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COMMISSION EUROPEENNE POUR LA DEMOCRATIE PAR LE DROIT

(COMMISSION DE VENISE)

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

74e SESSION PLENIERE
74th PLENARY SESSION

(Venise, Scuola Grande di San Giovanni Evangelista)
vendredi, 14 mars 2008 (9h30) –
samedi, 15 mars 2008 (13h00)
(Venice, Scuola Grande di San Giovanni Evangelista)
Friday, 14 March (9.30 a.m) –
Saturday, 15 March 2008 (1.00 p.m.)

RAPPORT DE SESSION
SESSION REPORT

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1. Adoption de l'ordre du jour

L'ordre du jour est adopté sans modification.

2. Communication du Secrétariat

M. Buquicchio informe la Commission de la demande d'adhésion de la Tunisie à la Commission de Venise. Cette demande doit être approuvée par le Comité des Ministres.

3. Coopération avec le Comité des Ministres

M. l'Ambassadeur Alexander Alekseev, Représentant permanent de la Fédération de Russie auprès du Conseil de l'Europe, rappelle à la Commission combien la coopération entre la Commission de Venise et la Russie a été et reste importante et fructueuse dans le domaine électoral ; domaine important tant pour la Fédération de Russie que pour le Conseil de l'Europe et le Comité des Ministres en particulier. La Fédération de Russie a accueilli plusieurs conférences en matière électorale, que ce soit sur les normes internationales en matière électorale ou afin de rassembler les organismes liés aux questions électorales. Il est important que le droit électoral comme l'observation des élections soient unifiés au niveau européen et que selon les termes de la Recommandation 1756 existe « une réconciliation des normes et pratiques des Etats membres ». La Fédération de Russie et la CEI avaient à cet égard proposé un projet de convention sur les droits électoraux, projet pour lequel la Commission de Venise avait donné un avis favorable. Le code de bonne conduite en matière électorale constitue d'ailleurs une étape importante dans ce domaine.

Madame l'Ambassadeur Irma Ertman, Représentante permanente de la Finlande auprès du Conseil de l'Europe, rappelle que l'un des trois piliers de la déclaration de Varsovie est la défense de l'état de droit, notion pour laquelle la Commission de Venise aura apporté le plus de substance. La Commission se distingue également par le succès et le rayonnement de ses activités au-delà des pays membres du Conseil de l'Europe. La Finlande en saisissant la Commission de Venise pour un avis sur sa nouvelle constitution aura démontré qu'aucun Etat membre ne peut prétendre ne pas avoir besoin de la Commission de Venise.

M. l'Ambassadeur Emil Kuchar, Représentant permanent de la République slovaque auprès du Conseil de l'Europe et Président des délégués des Ministres souligne la place importante de la Commission de Venise dans la défense et la promotion des trois valeurs fondamentales du Conseil de l'Europe : la démocratie véritable, la protection des droits de l'homme et l'état de droit, et ce tant à l'intérieur du Conseil de l'Europe et de ses instances, qu'à l'extérieur vis-à-vis d'autres organisations internationales comme l'Union européenne. La République slovaque a voulu renforcer durant sa présidence du Comité des Ministres du Conseil de l'Europe le rôle du Comité des Ministres, souligner les avantages de la structure intergouvernementale du Conseil de l'Europe, l'égalité de chaque Etat membre dans le processus décisionnel du Comité des Ministres . Ces éléments sont propres à favoriser et entretenir de bonnes relations entre Etats membres, à étendre le champs des instruments internationaux, et devront permettre d'envisager le futur de l'institution sous un angle positif.

4. Coopération avec l'Assemblée parlementaire

M. Christos Pourgourides, membre de la Commission des affaires juridiques et des droits de l'homme de l'Assemblée parlementaire, informe la Commission des derniers développements.

M. Pourgourides a été désigné par la Commission des affaires juridiques et des droits de l'homme de l'Assemblée parlementaire comme représentant de l'Assemblée aux sessions de la Commission de Venise, Mme Leutheusser-Schnarrenberger a été désignée comme

suppléante. Le Bureau de l'Assemblée pourrait également y ajouter un représentant du Président de l'Assemblée.

