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(VENICE COMMISSION)

COMMISSION EUROPEENNE POUR LA DEMOCRATIE PAR LE DROIT

(COMMISSION DE VENISE)

117th PLENARY SESSION
Venice, Scuola Grande di San Giovanni Evangelista
Friday, 14 December- Saturday, 15 December 2018

117e SESSION PLÉNIÈRE
Venise, Scuola Grande di San Giovanni Evangelista
Vendredi 14 décembre - Samedi 15 décembre 2018

SESSION REPORT/RAPPORT DE SESSION

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1. Adoption of the Agenda

A minute of silence was observed in memory of the victims of the Strasbourg attack of 11 December 2018.

The agenda was adopted without any amendments (CDL-PL-OJ(2018)004ann).

2. Communication by the President

The President presented his recent activities (CDL(2018)036), in particular his visit to Armenia in November 2018 (when its Parliament was dissolved) for extensive meetings with the *ad interim* Prime Minister, the *ad interim* Deputy Prime Minister and parliamentary parties as well as the Head of the Judicial Council. The elections on 10 December 2018 were considered to have been well-managed, the country's electoral code and judicial system will be revised in the near future and its Constitution amended. The Venice Commission will therefore continue its co-operation with Armenia.

3. Communication from the Enlarged Bureau

Mr Markert informed the Commission that the Enlarged Bureau had discussed the Council of Europe's difficult financial situation, which also affected the Venice Commission and which resulted from the Russian Federation's non-payment of its contribution. Although the Venice Commission had received several voluntary contributions from the EU and others, these were often earmarked for specific countries, mostly outside Europe, or for specific activities or both, making it difficult to organise general activities in Europe.

Mr Buquicchio invited the members of the Venice Commission to urge their authorities to support the Venice Commission financially.

4. Communication by the Secretariat

Mr Markert provided logistic information on the session.

5. Coopération avec le Comité des Ministres

L'Ambassadeur Katrin Kivi, Présidente du GR-EXT et Représentante Permanente de l'Estonie auprès du Conseil de l'Europe, évoque l'échange de vues fructueux avec M. Buquicchio lors de la réunion du GR-EXT en octobre 2018, sur le rôle de la Commission de Venise dans la politique du Conseil de l'Europe à l'égard des régions voisines. M. Buquicchio avait présenté la coopération avec l'Asie centrale et les pays méditerranéens. Mme Kivi explique que le Comité des Ministres travaille avec les pays des régions voisines avec le soutien de la Commission de Venise, surtout pour les pays en transition démocratique et félicite la Commission pour sa réactivité, sa clairvoyance et sa flexibilité ainsi que son efficacité.

M. Buquicchio indique que la Commission de Venise se tient à la disposition du Comité des Ministres. Il explique que si l'Europe reste la priorité de la Commission, les régions voisines demeurent dans son champ d'action.

L'Ambassadeur Marek Eštok, Représentant Permanent de la République slovaque auprès du Conseil de l'Europe, dit que l'année 2018 est une année symbolique pour son pays car la Slovaquie est devenue membre du Conseil de l'Europe il y a 25 ans. Il explique que la Commission a aidé la Slovaquie à surmonter des obstacles juridiques dans la nomination des juges constitutionnels. Les 27-28 juin prochains, le Ministère de l'Intérieur slovaque co-

organisera avec la Commission la 16è Conférence européenne des administrations électorales sur le traitement du contentieux électoral.

M. Buquicchio ajoute que la question de la nomination des juges constitutionnels en Slovaquie n'a pas encore été résolue car il serait nécessaire de modifier la Constitution ; la Commission se tient prête à aider au besoin.

Ambassador Elisabeth Walaas, Permanent Representative of Norway to the Council of Europe said that Norway has always been, and will continue to be, a strong supporter of the Venice Commission, because of the high quality of its work and its objectivity. Ms Walaas observed that the request for opinions was constantly rising, which is a positive sign and shows that the authorities of the Venice Commission's member states trust the Commission. She also said that the member states contributed not only financially to the Venice Commission, but also by designating members and substitute members from amongst their brightest and most competent people in the field.

Mr Buquicchio agreed with Ambassador Walaas and thanked Norway for the choice of its member and substitute member.

6. Co-operation with the Parliamentary Assembly

Mr Sergiy Vlasenko, Member of PACE Committee on Legal Affairs and Human Rights explained that since October the Committee had adopted numerous reports including on topics such as the compatibility of Sharia law with the ECHR and on the deprivation of nationality as an anti-terror measure and human rights. The Committee was also working on a report on the on-going investigation concerning the killing of a journalist, Daphne Caruana Galizia, in Malta, for which it would refer to the Venice Commission's opinion. The Monitoring Committee had requested an opinion from the Venice Commission for Georgia on the Prosecutorial and High Judicial Councils. The Assembly carried out election observation missions in Ukraine, Turkey and Georgia with the Venice Commission's assistance.

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

Mr Leen Verbeek, Chair of the Congress Monitoring Committee, informed the Commission about the election of Anders Knape (Sweden) as new President of the Congress and of himself as Chair of the Congress Monitoring Committee. The Congress had adopted reports on local and regional democracy for, *inter alia*, Georgia, Lithuania and Slovenia and, notably with respect to its monitoring missions to Bosnia and Herzegovina, it had very much relied on the Venice Commission's expertise. The Congress had also published the first volume of its Handbook on Human Rights at local and regional levels.

8. Co-operation with the Council of Europe Development Bank

Mr Rolf Wenzel, Governor of the Council of Europe Development Bank, explained that the Bank had endeavoured to tackle the migration and refugee crisis over the past couple of years, while supporting Council of Europe values. The Bank supports social projects in its 41 member states and its activities can only flourish in countries in which working structures are in place. In this respect, the Venice Commission's work is key, as it helps to establish such structures – notably with respect to transparent and independent judiciaries that lead to strong democracies.

Mr Lucio Gussetti followed up concerning the EU's financial support for the Venice Commission and said that there are two reasons why the EU decided to do so: the Venice Commission provides invaluable expertise and is independent.

9. Follow-up to earlier Venice Commission opinions

The Commission was informed on follow-up to:

> *Romania - Opinion on draft amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organisation and Law No. 317/2004 on the Superior Council for Magistracy (CDL-AD(2018)017) and Opinion on draft amendments to the Criminal Code and the Criminal Procedure Code (CDL-AD(2018)021)*

In its opinions adopted in October 2018, without challenging the necessity and purpose of amending the three judicial laws and the criminal and criminal procedure codes, the Commission criticized important new features which seen alone, but especially in view of their cumulative effect, in the complex political context in Romania, were likely to undermine the independence of Romanian judges and prosecutors, the effectiveness of criminal justice, as well as the country's fight against corruption and public confidence in the judiciary.

