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(VENICE COMMISSION)

COMMISSION EUROPEENNE POUR LA DEMOCRATIE PAR LE DROIT

(COMMISSION DE VENISE)

118th PLENARY SESSION
Venice, Scuola Grande di San Giovanni Evangelista
Friday, 15 March- Saturday, 16 March 2019

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Vendredi 15 mars - Samedi 16 mars 2019

SESSION REPORT/RAPPORT DE SESSION

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1. Adoption of the Agenda

The agenda was adopted without any amendments (CDL-PL-OJ(2019)001ann).

2. Communication by the President

The President welcomed members, special guests and delegations and presented his recent activities, as set out in document CDL(2019)010.

3. Communication from the Enlarged Bureau

Mr Markert informed the Commission that the Enlarged Bureau, which met on 14 March 2019, had authorised the conclusion and signing of a Cooperation Agreement between the Venice Commission and the National Electoral Institute of Mexico. It also authorised the adoption of two urgent opinions, one for Georgia on the nomination of Supreme Court judges and one for Tunisia on the organic draft Law on the establishment of an independent institution on sustainable development and the rights of future generations – both of which are to be finalised by the end of April 2019 and endorsed by the Venice Commission at its 119th Plenary Session on 21-22 June 2019.

The Enlarged Bureau had also discussed a proposal made by five members of the Venice Commission to introduce the possibility of providing separate opinions to Venice Commission opinions (see item 18). Finally, the enlarged Bureau had been informed about a possible future request for an opinion by the Second Chamber of the Dutch Parliament on shortcomings in and improvements to democratic control in the European Union and the Eurozone. The Dutch Parliament intended to send a representative to discuss the matter in more detail with the Enlarged Bureau.

4. Communication by the Secretariat

Mr Markert informed the Commission that Ms Artemiza Chisca, Head of the Division on democratic institutions and fundamental rights of the Venice Commission, would be leaving the Venice Commission Secretariat on 1 April 2019 and would be replaced by Ms Silvia Grundmann.

He then provided logistic information on the session.

5. Co-operation with the Committee of Ministers

Ambassador Albana Dautllari, Permanent Representative of Albania to the Council of Europe, stressed that Albania was a fervent supporter of the Venice Commission and valued its expertise and objective advice. The Commission indeed had provided much support to Albania during its reform of the judiciary, seeking to establish an effective justice system free of corruption and also in its co-operation with the *ad hoc* electoral commission of Albania, together with the OSCE/ODIHR, the chairmanship of which will be taken over by Albania in 2020.

Mr Buquicchio added that co-operation between the Venice Commission and Albania would continue, not least in view of supporting Albania in its future integration in other European institutions.

Ambassador Roeland Böcker, Permanent Representative of the Netherlands to the Council of Europe, referred to a symposium held in The Hague in October 2013, at the Dutch Senate on raising awareness in the Netherlands of the work of the Venice Commission. At this

event, Mr Timmermans, Minister of Foreign Affairs at the time, had referred to the end of the Cold War and had foreseen instability in Europe. In reply to this prediction, Mr Buquicchio had said that the consolidation phase of democratic institutions was as important as the transition itself. He was at a later stage proven to be right. Ambassador Böcker emphasised that vigilance must be maintained and concluded by saying that the Venice Commission had become the prime advisory body in Europe and beyond.

Mr Buquicchio added that this symposium had helped raise awareness about the Venice Commission's work in Western Europe and encouraged other member states to follow this example.

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

Mr Leen Verbeek, Chair of the Congress Monitoring Committee, referred to the last meeting of the Monitoring Committee that took place in February 2019 and dealt with reports on the situation of local and regional democracy in Poland and in the Republic of Moldova, which were approved by the Committee to be submitted for adoption at the Congress' April 2019 session. He then mentioned recent and upcoming monitoring visits to Bosnia and Herzegovina and Hungary and the pre-electoral visit to Ankara to assess the campaign and preparations for the local elections which will take place in Turkey on 31 March 2019.

7. Follow-up to earlier Venice Commission opinions

The Commission was informed on follow-up to:

Albania - Opinion on draft constitutional amendments enabling the vetting of politicians (CDL-AD(2018)034)

In its opinion adopted in December 2018 the Commission acknowledged the legitimate aim of the draft amendments, i.e. to remove offenders and their influence from political life, but questioned the added value of the draft amendments. The vetting of judges and prosecutors is already on-going and there is a legal basis for excluding convicted offenders from accessing positions in public institutions and state administration. Going beyond this the draft would have provided a constitutional basis for preventing persons who "have contacts with persons involved in organised crime" from being candidates for parliament and other elective positions and from senior positions in the public administration. The draft amendments did not provide for sufficient safeguards to protect the rights of the persons concerned.

In an extraordinary plenary session in January 2019 the Albanian parliament, taking into account the Venice Commission's opinion, rejected the proposed amendments with 74 votes against and 52 in favour. Opponents referred to the comments made by the Venice Commission in its opinion.

Hungary - Joint Opinion on the Provisions of the so-called "Stop Soros" draft Legislative Package which directly affect NGOs (in particular Draft Article 353A of the Criminal Code on Facilitating Illegal Migration) (CDL-AD(2018)013)

In the 2018 Joint Opinion on the provisions of the so-called "Stop Soros" Draft Legislative Package and in particular Article 353A of the Criminal Code on Facilitating Illegal Migration, the Commission concluded that the introduction of a criminal offence establishing criminal liability for intentionally assisting irregular migrants to circumvent immigration rules is not by itself contrary to international human rights. However organisational activities which are not directly related to the materialization of illegal migration were also unjustifiedly criminalised, which constituted an illegitimate interference with freedom of expression and association.

