Strasbourg, 19 November 2020

CDL-PL-PV(2020)003*
Or. Engl

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

124th PLENARY SESSION

(online)
8-9 October 2020

DRAFT SESSION REPORT

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1. Adoption of the Agenda

The agenda was adopted without any amendment (CDL-PL-OJ(2020)003ann-rev).

2. Communication by the President

The President welcomed the members and informed the Commission about the newly appointed members and substitute members and presented his recent activities, as set out in document (CDL(2020)026).

3. Communication from the Enlarged Bureau

The President informed the Commission that at its online meeting on 7 October 2020, the Enlarged Bureau had discussed the need to support the continuity of the office of the Polish Human Rights Commissioner. The term of office of the current Commissioner had expired on 9 September 2020. While the successor had not yet been elected, on 17 September 2020 some MPs requested the Constitutional Court to declare unconstitutional the provision of the Human Rights Commissioner Law stating that the outgoing Commissioner performs his or her duties until the incumbent assumes the position. Referring to the Principles on the protection and promotion of the Ombudsman institution ("the Venice Principles"), the Enlarged Bureau recommended to that the plenary session adopt a declaration recalling that continuity in office is of the utmost importance for the protection of the rights of individuals in Poland.

The Commission asked its President to issue a public statement on its behalf in support of the continuity of the Institution of the Human Rights Commissioner of Poland, based on the "Venice Principles" on the Protection and Promotion of the Ombudsman institution.

The President further informed the Commission that the Enlarged Bureau recommended with regret holding the 125th Plenary Session (11-12 December 2020) exclusively online.

The Commission decided to hold its 125th Plenary Session (11-12 December 2020) exclusively online.

4. Communication by the Secretariat

Ms Granata-Menghini informed the Commission about the modalities of the current session that would be held on-line using the Council of Europe's KUDO platform.

5. Follow-up to earlier Venice Commission opinions

The President referred to information on follow-up provided in document CDL(2020)036 in respect of the following opinions:

- Albania - Opinion on the powers of the President to set the dates of elections (CDL-AD(2019)019);
- Albania - Opinion on the appointment of judges to the Constitutional Court (CDL-AD(2020)010);
- Armenia - Opinion on three legal questions in the context of draft constitutional amendments concerning the mandate of the judges of the Constitutional Court (CDL-AD(2020)016);
- Georgia - Draft constitutional amendments relating to the electoral system as adopted on 15 December 2017 at the second reading by the Parliament of Georgia (CDL-AD(2018)005);

- Kyrgyzstan – Joint opinion of the Venice Commission and the OSCE/ODIHR on the amendments to some legislative acts related to sanctions for violation of electoral legislation (CDL-AD(2020)003);
- Russian Federation - Opinion on draft amendments to the Constitution (as signed by the President of the Russian Federation on 14 March 2020) related to the execution in the Russian Federation of decisions by the European Court of Human Rights (CDL-AD(2020)009)**;**
- *Amicus curiae brief* for the European Court of Human Rights in the case of Mugemangango v. Belgium on procedural safeguards which a State must ensure in procedures challenging the result of an election or the distribution of seats (CDL-AD(2019)021).

In addition to document CDL(2020)036, the Commission was informed on **follow up** to:

- Hungary - Opinion on Article XXV of 4 April 2017 on the Amendment of Act CCIV of 2011 on National Tertiary Education, (CDL-AD(2017)022)

The opinion had acknowledged that there were few international standards for the licensing and operation of foreign universities, but it was difficult to see reasons for a sudden introduction of new, very stringent rules, and of strict deadlines for complying with them for already existing universities. This could have a detrimental effect on the freedom of education. The opinion underlined several conditions which were particularly difficult to meet – such as the requirement for a prior international agreement between Hungary and the university's home state. Another problematic requirement was that the foreign university should also provide education in its home country. In October 2017 the Hungarian Parliament extended the deadline for foreign universities to meet the new requirements to 1 January 2019, but the essence of the new law remained.

Upon appeal by the European Commission, the Court of Justice of the European Union (ECJ) decided on 6 October 2020 that the legislation was in breach of the General Agreement on Trade in Services (GATS) of the WTO, and that it was incompatible with the provisions of the EU Charter of Fundamental Rights on academic freedom, the freedom to found higher education institutions, and the freedom to conduct a business, and also contrary to the EU legislation on free movement of services and the freedom of establishment. According to the Court the contested legislation jeopardized the normal functioning of the foreign universities and put academic freedom at risk. Without citing its opinion, the ECJ confirmed in essence the Venice Commission's position.

- Russian Federation - Opinion on the Federal Law on combating extremist activities in the Russian Federation, (CDL-AD(2012)016)

In its 2012 opinion, while acknowledging the challenges faced by the Russian authorities in countering extremism, the Commission stated that the manner in which this aim is pursued in the Extremism Law was problematic. Serious concern in the light of human rights standards as enshrined in the ECHR was expressed over the lack of precision of the definitions of "extremism", "extremist actions", "extremist organisations" or "extremist materials" provided by the Law, as this could open the door to an overly broad interpretation by the enforcement authorities. The specific preventive and corrective instruments provided by the Law for combating extremism - the written warnings and notices - and the related sanctions (liquidation and/or ban on the activities of public, religious or other organisations, closure of media outlets) were also found to be problematic in the light of freedom of association and freedom of expression as protected by the ECHR. The Opinion recommended that the relevant provisions be amended in order to be brought in full compliance with the applicable international standards and in particular with the ECHR requirements of legality, necessity and proportionality.

In a Chamber judgment of 6 October 2020 (Korastelev v. Russia), the Court found that the relevant provisions of the anti-extremist legislation were formulated in broad terms, leaving too wide a discretion to the prosecutor and making their application unforeseeable. Nor had the legislation and practice provided adequate protection against arbitrary recourse to the legal

procedures used in the applicants' case. The Court thus found a breach of Article 10 and of Article 6 ECHR.