Following their entry into force, the three judicial laws were modified through two government emergency ordinances, confirmed by the Romanian parliament. One amendment, the postponement of the entry into force of the new early retirement scheme, addressed an issue raised in the Venice Commission's opinion. On the other hand, the new Section for investigating offences committed by magistrates criticised in the opinion was now operational.

An important number of amendments to the two Codes, among them many provisions criticized by the Venice Commission, were invalidated by the Constitutional Court and were under re-examination by the Romanian parliament. The Committee of Ministers of the Council of Europe, as well as the European Parliament and the European Commission, called upon the Romanian authorities, with reference to the Venice Commission's recommendations, to re-consider the recent amendments.

> *Amicus curiae brief for the European Court of Human Rights in the case of Berlusconi v. Italy on the minimum procedural guarantees which a State must provide in the framework of a procedure of disqualification from holding an elective office (CDL-AD(2017)025)*

In July 2017 the President of the European Court of Human Rights requested the intervention of the Commission in the proceedings related to the case of Berlusconi v. Italy. The case concerned the procedural guarantees for disqualification from office. In its *amicus curiae* brief, to which a comparative analysis of legislation in 62 countries was attached, the Commission had focused on legal systems where the loss of an elective mandate is not left to a decision by a judge but is regulated in the legislation. In some States where the disqualification operates *ex lege*, it is still necessary that the loss of mandate be confirmed by a decision of parliament. The Commission expressed the view that such a decision does not in itself amount to an interference with the right to be elected, because the loss of mandate flows from the law itself: parliament may not impose it unless the legal conditions are met. It follows that the guarantees afforded to the person concerned by the parliamentary procedure do not need to be full-fledged: he or she should be able to make submissions, to appear in parliament or be represented by a lawyer of his or her choice, the hearing should be public and the decision should be made public. It would be appropriate to provide for the possibility to appeal to the Constitutional Court.

It will never be known whether the Court agrees with this analysis: by a decision of 15 November 2018, upon the request of the applicant following his rehabilitation on 11 May 2018, the Court decided by a majority to strike the case out of the list.

Poland - Opinion on the Draft Act amending the Act on the National Council of the Judiciary; on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts (CDL-AD(2017)031)

In its opinion of December 2017 the Commission concluded that the reform of the Polish judiciary posed a grave threat to judicial independence. In 2018 the legislative amendments were put into practice; this gave rise to a major controversy between the European Commission and the Polish Government and resulted in at least two sets of proceedings before the European Court of Justice (the ECJ). The first concerned an extradition request for a suspected criminal from Ireland to Poland, due to concerns about the integrity of the Polish justice system. The ECJ held that the extradition may be postponed if the Irish court finds that the person being extradited was exposed to a risk of a flagrant denial of justice. In November, the Irish court decided that despite serious doubts about the independence of the Polish judiciary, the applicant's specific situation was not such as to conclude that he would not receive a fair trial back home.

The second case was referred to the ECJ by the European Commission on 2 October 2018. It concerned one of the major aspects of the reform, namely the retroactive lowering of the retirement age for judges of the Supreme Court. Many Supreme Court judges, including the First President, had refused to leave, considering this change unconstitutional. The Commission believed that this measure also infringed EU law. While the proceedings were pending the Commission requested an interim measure, and on 19 October the Vice-President of the ECJ ordered the suspension of early retirement of judges and the appointment of the new judges to the SC. At the end of November, the Polish Government introduced draft legislation which would reinstate the Supreme Court judges (including the First President) who were supposed to leave under the new rules. This is positive, but other issues, noted in the 2017 opinion, remain unresolved.

10. Albania

Mr Sorensen, introducing the draft opinion reminded the Commission that the opinion had been requested by the Speaker of the Albanian parliament, and concerned draft constitutional amendments enabling vetting of politicians, initiated by the parliamentary opposition. In particular, it was proposed to prevent persons who "have contacts with persons involved in organised crime" from being candidates for Parliament or other elective positions, or from holding such positions.

The Venice Commission had already assisted Albania in elaborating the framework for reforming and cleansing the judiciary. Vetting processes were on-going in respect of judges and prosecutors, and of the police forces. Also, persons finally convicted for specific criminal offences were prevented, under the 2015 "Decriminalisation Law", from accessing a number of elected and appointed positions in public institutions and state administration.

Despite its legitimate aim, the vetting proposal failed to provide the guidance and safeguards needed for such a complex and sensitive process, with severe implications for the rights of those subject to it. It lacked legal clarity and certainty (in terms of scope, grounds for ineligibility and loss of mandate, and implementation mechanism), and raised issues of proportionality. In the light of the existing framework, its added legal value was questionable. It was for the Albanian Parliament, through a wide and constructive dialogue, to decide on forthcoming steps concerning the amendments.

Ms Klotilda Bushka, Secretary of the Committee on Legal Affairs and Human Rights of the Albanian parliament, thanked the Commission for its support in setting up the constitutional

and legislative bases for cleansing the Albanian judiciary and reaffirmed Albania's commitment to freeing the Albanian political class and administration from offenders and their influence. For reaching this goal, the on-going vetting within the judiciary was instrumental. Mr Oerd Bylykbashi, representative of the Democratic Party, on behalf of the initiators of the draft constitutional amendments, also thanked the Commission for its opinion and for acknowledging the legitimate aim pursued by the draft amendments. He stressed that the opinion would constitute an excellent basis for further work on the envisaged vetting scheme, and expressed the openness and readiness of the opposition in the Albanian parliament to engage a dialogue in with the political majority on this crucial issue for the Albanian society.

The Commission adopted the opinion on the draft constitutional amendments enabling the vetting of politicians of Albania (CDL-AD(2018)034) previously examined by the Sub-Commissions on Democratic Institutions and on the Mediterranean Basin on 13 December 2018.

11. Malta

Mr Kuijer, introducing the draft opinion, pointed out that it was the result of two requests, from the PACE Committee on Legal Affairs and Human Rights and from the Maltese Minister for Justice, Culture and Local Government. The scope of both requests was roughly similar, i.e. to look into the constitutional arrangements of the country, the separation of powers, judicial independence and the position of the law enforcement bodies.

This scope was very broad and it was near to impossible to provide a comprehensive and exhaustive analysis of the existing constitutional arrangements. Therefore, the draft opinion covered only the most relevant topics. The proposed constitutional reform required a holistic approach. In Malta, all interlocutors of the Commission's delegation had acknowledged the need for reform, notably as concerns the judiciary and the role of criminal prosecution. In its written response to the draft opinion, the Government had shown a willingness to accept the opinion as a basis for reform.

Even if the request from PACE was prompted by the assassination of an investigative journalist Daphne Galizia, the draft opinion did not look into this specific case or any other individual cases but was limited to the constitutional arrangements as such.