The Hungarian Constitutional Court had examined the stop-Soros package in a judgement issued on 28 February 2019.

The Court found that the challenged provision was compatible with the Constitution, as it was a necessary response to the challenges to border protection presented by the influx of migrants. However, the judgment mitigates the effects of the provision by giving a restrictive interpretation of it.

According to the Constitutional Court:

- The crime of facilitating illegal migration can only be committed intentionally.
- Criminal responsibility can only be engaged for supporting asylum applications if the perpetrator was aware of the fact that she/he was providing assistance to a person who does not meet the definition of a refugee and thus is not eligible for protection.
- The participation in public debate on and dissemination of information about immigration is not prohibited.
- It was equally pointed out that civil society organizations have the right to pursue activities in order to defend human rights which also extends to providing assistance to asylum-seekers.
- The Constitutional Court also stated that the criminalization of charitable activities in support of vulnerable people would be contrary to the Fundamental Law.

Mr Varga added that according to the judgment of the Constitutional Court, in order for the act of facilitating illegal migration to fall under Article 353A of the Criminal Code, the act should be committed intentionally, but also it should be directly related to the materialization of illegal migration.

Ukraine - Opinion on the Draft Law on Anticorruption Courts and on the Draft Law on Amendments to the Law on the Judicial System and the Status of Judges (concerning the introduction of mandatory specialisation of judges on the consideration of corruption and corruption-related offences) (CDL-AD(2017)020)

In its Opinion of October 2017 the Venice Commission supported the establishment of an effective Anti-corruption Court in Ukraine and the involvement of international experts in selecting its judges. While there was a lot of domestic resistance to the adoption of a law giving a strong role to international experts in the selection of the judges of this court, on 7 June 2018 the Verkhovna Rada adopted a law which seemed to satisfy the requirements of the Venice Commission. In particular, it made it impossible to appoint somebody as a judge to the Court if 3 or more of the 6 experts designated by international organisations object to the candidate.

The High Qualification Commission of Judges of Ukraine launched the vacancy notice for judges of the High Anti-Corruption Court on 2 August 2018. During the appointment procedure of judges, the Public Council of International Experts vetoed 42 candidates due to doubts about their integrity and professional ethics. In particular, candidates were unable to explain the source of their income, had committed procedural violations while in office, had committed acts unacceptable for the behavior of a judge or had delivered unlawful judgments sentencing the participants of the “Revolution of Dignity”.

In sum, the Venice Commission has contributed significantly to the establishment of a specialised Anti-corruption Court in Ukraine, and one of the major achievements in this process is the crucial role of international experts in selecting its judges which proved to be highly effective.

Kazakhstan - Opinion on the Concept Paper on the reform of the High Judicial Council (CDL-AD(2018)032)

The Concept Paper aimed at reforming the process of recruitment of judges, and giving more powers to the High Judicial Council. In February this year a new law, based on the Concept Paper, had been adopted. According to the information provided by the authorities of Kazakhstan, the law incorporated many of the elements of the Concept Paper which had been assessed positively by the Venice Commission. In particular, the institutional design of the HJC was clarified. The Law defines the grounds for early termination of the mandate of the members of the HJC. The use of a "lie detector" in recruitment interviews was somewhat reduced. Some of the Commission's recommendations had been implemented at the level of Regulations of the High Judicial Council: thus, the recruitment system was now based on a cumulative result of various tests, and the interview with the candidates had become a separate stage of the entry exam. The disciplinary cases would be henceforth examined by the High Judicial Council, while professional evaluations would remain within the competence of the Supreme Court. The new law therefore seemed to introduce many improvements. However, the opinion's central recommendation remained unaddressed: there was still not enough independence of the High Judicial Council from the President of the Republic, primarily because the Constitution does not indicate the number of its members and the President has the ultimate word in the appointment of the members of the Council. This reform may require a constitutional amendment in the future.

Uzbekistan - Joint opinion on the draft election code (CDL-AD(2018)027)

The final version of the Election Code of Uzbekistan was adopted by Parliament on 28 February 2019. The Election Code unified five different laws (which regulated the conduct of presidential, parliamentary and local elections, outlined guarantees of citizens' suffrage rights and established the framework for activities of the Central Election Commission). For the time being, no text had been published. The secretariat of the Venice Commission will report at a next plenary session on the changes made after the adoption of the opinion.

8. Luxembourg

M. Holmoyvik informe la Commission que le but principal de la révision constitutionnelle est l'adaptation d'un texte vieux de 150 ans à l'évolution naturelle du système politique, des institutions et des concepts juridiques. Cette révision totale de la Constitution maintient la structure du texte de 1868 sans le changer fondamentalement. En général, le texte proposé est conforme aux valeurs fondamentales du Conseil de l'Europe, et il prend en compte un bon nombre des recommandations de l'avis de la Commission de 2009. Cependant, la cohérence et la précision devraient encore être améliorées. Par exemple, le chapitre sur les droits fondamentaux mériterait d'être revu en distinguant clairement les différentes catégories de droits et libertés, ainsi que des objectifs à valeur constitutionnelle ; en adaptant le texte au droit international – par exemple en garantissant le principe d'égalité de manière générale et non aux seuls citoyens – et en actualisant la terminologie. Il faudrait aussi prévoir une disposition générale sur la hiérarchie des normes, ou du moins indiquer de manière explicite le rang du droit international.