Lors de la dernière session de l'Assemblée en janvier 2008, l'Assemblée a adopté, à une écrasante majorité, le rapport de M. Dick Marty sur les procédures employées par le Conseil de Sécurité des Nations Unies et l'UE pour inscrire sur liste noire des personnes et des groupes soupçonnés d'avoir des liens avec le terrorisme considérant que ces procédures bafouent les droits fondamentaux individuels et sont « totalement arbitraires ».

L'Assemblée a également adopté le rapport de M. Sharandin sur la vidéosurveillance des lieux publics pour lequel la Commission avait donné un avis qui a été dûment cité dans le rapport.

M. Holovaty a été élu Président de la Commission de suivi.

M. Pourguirides est en train de préparer une motion afin d'institutionnaliser les réunions conjointes entre la Commission des Affaires juridiques et des droits de l'homme de l'Assemblée parlementaire et la Commission de Venise.

5. Coopération avec le Congrès des pouvoirs locaux et régionaux du Conseil de l'Europe

M. Newbury informe la Commission que le Congrès organisera un séminaire de formation en matière électorale à Moscou en vue des élections locales qui auront lieu à la fin de l'année 2008.

Le Congrès prévoit également d'envoyer une délégation pour l'observation des élections de l'assemblée des représentants du peuple de Gagaouzie. La Commission de Venise avait d'ailleurs adopté un avis sur la Loi de l'entité territoriale autonome de Gagaouzie relative à l'élection du Gouverneur de Gagaouzie

6. Follow-up to earlier Venice Commission opinions

- *Opinion on the Law making amendments and addenda to the law on conducting meetings, assemblies, rallies and demonstrations of the Republic of Armenia (CDL-AD(2005)035)*

Ms Granata-Menghini recalled that in 2005, after a lengthy consultation process with the Armenian Parliament, the Venice Commission adopted its final opinion on the amendments to the Law on Rallies of Armenia. It found that the law would now be generally in line with European Standards. It stressed however that the implementation of the law would be crucial and would need to be monitored both at the national and at the international level.

In the light of the recent events in Armenia concerning the exercise of the right to freedom of assembly, the Commission decided to revert to this issue at its next Plenary Session, after gathering more detailed information.

- *Opinion on the Draft Amendments to the Law on Freedom of Assembly of Azerbaijan (CDL-AD(2007)042)*

In 2006 the Venice Commission assessed, at the request of the Presidential Administration of Azerbaijan, the Law on Freedom of Assembly of 1998 and expressed severe criticism concerning e.g. blanket restrictions on freedom of assembly and in general the lack of the proportionality principle. Since then, the Presidential Administration in consultation with the Venice Commission, the OSCE Mission in Azerbaijan and ODIHR, has been preparing amendments to the law.

In December 2007, the Commission adopted an opinion on the latest set of amendments and considered that, if adopted, they would bring the law into line with European Standards with only a few outstanding problems.

The main problem remained the list of places in Article 9, para. 3 around which demonstrations can be limited.

The Commission recommended that this list be as limited as possible, in particular that only "central" bodies would be concerned.

The Presidential Administration was now finalising the draft amendments with a view to submitting them to Parliament shortly. They would accept adding the word "central" but would also want to include some local self-government bodies.

The Rapporteurs were being consulted and it was hoped that the amendments to the law could soon be submitted to parliament.

- *Comments on the draft law on the Judicial Council of Montenegro (CDL(2007)129);*

Mr Markert informed the Commission that the parliament of Montenegro had adopted the law on the Judicial Council. The text adopted reflected to a large extent the comments made by the Venice Commission. In particular, the composition of the Council was now more balanced with fewer seats being reserved to judges from higher courts, the Council was no longer involved in the appointment and dismissal of the President of the Supreme Court and judges subject to disciplinary proceedings had the right to be represented by a lawyer and could appeal the decisions of the Council to a court.

- *Opinion on the Law on Disciplinary Responsibility and Disciplinary Prosecution of Judges of Common Courts of Georgia (CDL-AD(2007)009).*

Ms Gerwien reminded the Commission that the Opinion on the Law on Disciplinary Responsibility and Disciplinary Prosecution of Judges of Common Courts of Georgia had been adopted at the 70th Plenary Session of the Venice Commission in March 2007 and brought about a number of welcome changes to this Law.

This Opinion had been adopted in the wake of disciplinary proceedings brought against a number of Georgian judges for the misinterpretation of two provisions of the Criminal Procedure Code of Georgia. The question that was raised by these proceedings concerned the manner in which a balance could be struck between the disciplinary responsibility of judges and the guarantees for their independence, without compromising the latter through the introduction of excessive limitations.