As concerns the executive power, under the Maltese Constitution, it is the Prime Minister who is clearly the centre of political power. Other actors such as the President, Parliament, the Cabinet of Ministers, the Judiciary or the Ombudsman are too weak to provide sufficient checks and balances. The draft opinion therefore recommended strengthening these powers. Regarding Parliament, the draft opinion recommended tightening the rules on conflicts of interest, raising the salaries of 'part-time' MPs so that they would not depend on other remunerated positions attributed to them by the executive power and ensuring that MPs have sufficient access to non-partisan information to perform their controlling function. The President of Malta should be strengthened through powers of – notably judicial - appointments without the intervention of the Prime Minister. The draft opinion also recommended considering electing the President of Malta with a qualified majority.

As concerns the Judiciary, vacancies for judicial office are not announced or published. The Judicial Appointments Committee, established by constitutional amendment in 2016, vets candidates for judicial appointment and includes suitable candidates in a permanent register. When a vacancy comes up, the Prime Minister is free to choose a candidate from that register or from among the sitting magistrates (first instance judges). The draft opinion recommended widening the composition of the JAC, publishing judicial vacancies and enabling the JAC to not

only vet candidates but also to rank them upon merit. The draft opinion also recommended abolishing the possibility that judges are dismissed by Parliament.

As concerns prosecution, it is the Police who investigate crimes and who then press the charges in court. The office of the Attorney General (AG) is involved in prosecution only for the most serious crimes, but the AG is also the Legal Adviser to the Government. The draft opinion recommended setting up an office of an independent Director of Public Prosecutions or Prosecutor General with security of tenure, being responsible for all public prosecutions, subject to judicial review. The AG would remain the Legal Adviser to the Government and the Police could focus exclusively on investigative work. Mr Kuijer also referred to a number of changes made to the draft opinion following the debate in the Sub-Commission.

Mr Owen Bonnici, Minister of for Justice, Culture and Local Government, welcomed the draft opinion and its wide ranging recommendations, which did not conflict with the fundamental principles of the Maltese Constitution. The 1963 Constitution, which had been prepared on the basis of the British model, contained checks and balances but it had to be amended in the light of new requirements to ensure the separation of powers. Amendments to the Constitution had to be adopted by a two-thirds majority in Parliament. Extensive consultations were necessary for these amendments. In general, the Maltese Government welcomed the draft opinion which should become the basis for constitutional reform. The implementation of the opinion's recommendations might require assistance by the Venice Commission at a later stage. President Buquicchio welcomed the constructive approach of the Maltese Government.

The Commission adopted the Opinion on the constitutional arrangements and separation of powers and the independence of the judiciary and law enforcement bodies of Malta, previously examined by the Sub-Commissions on Democratic Institutions and on the Mediterranean Basin on 13 December 2018 (CDL-AD(2018)028).

12. Georgia

Mr Eșanu explained that the draft opinion on the provisions on the Prosecutorial Council (PC) in the draft Law of Georgia on the Prosecutor's Office and on the provisions on the High Council of Justice (HCJ) in the Law on General Courts of Georgia, had been requested by the Monitoring Committee of the Parliamentary Assembly.

The opinion focused on the constitutional status of the Prosecutor's Office, the subordination of the prosecutors, the disciplinary responsibility of the Prosecutor's Office's employees and the role of the PC. For the HCJ, the relevant provisions in the existing Law on General Courts were analysed.

The main recommendations for the PC in light of its new role under Article 65(3) of the Constitution include: that its composition be revised to include members from civil society; the Prosecutor's Office's external and internal independence should be ensured in relation to the legislative and executive powers; that the internal independence of the prosecutors should be ensured and to do so the PC should be attributed with the role of ensuring at least a minimum set of guarantees. To achieve a balance between the hierarchical control over and the independence of prosecutors, the PC's powers should be increased regarding the careers of prosecutors. The draft Law needs to also expressly indicate how the PC is to guarantee the transparency of the Prosecutor's Office. For the HCJ, the terminology for the grounds for terminating the powers of a member of the HCJ needs to be made clear and precise. Objective criteria should be established setting out what is deemed proper or improper fulfilment of duty.

Ms Tamar Chugoshvili, First Deputy Chairperson, Parliament of Georgia, said that the Georgian authorities appreciated the Venice Commission's work and that, while the

constitutional amendments would enter into force on the inauguration of Georgia's new President, the recommendations in this opinion would nevertheless be taken into account in legislative amendments. She explained that the Prosecutor's Office will become fully independent and that the PC will have an important role, not through direct management, but through the Prosecutor General and through the scrutiny and oversight of his or her work. As for the HCJ, there was no specific law on this institution for the moment, however a draft was currently being prepared. The Georgian authorities would turn to the Venice Commission once draft amendments are available on the provisions on the PC and on the HCJ.

The Commission adopted the Opinion on the provisions on the Prosecutorial Council in the draft Law of Georgia on the Prosecutor's Office and on the provisions on the High Council of Justice in the Law on General Courts (CDL-AD(2018)029).

13. Parliamentary Assembly report on "Updating guidelines to ensure fair referendums in Council of Europe member States"

Ms Chatzivassiliou-Tsovilis introduced the draft report prepared by Dame Cheryl Gillan and approved by the PACE Committee on Political Affairs and Human Rights, to be submitted to the next plenary session of the Assembly for adoption. This was part of a long-term co-operation between the Assembly and the Commission, which had started with the Code of Good Practice on Referendums. This report had been initiated by Lord Foulkes, who had expressed concerns about the procedure and from time to time about the results of referendums. The draft resolution suggested amending the Code of Good Practice on Referendums to take account of the developments which had taken place since its adoption. It proposed following some general principles and also detailed possible areas for amendments. In particular, it was felt that there was a need for an independent body to supervise referendum conduct by taking into account the peculiarity of referendum campaigns. The draft also recognised the need to increase citizen participation, for example through citizens' assemblies. The explanatory memorandum was based on replies to a questionnaire by 38 countries as well as input from an expert, Alan Renwick.

Mr Kask reported on the discussion held in the Council for Democratic Elections. He reiterated that a reflection on referendums was on-going within the Commission, and a questionnaire had been circulated amongst members. Mr Alivizatos had led this reflection and had co-operated with Dame Gillan in the preparation of this report. Against this background, the Council was open to the revision of the Code of Good Practice on Referendums. This revision would in particular be aimed at closing the loopholes in the Code and take account of the replies to the questionnaires on referendums drafted by the Venice Commission and the Parliamentary Assembly.

14. Hungary

Ms Bilková presented the Joint opinion on Section 253 of the special immigration tax of Act XLI of 20 July 2018 amending certain tax laws and other related laws and on the immigration tax. She explained that Section 253 imposes a 25 per cent tax on financial support to associations conducting immigration-supporting activities in Hungary. An immigration-supporting activity is defined as "any programme, action or activity that, either directly or indirectly, aims at promoting immigration" and which is realised through carrying out media campaigns and media seminars, and participating in such activities, organising education, building and operating networks or propaganda activities that portray immigration in a positive light. The special immigration tax aims at obliging NGOs conducting activities in the field of migration to bear the costs that have arisen as a result of their activities, which contribute to the growth of immigration and result in public tasks and expenditure.