M. Mathieu ajoute que la révision constitutionnelle semble modifier l'équilibre des pouvoirs de manière extrêmement importante ; en fait toutefois, elle vise essentiellement à mettre le droit en conformité avec la réalité. Ainsi, la souveraineté n'appartient plus au Grand-Duc mais à la nation. Dès lors, l'évolution vers un système parlementaire de type moniste, où les pouvoirs du Grand-Duc sont pour l'essentiel transférés au gouvernement, est consacrée. Même si, formellement, le Grand-Duc retient une partie du pouvoir exécutif, en fait il n'a plus qu'un rôle notarial dans la promulgation des lois et toutes ses décisions doivent être contresignées par un membre du gouvernement. En ce qui concerne la Chambre des Députés, les modifications les

plus importantes concernent l'introduction de l'initiative législative populaire et les commissions d'enquête ; le rôle du Parlement en matière de contrôle de l'activité du gouvernement est relativement limité. Parmi les points positifs, on peut noter l'introduction d'un recours à la Cour constitutionnelle en matière d'élection des députés et la constitutionnalisation du médiateur. Il serait souhaitable de reconnaître l'autonomie communale comme principe constitutionnel. Certains points devraient être traités au niveau constitutionnel, tels que : la composition du corps électoral en matière référendaire ; les conditions et les effets du référendum ainsi que la nomination et la composition du Conseil d'Etat et du Conseil national de la justice ; la durée du mandat du médiateur.

M. Henri Kox, député, membre de la Commission des Institutions et de la Révision constitutionnelle, indique que le processus de révision constitutionnelle, commencé en 2005, a impliqué toutes les forces vives, notamment à travers le référendum de 2015. Un premier vote à la Chambre des Députés est prévu début 2020, suivi d'un référendum avant l'adoption finale du texte par la Chambre. Les autorités prendront en compte l'avis de la Commission de Venise, notamment en ce qui concerne le chapitre sur les droits et libertés : les différentes catégories seront clarifiées, la terminologie actualisée et l'égalité entre Luxembourgeois et étrangers reconnue. La place du droit international et du droit de l'Union européenne pourra être indiquée. Le chapitre sur le Grand-Duc a pour partie une valeur symbolique, c'est pourquoi, il est toujours nommé chef de l'Etat, mais il n'y a pas eu de conflit depuis des décennies. Certaines autres précisions, notamment sur la formation du gouvernement, pourront être apportées.

La Commission adopte l'avis sur la proposition de révision portant instauration d'une nouvelle Constitution du Luxembourg (CDL-AD(2010)003), préalablement examiné par la sous-commission des institutions démocratiques le 14 mars 2019.

9. Georgia

Mr Kuijer introduced the draft opinion, requested by the Deputy Minister of Internal Affairs of Georgia; the draft opinion analysed the concept of the amendments to the Criminal Procedure Code of Georgia (the CPC) concerning the relationship between prosecution and investigators. The reform aimed to restore a better balance between the investigators and the prosecutorial authorities by clearly distinguishing two separate phases of a criminal investigation and making the investigators solely responsible for the first phase. The role of prosecutors in criminal investigations varies considerably from one system to another, so, in the absence of specific international standards or a uniform European approach, the proposed reform was a perfectly legitimate choice for a legislator to make. However, the proposed reform aimed at the "forced emancipation" of the police investigators, and they were not well prepared for the new role. The authorities must therefore invest in legal training of investigators, strengthen internal controls mechanisms, and provide for other transitional mechanisms. The investigators should be able at least to consult the prosecutor in borderline cases. In addition, the prosecutors should keep the power (at least in certain category of cases, and at the initial stages of the reform) to overrule the decision of the investigator not to open an investigation/terminate it, and to transfer it to another investigator/investigative authority for re-consideration. Instructions by the prosecutor to the investigative authorities should in principle be in writing. Likewise, decisions of the prosecutor overriding decisions of the investigator should contain reasoning.

Ms Natia Mezvrishvili, Deputy Minister of Internal Affairs of Georgia, and Ms Irine Tsakadze, Head of the Legal Department at the Ministry of Justice, informed the Commission about the rationale behind the reform and its main proposals, and thanked the Commission for its continuing support to the process of legal reforms in Georgia. The model established by the 2010 Code of Criminal Procedure provided for the dominance of the prosecutors, but the lack of a clear separation of functions between the prosecution and the investigative authorities

undermined the overall efficiency of the criminal justice system. The recommendations of the Venice Commission would be taken into account in the next phase of the reform which will consist of drafting specific legislative amendments to the CPC.

The Venice Commission adopted the Opinion on the Concept of the legislative amendments to the Criminal procedure Code concerning the relationship between the prosecution and the investigators (CDL-AD(2019)006).

10. Hungary

Mr Grabenwarter highlighted that as such the establishment of a separate system of administrative justice was a valid choice. However, the laws attributed powers to the Minister of Justice which were in certain areas even more extensive than those attributed to the President of the National Judicial Office for the general judiciary, which had been criticised in earlier Venice Commission opinions. The main criticism of the opinion was that the strong powers of the Minister and the President of the new Supreme Administrative Court were not sufficiently counterbalanced by the National Administrative Judicial Council (NAJC), notably also in the important transition period during which the courts would be established. The Personnel Council of the NAJC did not include a sufficient number of judges. However, together with his comments on the draft opinion, the Minister had transmitted draft amendments recently submitted submitted to Parliament that *inter alia* added two judges to the latter Council.

