-sided. The crisis had been triggered by the previous majority which wished to appoint 14 out of 15 judges. The President of Poland had been entitled to raise doubts about the legality of the election of the October judges and to refrain from taking their oath. When the new Sejm elected judges, the President accepted their oath and thus terminated the election procedure. The President of the Tribunal accepted them as judges but illegally refused to allow them to sit at the Tribunal. Several proposals had been made to allocate the October judges to the Court but the opposition had refused any compromise. The Polish Government was ready to take into account the opinion for future reforms and a wide range of solutions could be imagined. However, the part of the opinion referring to the appointments was not covered by the request and should be removed. The opinion should be adopted as an interim opinion.

Mr Aleksander Stępkowski, Undersecretary of State at the Ministry of Foreign Affairs, insisted that the procedural changes were intended to avoid a political use of the Tribunal. They only affected cases of abstract control decided in full bench, which were initiated by political groups. Individual complaints were not concerned. Statistics showed that since 1997, in practice 85 per cent of cases had anyway been decided by at least 13 judges. Now, this practice had simply been turned into a legal rule in order to avoid arbitrary decisions of the President of the Tribunal. The administration of the Tribunal should be guided by law and not by the discretion of its President. If the President of Poland and the Minister of Justice could introduce disciplinary cases, it remained for the Tribunal to decide on disciplinary matters. Giving the *Sejm* a final say on dismissal provided an additional guarantee for the judges against internal pressure at the Court. The average length of proceedings was 21 months; the minimum of three months before a hearing thus could not have a negative impact on the speed of deciding cases. The requirement of a two thirds majority for decisions was only counter-balancing the fact that the judges were elected by simple majority.

Mr Varga suggested that the Venice Commission should be especially careful in this case because the European Commission had started a rule of law procedure against Poland. Even if

the Sejm had 99 per cent of the competence in the appointment procedure and the President of Poland only one per cent, the acceptance of the oath by the President was decisive and the December judges had been correctly appointed.

Several members insisted that the opinion should be final, not interim, because there were no further legislative measures to be expected. The opinion had not been requested by the EU but by the Polish Minister of Foreign Affairs. What was needed was the publication of the judgment of 9 March. The final arbiter in constitutional matters was not the President of Poland, but the Constitutional Tribunal.

Mr Varga pointed out that he dissented from the opinion. When requested by the chair, however, he did not seek a formal vote.

**The Commission adopted the Opinion on constitutional issues addressed in amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland (CDL-AD(2016)001).**

## 13. Russian Federation

Mr Cameron presented the draft interim opinion on the amendments to the Federal constitutional law on the Constitutional Court of the Russian Federation, prepared at the request of the Parliamentary Assembly of the Council of Europe and previously examined by the Sub-Commissions on Constitutional Justice and of International Law. He explained at the outset that, as the Russian authorities had not been able to host the rapporteurs prior to the Plenary Session, an exchange of views on the amendments in question had not been possible. It was therefore proposed to adopt the opinion as an interim one. Hopefully these meetings would take place before the June Session, so that a final opinion could be presented then.

Mr Cameron explained that the power of a Constitutional Court to examine the compatibility with the national constitution of a measure of execution of a judgment of the European Court of Human Rights was not contrary to international law. What instead was contrary to international law was the power of the Constitutional Court to declare that the ECtHR's judgment was "non-enforceable" and the ensuing consequence that no measure of execution whatsoever (either general or specific) could be taken. Indeed, under Article 27 of the Vienna Convention on the Law of Treaties and Article 46 ECHR, States parties to the ECHR are under an unconditional obligation to abide by the judgments of the ECtHR. This obligation is incumbent on the State as a whole, e.g. all State authorities. This means that if the Constitutional Court declares that there is a constitutional hurdle to the execution of a judgment of the ECtHR, the other competent authorities must take appropriate action to ensure the execution, in any suitable manner, including, when unavoidable, by proposing the necessary constitutional amendment. The interim opinion therefore recommended to remove the power of the Constitutional Court to declare that a judgment of the Constitutional Court is non-enforceable and the ensuing consequence that no measure of execution may be taken.