The Court referred extensively to the Commission's opinion. In particular, it shared the Commission's criticism that a warning entailed the threat that a failure to comply with the warning – which was not based on a finding of guilt - could result in liability for an administrative offence and that as a result of the vagueness of the Law and of the wide margin of interpretation left to the enforcement authorities, undue pressure is exerted on civil society organisations, media outlets and individuals, which undoubtedly has a negative impact on the free and effective exercise of human rights and fundamental freedoms.

6. Republic of Moldova

The urgent joint opinion by the Venice Commission and the OSCE/ODIHR (CDL-PI(2020)011) on draft Law no. 263 amending the Electoral Code, the Contravention Code and the Code of Audiovisual Media Services was issued on 19 August 2020 in accordance with the Protocol on the preparation of Venice Commission urgent opinions. No objection to the endorsement was raised by any member.

The key recommendations of the opinion firstly concerned restrictions on freedom of expression, which should be drafted and interpreted in conformity with constitutional and international human rights law, and in particular: prohibitions on participation in campaigning ("electioneering") by non-government, trade unions, charity organisations, as well as during processions and/or religious services, as well as by media; provisions on hate speech and incitement to discrimination. Secondly, provisions on (misuse of) administrative resources should be further refined, including introducing an effective enforcement mechanism to prevent these violations. Thirdly, draft amendments needed to be re-considered to continue allowing observers to observe all stages of the electoral process, and fourthly, sanctions should respect the principles of proportionality and equality. Other recommendations concerned the need not to provide for excessive regulative delegation to the Central Election Commission, to clarify provisions on complaints and appeals, concerning in particular the actions, inactions and decisions subject to challenge by appeal, the competences and the decision-making power of the various bodies, including the courts.

The Commission endorsed the urgent joint opinion by the Venice Commission and the OSCE/ODIHR on draft Law no. 263 amending the Electoral Code, the Contravention Code and the Code of Audiovisual Media Services of the Republic of Moldova (CDL-AD(2020)027).

7. Montenegro

The urgent joint opinion by the Venice Commission and the OSCE/ODIHR (CDL-PI(2020)007) on the draft law on elections of members of parliament and councillors was issued on 1 July 2020 in accordance with the Protocol on the preparation of Venice Commission urgent opinions. No objection to the endorsement was raised by any member.

The key recommendations of the opinion concerned cases and procedures for dismissal or replacement of members of election commissions – including polling boards – which should be made more precise, and open to judicial review - consideration should be given to defining a dispute settlement mechanism in order to prevent and/or to counteract any abuse of the Parliament's right to dissolve the CEC; the need for ensuring adequate representation of national minorities in membership of election commissions; the need for detailed rules for signature collection and verification, as well as for clear liability rules and sanctions for violations; the limitation of repeat elections to cases of gross violation of the law where the discrepancy could have affected the election results and subsequently the allocation of mandates. Other recommendations related to the harmonisation of electoral legislation, ensuring level playing field to all contestants, introducing a limit on the amount of paid political advertising; and consider

prescribing obligatory online publication by all election commissions of their decisions on complaints immediately upon adoption of these decisions.

The Commission endorsed the urgent joint opinion of the Venice Commission and the OSCE/ODIHR on the draft law on Elections of Members of Parliament and Councillors of Montenegro (CDL-AD(2020)026).

8. Ukraine

The urgent joint opinion by the Venice Commission and the OSCE/ODIHR (CDL-PI(2020)009) on draft Law 3612 on democracy through all-Ukraine referendum (CDL-REF(2020)029) was issued on 21 July 2020 in accordance with the Protocol on the preparation of Venice Commission urgent opinions. No objection to the endorsement was raised by any member.

The key recommendations of the opinion concerned clarification of the relations between the popular initiative referendum of abrogation of laws or parts of laws and the referendum on "resolving matters of nationwide significance"; increasing the role of the Parliament before the vote, as well as, if necessary, after the vote and in conformity with the results; ensuring equal opportunities for the supporters and the opponents of issues submitted to referendum in referendum commissions of different levels; extension of the deadline for collecting the signatures for referendums on popular initiative and synchronising the provisions of the Draft law on funding of referendum campaigns with the legislation on the financing of political parties. The opinion also recommended excluding from the draft law provisions on electronic voting and regulating these issues globally at a later date by way of a separate law, which would also address local, parliamentary and presidential elections.

The Commission endorsed the urgent joint opinion of the Venice Commission and the OSCE/ODIHR on draft Law 3612 on democracy through all-Ukraine referendum (CDL-AD(2020)024).

9. Report on electoral law and electoral administration in Europe

No member had expressed any objection to taking note of this report.

The main objective of the report was to identify both improvements as well as remaining and new challenges in the electoral legislation and the electoral administration in Europe against the background of international standards and good practices in electoral matters, which have been observed since the 2006 report on the same issue. Challenges remained in relation to the various fundamental principles of electoral law (universal, equal, direct, secret and free suffrage). Concerning universal suffrage, a tendency can be identified to grant the right to vote in national elections to all citizens where possible, both legally and de facto; the remaining restrictions on the right to vote were increasingly under discussion. Concerning equal suffrage and freedom of voters to form an opinion, main challenges are the distortion of political competition conditions, especially through misuse of administrative resources and unbalanced coverage in the media, negative campaigning and – what is new – the inadaptation of legislation to the digital environment. Freedom of voters to express their votes and free suffrage continue to be challenged from time to time by irregularities in the voting process as well in the counting and tabulation of results. This also entails anybody being able to lodge complaints and appeals in the case of electoral irregularities and that these are followed up effectively.

The Commission took note of the report on electoral law and election administration in Europe (CDL-AD(2020)023).

10. Compilation on separation of powers

The Commission endorsed the Compilation of opinions and reports of the Venice Commission on the Separation of Powers (CDL-PI(2020)012).

11. Ceremony of the 30th Anniversary of the Venice Commission

The Ceremony was postponed due to the Covid-19 pandemic.