Mr László Trócsányi, Minister of Justice, insisted that in Hungary separate administrative courts had existed before WWII. In re-establishing them Hungary followed the Austrian model. The procedure of adoption of the laws had been transparent. An expert committee had already been established in 2014 and he had made numerous public presentations on this subject. The opinions of the Venice Commission had been studied in the drafting process. This thorough preparation had been followed by five weeks of debate in Parliament. The length of such debate always depended on parliamentary culture and the approach of the parties, notably opposition. As a Minister, he had never criticised court judgments. However, he was responsible for the functioning of the judiciary and the model of ministerial responsibility existed in many countries. In seeking a balance, it was also necessary to avoid judicial corporatism. Eight regional judicial councils and a national council had been set up. The NAJC took many important decisions together with the Minister, for instance as concerns the budget or judicial appointments. Full transparency had been established in areas where the Minister decided alone. He was grateful that the rapporteurs had taken up in the draft opinion amendments already submitted to Parliament. He insisted that the preparation of this opinion was an example of good co-operation between a State and the Venice Commission.

The discussion focused on the time of parliamentary debate of the draft laws, once the text of the draft laws had become public. The Commission should be kept informed on the follow-up to this opinion.

The Commission adopted the Opinion on the Hungarian Laws on Administrative Courts and on the entry into force of the Law on Administrative Courts and certain transitional rules (CDL-AD(2019)004), previously examined by the Sub-commission on the Judiciary on 14 March 2019.

11. North Macedonia

Mr Barrett introduced the opinion on the Draft Law on the Judicial Council, requested by the Prime Minister of North Macedonia. This opinion followed several previous opinions on the

judiciary of North Macedonia (the latest had been adopted in October 2018, CDL-AD(2018)022). The authorities of North Macedonia had carefully responded to the previous recommendations of the Venice Commission, and the last version achieved better consistency and was a significant improvement. In response to the draft opinion forwarded to Skopje two weeks ago, the authorities prepared a revised version of the draft law. These latest amendments were reflected briefly in the draft opinion. Thus, in particular, the President of the Judicial Council was now to be elected from the number of lay members; psychological tests in the recruitment exams were abandoned, the idea of individual reasoning of the appointment decisions (by each voting member of the Judicial Council) was replaced with collective reasoning, which is a better option. The filtering mechanism in the context of disciplinary proceedings was created, the Inquiry Commission being entrusted with this function. The failure to provide asset declaration by a member of the Judicial Council was now regarded as a ground for his/her dismissal. Some outstanding issues remained, however. In particular, the disciplinary procedure provided for elaborate rules on the exclusion of members from voting, which may result in blockages since the pool of members who may vote is very small, while the majorities are high. The practical application of these procedural rules needed to be kept under review. The previous rule that a finding of a violation by the European Court of Human Rights should automatically have negative consequences for the judge who adopted a decision in the case was dropped, and this was positive. Mr Barrett underlined the good cooperation with the authorities in Skopje.

Ms Renata Deskoska, Minister of Justice of North Macedonia, thanked the Venice Commission for the support to the legislative reforms. The law on the Judicial Council had been amended six times since 2006, but the threats to the independence of the judiciary remained. The amendments to the law on the Judicial Council had been developed on the basis of the recommendations of the Venice Commission and of other international partners, including the recommendations of the "Priebe report". Ms Deskoska outlined the content of the last revisions of the draft law on the Judicial Council and mentioned several future amendments which should be introduced in the draft law.

The Commission adopted the Opinion on the Draft Law on the Judicial Council of North Macedonia (CDL-AD(2019)008).

12. Ukraine

Mr Varga pointed out that the examination of national legislation had shown that nearly all countries provided an appeal against decisions on detention that was separate from the appeal against the judgment on the merits. This was confirmed by information on Bosnia and Herzegovina and Denmark that had been received after the preparation of the draft opinion. While Articles 6 and 13 ECHR provided fair trial and a right to a remedy in general, Article 5 ECHR was *lex specialis* in respect of detention. A recommendation of the Committee of Ministers of the Council of Europe called for a right to an appeal against detention. Several principles governed the system of detention: principle of exceptionality of detention, principle of *habeas corpus*, fair trial, the right to appeal, principle of regular review, principle of compensation. The opinion strongly recommended establishing a separate appeal against detention but the decision whether the absence of such an appeal was unconstitutional was for the Constitutional Court of Ukraine to take.

During the discussion, the applicability of Article 2 Protocol 7 ECHR was raised, which provides for the right of appeal against one's conviction or sentence by a higher tribunal.

The Commission adopted the *amicus curiae* brief on separate appeals against rulings on preventive measures (deprivation of liberty) of first instance courts of Ukraine (CDL-AD(2019)001).

13. Principles on the protection and promotion of the Ombudsman Institution ("the Venice Principles")

Mr Helgesen reiterated that the decision to draft a set of constitutional and legal principles on the Ombudsman institution was taken by the Venice Commission at its 111th plenary session (15-16 June 2017).

The Working Group had decided to present a short, operational text like the Paris Principles which has successfully served the promotion and protection of National Human Rights Institutions for more than 25 years.

This text had largely benefited from several consultation processes to which Council of Europe bodies, international organizations and Ombudsman associations had contributed.

Despite the variety of Ombudsman institutions, the text identifies core legal principles which must be enshrined and respected and which should prevail when setting up or reforming an existing institution. The text starts by singling out major elements that ensure the independence of the institution going from the nomination to the term of office. Independence has also financial and functional aspects. Thus, the text calls for sufficient and independent means, foresees the Ombudsman's consultation in its preparation, bans any reduction during the financial year unless the reduction applies to other state institutions. Functional guarantees as sufficient staff, functional immunity or prevention from any instructions from any authorities are also provided for. The mandate of the Ombudsman shall not only cover prevention and correction of maladministration but also protection and promotion of human rights, the scope of intervention includes also public services provided by private entities. Finally, the Ombudsman institution shall be meaningful. Hence, the text identifies the Ombudsman's most important powers and competencies going from unhindered access to documents, people or buildings, a capacity to report in public and make recommendations which should be responded, access to the judiciary as well as a capacity to monitor the implementation at the national level of international instruments related to human rights.