While the draft opinion recognised that it is necessary for States to raise revenue through taxation, it stressed that by targeting specific activities of associations, the special tax restricts the objectives of associations and constitutes an interference with their rights to freedom of association and expression.

The draft opinion pointed to the vague character of some terms used in the provision such as “indirect promotion of migration” or “portraying immigration in a positive light” which make the provision overly broad and offer too little guidance to understand when the tax may be imposed. The provision therefore does not meet the criterion of “legality”. The draft opinion also underlined that certain characteristics of the special immigration tax indicate that it is imposed for the purpose of limiting the potential of NGOs to seek funds for their legitimate activities in the field of immigration. The draft opinion expressed serious concerns about the legitimacy of this aim which has the effect of dissuading persons, including legal persons, from lawfully advocating a particular political point of view. Lastly, in the assessment of the necessity and proportionality of the interference, the draft opinion took into account the cumulative effect created by the imposition of the special immigration tax, together with the reporting obligations imposed by the Law on Transparency of Organisations Receiving support from abroad and the restrictions imposed by the implementation of Section 353A of the Criminal Code on Facilitating Illegal Migration on legitimate activities of NGOs. It concluded that the special tax represents an unnecessary and disproportionate interference with the right to freedom of association and expression of NGOs.

Ms Bilková further explained that following the comments and suggestions made during the meeting of the Sub-Commission on Fundamental rights on 13 December, the draft opinion had been amended. However, the conclusions of the Opinion remained unchanged and the amendments were limited to rendering the text more concise. The Opinion only focused on some problematic aspects of Section 353A.

Mr Balázs Orbán, State Secretary, stressed that the new challenges created by the unprecedented increase in migration in recent years required new solutions. The purpose of the special tax was not to penalise NGOs conducting immigration-supporting activities. However, those NGOs play a very important role in the escalation of mass migration and the resulting public expenditures are real and quantifiable. Therefore, they were required to pay the resulting cost of their activities. Mr Orbán stressed that the draft opinion did not take into account the sovereign power of Hungary to organise its tax system and criticised the draft opinion for not formulating recommendations aiming at improving Section 253 but simply asking the authorities to repeal it. He asked the Commission not to adopt the draft opinion.

In reply to a proposal to postpone the adoption of the draft opinion in view of the extensive amendments made following the discussion at the Sub-Commission on Fundamental Rights, several members insisted that the revisions made in the draft addressed all issues raised during the Sub Commission and that the revised version was only a shortened version of the original text which did not contain any substantial additions. They opposed the postponement of the adoption of the draft opinion.

The draft opinion was adopted with one abstention (Ms Karakamisheva-Jovanovska).

The Commission adopted the Joint Opinion on Section 253 on the special immigration tax of Act XLI of 20 July 2018 amending certain tax laws and other related laws and on the immigration tax of Hungary (CDL-AD(2018)035), previously examined by the Sub-Commission on Fundamental Rights on 13 December 2018.

15. Kazakhstan

Mr Mathieu explained that the opinion on the Concept Paper on the reform of the High Judicial Council (HJC) of Kazakhstan had been requested by the Chairman of this body. Most of the proposals contained in the Concept Paper deserved praise. The authorities of Kazakhstan had repeatedly stated their desire to move towards the European model of organisation of the judiciary, and this was positive. The reform had two limbs: institutional (regarding the distribution of powers between different bodies in the sphere of judicial careers) and procedural (regarding the process of recruitment and promotion of judges). As to the institutional limb, the HJC was not yet fully independent from the President of the Republic, who may appoint its members and define its composition. It was understandable that the Kazakh authorities preferred a step by step approach, but in future it would be necessary to ensure greater independence of this body, and describe its composition, grounds for termination of the mandate of its members, extend the duration of the mandate, etc. The procedural limb of the reform aimed at improving the quality of judges recruited to the system. However, psychological tests and lie detector tests were to be avoided in this process. The qualification exam should permit the grading of all successful candidates. As regards the accountability of judges, it was necessary to distinguish between ethical breaches, disciplinary offences and results of the professional evaluations.

Mr Talgat Donakov, Chairman of the High Judicial Council, expressed gratitude to the Venice Commission for its prompt reaction and for the recommendations. It was necessary to ensure the recruitment of the most qualified candidates to the judicial system; the Concept Paper had already been transformed into draft legislation which was being considered in Parliament. Many of the recommendations of the draft opinion had already been reflected in the draft law - for example, it was planned to introduce the grounds for early termination of the mandate of a member of the HJC. Judges would represent more than half of the members of the HJC. Matters related to judicial careers would be decided by the HJC, while the Supreme Court will deal with professional evaluations. More comprehensive reforms, which may need constitutional amendments, may require extra time and preparatory measures.

The Commission adopted the Opinion on the Concept Paper on the Reform of the High Judicial Council of Kazakhstan (CDL-AD(2018)032).

16. "The former Yugoslav Republic of Macedonia"

Mr Dimitrov explained that the opinion on the draft law amending the Law on Courts was a follow-up to an opinion adopted at the October plenary session (CDL-AD(2018)022), and had been requested by the Prime Minister of the country. He praised the authorities for the good co-operation and for their willingness to implement the earlier recommendations of the Venice Commission. Most of the amendments concerned the grounds for disciplinary liability of judges: these grounds were now better formulated and more coherent. The draft law was a clear improvement compared to the previous version, but would benefit from some clarifications. Thus, the law should define the grounds for self-recusal; abuse of the office should not be a ground for an automatic termination of the judicial mandate but may lead to disciplinary proceedings. It was necessary to clarify when the court presidents have the duty to inform the Judicial Council about the misbehaviour of judges. The draft law had been in the meantime approved by the Government, and the recommendations of the draft opinion had been duly taken into account.

Ms Ljubica Karamandi Popchevski, legal adviser at the Ministry of Justice, informed the Commission that the Draft Law had been submitted to Parliament, and that the amendments to the Law on the Judicial Council (the second law analysed in the October 2018 opinion) were also being prepared. The draft law narrowed down the grounds for the dismissal of judges, and

introduced the elements of fault and severe consequences as a pre-condition for dismissal. For candidates to judicial positions there would be a single entry point to the judiciary (through the Judicial Academy). Regular evaluations would be henceforth conducted every 4 years.

The Commission adopted the Opinion on the draft law amending the Law on Courts of "the former Yugoslav Republic of Macedonia" (CDL-AD(2018)033).

17. Turkey

Mr Kask explained that the amendments had been adopted in a hasty and non-inclusive way just a few weeks before the elections; he underlined the importance of the stability of the fundamental elements of electoral law, as did in principle the Turkish Constitution (but the relevant clause had been suspended for the 2018 elections). Most amendments – at least the March ones - were made unnecessary by the constitutional revision. On substance, the opinion acknowledged that the new possibility of alliances could partly mitigate the too high threshold, but not for the parties not belonging to alliances; the draft opinion also criticised changes in the composition and leadership of the electoral administration, and that a number of safeguards for transparency and security had been affected.