Two sets of amendments had been made to this Law:

(1) the first set was made on 15 March and 29 December 2006 and emphasised the full autonomy of the judiciary *vis-à-vis* the other branches of government;
(2) the second set was made on 19 July 2007 and modified, in particular, Article 2.2.a on the "Basis for Disciplinary Responsibility of a Judges and the Types of Disciplinary Violation", which now provides a definition of "gross violation of the law".

Not all suggestions made in the Opinion were accepted, for instance Article 4 on types of disciplinary measures was not amended to clarify the disciplinary penalty of dismissal. It also seems that the provisions concerning the composition of the Disciplinary Collegium (Articles 21 and 24) were not amended – where the task of nominating candidates for this Collegium falls to

the High Council of Justice, which also commences disciplinary prosecutions in the case of a violation of Article 2.2.a.

The introduction of Article 2.3, which stipulates that the *"incorrect interpretation of a law based on the judge's belief is not a disciplinary violation and does not incur the disciplinary liability of a judge"* was very welcome, as were the amendments made to the Criminal Code of Georgia, which decriminalise the adoption of what was termed "illegal decisions" by judges.

7. Etude sur le contrôle démocratique des forces armées

M. Aurescu présente l'étude sur le contrôle démocratique des forces armées.

Cette étude a été menée suite à une demande du Comité des Ministres du Conseil de l'Europe.

C'est une étude très complète qui passe en revue tous les types de contrôle qui peuvent exister au niveau national dans les différents pays membres du Conseil de l'Europe, comme au niveau international. L'étude identifie également les raisons d'un tel contrôle comme les nouvelles fonctions des forces armées, qui s'ajoutent au activités traditionnelles de l'armée et qui nécessitent un ajustement des formes du contrôle démocratique.

L'étude avait pour objectif de décrire toutes les formes de contrôle disponibles et pratiquées généralement, et non pas de dresser des lignes directrices sur le contrôle démocratique des forces armées.

M. Haenel rappelle que le contrôle démocratique des forces armées est une donnée constitutive du modèle démocratique européen. Cette surveillance constitue en effet une priorité dans un état de droit. L'étude s'attache à détailler les conditions d'exercice de cette surveillance, insistant sur le partage et la complémentarité du contrôle entre le pouvoir exécutif, législatif et judiciaire. En outre l'existence de deux niveaux de contrôle national et international apparaît comme une garantie essentielle.

M. Helgesen considère que cette étude, comme celle sur le contrôle des services de sécurité, de par sa qualité constituera une borne incontournable dans l'histoire de la Commission de Venise.

M. Zorkin souligne combien il est important qu'une société démocratique puisse contrôler les activités des forces armées et souhaite que ce rapport puisse apporter une contribution à la sensibilisation tant de la classe politique que de la société civile d'une telle nécessité. En outre, rappelant la situation désastreuse dans laquelle se trouve la profession militaire dans les pays d'Europe de l'Est, un tel rapport ne peut que revaloriser une profession peu considérée. Ce rapport contribuera sans nul doute à favoriser un climat de confiance réciproque entre les Etats membres du Conseil de l'Europe.

M. Mifsud Bonnici attire l'attention de la Commission sur les nouvelles fonctions des forces armées de nos jours qui s'ajoutent au rôle traditionnel des forces armées de défense du territoire. Il souligne combien il est important dans une société démocratique que les forces armées soient isolées du pouvoir politique, ce point devant être ajouté clairement dans les conclusions de l'étude.

M. Nick rappelle combien les événements récents dans l'Ex-Yougoslavie nous invitent à soutenir la nécessité d'un contrôle démocratique des activités des forces armées et souligne l'ampleur de l'étude à cet égard.

Le Secrétariat en accord avec M. Aurescu prend note des différentes interventions qui seront reflétées dans la version finale de l'étude.

La Commission adopte l'étude sur le contrôle démocratique des forces armées (CDL-AD (2008) 004).

8. Azerbaïdjan

La Commission a un échange de vues avec M. Kamran Bayramov, Conseiller, Administration présidentielle de l'Azerbaïdjan, sur la révision du Code électoral de l'Azerbaïdjan.