In the two last paragraphs, the text makes clear that these Principles must be read in good faith, must not be used for diminishing or reducing the powers of the Ombudsman institution and shall be used only to strengthen the institution.

The text of the Venice Principles aimed to become a text of reference for the Ombudsman institutions.

Mr Peter Tyndall, President, International Ombudsman Institute (IOI) welcomed the provisions of the Venice Principles which will have a global application. Mr Tyndall praised the consultation process which had led to a strong draft which addresses all fundamental principles related to the Ombudsman institution. The provisions related to the independence and powers of the Ombudsman fully respond to the needs of the Ombudsman. Despite the variety of models this text fully reflects the role of the Ombudsman and has the full support of the IOI's members.

Mme Catherine de Bruecker, Médiatrice fédérale, Belgique, intervenant au nom de l'Association des Ombudsman et Médiateurs de la Francophonie (AOMF), souligne combien ce texte vient combler un vide et constitue une avancée fondamentale dans la promotion et la protection de l'institution de Médiateur. Mme de Bruecker remercie le groupe de travail pour avoir pris le temps à plusieurs reprises d'écouter les associations de Médiateurs et pour avoir

ainsi aboutit à un texte qui offre un cadre solide bénéficiant d'un très large consensus au sein de l'AOMF.

Mr Andreas I. Potakis, President, Association of Mediterranean Ombudsman (AOM) underlined that this text will offer a solid basis for the setting up of new institutions but also will consolidate existing ones. Mr Potakis wondered whether the Council of Europe could provide for a mechanism which would assess the implementation of the Venice Principles.

Ms Carmen Comas-Mata Mira, on behalf of the Federation Ibo American Ombudsman (FIO) which represents 162 institutions mostly outside the European continent, highlighted the relevance of the text beyond Europe and the successfully achieved goal to provide for a strong institution which would be significant to all citizens, who will be at the end the final beneficiary of the Venice Principles.

Mr Vladlen Stefanov, Chief, National Institutions and Regional Mechanisms Section, Field Operations and Technical Cooperation Division, Office of the United Nations High Commissioner for Human Rights (OHCHR) thanked the Commission for having consulted the OHCHR in the drafting process. Since most Ombudsman institutions have seen their mandate broadened to embrace human rights issues, the Venice Principles perfectly reflects this evolution; they can be regarded and will be used as a complement to the Paris Principles, notably when assessing the institution in the accreditation process. Mr Stefanov praised the high level of standards which are foreseen in the Venice Principles.

M. Christos Giakoumopoulos, Directeur Général des droits de l'homme et de l'état de droit rappelle que parmi toutes les institutions publiques, celle de l'ombudsman est celle qui s'est sans doute développée et diversifiée de la manière la plus spectaculaire, et ce sous l'impulsion du Conseil de l'Europe et, sans aucun doute, celle déterminante de la Commission. M. Giakoumopoulos salue tant l'initiative de la Commission de s'être saisie de cette question, surtout à un moment où l'institution fait l'objet d'ingérences indues, que la qualité du texte qui a d'ailleurs pris en compte beaucoup des propositions faites par le Comité directeur pour les droits de l'Homme (CDDH) au cours des différents processus de consultation. Le Comité des Ministres a confié au CDDH la mise à jour de sa Recommandation R(85)13 relative à l'institution d'Ombudsman qui est sur le point d'être aboutie et qui fait dûment référence au Principes de Venise. Le CDHH va également se pencher prochainement sur la question des Institutions nationales des droits de l'homme en révisant la Recommandation CM (97) 14.

Ms Krista Oinonen, Chair of the CDDH Drafting Group on Civil Society and National Human Rights Institutions (CDDH-INST) informed the Commission about the revised version of Recommendation R(85)13, which will refer to the Venice Principles and mainly deal with three issues : the fundamental characteristics of the Ombudsman institution, its main tasks and the need for cooperation and dialogue. The text of the Venice principles will constitute a legal bridge to the political message of the Recommendation.

Mr Leen Verbeek, Chair of the Congress Monitoring Committee of the CPLRE, considered this document as a worthy document for CPLRE's monitoring activities.

Following proposals by members and ensuing discussions, amendments were made to paragraph 11 of the principles.

The Commission adopted the Draft Principles on the Protection and Promotion of the Ombudsman institution ("The Venice Principles") (CDL-AD(2019)005), previously examined by the Sub-Commission on Fundamental Rights on 14 March 2019.

14. Rapport sur les Limitations de Mandat : Partie II - les membres du parlement et Partie III - les représentants élus aux niveaux sous-national et local et responsables exécutifs élus aux niveaux sous-national et local

Mme Otalora Malassis informe la Commission que le rapport sur les limitations de mandat a été préparé à la suite d'une demande du Secrétaire général de l'Organisation des États américains faite le 24 octobre 2017, sur le droit à la réélection dans le contexte d'une mauvaise pratique observée de modification des termes présidentiels par le biais d'une décision des cours constitutionnelles plutôt que par un processus de réforme. Lors de sa 114e session plénière en mars 2018, la Commission avait adopté la Partie I de ce rapport qui porte sur la limitation des mandats des Présidents.

Mme Malassis explique que la Partie II de ce rapport porte sur les limitations des mandats de membres du parlement. Dans cette Partie II, il est indiqué que le droit à la participation politique n'est pas absolu et qu'en général, les restrictions au droit à la participation politique et à la candidature aux élections sont autorisées dans une démocratie constitutionnelle dans la mesure où elles sont fondées sur la loi, raisonnables et objectives. Tant que ces conditions permettent un accès raisonnablement libre aux postes, sont prescrites par la loi, poursuivent des objectifs légitimes, sont nécessaires dans une société démocratique et ne sont pas discriminatoires, elles devraient être autorisées ; par contre les limitations devraient être plus flexibles que celles appliquées aux Présidents. Mme Malassis ajoute que des restrictions excessives des mandats peuvent avoir des effets négatifs qui affaiblissent le pouvoir législatif face à l'exécutif, car cette restriction diminue le rôle du législatif et contribue à la migration du pouvoir des représentants élus aux fonctionnaires non-élus.