12. Georgia

The Opinion on the draft Organic Law amending the Organic Law on Common Courts ("draft Amendments") had been requested by the Speaker of Parliament on 22 September 2020 with a very short deadline; the draft Amendments were planned to be adopted at the last session of the current Parliament, which fell on the same day as a series of virtual meetings (30 September 2020) that were held by the Venice Commission with the High Council of Justice ("HCoJ"), the Parliamentary Majority and Opposition, the Deputy Public Defender and civil society.

This opinion followed an Urgent Opinion, issued on 16 April 2019, regarding the appointment of judges to the Supreme Court of Georgia (CDL-AD(2019)009).

The opinion considered the draft Amendments to be an improvement to the previous procedure, having taken some of the recommendations made in the Urgent Opinion into account, such as removing the vote by secret ballot in the HCoJ and providing that each vote be accompanied by written reasoning that is made public. Other aspects still give rise to concern, for instance that it is not mandatory for HCoJ members to vote in compliance with the evaluation scores for judge candidates, even if they have to provide a special justification for such deviation. The opinion considers this to be inconsistent with a merit-based evaluation system. In addition, the identity of HCoJ members in relation to each vote is not disclosed and doing so would even expose them to "liability". Only where a candidate challenges a decision of the HCoJ before the Qualifications Chamber of the Supreme Court are the HCoJ members' names revealed to the members of the Chamber, the candidate and his or her representative and the representative of the HCoJ in these proceedings (not to the wider public). The opinion recommends, however, that doing so would allow public scrutiny of the behaviour of the individual members of the HCoJ, thereby further enhancing the trust of the public in this body. It would also serve as a deterrent against taking political or other irrelevant factors into consideration in the procedure. Finally, it would enable the effective exercise of the existing possibility of appealing against the decision on account i.a. of bias or discrimination.

Although the opinion welcomed that the decision of the HCoJ may be appealed to the Qualifications Chamber of the Supreme Court, the opinion recommended that once a decision had been rendered by the Chamber and remanded to the HCoJ, the new decision by the HCoJ should also be appealable.

Mr Archil Talakvadze, Chairman of the Parliament of Georgia, thanked the Venice Commission and said that Georgia now has an unprecedented procedure for the selection of judges, which has taken most of the Commission's recommendations in its Urgent Opinion of 2019 into account. He provided explanations as to why the other recommendations could not be heeded and reiterated that the current Parliament has finalised its work with the adoption of the draft Amendments at its last session on 30 September 2020 and that it could, for that reason, not have waited for the final adoption of this opinion.

Mr Esanu, while thanking the Georgian authorities for their co-operation, questioned the grounds for not following the other recommendations made in the Urgent Opinion as well as in this opinion, notably not introducing an appeal for the second decision of the HCoJ following a judgment of the Qualifications Chamber of the Supreme Court.

The Venice Commission adopted the Opinion on the draft Organic Law amending the Organic Law on Common Courts of Georgia (CDL-AD(2020)021), previously examined in a written procedure replacing Sub-Commissions.

This activity falls into the framework of the Quick Response Mechanism (QRM) for Eastern Partnership Countries under the Partnership for Good Governance (PGG).

13. Iceland

Mr Scholsem pointed out that in 2013 the Commission had adopted an opinion on a draft new whole Constitution. That reform procedure had failed. The 2020 draft was more cautious, introducing only partial amendments to the Constitution, in relation to matters that could more easily meet a sufficiently broad consensus. The opinion examined four constitutional bills on the protection of the environment, on natural resources, on referendums and on the President of Iceland, the government, functions of the executive and other institutional matters.

Concerning the President of the Republic, one of the most significant changes proposed in the bill was the term limitation of the President to two consecutive terms of six years. Considering that the Icelandic President is not directly in the fray of day-to-day politics but enjoys moral and intellectual leadership, the Opinion concluded that the maximum 12 years appeared reasonable. With a view to aligning the wording of the Constitution to the current political practice, the President is no longer the only authority to appoint public officials but shares this competence with the Cabinet of Ministers and other public authorities. Furthermore, before deciding whether to assent to the Prime Minister's proposal to dissolve Parliament, the President shall consult the Speaker of the Althing and the leaders of the parliamentary groups. The veto power of the President remained, but the amendments introduced the possibility for the Parliament to repeal the law within five days of the President's rejection, in which case the referendum provided following a presidential veto does not take place. Under the draft amendments, the immunity of the President was limited to "executive acts which are countersigned by a Minister".

Two of the main criticisms of the Commission in its 2013 Opinion were the ambiguous nature of the Cabinet and the weak and ambiguous role of the Prime Minister. These criticisms seemed to have been fully overcome, since the draft amendments put an emphasis on the important role of the Cabinet and the co-ordinating role of the Prime Minister who presides over Cabinet meetings and supervises government activities. The draft amendments also introduced the rule that no Cabinet Minister may remain in office after the Althing has adopted a motion of no confidence and thus clearly state the principle of parliamentarism which is currently based in Iceland on the practice and constitutional conventions.

Concerning the criminal liability of ministers, under the draft amendments there was no fixed rule concerning the ministerial liability in both material terms and procedural aspects. The Opinion considered that the Bill seemed to go too far in delegating so much power to the lawmaker, without setting any constitutional rule or principle. Globally, the draft amendments were a realistic and empirical text aiming at obtaining a broad consensus for the reform.

Ms Bazy-Malaurie underlined that in addition to the existing three cases of binding referendums (removal of the President, presidential veto again a bill, amendments to the status of the Church), the draft amendment introduced a new type of referendum at the request of 15 per cent of the electorate for the repeal of enacted laws, resolutions on approval of international treaties and resolutions "resolutions which have a legal effect or represent an important policy decisions". The latter formulation leaves the choice of these texts to the Althing (by a majority of 2/3) The opinion noted ambiguous formulations concerning the abrogative referendum. Clear regulations and definitions were required for referendums on international treaties as well as on tax laws. The effects of an application for the abrogative referendum within six weeks of the publication of a law were unclear (application of the challenged law). Specific provisions on applicability would be needed, particularly in the area of international treaties.