Mr Andriy Klishas, Chair of the Committee on Constitutional Legislation and State Construction of the Federation Council of the Russian Federation, thanked the Commission for the preparation of the interim opinion. He explained that the rationale for these amendments was to entrust the assessment of the constitutionality of the execution of a judgment of the ECtHR to the Constitutional Court only, thus removing the discretionary power of the Executive to do so in the context of the procedure of execution of judgments. He stressed that respect for the European Convention on Human Rights and for the judgments of the ECtHR was not contested in Russia. The Russian constitution is the supreme value and the Constitutional Court is its watchdog. Under the amendments, the Executive is not given any power to interpret the

constitution, and may not influence the Constitutional Court. The latter aims to establish a dialogue with the international court; if the hurdle to execution cannot be lifted, the Constitutional Court may address the Federal Assembly for further measures to be taken.

Mr Dmitry Vyatkin, Deputy Chairman of Committee of the State Duma on Constitutional Legislation and State-building, considered that the interim opinion was well-balanced and detailed. He underlined that the Constitutional Court of the Russian Federation, in its assessment of the "executability" of a judgment of the European Court of Human Rights, does not take a "black or white" approach: it tries to reconcile the constitution and the judgment and to indicate the means to avoid further collisions. The Court in its decisions takes into account the opinions of the civil society as well as of experts.

Mr Craig stated that, while it was beyond doubt that the Russian courts and political authorities took account and cognizance of the judgments of the ECtHR and were willing to engage in order to reach a solution of the issue, the amendments under consideration provided explicitly that in case of acknowledged conflict between the constitution and a specific judgment of the Strasbourg Court, Russia would consider itself not to be bound by that judgment and the Russian authorities would even be explicitly prevented from taking any implementation steps. Mr Craig added that the amendments needed to be revised and also the ruling of July 2015 of the Constitutional Court, on which the amendments were based, needed to be revised if it were not to influence all the courts in the Russian Federation.

Mr Boillat, Director General of Human Rights and the Rule of Law of the Council of Europe, stressed that the execution of the judgments of the European Court of Human Rights was an obligation of result, the means being in principle left for the State concerned to find. There existed several means: an interpretation of the constitution in conformity with the Strasbourg Court's case-law; a change in the domestic case-law; an injunction to other authorities and finally an amendment to the constitution. The declaration that a judgment of the ECtHR is non-enforceable amounts to a breach of the obligations under international law of the State concerned.

Mr Huseynov, Ms Bilkova and other members intervened to suggest technical amendments to the interim opinion.

Mr Aurescu thanked the Russian representatives for providing explanations on the rationale for the amendments and welcomed the commitment of the Russian authorities to respect the European Convention on Human Rights and the judgments of the European Court of Human Rights.

**The Commission adopted the interim opinion on the amendments to the Federal constitutional law on the Constitutional Court of the Russian Federation (CDL-AD(2016)005).**

## 14. "The former Yugoslav Republic of Macedonia"

Mr Meridor introduced the Draft Opinion on the Law on protection of privacy and the Law on protection of whistleblowers, previously examined by by the Sub-Commission on Fundamental Rights at its meeting on 10 March 2016.

This opinion had been requested by the Macedonian authorities and concerned two laws (the Privacy law and the Whistleblowers law) adopted in 2015 following a scandal caused by a massive illegal wiretapping of public figures, allegedly organised by the Macedonian secret service. The purpose of the Privacy Law was to stop further publication of the materials which

have been illegally intercepted; some of those materials have already been leaked to the press in 2015, while others remained in private hands. An office of Special Prosecutor was created to investigate into those mass illegal wiretappings. However, the Commission's opinion stressed that the creation of the office of the Special Prosecutor should not deprive the public of its right to know important information "of public interest" which those audiotapes may contain. The law may legitimately punish those responsible for having organised the wiretapping, but not the bona fide journalists. Furthermore, it is legitimate to protect the privacy of those targeted by the wiretapping; however, given that the victims of wiretapping were mainly public figures, the existence of a "public interest" in their conversations should be taken as a starting point. The Privacy Law should allow for balancing between private life and freedom of speech. Thus, the absolute ban on the publication of such materials is not justified. It should be up to the journalist to decide whether the information contained on the audiotapes is "of public interest" and deserves publication; and, in any event, heavy criminal sanctions (such as imprisonment) should be avoided.

The opinion assessed positively the second law on the Whistleblowers. This Law follows a recent trend of giving protection to employees who breach the duty of confidentiality in order to report on an unlawful activity within their institution. The Law described very restrictively the conditions in which the law allowed for public disclosure of confidential information, and the opinion recommended to be more explicit as to whether and when the protection given to whistleblowers goes beyond the labour-law sanctions and covers criminal or civil sanctions.

Mr Gussetti, speaking on behalf of the European Commission, encouraged the Macedonian authorities to give a thorough consideration to the recommendations contained in the Opinion. The European Commission in fact expects that the Opinion will be followed by a speedy appropriate action.