La Partie III de ce rapport porte sur les limitations aux mandats des représentants élus aux niveaux sous-national et local et aux responsables exécutifs élus aux niveaux sous-national et local. Mme Malassis explique que les limitations imposées aux membres d'organes collégiaux directement élus au niveau sub-national et local étaient similaires à celles qui s'appliquent aux parlementaires. Par contre, la situation des représentants exécutifs directement élus aux niveaux sous-national et local s'apparente à celle d'un président et présente des risques similaires d'accumulation de pouvoir et de distorsion de la concurrence électorale : l'imposition de limitations de mandat pourrait dès lors sembler justifiée. Tel n'est pas le cas pour les responsables exécutifs qui sont élus indirectement par des conseils municipaux ou infranationaux, et dont la situation ressemble davantage à celle d'un Premier ministre dans un système parlementaire, qui nécessité de la confiance continue du parlement. C'est pourquoi leur imposer une limitation de nombre de mandats ne semble pas justifié.

Mr Francisco Guerrero, Organisation of American States' (OAS) Secretary for Strengthening Democracy, explained that he was proud of the co-operation between the Venice Commission and the OAS and delighted that so many Latin American States were represented at the Venice Commission and take part in its Sub-commission on Latin America, when it meets. The OAS appreciates the work with the Venice Commission's Division on elections, referendums and political parties and notably with its Council for Democratic Elections.

The OAS is also grateful for the Venice Commission's opinion for Venezuela on the legal issues raised by a decree calling elections to a national constituent assembly, which it requested in June 2017, and for its Report on term limits, both of which had been requested by the Secretary General of the OAS. Mr Guerrero explained that the concept of re-election was a new one in Latin America and marked a shift away from the long-term tradition that did not provide for this possibility. The OAS saw this trend with concern and is grateful for this Report that sets out that there is no absolute right to hold office and that the right to be re-elected is not a specific and distinct human right. The OAS will be sharing this Report widely.

Mr Darmanovic reminded the Commission that the Opinion on the Electoral Legislation of Mexico, adopted in June 2013, also dealt with the terms of members of parliament – noting that the Constitution of Mexico was among the rare constitutions in the world that did not foresee the possibility for a consecutive parliamentary mandate. In addition, Mexico's Electoral Code bans the immediate re-election of members of the legislative body with the result that each member of the House of Representatives and the Senate may be re-elected only after a break of three or six years (depending on the chamber). He underlined the importance for the representatives of the people not to be weakened with respect to the executive or linked to heads of political bodies.

La Commission adopte le Rapport sur les limitations de mandat – Partie II les membres du parlement et Partie III - les représentants élus aux niveaux sous-national et local et les responsables exécutifs élus aux niveaux sous-national et local (CDL-AD(2019)007), préalablement examiné par la sous-commission sur l'Amérique Latine le 30 novembre 2018.

15. Report on Funding of Associations

Ms Kjerulf-Thorgeirsdottir explained that the Report on Funding of Associations followed a request by the Secretary General. In the process of the preparation of this Report, a Round Table had been organised in co-operation with the OSCE/ODIHR in Venice in October 2017 in order to review the regulations in force in different countries and to identify and develop international and common national standards concerning foreign funding of associations. Ms Thorgeirsdottir also recalled that the draft report had been submitted to the Sub-Commission on Fundamental Rights during the December 2018 Plenary and the comments made by the members/substitute members had been taken into account in the latest version of the Draft Report.

The Report reminded that in its Opinions the Commission had observed three main reasons that are advanced by States in order to justify the restrictions on foreign funding of associations. These are

a. Ensuring openness and transparency;
b. The prevention of terrorism and money laundering; and
c. protection of the State and its citizens from disguised political interference by foreign countries.

In its previous opinions, the Venice Commission considered that ensuring transparency would not by itself appear to be a legitimate aim but may be a means to achieve one of the legitimate aims under the second paragraph of Article 11 ECHR.

In its report, the Venice Commission distinguished between "reporting obligations" and "public disclosure obligations" imposed on associations concerning their financial resources. A "reporting obligation" consists in reporting the amount and the origin of the funding to the relevant authorities. A "public disclosure obligation" consists in making public the source of funding and potentially, the identity of donors. The goal of a public disclosure obligation is not to inform the authorities but to inform the public.

The Report concluded that reporting obligations may be considered to pursue the legitimate aim of preventing terrorism financing and money laundering by enhancing the transparency of funding of associations. However, disclosure obligations are not suitable for this purpose. The Report accepted nevertheless that "Public disclosure obligations" could pursue the legitimate aim of prevention of disorder only as concerns formal remunerated lobbying activities carried out by associations. Public disclosure obligation may be seen in this context as pursuing the

aim of ensuring the transparency of the political influence exerted by lobbying groups on the process of formation of political institutions and on the political decision-making process. Moreover, some “public disclosure obligations” can be imposed on associations with public utility status, but those obligations should be limited to information on how the public funds obtained by the association concerned are spent.

The Report also examined the necessity and proportionality of reporting/disclosure obligations concerning the financial sources of associations and of the sanctions imposed in case of violation of those obligations, the discriminatory nature of restrictions on foreign funding of associations and the issue of the guarantee of effective legal protection.