Mr Helgesen explained that the reform package included two more important draft bills, concerning the natural resources and the protection of the environment. The draft bill on natural resources introduced two different categories of entitlement to land/resources: a) private property belonging to individuals and legal entities b) natural resources and rights to land 'belonging to the nation'. Mr Helgesen explained that prior to the Plenary session, the authorities had provided a revised translation of the draft provision from which it appeared that the first sentence of the provision that "the natural resources of Iceland belong to the Icelandic nation" is indeed more a statement of policy principle, rather than a legal norm. A reference to judicial review of the protection of rights is recommended considering the great novelty that the rights involved represent. Concerning the draft bill on the protection of the environment, some notions on the scope of individual responsibility for environment and its relationship to "shared responsibility" should be clarified. Moreover, the duty of the state and its overall responsibility for the protection of the environment and nature could be further emphasised. The nature of the right to a healthy environment, as well as the rights and obligations which derive from this right should be clarified, specifically referring to judicial review of rights and obligations.

Mr Páll Thorhallsson, Director General at the Office of the Prime Minister of Iceland, underlined that since 2013, the constitutional reform process had been in a sort of stalemate because of the tension between those who support constitutional reform and those who defend the status quo. Despite the efforts made by the coalition governments since 2013, there had not been sufficient political support for the adoption of constitutional amendments. Criticism of the partial character of the amendments would serve those who defend the status quo and who are against any constitutional amendment. The constitutional reform was an ongoing process in Iceland and would not be limited to the amendments currently submitted to the Commission for assessment.

The Commission adopted the Opinion on four draft constitutional bills on the protection of the environment, on natural resources, on referendums and on the President of Iceland, the Government, the functions of the executive and other institutional matters (CDL-AD (2020)020), previously examined in a written procedure replacing Sub-Commissions.

14. Malta

Mr Kuijer pointed out that this opinion was the third in a line of opinions dealing with the constitutional arrangements in Malta. In December 2018, the Venice Commission concluded that in the then Maltese Constitution, the Prime Minister clearly was the centre of political power. Other actors such as the President, Parliament, the Cabinet of Ministers, the judiciary or the Ombudsman, had too weak an institutional position to provide sufficient checks and balances. The Opinion therefore made various recommendations aimed at strengthening those other actors. The Opinion insisted that holistic constitutional changes should be adopted as the result of a process of wide consultation in society to give citizens a chance to take ownership of these amendments.

The Opinion adopted in June 2020, at the request of the Maltese Government, examined proposals for legislative changes engaging with many of the recommendations made in the 2018 Opinion. The present draft opinion - again, at the request of the Maltese government – dealt with ten bills translating the proposals previously examined in the June 2020 Opinion into concrete legislative texts. Six of these bills had in the meantime been adopted in Parliament.

The draft opinion warmly welcomed the implementation of the proposals for legislative reform as an important step in the right direction. The legislative process for the adoption of the six bills had been too swift, given the fact that the constitutional amendments should have a profound and long-term impact in Malta and hence required wide consultations within Maltese society. For that reason, the opinion recommended that the remaining four bills and any future amendments be discussed in a wider framework also with civil society. Not all recommendations of the 2018 Opinion were dealt with by these six Acts and four bills. The future Constitutional Convention was

welcome and the Venice Commission remained available for further assistance as regards this Constitutional Convention.

While the opinion contained numerous positive appraisals as regards the six Acts that had already been adopted by Parliament, there were notably two points related to the judiciary that should be improved. The election of the Chief Justice with a two-thirds majority led to depoliticization but could also lead to deadlock in Parliament. A suitable anti-deadlock mechanism might be that the Chief Justice be elected by the judges of the Supreme Court. As concerns the publicity of judicial candidates, the Commission had considered in its June 2020 Opinion that at least the names of the three judicial candidates presented to the President by the Judicial Appointments Committee should be made public. In a letter of 17 June 2020, the Government had accepted this recommendation. The amended Article 96A of the Constitution however stipulates that the list of three candidates presented by the JAC to the President "shall be made public in the President's decision", i.e. *after* the President has chosen one of the three judicial candidates. The list of three candidates should be accessible to the public *when* the JAC presents its list to the President.

As concerns the six adopted Acts, the recommendations made in the opinion had the character of corrections or adjustments and should be dealt with without delay, rather than being left to the future Constitutional Convention.

As regards the four Bills that are still pending in Parliament, throughout the opinion, recommendations were made as to how the legislative texts may be made more effective, for instance, the Auditor General who should not be only *empowered* to report corrupt practices to the Attorney General, but be *obliged* to do so. The opinion urged the Maltese authorities to explicitly fix the (low) maximum number as persons of trust and the duration of such engagements in the law.

Mr Edward Zammit Lewis, Minister for Justice, Equality and Governance of Malta, explained that since January, the Maltese Government had undertaken important reforms. For the first time in the history of Malta, the President had been given executive powers, in the field of judicial appointment. These important improvements had to be adopted in an expedient manner. The reforms had been widely discussed for eleven years already. There had been a structured dialogue with stakeholders, led by the Venice Commission. In Malta, any person could participate in parliamentary proceedings. Civil society had made sufficiently clear its position. It was incorrect when the opinion stated that there was no anti-deadlock mechanism for the election of the Chief Justice; when no qualified majority could be achieved, the incumbent Chief Justice remained in office. The current Chief Justice had been elected by unanimous vote. Malta had a tradition of achieving qualified majorities. This should be possible also for the election of the Ombudsman or the Auditor General. As concerns the publicity of judicial candidates proposed by the JAC to the President, the adopted changes provided for sufficient transparency. As it had set out in its observations, the Government was ready for further changes. Notably, the Auditory General should indeed not only be able but be obliged to report corrupt practice to the Attorney General.