Mr Misev, Election Adviser, OSCE/ODIHR, reminded the Commission of the long-standing recommendation for a comprehensive review of the electoral legislation.

Mr Ömer Yilmaz, Rapporteur Judge, Department of Human Rights, Ministry of Justice, referred to the written submission and to the information note provided by the Turkish authorities. The scope of the opinion went beyond the request, since it addressed issues which were not included in the amendments (for example, the electoral threshold pre-existed them). A number of positive amendments had been introduced (electoral alliances and mobile ballot boxes, for example). Other amendments did not put into question the impartiality of the electoral administration or the right to vote.

Mr Kask underlined that the Commission should not limit its assessment to the text but had to take into account the context, including the amendments to the Constitution and the election observation reports. The draft had duly taken into consideration the submissions of the Turkish authorities.

The Commission adopted the Joint Opinion of the Venice Commission and the OSCE/ODIHR on Amendments to the Electoral Legislation and related "Harmonisation Laws" adopted in Turkey in March and April 2018 (CDL-AD(2018)031), previously adopted by the Council for Democratic Elections on 13 December 2018.

18. Report on separate opinions of Constitutional Courts

Ms Šimáčková explained that the report on separate opinions of Constitutional Courts had been discussed at the Sub-Commission on Constitutional Justice on 13 December 2018 and that it was divided into three main parts: an overview of the advantages and disadvantages of separate opinions, the rules governing these opinions and a conclusion with recommendations. She explained that arguments against separate opinions claim that they endanger the unity of the court and undermine its authority and that arguments in support of them claim that they democratise the judiciary, making it more transparent and thereby strengthening its authority and credibility.

The choice of whether or not to introduce separate opinions remains with the states. However, for those which have them, the report's main recommendations should be considered. These include that the law should treat separate opinions as a right and not a duty of judges; that these opinions should remain loyal to the court and its institutional role in order to ensure the legitimacy of judicial decision-making; that a separate opinion should be considered as an *ultima ratio* solution; that the majority must be able to respond to a written separate opinion to ensure the quality of judgments and the collegiality within the court; that the judges' code of conduct/ethics should deal with separate opinions setting out which lines should not be crossed; that a disrespectful separate opinion breaching the code of conduct/ethics must be published regardless of whether or not a procedure has been launched against the dissenting or concurring judge and that a separate opinion forms a part of the judgment and should therefore be published in every case together with the majority judgment and *ex officio*, not only upon request by the judges, who formulate these opinions.

A discussion ensued about whether or not separate opinions should be considered a right or a duty of judges, especially for constitutional court judges. However, on that point the Sub-Commission on Constitutional Justice had already concluded that a delicate balance had been reached on this matter. Different countries have different rules regarding this issue and judges should be seen as having an ethical, not a legal, duty to provide a separate opinion. Making a separate opinion should therefore be regarded as part of the right to freedom of expression of the judge.

The Commission adopted the Report on separate opinions of constitutional courts (CDL-AD(2018)030), previously examined by the Sub-Commission on Constitutional Justice on 13 December 2018.

19. Constitutional Developments in Observer States

Canada

Mr Stéphane Dion, Ambassador of Canada to Germany and Special Envoy to the European Union and Europe and Mr Warren Newman, Senior General Counsel, Constitutional, Administrative and International Law Section, Department of Justice, addressed the Commission. The text of their interventions can be found in the annex to the present report.

President Buquicchio underlined the history of the relations between the Commission and Canada and expressed the hope that Canada would become a fully-fledged member of the Commission.

Japan

In the absence of Ambassador Takamasa Sato, Permanent Observer of Japan to the Council of Europe, Mr Kosuke Yuki, Consul of Japan in Strasbourg and liaison officer for the Commission's CODICES database, referred to the latest jurisprudence of the Supreme Court of Japan regarding the House of Councillors' elections, which was proof that the rule of law had taken root in Japan in practical terms.

Since 1983 the Supreme Court Grand Bench had delivered a number of judgments concerning the House of Councillors' elections. In the 2012 judgment the Court found that during the 2010 Election the disparity in the allocation of seats between constituencies was extreme and, therefore, unconstitutional; the Court further noted that to correct this inequality urgent legislative measures to reform the current election system were necessary. Only one month after the 2012 judgment, Parliament partially modified the Public Offices Election Act

on the allocation of seats. It pursued the reform of the electoral system and in 2015 further revised the provisions of that Act to introduce an unprecedented merger of some less-populated constituencies. That measure reduced the disparity to around 3 to 1, instead of 5 to 1 for several decades. Moreover, the revised Act embedded (in its supplementary provision) the need to pursue the fundamental reform of the election system.

As for the 2016 House of Councillor's election and the relevant provisions of the Public Offices Election Act, the Supreme Court Grand Bench stated in 2017 that the disparity between constituencies in terms of the value of votes (1 to around 3 at the time), was not an indication of an extreme inequality, and therefore, could not be declared unconstitutional. Since the Parliament had properly complied with the decision of the Supreme Court, the disparity was corrected without any drastic measures such as cancelling the election. This demonstrated that Japan had a well-functioning checks-and-balances mechanism between the legislative and judicial branches of power.

President Buquicchio underlined the history of the relations between the Commission and Japan, and expressed the hope that the latter would become a fully-fledged member of the Commission.

United Kingdom

Mr Clayton stated that the Chequers proposal made in July by the government had been abandoned. The negotiation with the European Union had led to an agreement whose submission to parliament had been postponed. The European Union had declined any revision of the agreement, while the European Court of Justice had stated that the United Kingdom could unilaterally revoke its decision under Article 50 of the Treaty on the European Union. It should be noted that, following a decision of the Supreme Court, the absence of a decision by Parliament would lead to a "no deal" situation. New elections would only be possible on the basis of new legislation adopted by a two-thirds majority in Parliament or of an express vote of no-confidence. The possibility of a second referendum had also been invoked. A solution needed to be found by 29 March 2019.

Mr Gussetti informed the Commission that there were solutions which could come from co-ordinated action with the European Union, including an extended deadline, but they had to be negotiated.

20. Information on constitutional developments in other countries

Republic of Korea

Mr Suk-Tae Lee, new Justice at the Constitutional Court of Korea, informed the Commission on three recent significant decisions by the Constitutional Court and on its new composition.

In June 2018 the Constitutional Court of Korea upheld the freedom of conscience and of conscientious objection to military service, contrary to two past decisions. The Military Service Act did not provide for alternative military service and the Court therefore declared the relevant legislation unconstitutional.