**The Commission adopted the Opinion on the Law on the Protection of Privacy and on the law on the Protection of Whistleblowers of "the former Yugoslav Republic of Macedonia" (CDL-AD(2016)008).**

## 15. Turkey

Mr. Sorensen presented the Opinion on Articles 216, 299, 301 and 314 of the Penal Code of Turkey. He underlined that it was not limited to the wording of the criminal provisions in question, but the practice of the domestic courts in the implementation of those provisions has also been taken into account in order to assess the compatibility of these provisions with European and International Standards. The Opinion concluded that, despite some positive amendments already made, the four articles of the Criminal Code in question needed either to be repealed or to be amended or to be applied in a radically different manner.

Article 216 (Provoking the Public to Hatred, Hostility, Degrading) should not be used to punish harsh criticism against government policies or mere blasphemy without the element of incitement to violence. Article 299 (insulting the President of the Republic), having regard to its excessive and growing use, should be repealed. Article 301 (Degrading the Turkish Nation, State of Turkish Republic, the Organs and Institutions of the State) should be redrafted and amended with the aim of clarifying all the notions used in it. The established criterion in the case-law of the Court of Cassation with respect to membership of an armed organisation (Article 314) should have a strict application. Committing offences on behalf of an armed organisation (Article 220(6)) and aiding and abetting an organisation knowingly and willingly (Article 220(7)) should not be sentenced under Article 314, but other, separate sanctions should be applied to those crimes.

Mr Selahattin Menteş, Under-secretary of the Minister of Justice, underlined that in the last 13 years important steps have been taken in Turkey towards democratisation. He reminded the Commission that Article 216 had been revised in 2004 taking into account the relevant ECtHR case-law and that it was now applied only in respect of expressions which cause imminent danger to public security. Concerning Article 299, he observed that similar provisions existed in many European countries and that in Turkey this provision only applied to profanity which did not contain any criticism. The Under-Secretary also emphasised that Article 301 was applied only in respect of offences of incitement to violence and hatred. He considered that the strict criteria established by the Court of cassation in relation to Article 314 were binding on the local courts and that the amendments to the Anti-terror Law prevented restrictive application of this provision in respect of freedom of expression.

**The Commission adopted the Opinion on Articles 216, 299, 301 and 314 of the Penal Code of Turkey (CDL-AD(2016)002).**

## 16. Draft joint Guidelines for preventing and responding to the misuse of administrative resources during electoral processes

Mr González Oropeza introduced the draft joint Guidelines for preventing and responding to the misuse of administrative resources during electoral processes, previously adopted by the Council for Democratic Elections at its meeting held on 10 March 2016. These Guidelines were the result of several years of work of international experts from various international organisations. Mr González Oropeza referred to the background of the topic, especially to the Report adopted by the Venice Commission in 2013. He pointed out that these Guidelines are intended for lawmakers who are invited to make use of them in order to reinforce the existing legislation on the use of administrative resources during electoral processes.

The main purpose of the Guidelines was to avoid that public resources, whether financial or in-kind, be used during electoral processes for or against electoral stakeholders. The Guidelines aimed at preventing such misuses as well as at responding to them. After detailing the main principles applicable to the use of administrative resources (Rule of Law, political freedoms, impartiality, neutrality, transparency, equality of opportunity), the Guidelines addressed the ways of preventing and responding to misuses. Preventive measures included the adoption of specific legal provisions, audit, information and awareness-raising, without forgetting the political will. Proper responses included complaint and appeals mechanisms, as well as sanctions.

During its last meeting, the Council for Democratic Elections had mainly discussed the rights of civil servants involved in elections, as supporters or as candidates, and their limitations.

**The Commission adopted the Joint Guidelines for Preventing and Responding to the Misuse of Administrative Resources during Electoral Processes (CDL-AD(2016)004).**

## 17. Rule of Law checklist

Mr Tuori retraced the genesis of the Rule of law checklist, from its beginning as an appendix to the 2011 Report on the rule of law, to its launching as a tool for the “rule of law as a pragmatic concept” in London in 2012, to today’s adoption. The premise of the Checklist is that there are core elements of the Rule of Law which are universally recognised and shared (legality, legal certainty, prevention of abuse (misuse) of powers, equality before the law and non-discrimination, and access to justice): the benchmarks develop such core elements. The checklist also contains two examples of particular challenges to the Rule of Law (corruption and

conflict of interest, and collection of data and surveillance). The benchmarks are based on European and universal standards, which are listed in the Checklist.