The Commission adopted the Opinion on ten Acts and bills of Malta implementing the legislative proposals subject of Opinion CDL-AD(2020)006, previously examined through a written procedure replacing the meetings of the Sub-commissions (CDL-AD(2020)019).

15. Turkey

Mr Carozza explained that the focus of the opinion, requested by the PACE Monitoring Committee, was on the July 2020 amendments to the original Attorneyship Law of 1969. The 2020 amendments introduced the possibility to create alternative bar associations (the BAs) in three large cities, and also reduced the quota of representation of large BAs in the Union of the Turkish Bar Associations (the UTBA). The main challenge for the rapporteurs was that there are few specific international standards directly applicable to this situation. Therefore, the opinion

relied on more general principles of independence and professionalism of lawyers, which could be derived from the human rights treaties, as well as on more specific soft-law standards, which provided for the self-governance of the legal profession and for the representative character of the governance bodies. The opinion examined how the 2020 amendments might affect the independence of the lawyers in Turkey.

There were no compelling reasons for this reform, and it was unclear how it would contribute to making BAs more efficient or to improve the quality of the legal services in Turkey. The amendments were not initiated by the BAs themselves. The creation of alternative BAs would increase the risk of politicization, which was admittedly already present, to a lesser extent, in the old system where all the BAs were organised according to a geographical principle and were henceforth necessarily inclusive. This may lead to the divergence of practice in disciplinary cases and was incompatible with the neutrality of the legal profession. The new system was potentially unstable: a BA has to be liquidated when the number of its members drops below the threshold due to the attorneys joining alternative BAs. Departure from the principle of roughly proportionate representation of lawyers in the UTBA will disturb the representative character of this body. Even though perfectly equal voting power is impossible, the new system is clearly disproportionate as regards the voting power of attorneys from larger cities and smaller provincial centres. If, as the Turkish authorities suggested, the previous model did not ensure that the BAs in large cities were sufficiently representative of their members, it can be addressed by other means, for example by introducing an element of proportionate representation to the election of delegates to the UTBA. Finally, Mr Carozza briefly outlined changes made to the draft opinion following written comments received from the Turkish Government.

Mr Hacı Ali Açikgül, Head of the Department of Human Rights, Ministry of Justice of Turkey, explained the reasons for the 2020 amendments to the Attorneyship Law. The amendments had made many positive changes to the Attorneyship Law of 1969 which were not analysed in the opinion. There were no international standards which would require Turkey to choose a particular model of governance of the legal profession. The opinion was based on some speculative assumption, in particular one concerning the increased risk of politicisation of the legal profession as a result of the creation of alternative bars. As to the change in the principle of representation of the BAs in the UTBA, the Constitutional Court had rendered a decision finding this new provision not contrary to the Constitution (but the reasoning of the Constitutional Court decision is not yet available). The draft opinion erroneously asserted that the Turkish legal community had been weakened as a result of mass dismissals following the failed coup of 2016.

Mr Carozza noted that the opinion was focused on those elements which have been the subject of controversy domestically and, indeed, did not discuss all other elements of the amendments.

The Commission adopted the joint Opinion by the Venice Commission and the Directorate General of Human Rights and Rule of Law on the July 2020 amendments to the 1969 Attorneyship Law of Turkey, previously examined through a written procedure replacing the meetings of the Sub-commissions (CDL-AD(2020)029).

16. Ukraine

Mr Gerhard Reissner, Expert, Council of Europe-DGI, former President of the Consultative Council of European Judges, explained that there were three problems, (a) some 2000 judicial vacancies could not be filled since the High Qualification Commission of Judges (HQCJ) had been dissolved in November 2019; (b) there was a high level of mistrust in the judiciary, including the High Council of Justice (HCJ); (c) eight judges from the former “Supreme Court of Ukraine” (SCU) had to be integrated into the new “Supreme Court” (SC) following a decision of the Constitutional Court. Draft Law no. 3711 was considered to be a fast track law, addressing issues (a) and (c) only. However, the draft law subordinated the new HQCJ to HCJ. HQCJ would be composed through a mixed national/international body, the Selection Committee. According to the draft law, the HCJ would adopt the procedure and methodology of the HQCJ. The opinion insisted that the draft law should focus on the re-establishment of the HQCJ without subjecting it

to the HCJ. The integration of the HCJ and the HQCJ would be as a long-term goal only. The issues of integrity and ethics of the HCJ are an urgent issue as well.

Mr Ruslan Stefanchuk, First Deputy Chairperson of the Verkhovna Rada of Ukraine, welcomed the opinion but pointed out that it should provide an *ad hoc* procedure of integrating the judges of the SCU into the SC. The opinion should also indicate good EU practice on the integrity check of the current members of the High Council of Justice.

Mr Andrii Kostin, Chairperson of the Legal Policy Committee of the Verkhovna Rada, welcomed that the opinion recommended re-establishing the HQCJ as a matter of urgency. Another draft law on the ethics of the HJC was not yet ready. The plenary of the Rada would discuss draft law no. 3711 on 3 November. Changes to the draft could be made before in the legal committee. He welcomed that the opinion recommended that the HQCL be composed of at least 50 per cent judges; this had been a contentious issue. He also welcomed that the opinion recommended narrowing the scope of the international bodies that could nominate members for the mixed national/international Selection Committee. The opinion should be more prescriptive as concerns the issue of the de-registration of the SCU.

The Commission adopted the joint Opinion by the Venice Commission and the Directorate General of Human Rights and Rule of Law on draft Amendments to the Law 'On the Judiciary and the Status of Judges' and certain laws on the activities of the Supreme Court and Judicial Authorities of Ukraine, previously examined through a written procedure replacing the meetings of the Sub-commissions (CDL-AD(2020)022).

17. Kosovo

Ms Nussberger explained that during the video-meetings held for the preparation of the opinion it had become clear that that the current 2009 law on public gatherings faced serious problems of implementation due to legal gaps and ambiguities, as well as due to potential conflicts with other pieces of legislation. The new draft included significant changes in comparison to the law in force, notably the extension of the right to organise or participate in public gatherings to “any person”, the protection of smaller groups of persons under the right to public gatherings, more flexible notification requirements and the reduction in the competences of the private “stewards”.