In August 2018, two other important decisions had been delivered by the Court providing remedies against past governments' wrongdoing: before the democratisation of 1987, executions were carried out by the government without a fair trial, and freedom of speech was violated by illegal layoffs and criminal prosecutions. The government only recently acknowledged that their actions were based on an unconstitutional presidential decree which violated citizens' rights. In the first decision, the Court eliminated one of the two time limits for civil remedy claims in specific types of cases: it struck down the relevant section of the

Civil Code, replacing the 5 year limit starting from the day the damages took place by a limit of 3 years from the day of the State's acknowledgment of its wrongdoing or of the relevant retrial. In the second judgment, the Court declared unconstitutional a special law which provided only for physical, and not for moral damages suffered by the victims of repressions of past government wrongdoing. Based on these two judgments, retrials in ordinary courts for further compensation claims were expected to take place.

Another recent development concerned the formation of the Constitutional Court of Korea in September 2018 after the retirement of 5 Justices. The new appointment procedure took into account public opinion and resulted in a more diverse composition of the Court, thus strengthening its democratic legitimacy. According to this procedure, one female judge from an ordinary court and Justice Lee himself, a lawyer without prior experience as a judge, were appointed, following the recommendation of the Chief Justice. The remaining 3 Justices, who previously served in ordinary courts, were appointed by Parliament. Thus, currently and for the first time, 2 out of 9 justices are women; this improves the gender balance in the composition of the Court.

21. Co-operation with other countries

Egypt

Mr Ahmed Abdel Aziz Abu El Azm, President of the Council of State, informed the Commission that this Council had been established in the late 1940s, to deal with administrative cases and disputes against the government – including on tax issues; it comprised approximately 3000 judges and 5000 employees; about 2 million lawsuits were pending. It was also in charge of reviewing draft laws. It had developed judicial principles which were adopted by all countries in the region and had contributed to the drafting of a number of constitutions in the Arab world. It provided the location for the Arab Union of Councils of State, including 16 countries. It had posted about 100 judges in other Arab states. One of the most crucial points for the Council of State was the protection of individual rights in particular in the field of elections and referendums. The Council of State was in favour of developing its co-operation with the Venice Commission. It had already organised conferences on the settlement of electoral disputes and on voting in elections and referendums: between right and duty, with the participation of the Venice Commission. Further co-operation could address: fundamental rights such as freedom of expression; the formation of political parties; elections and referendums and the involvement of the judiciary; the implementation of international treaties and the role of the judiciary; the independence of the judicial system – by conferences and exchanges of documents.

Mr Buquicchio highlighted the importance of co-operation with Egypt, especially the association of Arab Constitutional Courts and Councils. In 2013, the Commission had issued an opinion on foreign funding of NGOs. This year, activities involving the Venice Commission had taken place on three occasions in Egypt. The Commission was ready to accept concrete requests for co-operation, including legislation and the training of judges.

22. Information on Conferences and Seminars

The Commission was informed on the results and conclusions of:

6th Inter Cultural Workshop on Democracy "The Role and Place of Independent Bodies in a Democratic State" (Tunis, 13-14 November 2018)

Mr Buquicchio explained that the Venice Commission, in co-operation with the Tunisian Ministry of Foreign Affairs, had organised the 6th intercultural Workshop on Democracy on the topical subject of constitutional and other independent bodies, which are collective bodies entrusted by

the Constitution or by specific laws with the supervision of sensitive sectors of political, social and economic life (for example, the protection and promotion of human rights, the prevention of torture, the fight against corruption, organisation of elections, telecommunications, media) with the aim of protecting them from political interests and influence, thus ensuring a high degree of public trust. The conference had explored the different models that existed in the countries of the South Mediterranean (Algeria, Egypt, Jordan, Mauritania, Morocco and also in Qatar), as well as in several European countries. The guarantees for their independence (including an appropriate constitutional and legal basis and an appropriate budget) and for their effective functioning had been identified and discussed.

Mr Buquicchio further informed the Commission that on the occasion of this event, he had held meetings with the Tunisian authorities, notably the Minister of foreign Affairs with whom he had had very fruitful discussions.

Having learned of the continued difficulties in setting up the Constitutional Court of Tunisia, Mr Buquicchio had issued a public statement prompting all sides to proceed without further delay with the creation of this indispensable body which the Constitution had required to establish within one year of its adoption (link to statement).

VIII International Congress of Comparative Law "Comparative Law in search of the Constitutional ideal" (Moscow, 7-8 December 2018)

Mr Helgesen and Mr Mathieu had represented the Commission at this Congress devoted to the 25th anniversary of the Russian Constitution. They had presented reports on the 2014 Constitutional reform in Norway and the crisis of the liberal democracy model respectively. The Institute of Legislation and Comparative Law of which member Ms Khabriyeva is Director, organised a platform for a thorough debate, namely on the supremacy of the Constitution on the one hand and respect for the international legal obligations on the other hand (cf. article 15 paragraphs 1 and 4 of the Russian Constitution) in which numerous scholars from CIS countries, China, France, Iran, Vietnam and the Russian Federation took part. The overall positive assessment of the 1993 Russian Constitution by the Venice Commission was very important for the Russian legal community. Mr Helgesen also informed the Commission of a new book by Ms Khabriyeva entitled "The Venice Commission as an entity of interpretation of law". The co-operation between the Commission and the Institute was highly valuable and had to be pursued; both institutions had the same vision in this respect.

23. Compilations of Venice Commission opinions and reports

Ms Granata-Menghini informed the Commission that the study on digital technologies and electoral processes would address cyber threats including challenges to electoral and deliberative democracy. Digital technologies in the electoral process start at registration and continue through the entire electoral process, up to and including the transmission and publication of the results. These technologies brought a number of improvements but the electoral management bodies were very reluctant to say so, while the Venice Commission had never expressed a general appreciation of the introduction of digital technologies. The compilation would be used for the preparation of the report to be submitted in June 2019.

The Commission endorsed the compilation of Venice Commission opinions and reports concerning digital technologies in the electoral process (CDL-PI(2018)010).

24. Information on Council of Europe External funding

Mr Matthew Barr, Head of the Division for Resource Mobilisation and Donor Relations, Office of the Directorate General of Programmes of the Council of Europe, informed the Commission about the Council of Europe's budget and in particular about the volume of voluntary contributions received, including in particular in favour of the Venice Commission. In 2018, the Commission had received contributions i.a. from Germany, Italy, Malta, Mexico and Sweden as well as the "*Organisation internationale de la francophonie*", in addition to funding available for activities carried out under three financial facilities of the European Commission. Mr Barr indicated that the Venice Commission appeared to be in need of roughly 350,000 euros per year for the next five years, in addition to its ordinary budget; he stressed that it would appear important that the Commission could rely on foreseeable and stable, medium to long-term voluntary contributions. Ideally, these should not be earmarked, so that they may be used to cover diverse activities in any of the Commission's member states.