The Checklist aims at enabling an objective, thorough, transparent and equal assessment of the Rule of law in a given country. It is a tool at the disposal of various actors, such as parliaments and other State authorities, the civil society and international organisations. The Checklist is a practical tool, focusing on public power and the prevention of the abuse of public power, but also stressing the importance of complying with the Rule of Law principles in private activities when public functions are outsourced to private actors. The benchmarks contained in the checklist focus on legal issues, but it is understood that the Rule of law may only function in an enabling environment, when there is a supporting legal and political culture. There is a very close interrelation between the Rule of law and the other two Council of Europe pillars: democracy and respect for human rights.

Mr Helgesen stressed that, because of the complexity of the notion, the process of preparation of the Checklist could have been potentially endless; indeed, it had been lengthy and complex. The Checklist was now mature for adoption. The other rapporteurs stressed the quality and intensity of the work accomplished. Numerous interventions followed all expressing praise for the quality of the Checklist.

**The Commission adopted the Rule of Law checklist (CDL-AD(2016)007).**

## 18. Armenia

Mr Tanchev informed the Commission about a request for an opinion on the draft new Electoral Code of Armenia. This opinion would be jointly prepared with the OSCE/ODIHR. The visit of the rapporteurs would take place on 15-17 March 2016. Mr Tanchev asked the Commission to authorise the rapporteurs (Mr Barrett, Ms Biglino, Mr Tanchev and Mr Vollan, Venice Commission expert) to send a preliminary opinion to the authorities prior to the June session, since the newly adopted Constitution required the Code to be adopted in early June.

**The Commission authorised the rapporteurs to send a preliminary opinion on the draft new Electoral Code of Armenia prior to the June Session.**

## 19. Constitution monitoring

Mr Harutyunyan informed the Commission about his project to organise a conference on constitutional monitoring. Constitutional justice in its current form was not able to identify, assess and restore constitutional imbalances. A new mechanism was required providing an integral system of constitutional diagnostics and monitoring. The Rule of Law checklist would open new avenues in this respect. Mr Harutyunyan would soon transmit a concept paper for such a conference to the Secretariat.

Mr Grabenwarter proposed that this proposal could be discussed by a sub-commission in order to explore how the Rule of Law checklist would relate to this initiative.

**The Commission decided to explore how a conference on constitutional monitoring could be linked to the Rule of Law Checklist.**

## 20. Compilations of Venice Commission opinions and reports

Ms Granata-Menghini presented the updated compilation of Venice Commission opinions and reports concerning political parties and the compilation on local self-government. The latter was particularly welcomed since it confirmed that local self-government and related principles belong to the Constitution.

**The Commission endorsed the Compilation of Venice Commission opinions and reports concerning Political Parties (CDL-PI(2016)003) and the Compilation of Venice Commission opinions concerning Constitutional and Legal Provisions for the Protection of Local Self-Government (CDL-PI(2016)002).**

## 21. Adoption of the Annual Report of activities 2015

Mr Buquicchio informed the Commission that he would present the annual report of activities 2015 to the Committee of Ministers on 1 June 2016.

**The Commission adopted the draft annual report of activities 2015.**

## 22. World Conference on Constitutional Justice

Mr Lewandowski informed the Commission that the Bureau of the World Conference on Constitutional Justice (WCCJ) would hold its 10th meeting in Venice, on Saturday 12 March 2016, following the 106th plenary session. Major items on the agenda were the organisation of the 4th Congress of the WCCJ, to be held in Vilnius, Lithuania on 10-13 September 2017 as well as the examination of the financial report.

## 23. Co-operation with other countries

*Central Asia*

Mr Esanu informed the Commission about the publication entitled “Judicial systems of Central Asia: a comparative overview”. This research project was funded by the European Union and the Minister of Foreign affairs of Finland. In the summer of 2015 a group of experts of the Commission (including two members – Mr Esanu and Mr Mesonis) had visited the five Central Asian countries (Kazakhstan, Kyrgyzstan, Uzbekistan, Tajikistan and Turkmenistan) and prepared an overview of their judicial systems, with emphasis on the status of judges and the structure of the bodies governing the judiciary. The overview is in Russian, with an introductory article translated into English. It may serve as a useful source of information for academic exchanges and as a tool for designing future reforms in the area of the judiciary in this region.