The Commission adopted the Report on Funding of Associations (CDL-AD(2019)002), previously examined by the Sub-Commission on Fundamental Rights on 14 March 2019.

16. Revised Joint Guidelines on Freedom of Peaceful Assembly (3rd Edition)

This item was postponed to the next Plenary Session.

17. Co-operation with the Parliamentary Assembly

Mme Liliane Maury Pasquier, Présidente de l’Assemblée parlementaire, informe la Commission des résultats et des conclusions de la réunion du Bureau élargi avec le Comité des Présidents de l’Assemblée parlementaire, tenue le 16 mars 2019. Quatre sujets avaient été abordés : (1) comment l’Assemblée parlementaire pourrait mieux assurer le suivi des avis de la Commission de Venise, étant donné qu’elle est le « meilleur client » de la Commission, ayant demandé huit avis au cours de l’année 2018 ; (2) la manière dont l’Assemblée parlementaire pourrait renforcer l’état de droit et, à ce sujet, l’importance de la Liste des critères de l’Etat de droit de la Commission de Venise ; (3) la question des referendums et de la révision du Code de bonne conduite en matière référendaire qui date de 2007 et (4) l’excellente coopération entre l’Assemblée parlementaire et la Commission en matière de mission d’observation d’élections. L’Assemblée parlementaire a établis une annexe au Code de conduite des membres de l’Assemblée parlementaire sur les missions d’observation d’élections pour que ces dernières soient aussi indépendantes, sérieuses et incontestables que possible – suite à la Résolution 2182 (2017).

M. Buquicchio explique que la coopération entre la Commission de Venise et l’Assemblée parlementaire est très importante et que, par exemple, la Liste des critères de l’Etat de droit et le Code de bonne conduite en matière référendaire étaient réalisé à l’initiative de l’Assemblée parlementaire.

18. Working Methods

The Commission examined a proposal made by Ms Karamisheva-Jovanoska, Mr Backovic, Mr Knezevic, Mr Varga and Mr Warchol to provide for the possibility to append separate opinions by members to the opinions adopted by the Commission.

Ms Karamisheva presented the proposal as a well-intended initiative aimed at opening up new potentials in exploiting the talents of all the Commission members, by allowing a more complete analysis of the topics submitted for opinion. Separate opinions would enable all members to express a plurality of views on an equal footing. Members could thus provide the Secretariat pro bono with a wealth of arguments and reasoning.

Mr Giakoumopoulos stressed that in the Council of Europe system only the European Court of Human Rights and the European Committee for the Social Charter (in the quasi-judicial procedure of collective applications) provided for the possibility of separate opinions. No advisory body or monitoring body allowed them.

Mr Ribicic supported and joined the proposal, stating that it would improve the democratic atmosphere and quality of the Commission's work. He thought that only dissenting opinions should be appended, not concurring ones, and only in case the relevant dissenting argument had been raised and rejected in a Sub-Commission. He referred to the 2000 Opinion on the constitutional amendments concerning legislative elections in the Republic of Slovenia, to which the separate comments of the Slovenian member had been appended.

Mr Carozza, against the background of his experience within the Inter-American Human rights protection system, considered that, while the desire to fully air and take into account the arguments of all members was understandable, separate opinions risked affecting the collegiality, the efficiency and the efficacy of Commission opinions.

Ms Cleveland considered that separate opinions is a practice that can be appropriate under certain circumstances for a court. Many bodies – including many courts, and many courts in Europe – operate under a strict rule of consensus. This is the case for Council of Europe advisory bodies. Similarly, the recommendations of the UN treaty bodies to States resulting from the periodic reviews of states' human rights practices are produced on a consensual basis. Only in their capacity as quasi-judicial bodies addressing individual cases do the Treaty bodies have separate opinions. Ms Cleveland was of the view that separate opinions would undermine the coherence, weight and influence of the Venice Commisison's work. In addition, they would raise very difficult procedural and logistical complications, and would have financial implications to the extent that the process of adoption of opinions would become significantly more complicated and lengthy.

M. Mathieu soutient l'exigence de pluralisme dans le travail de la Commission, et considère que plutôt qu'à travers des avis séparés, elle peut être respectée en évitant d'émettre des jugements moraux dans les avis, en réservant le temps nécessaire aux débats sur des questions controversées, et en mentionnant dans les considérants des avis les arguments contraires exprimés par les membres.

Ms McMorrow stressed that the Commission was required to provide coherence and clarity, and for it to express a multiplicity of views would undermine its commitment to consensus.

M Meridor raised the question of the Commission's credibility if it were to provide conflicting opinions. In addition, the dynamic within the Commission would shift from a consensus to dissent.

Mr Knezevic considered that the working methods needed to be improved to provide for the possibility of all members to express their dissenting positions and arguments in advance; the rapporteurs should provide due reasons for rejecting such positions and arguments.

Messrs Dimitrov, Pinelli, Clayton, Darmanovic and Endzins also expressed their position against separate opinions.

Mr Varga argued that the Venice Commission functions almost as a Court even if its opinions are non binding.

Mr Giakoumopoulos explained that in 2000 the then Slovenian member was a member of the government. Mr Buquicchio added that since 2002 there are specific rules that prevent the

national member from participating in the discussion and voting on an opinion concerning his or her own country.

The Commission instructed the Enlarged Bureau to discuss the matter further with the participation of a representative of the members making this proposal, and to report back to the Plenary at the June session.

19. Adoption of the Annual Report of activities 2018

The Commission adopted the annual report of activities 2018.