Ms Granata-Menghini thanked ODG-PROG for its support. She said that the Venice Commission was a staff-intensive body, which meant that its ordinary budget provided a limited margin for operational activities. These activities thus needed to be financed largely through voluntary contributions. The latter however were often limited to the preparation of opinions in specific geographical areas, typically not covering European Union countries. The preparation of opinions was only one part of the Commission's activities. Knowledge of and trust in the Commission also required constant participation in public events, both scientific and on topical constitutional developments in member states, participation in meetings in member States and in Brussels. In 2017, Venice Commission members and secretariat had taken part in some 170 events. It was important to be able to rely on additional funding in order to maintain this essential aspect of the Commission's work.

Mr Buquicchio pointed out that one of the essential features of the Venice Commission was its flexibility and stressed that it was necessary that its budget enable it to continue to work effectively.

25. Report of the meeting of the Sub-Commission on Latin America (Mexico City, 30 November 2018)

Mr Sardon reported on the meeting of 30 November 2018. The Sub-Commission was informed of the activities which the organization of American States – OAS – had carried out to make known the Commission's opinion "on the calling of elections to a National Constituent Assembly in Venezuela" and its report "on term limits for Presidents". Thanks to active media contacts and public statements by Secretary General Almagro, both texts had been widely circulated and referred to in Latin America. Indeed OAS has started a very fruitful co-operation with the Commission. Its requests for opinions and studies had made it possible for the Commission to provide useful input in the discussion of the most topical constitutional issues on the Latin American continent.

The Sub-Commission discussed and adopted the second and third parts of the report on term limits, of MPs, locally elected representatives, Governors and Mayors. This report distinguished between the situation of elected representatives sitting on collegiate bodies – MPs, locally elected representatives – from that of single-person executive officials – Governors, mayors. For the first category, limitations on mandates do not appear necessary as there is not a high risk of concentration of powers and of manipulation of votes or undue influence in view of re-election. In balance, having examined the arguments in favour and against, and having noted the very few examples in national experience, the report concluded that term-limits for MPs and locally elected representatives are not recommended. Directly elected executive officials, however, are closer to the situation of Presidents in presidential regimes, and for this reason term-limits could be seen as more justified. National examples of term-limited mayors are

indeed more numerous. Indirectly elected mayors, instead, are responsible before and require the continued confidence of the municipal councils and, as such, are in a similar situation as Prime Ministers in parliamentary regimes. Term-limits therefore did not seem appropriate. This draft report would be submitted to the Plenary in March 2019.

The Sub-Commission was further informed that the report on social media and elections would be submitted to the Plenary in June 2019.

Progress in the preparation of the Venice Principles was presented and the excellent co-operation with the Federation of Ibero-American Ombudsman was stressed. After the adoption of the Venice Principles foreseen for March 2019, the Secretariat intended to propose some joint activities with the Federation, thanks in particular to a voluntary contribution received from the European Commission.

26. Report of the meeting of the Council for Democratic Elections (13 December 2018)

Mr Kask informed the Commission that the Council, had addressed, the joint opinion on Turkey (item 17), the Parliamentary Assembly report on referendums (item 13), the advancement of the study on digital technologies and electoral processes; it had taken note in particular, of the conference on electoral justice, the Sub-Commission on Latin America and the meeting of the global network on electoral justice, all held in Mexico. The Council had taken note of the OSCE/ODIHR's numerous activities in the electoral field; the question of background references to Venice Commission and Council of Europe material in electoral observation statements and reports was raised; improved co-ordination would take place in this respect.

27. Report of the Joint Meeting of the Sub-Commissions on Democratic Institutions and on the Mediterrean Basin (13 December 2018)

Mr Tuori evoked the opinions adopted at the Plenary following their examination by the Sub-Commission. As concerned progress of the work on the report on the interrelation between the opposition and the majority in a democratic parliament, it was difficult to formulate normative standards, so the working group had decided to prepare a check-list based on questions and examples of best practices. The check-list would be submitted to the Sub-Commission in March 2019, with a view to possible adoption at the Plenary in June 2019.

28. Report of meeting of the Sub-Commission on Fundamental Rights (13 December 2018)

The Plenary was informed on the discussion at the Sub-Commission on Fundamental Rights concerning the draft report on funding of associations (CDL(2018)045). The draft report would be submitted with a view to adoption at the March Plenary Session.

All members were invited to submit further comments on the draft report on Funding of Associations before 21 January 2019.

The Plenary was also informed about the preliminary examination of the draft 3rd revised version of the joint Guidelines on Freedom of Assembly. The draft guidelines would be submitted with a view to adoption at the March Plenary Session.

All members were invited to submit further comments on the draft Guidelines before 21 January 2019.

29. Information on the Association of Former Venice Commission members

Ms Finola Flanagan informed the Commission that at the moment the AFM counted 66 members (60 at the end of 2017). In 2018, 14 AFM members had contributed to the preparation of several opinions and studies and had represented the Venice Commission in several events concerning 14 countries.

In addition, three articles on the work of the Commission had been published while a current member and a former member continued their work on a book on the Venice Commission, contracted by the Cambridge University Press. The 4th AFM meeting in 2017 had welcomed the idea put forward by Mr Vogel to hold a conference on 6-7 May 2019 at Lund University, Sweden, as a follow-up to the Seminar on "Democracy in a Society in Transition" which the Commission had organised in co-operation with the University of Lund on 19-20 May 2000. This event would be a stock-taking exercise of the democratic developments in Central and Eastern Europe in the last thirty years. The financing of the activity would be assured through a Swedish voluntary contribution and would be part of the programme of the Finnish Presidency of the Committee of Ministers of the Council of Europe.

The 5th annual meeting would take place later that day, at the Council of Europe office in Venice.

30. Other business

31. Dates of the next sessions

The schedule of sessions for 2019 was confirmed as follows:

118th Plenary Session	15-16 March 2019
119th Plenary Session	21-22 June 2019
120th Plenary Session	11-12 October 2019
121st Plenary Session	6-7 December 2019

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

APPENDIX

Remarks of Special Envoy Stéphane Dion, delivered as Observer at the Venice Commission's 117th Plenary Session December 14-15, 2018 Venice, Italy

C'est un grand honneur pour moi, en tant qu'Envoyé spécial du Premier ministre Trudeau auprès de l'UE et de l'Europe, ainsi qu'à titre d'ambassadeur du Canada en Allemagne, d'être de retour devant la Commission de Venise une deuxième fois en quelques mois. Je suis de nouveau accompagné par un éminent expert juridique canadien, choisi par le ministère fédéral canadien de la Justice: le professeur Warren Newman, Avocat général principal, Section du droit administratif, constitutionnel et international, ministère de la Justice du Canada. Cette fois-ci, ce joint également à moi, Alan Bowman, Chef de mission adjoint du Canada auprès de l'Union européenne et observateur permanent du Canada au Conseil de l'Europe.