The opinion identified problems in the systematic, definitions, wording and overall conception of freedom of assembly in Kosovo’s draft law on public gatherings. The draft covered in one law and under similar requirements the right of peaceful assembly as guaranteed under international standards and other kinds of gatherings. Vague and ambiguous definitions left a wide scope of action to the policing forces. The duties and responsibilities of the organisers were unclear because the draft did not foresee any exceptions to the notification requirement, taking it for granted that there will always an identifiable organiser who has a duty of hiring “enough” stewards for securing the gathering and who has a duty of compensating police expenses. Provisions on prohibitions and restrictions were vague and wide and there was no indication regarding who was supposed to bear the burden of proof when violent actions happened during public gatherings. Some provisions referred to a “fast track procedure” for settling appeals against police decisions prohibiting public gatherings, in spite of the fact that the current legislation in Kosovo did not foresee such a legal remedy. Finally, the draft law did not foresee a proper procedure for disposing of digital images gathered by the police, and that the draft law did not take into account the factual economic situation of Kosovo when fixing fines for breaching the law. Although the aim of the legislator was to strike a fair balance between the protection of the right to freedom of gathering with other rights in line with international standards, the draft law presented several shortcomings in its provisions due to lack of precision, which might cause uncertainties and difficulties in its implementation and enable misuse.

Mr Mentor Borovci, Director of the Legal Office of the Prime Minister’s Office, thanked the Commission for this useful assessment. He expressed the commitment and predisposition of the

Kosovar authorities for implementing the recommendations of the Venice Commission when drafting a new draft law on public gatherings.

The Commission adopted the Opinion on the draft Law on public gatherings of Kosovo, previously examined through a written procedure replacing the meetings of the Sub-commissions (CDL-AD(2020)030).

18. Uzbekistan

Mr Konstantine Vardzelashvili, Chief of the Legislative Support Unit, OSCE/ODIHR Democratization Department, introduced the draft joint opinion by the Venice Commission and the OSCE/ODIHR requested by the First Vice President of the Legislative Chamber of the Parliament (*Oliy Majli)*. The opinion welcomed Uzbekistan's efforts to amend the current legal framework relating to the right to freedom of religion or belief, with a view to bringing it into compliance with international standards on freedom of religion or belief as called upon by several international human rights monitoring bodies. The draft law brought some improvement compared to the existing legislation, such as the reduction of the required minimum of believers to create a religious organisation, the removal of the ban to wear religious attire in public and the requirement that liquidation of a religious organisation be pronounced by a court instead of administrative bodies.

However, the draft Law also maintained major restrictions and suffered from deficiencies that were incompatible with international human rights standards. Especially, the Draft still banned unregistered religious or beliefs activities and communities, imposed stringent and burdensome registration requirements, provided various prohibitions or strict limitations regarding the exercise of the right to freedom of religion or belief, such as on religious education, authorised places for worship and the production, import and distribution of religious materials, and still prohibited the ban of missionary activities and "proselytism" that contributes to the so-called "violation of inter-confessional harmony and religious tolerance in society", which remained subject to administrative and criminal sanctions, among others. The grounds that may justify the suspension or dissolution of a religious organisation were vague and broad, and gave wide discretion to public authorities, without providing an effective remedy. The competences of the Religious Affairs Committee should be reconsidered. The OSCE/ODHIR and the Venice Commission further noted with satisfaction the Uzbek authorities' commitment to review and incorporate the recommendations of the joint opinion during the next stages of the legislative process.

Mr Shukrat Bafayev, Chair of the Committee on Democratic institutions, NGOs and Citizen's Self-Governement bodies of the Oliy Majlis (Parliament), expressed sincere gratitude to the OSCE/ODHIR and to the Venice Commission for the recommendations made on the draft law. The draft law had been the subject of wide public discussions, whether within the Legislative Chamber of the Parliament or by NGOs which had submitted more than 500 proposals for amendments. The draft had been adopted in a first reading on 16 September 2020. In general, the Parliament supported and agreed with several recommendations, as concerns the revision of certain powers of the Committee of Religious Affairs, the decision of suspension of the activity of a religious organisation by a court, the explicit reference to coercion in the definition of missionary activities. With regard to other recommendations, Mr Bafayev recalled the specific context of Uzbekistan in facing threats of terrorism and extremism, the constitutional prohibition which would not allow for an unconditional ban on the establishment and operation of a political party and other public association on religious grounds, the support by the leaders of the largest religious organisations with regard to the provisions of the draft related to the consolidation of places of religious rites and ceremonies.

Mr Frendo suggested adding some references to the European Court of Human Rights' case-law with regard to lawful limitations clauses which require necessity in a democratic society and proportionality to the legitimate aims that they pursue. Mr Vermeulen and Mr Buquicchio welcomed the excellent co-operation with the OSCE/ODHIR during the preparation of this joint

opinion. Mr Buquicchio thanked the authorities for having requested an opinion on an important piece of draft legislation.

The Commission adopted the joint Opinion by the Venice Commission and the OSCE/ODIHR on the draft Law on freedom of conscience and religious organisations of Uzbekistan, previously examined through a written procedure replacing the meetings of the Sub-Commissions (CDL-AD(2020)002).

19. Report on criminal liability for peaceful calls for radical constitutional change from the standpoint of the ECHR

Ms Nussberger introduced the draft report on criminal liability for peaceful calls for radical constitutional change from the standpoint of the ECHR. The report had been requested by the Committee on Legal Affairs of the Parliamentary Assembly of the Council of Europe. This request was triggered by the growing number of prosecutions of politicians for statements calling for radical constitutional change including self-determination and even independence of parts of national territory.