20. Information on constitutional developments in other countries

Ukraine

Mr Holovaty informed the Commission about the judgment of the Constitutional Court of Ukraine of 26 February 2019 on Article 368-2 of the Criminal Code which criminalised illicit enrichment ("acquiring by a person authorized to perform functions of the State or local self-government in ownership of assets in significant amount, the legality of grounds for acquiring of which has not been established by evidence, as well as transfer by the person of such assets to any other person"). An *amicus curiae* brief prepared at the request of the European Union Advisory Mission in Ukraine had come to the conclusion that this provision was in conformity with European standards and the Ukrainian Constitution. The Court however held that the provision was unconstitutional because it contradicted legal certainty, the presumption of innocence and the privilege against self-incrimination. As a consequence of the judgment, the National Anti-Corruption Office had terminated numerous pending cases which could not be re-opened. The persons concerned could be indicted only under other criminal provisions, such as those criminalising making false declarations, which could not substitute for the punishment of illicit enrichment. It remained unclear whether Parliament would adopt new provisions on illicit enrichment.

21. Co-operation with other countries

Mexico

Mr Lorenzo Córdova Vianello, President of the National Electoral Institute of Mexico (INE) and Mr Buquicchio, President of the Venice Commission, signed a memorandum of understanding between INE and the Venice Commission.

Mr Córdova Vianello informed the Commission that the 2018 elections were the biggest test for the Mexican electoral system. Participation had been very broad, and the organisation and supervision of the elections, including its financial aspects, could be considered as positive, despite the great complexity including episodes of violence. Gender parity and a minimum quota of indigenous people in the organisation of elections as well in the composition of elected bodies were guaranteed. The auditing and training models ensured the accountability of parties and candidates. To counteract disinformation in social media, INE promoted freedom of speech instead of censorship, and agreements with Facebook, Google and Twitter enabling to provide counter-information. INE's policy was based on inclusiveness, gender parity, transparency and accountability.

22. World Conference on Constitutional Justice

Mr Dürr informed the Commission about the 14th meeting of the Bureau of the World Conference on Constitutional Justice - WCCJ (8 February 2019) and the 1st training for liaison officers of the WCCJ on the use of and contributing précis to the CODICES and the restricted Venice Forum (7-8 February 2019), both held in Santo Domingo. More than 60 liaison officers from constitutional courts and councils and supreme courts in Africa, the Americas, Asia and Europe participated in this successful training. Members and the public can subscribe to the new electronic Bulletin on Constitutional Case-Law at: https://bit.ly/2qMTArV.

Mr Dürr reminded the Commission that the Venice Commission acts as the Secretariat for the WCCJ, which currently had 114 courts members. The Bureau of the WCCJ, which is composed of 10 regional and linguistic court groups, four individual courts and the last and the next congress hosts, mainly discussed the preparation of the 5th WCCJ Congress on "Constitutional Justice and Peace" to be held in Algiers in September 2020. Venice Commission members will be invited to this event. The Bureau also adopted a new procedure to support constitutional courts whose independence is threatened, similar to the support (public statements) by the President of the Venice Commission for constitutional courts which are under undue pressure in the Commission's Member States. The Statute of the World Conference provides for support from the Bureau, but the Bureau had so far not been in a position to exercise this competence. To operationalise support for courts in non-Venice Commission Member States, the Bureau authorised the President of the Commission to make such statements on behalf of the Bureau in close consultation with the Bureau itself and with regional and linguistic groups of which the relevant court is a member.

23. Compilations of Venice Commission opinions and reports

Mr Helgesen informed the Commission that the Venice Commission had consistently expressed the view that the choice of an electoral system is a sovereign decision of a state through its political system, if it is in conformity with the standards of the European electoral heritage and it guarantees and gives effect to the free expression of the will of the voters. This is clearly stated in the Code of Good Practice in Electoral Matters and in various studies and opinions. He pointed out that, at the same time, the different electoral systems had different advantages and shortcomings.

A state's electoral system had to be seen in the context of the constitutional, legal and political traditions of the state, the party system, and territorial structure. Therefore, when assessing an electoral system, or proposed changes, the Venice Commission placed it within a specific context.

The present compilation gave an overview of the Commission's statements in this field, particularly regarding possible criteria for the choice of an electoral system and its possible effects. Some specific effects – namely in relation to the representation of minorities and of gender – would be dealt with in separate compilations later this year.

Mr Kask added that for the time being the Council for Democratic Elections was not planning to prepare a report or study on electoral systems in addition to the present compilation.

The Commission endorsed the Compilation of Venice Commission opinions and reports concerning electoral systems (CDL-PI(2019)001).

24. Report of the Meeting of the Sub-Commission on Democratic Institutions (14 March 2019)

Mr Tuori informed the Commission of the conclusions of the meeting of the Sub-Commission on Democratic Institutions (14 March 2019), in particular related to the draft opinion on the revision of the Constitution of Luxembourg (see item 8 above). The Sub-Commission also examined the preliminary draft "Parameters on the relationship between the parliamentary majority and the opposition in a democracy: a checklist" (CDL-DEM(2019)001). Mr Tuori explained the history of the preparation of the Checklist, and the choice of a "non-normative" approach to the questions formulated therein. The Checklist would be revised again by the rapporteurs and would be submitted for adoption at the Plenary Session of the Commission in June 2019; members were invited to provide comments on Checklist by the end of April 2019.

25. Other business

Ms Granata-Menghini was currently in contact with the Doge Palace to see whether it would be available to host the 30th anniversary ceremony of the Commission in 2020. The dates of the June session might be modified to accommodate the availability of the Palace. Information would be provided as soon as possible.

26. Dates of the next sessions

The schedule of sessions for 2019 was confirmed as follows:

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.

The schedule for the sessions in 2020 will be communicated shortly.

Link to the list of participants