As I explained during the 116th Plenary Session last October, Canada has official observer status at the Venice Commission, but we are not a member. We were a regular participant in the past, but have not been so for some years now. At the last October session, I had conversations with many of you, including President Gianni Buquicchio and Director-Secretary Dr. Thomas Markert, and many were kind enough to praise Canada's past contributions and encouraged its re-engagement.
Specifically you referenced:

- Canada's experience as a federal country with its own understanding and expertise on multi-level governance and constitutional affairs;
- Canada's bilingual reality, its legal traditions of both common and civil law; and
- the quality of our constitutional experts.

In return, I want to tell you that the Prime Minister and the Government of Canada highly value the work of the Venice Commission. We appreciate the prominent role that you play, in Europe and beyond, in providing legal advice in the fields of democracy, human rights and the rule of law.

We see how much you are promoting strong constitutional frameworks in countries which have young and fragile democratic traditions. Regularly, you comment on worrying European national contexts and you offer sober, respected opinions on challenges facing both EU member states and Europe more broadly. We highly appreciate how much your expertise comes from the best constitutional experts in Europe and other continents, with thirteen non-EU countries as members, including our two North-American partners, the United States and Mexico.

There is a clear convergence between your work and the Canadian government's priorities, especially at a time where the rule of law, liberal democracy and universal human rights are under strain across the world, including in Europe.

The Government of Canada's enhanced commitment to support liberal democracy and inclusion explains our renewed interest in the Venice Commission's unique role in combatting democratic backsliding in Europe and beyond.

I must say that Warren and I were positively impressed by the quality of your discussions and by the amount of work accomplished during last October Plenary Session. Discussions were tense, focussing on difficult issues, but always very professional, respectful, even cordial. If only all international deliberations were of such quality as the one we have witnessed in the Venice Commission, the world would be a much better place!

L'Europe a de la chance de compter sur une institution comme la vôtre à une époque où la xénophobie, l'intolérance et le populisme autoritaire frappent à la porte de l'Europe. Le Canada ne s'ingère pas dans les affaires domestiques des autres pays. Toutefois, le Canada souhaite trouver des voies respectueuses et efficaces de promouvoir la démocratie, l'État de droit et la société inclusive. La Commission de Venise est l'une de ces voies.

After having participated in these two plenary sessions, Warren, Alan and I will be in a position to recommend how best Canada might contribute to the work of the Venice Commission in the future.
We will report to the Government of Canada what we have heard, seen and experienced during these two sessions. We also look forward to continuing to forge personal contacts with each of you.

And now I will pass the microphone to Councillor Warren Newman.

Additional Remarks to the European Commission on Democracy through Law
Venice, 15 December 2018

WARREN J. NEWMAN[1]

Tel que l'Ambassadeur et l'Envoi spécial Dion et moi ont souligné en octobre dernier, le Canada et la Commission de Venise partagent plusieurs des mêmes principes, valeurs et objets: de promouvoir l'épanouissement de la démocratie, des droits de la personne, l'inclusion et la participation, notamment par l'adhésion au constitutionalisme et la primauté du droit, la séparation des pouvoirs et l'indépendance de la magistrature.

The Commission may wish to take note of the following constitutional developments in Canada. Our constitutional laws are rigid in form and, by design, their provisions are difficult to amend, even in the best of times. This is in part to protect the structure and integrity of key federal institutions, the fundamental characteristics of which should not be altered without a broad-based consensus. However, this is not to say that the Constitution remains static. Our Constitution continues to evolve through the dynamic and progressive interpretation of its provisions by the Supreme Court, through resort to underlying constitutional principles, and through legislative measures (such as organic, quasi-constitutional legislation) and executive action.

For example, in the *Senate Reform Reference* in 2014[2], the Supreme Court upheld the Senate's role within our constitutional structure as an appointed, and thus complementary, legislative chamber of sober second thought, "rather than a perennial rival" of the House of Commons in our central Parliament. Working within this basic constitutional framework, the new Prime Minister, the Right Hon. Justin Trudeau, established in 2016 an Independent Advisory Board for Senate Appointments to assist him in selecting worthy, non-partisan candidates for appointment to the Senate by the Governor General, through criteria based on merit, gender balance and diversity. Cette innovation a modernisé et même transformé le Sénat sans modifier les caractéristiques essentielles ou le rôle fondamental du Sénat.

Tout récemment, la Cour suprême a élucidé la portée et l'application de plusieurs principes constitutionnels qui intéresse cette Commission. Dans trois arrêts rendus depuis notre dernière séance plénière en octobre, la Cour a clarifié la distinction entre le privilège parlementaire et la souveraineté parlementaire; les rapports entre la souveraineté parlementaire et le principe fédéral, y compris le fédéralisme coopératif; ainsi que l'importance du principe de la séparation des pouvoirs, notamment en ce qui a trait à l'obligation de la Couronne de consulter des peuples autochtones avant d'entamer des démarches politiques qui pourraient toucher leurs droits et leurs intérêts.

In the *Chagnon* case[3], the Supreme Court recognized that legislative bodies in Canada, including provincial legislative assemblies, have inherent parliamentary privileges that flow from their nature and function in a Westminster model of parliamentary democracy. These parliamentary privileges help to preserve the separation of powers by protecting some areas of legislative activity from external review. However, it is for the courts to determine whether a category of privilege exists and to delimit its scope. Moreover, a legislature must comply with its own enactments.

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[2] *Reference re Senate Reform*, 2014 SCC 32; [2014] S.C.R. 704

[3] *Chagnon* v. *Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39.

In the *Mikisew Cree* case[4], the Court held that the separation of powers required distinguishing between the role of Ministers of the Crown in the exercise of executive power and their role in the exercise of legislative power. The development and introduction of legislation is legislative action that does not trigger the duty to consult Aboriginal peoples, a duty that attaches to Crown conduct and executive action. The principles of parliamentary sovereignty and parliamentary privilege make the legislative process ill-suited to judicial review, aside from manner-and-form requirements. Of course, the constitutional validity of legislation, once enacted, is always subject to judicial review.

As concerns the federal principle, the Court continues to encourage cooperative federalism, while respecting the principle of parliamentary sovereignty, as Parliament and the provincial legislatures remain sovereign in the exercise of their respective spheres of legislative authority allocated by the Constitution. In *Reference re Pan-Canadian Securities Regulation*,[5] the Court upheld the validity of a national cooperative system for the regulation of capital markets in Canada.

Along with these examples of executive action transforming Senate appointments and judicial review giving a dynamic interpretation to constitutional provisions through resort to underlying constitutional principles, the legislative branch has enacted many laws which implement and advance these principles, without contravening the provisions of the Constitution. Ces lois organiques comprennent, entre autres, la *Loi canadienne des droits de la personne*, la *Loi sur les langues officielles* ainsi que la *Loi sur le* m*ulticulturalisme canadien*. These laws are constitutional in *character* rather than in *status*. All of these actions contribute to the continual evolution and adaptation of the Constitution.

[4] *Mikisew Cree First Nation* v. *Canada (Governor General in Council)*, 2018 SCC 40.

[5] *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48.