There were visible differences in regulating these matters, even amongst liberal democracies. The report looked at this problem from the perspective of the ECtHR's case-law, essentially under Article 10 ECHR guaranteeing freedom of expression. "Expression" can be verbal or can take form of physical expressive acts. The legislation should be foreseeable; but it is impossible to achieve perfect precision here. As regards the proportionality, the ECtHR analysis is necessarily contextual; the ECtHR takes into account various factors such as the content of the message, the intensity of the speech, the means of communication and the medium used etc. Free political speech is a precondition of a democratic society, so it is protected under Article 10 even when it offends, shocks and disturbs. However, it is not protected when it contains calls for violent acts – this is the main limit to the freedom of political speech under the ECHR. Another exception concerns propaganda of ideology hostile to democracy or hate speech. The notion of "hate speech" should not be given an overly broad interpretation. The robust criticism of government – even when it contains calls for secession - is not hate speech as such. Whether speech is "peaceful" or not is often a question of fact; calls for violence can be sometimes disguised as peaceful messages, this is why it is important to see the statements in context, especially in the context of an ongoing violent conflict in the country.

From the comparative perspective, in many countries calls for separatism are punishable if associated with calls to violence, but there is at least one clear example to the contrary in Europe, and probably more, if the notions of "violence", "force" etc. are interpreted broadly by the national courts. So, it is difficult to establish a clear consensus on this matter. The position of the speaker as an elected politician often provides him/her more protection, which sometimes takes the form of parliamentary immunity. But the opposite is also possible: if a public person makes calls for unlawful actions and incites a riot, that may justify sanctions. Finally, sanctions should be proportionate and even where a criminal sanction is permissible in principle, it may be found too harsh by the ECtHR, given the effect the speech produced or was likely to produce.

The Commission adopted the report on criminal liability for peaceful calls for radical constitutional change from the standpoint of the European Convention on Human Rights, previously examined through a written procedure replacing the meetings of the Sub-Commissions (CDL-AD(2020)028).

20. Interim Report on the measures taken in the EU member States as a result of the Covid-19 crisis and their impact on democracy, the Rule of Law and Fundamental Rights

Mr Rubio presented the draft *interim* report requested by the President of the European Parliament, Mr David Sassoli. This was the first request made by the European Parliament to

the Venice Commission. The request resulted from the support provided by the Conference of Presidents of the European Parliament to the proposal made by the Committee on Civil Liberties, Justice and Home Affairs (LIBE) to seek a comparative report from the Venice Commission on the situation in EU Member States regarding measures taken during the Covid-19 crisis and to identify good and bad practices.

Whereas some countries have opted to declare a state of emergency, others have chosen a different approach to deal with this health crisis. However, all actions taken by EU Member States to address the Covid-19 crisis, whether through the declaration of an emergency or equivalent, will have had an impact to a lesser or greater degree on the state of democracy, the rule of law and human rights.

The actions taken by Member States of the EU have taken the form of emergency measures. Where these measures are rule of law-compliant, they will have built-in guarantees against abuse, specifically with respect to the principle of proportionality under its various aspects. This principle is important especially in the electoral field, because the impact of a postponement of elections must be balanced against the risks to free and universal suffrage arising from holding elections during an emergency situation. To ensure the respect for the principle of proportionality, emergency measures must be subject to effective, non-partisan parliamentary scrutiny and to meaningful judicial review by independent courts at a national and European level. Mr Rubio informed the Commission that a final version of this *interim* report would be prepared in due course.

Ms Sophie in't Veld, Chair of the LIBE Democracy, Rule of Law and Fundamental Rights Committee of the European Parliament, thanked the Venice Commission for the *interim* report. She explained that it was the first time in the history of the EU that a state of emergency applied to such a great number of EU Member States and that, in this context, it is understandable that the first steps taken by Member States were not always in line with European standards. However, after seven months, this excuse no longer stands and any restrictions imposed need to be necessary, proportionate and temporary. The problem is that the health crisis is ongoing and that discrepancies have started to appear between Member States of the EU in the measures they apply to tackle the situation.

Ms in't Veld informed the Commission that the *interim* report's findings would be included in the work of the Sub-Committee on Democracy, Rule of Law and Fundamental Rights of the European Parliament, which was set up following the murder of the Maltese journalist, Ms Daphne Caruana Galizia, and specialises in analysing horizontal issues (e.g. space for civil society, the impact of golden passports/visas on democracy, the rule of law and human rights) as well as the functioning of European political system safeguards, data protection and privacy issues. The Sub-Committee's work will lead to a Resolution of the European Parliament that will be adopted later in October or at the beginning of November 2020, at the Plenary Session of the European Parliament.

Ms Meaghan Fitzgerald, Deputy Head of the Democratisation Department at OSCE Office for Democratic Institutions and Human Rights (ODIHR), informed the Venice Commission that the ODIHR had also been working on Covid-19 related measures and produced a report in July 2020 on this issue.

Discussions then turned to the Venice Commission's earlier Report of June 2020 on "respect for democracy, human rights and the rule of law during states of emergency: reflections" (CDL-AD(2020)014), which was the Venice Commission's first reaction to the Covid-19 crisis and on the basis of which the *interim* report was drafted. Members agreed that, as the Covid-19 crisis was ongoing, it was premature to prepare the final version of the *interim* report for the December 2020 Plenary Session, because of the many problems that still lie ahead of us.

With respect to emergency measures and restrictions – an analogy to mithridatism was made, *(i.e. to act like Mithridates VI, King of Pontus, who so feared to be poisoned that he sought to build immunity by regularly ingesting small doses of poison)*. The danger in the Covid-19

context being that people get used to restrictions, which become the new normality and that the Venice Commission's mission should be to draw the line and ensure the application of the principle of temporariness. The final version of the *interim* report should therefore take this into account.

With respect to the issue of proportionality in this Covid-19 crisis, discussions also revolved around the fact that governments were put into the difficult position of having to protect social rights, not just civil and political ones, and notably the fundamental right to health. Therefore, in times of a health crisis, governments need to be provided with a margin of appreciation that enables them to deal with the crisis. Government actions should not exclusively be regarded as a negative factor, as many governments are willing and trying to protect public health. It would be unrealistic to expect them to fulfil the principle of legality during a health crisis such as this one – and this should also be taken into consideration.