*Tunisie*

Mme Granata-Menghini informe la Commission de la coopération étroite et fructueuse avec l’Association des Ombudsman de la Méditerranée. Dans ce cadre, en février 2016 une visite à l’institution du médiateur administratif de la Tunisie a été effectuée, avec pour objectif d’avoir un échange de vues avec l’institution sur son cadre juridique et ses méthodes de fonctionnement, en vue de pouvoir proposer d’éventuelles réformes législatives concernant son statut et un programme de formation à l’intention de l’ensemble de l’institution. Les discussions ont été particulièrement fructueuses et empruntes d’un esprit ouvert, constructif et de confiance réciproques.

Sur d'autres plans, la coopération avec les autorités tunisiennes semble malheureusement un peu en suspens. Le projet de loi sur le Conseil supérieur de la magistrature n'ayant pas encore été adopté et la demande annoncée par le Ministre auprès du chef du gouvernement chargé des relations avec les institutions constitutionnelles indépendantes pour un avis sur le projet de loi-cadre sur les Instances constitutionnelles indépendantes, conformément au Chapitre VI de la Constitution tunisienne n'étant toujours pas parvenue. Dans l'intervalle, trois rapporteurs (Mme Kiener et Bazy-Malaurie et M. Scholsem) ont néanmoins activement travaillé sur la préparation de cette loi-cadre.

M. Jeribi informe la Commission que le tribunal administratif a annulé le décret-loi de 2011 sur la confiscation des biens de l'ancien Président et de 114 de ses proches. Un avant-projet de loi est à l'étude concernant la confiscation des biens de l'ancien Président ainsi que la réconciliation. S'agissant de la Cour constitutionnelle, la loi qui met en œuvre les dispositions constitutionnelles a été adoptée, mais ne peut être appliquée, car un tiers des membres de la Cour doit être nommé par le Conseil Supérieur de la Magistrature, et la loi l'établissant a été annulée une deuxième fois pour des motifs techniques par l'Instance provisoire exerçant les fonctions de contrôle de constitutionnalité.

## 24. Information on constitutional developments in other countries

*Bosnia and Herzegovina*

Mr Buquicchio and Mr Knežević informed the Commission that the proposed removal of international judges of the Constitutional of Bosnia and Herzegovina as well as the decriminalisation of the non-execution of judgments of the Court had little chance of being adopted in practice.

*Croatia*

Mr Buquicchio informed the Commission that since the last plenary session a Government had been formed in Croatia. This increased the chances for an election of judges to the Constitutional Court. In June 2016 further vacancies would have had to be filled. In the absence of the election of judges, the number of remaining judges at the Court would fall below the quorum.

*Declaration on undue interference in the work of Constitutional Courts*

Ms Baricova highlighted that since the 2014 opinion on the appointment of judges in times of presidential transition, the President of Slovakia had refused to appoint all but one judge. Two vacancies at the Court remained open. A new vacancy had now come up and the President had again refused to appoint a judge.

The Commission was informed about statements made by the President of Turkey who had declared that he will not respect a recent judgment of the Constitutional Court and who had even threatened to abolish that Court.

Mr Buquicchio proposed that the Commission give a mandate to the Bureau to prepare a declaration of the Commission on undue interference in the work of Constitutional Courts in its member States, which should not only refer to Poland and Turkey but also to Slovakia, Bosnia and Herzegovina and Georgia. Mr Buquicchio undertook to inform the Bureau of the World Conference about the declaration.

**The Commission mandated the Bureau to prepare a declaration of the Commission on undue interference in the work of Constitutional Courts.**

## 25. Report of the meeting of the Council for Democratic Elections (10 March 2016)

Mr Vermeulen informed the Commission on the results and conclusions of the meeting held on 10 March 2016.

In addition to the Joint Opinion on Amendments to the Election Code of Georgia and the Joint Guidelines for Preventing and Responding to the Misuse of Administrative Resources during Electoral Processes, which had been adopted by the Plenary, the Council had discussed the issue of the publication of the lists of voters having participated in the elections. The Council had reached the conclusion that voters' lists should not be published. Nevertheless, under special circumstances, those having presented lists in elections should be given access to the lists. The Council would work further on this issue.

## 26. Other business

There was no other business to discuss.

## 27. Dates of the next sessions

The schedule of sessions for 2016 was confirmed as follows:

| | |
|---|---|
| 107th Plenary Session | 10-11 June 2016 |
| 108th Plenary Session | 14-15 October 2016 |
| 109th Plenary Session | 9-10 December 2016 |

Sub-Commission meetings as well as the meetings of the Council for Democratic Elections will take place on the day before the Plenary Sessions.

Link to the list of participants