The Venice Commission adopted the Interim Report on the measures taken in the EU member States as a result of the Covid-19 crisis and their impact on democracy, the Rule of Law and Fundamental Rights, previously examined through a written procedure replacing the meetings of the Sub-commissions (CDL-AD(2020)018).

21. Report on election dispute resolution

Mr Holmøyvik noted the comparative character of the report on an international scale (which goes beyond the strictly European framework) and that it was unique in its kind. He presented the structure of the report, dealing with existing international instruments, competent bodies, grounds for appeal, persons entitled to appeal, time limits, decision-making power, as well as various key procedural issues, such as the right to appeal, fair trial and the transparency of the systems for handling such litigation. The report also reflects the case law of the European Court of Human Rights and in particular its recent development with the Grand Chamber judgment in Mugemangango v. Belgium of 10 July 2020.

This last point led to a discussion and clarification on the need for final judicial review or at least review by a body offering guarantees of impartiality and allowing a fair decision objective and sufficiently motivated.

The Commission adopted the report on election dispute resolution, previously approved by the Council for Democratic Elections on 15 June 2020 (CDL-AD(2020)025).

22. Revised Guidelines on the holding of Referendums

Mr Kask informed the Commission that a revision of the Code of Good Practice on Referendums had been initiated in 2016, in particular in order to take into account problematic developments related both to the procedure for launching the referendum and to the substance of the proposed changes. The Venice Commission had worked in close co-operation with the Parliamentary Assembly, which adopted a recommendation on Updating guidelines to ensure fair referendums in Council of Europe member States; it had also co-operated with the Congress and the OSCE/ODIHR.

The Guidelines were not intended to assess the suitability of referendums, nor their frequency or subject-matter. Referendums tended to complement representative democracy. The most important changes vis-à-vis the 2007 Code of Good Practice on Referendums concerned *inter alia* the role of an impartial body in the referendum process, including the scrutiny of the clarity of the question; the balanced provision of information and the organisation of the referendum; the role of political parties in the process; the need to adopt legislation with broad consensus after extensive public consultations with all the stakeholders; the possibility for a non-judicial body to decide, as a final instance, if it ensures sufficient guarantees of independence and

impartiality. An approval quorum or a specific majority requirement were acceptable for referendums on matters of fundamental constitutional significance and new guidelines had been developed on the effects of referendums. A draft explanatory report would be submitted to the Council for Democratic Elections at one of its forthcoming meetings.

Messrs Maiani and Alivizatos underlined that the Guidelines respected the principle of subsidiarity and took into account national peculiarities; this made them applicable both to countries where referendum belonged to normality and to those which did not have such a positive experience of referendums.

Dame Cheryl Gillan, Chairperson of the Committee on Political Affairs and Democracy of the Parliamentary Assembly of the Council of Europe, pointed out that the revised guidelines were the result of long-term co-operation between the Venice Commission and the Parliamentary Assembly, specifically the Committee on Political Affairs and Democracy, which she chaired. She recalled the concerns about the referendum processes and their fairness. The essential elements appearing in the Assembly's resolution were retained by the report: the referendums should be embedded in the process of representative democracy; the principles of clarity of the question and fairness of the campaign, as well as the need for the intervention of an impartial body throughout the process, were also taken into account. She also praised the content of the Guidelines on transparency and quotas. She invited the Venice Commission to address the role of citizens' assemblies and other similar mechanisms in its future work. Following the adoption of the revised Code of Good Practice on Referendums, she would initiate a new report for the Assembly to endorse these Guidelines.

The Commission adopted the revised Guidelines on the holding of Referendums, previously approved by the Council for Democratic Elections on 7 October 2020 (CDL-AD(2020)031).

23. Report of the meeting of the Council for Democratic Elections (7 October)

Mr Kask informed the Commission that at its on-line meeting on 7 October 2020, the Council for Democratic Elections had approved the Joint Revised Guidelines on Political Party Regulation, drafted in co-operation with the OSCE/ODIHR, to be submitted for adoption to the Venice Commission in December. It had also examined the draft Principles on the Use of Digital Technologies and Elections, which would also be submitted for adoption in December; this would enable them to be presented to the Ad Hoc Committee on Artificial Intelligence (CAHAI) on 15-17 December 2020. The next European Conference of Electoral Management Bodies would take place online on 12-13 November 2020 and deal with "Electoral law and electoral administration in Europe – Recurrent challenges and best practices"; it would particularly address the challenges posed by the COVID-19 crisis.

The Report on electoral law and electoral administration in Europe was dealt with under item 9 above, and the Revised Guidelines on the holding of referendums under item 22 above.

24. Dates of the next sessions

The dates of the next sessions were confirmed as follows:

125th Plenary Session	11-12 December 2020 (online)

The schedule of sessions for 2021 was confirmed as follows:

126th Plenary Session	19-20 March 2021
127th Plenary Session	18-19 June 2021
128th Plenary Session	15-16 October 2021
129th Plenary Session	10-11 December 2021

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 Commission decided, upon proposal by the Enlarged Bureau, to hold the 125th Plenary Session exclusively online, due to the Covid-19 pandemic.

25. Other business

Ms Granata-Menghini informed the Commission about the publication of the book "Venice Commission. Thirty-year quest for Democracy through Law", on the occasion of the Commission's 30th anniversary. The table of contents is available at the link: https://www.venice.coe.int/files/30YearsQuest.pdf. Members and other authors would receive a copy free of charge. She expressed gratitude to Mr Vogel, former member in respect of Sweden, who generously had made possibly the publication of the book with the help of the University of Lund.

Ms Granata-Menghini further thanked the members and substitute members for their constructive and patient participation in this first-time digital Plenary Session. She also thanked the Secretariat, the interpreters and the Council of Europe's ITEM team for their dedication and efficiency.

Link to the list of participants