M. Paczolay présente le projet d'avis intérimaire (CDL(2008)016) de la Commission de Venise et de l'OSCE/BIDDH sur les amendements au Code électoral de l'Azerbaïdjan (CDL(2008)029), établi sur la base de ses commentaires, ainsi que de ceux de MM. Endzins et Pilgrim (voir également le document CDL(2003)047 qui contient le code électoral). M. Paczolay rappelle que ce projet d'avis s'inscrit dans la ligne d'une série d'avis de la Commission et de l'OSCE/BIDDH sur le droit électoral de l'Azerbaïdjan. En outre, deux conférences ont été organisées en novembre 2007 pour discuter des problèmes principaux – les recours et la composition des commissions électorales. Les projets d'amendements répondent à certaines recommandations des avis précédents, notamment en ce qui concerne les ingérences dans le processus électoral, le droit de se présenter, l'annulation de l'enregistrement des candidats, le publication des adresses des électeurs et l'encrage de leurs doigts. La création de groupes de travail sur les recours doit être soulignée. Par contre, certains projets d'amendements sont négatifs, concernant la réglementation des sondages à la sortie des urnes, le régime spécial pour les militaires et les émissions de télévision relatives aux élections. En outre, la question cruciale de la composition des commissions électorales n'a pas été réglée, comme d'autres relatives notamment aux finances, à l'annulation des résultats, aux listes de soutien pour les candidatures à l'élection présidentielle et au refus des candidatures à cette élection. M. Endzins souligne l'importance de la question de la composition et du fonctionnement des commissions électorales.

M. Bayramov indique qu'une table ronde consacrée à la question de la composition des commissions électorales s'est tenue en novembre 2007 à Bakou, mais que, en l'absence de certains partis, il n'y a pas eu de discussion sur le fond. IFES doit préparer un projet d'amendements au code électoral sur ce thème.

La Commission adopte l'avis intérimaire de la commission de Venise et de l'OSCE/BIDH sur les amendements au code électoral de l'Azerbaidjan (CDL-AD(2008)003).

Par ailleurs, M. Bayramov indique que le projet de loi sur la liberté de réunion sera bientôt soumis au Parlement.

9. Bosnie-Herzégovine

- *Loi sur le conflit d'intérêt*

M. Tuori informe la Commission que la loi sur le conflit d'intérêt en Bosnie-Herzégovine soulève des problèmes complexes quant à la répartition de compétences entre l'Etat et les Entités. A la lumière de nouvelles informations que les Rapporteurs viennent de recevoir, une visite sur place semble nécessaire afin de clarifier certaines questions. Les Rapporteurs proposent dès lors de reporter l'examen de cette question à la prochaine session plénière.

La Commission renvoie l'examen de cette question à la prochaine session.

- *Loi sur le financement des partis politiques*

La Commission examine en vue de son adoption le projet d'avis (CDL(2008)017) sur la loi sur le financement des partis politiques en Bosnie-Herzégovine (CDL(2008)006) établi sur la base des observations de M. Vogel. Celui-ci indique que la Commission électorale de Bosnie-Herzégovine et le bureau de l'OSCE à Sarajevo ont demandé une assistance pour résoudre les problèmes dus à l'ambiguïté de l'ancienne loi, soulevés dans l'audit des partis politiques, et qui font l'objet d'un contentieux qui est encore pendant. Le projet d'avis ne traite pas des questions *sub iudice*. Une délégation de la Commission s'est rendue en février à Sarajevo. Parmi les principaux problèmes, on peut citer la question du financement possible en provenance de l'étranger ainsi que le montant des amendes.

La Commission adopte l'avis sur le financement des partis politiques en Bosnie-Herzégovine (CDL-AD(2008)002).

10. Bulgaria

Mr. Hamilton presented the draft opinion (CDL(2008)004) on the Constitution of Bulgaria (CDL(2007)077rev). He recalled that the Commission had been asked by the Monitoring Committee of the Parliamentary Assembly to give an opinion on the whole Constitution and in particular the 2007 amendments. Mr. Hamilton underlined that eleven out of the 25 members of the Supreme Judicial Council were elected by a simple majority in Parliament. The Minister of Justice chaired the meetings of the Council and could make proposals both for the budget and for the appointment, promotion and dismissal of judges. Taken together this could lead to a politicisation of the Judiciary. The draft opinion did not criticise present post holders but pointed out which safeguards would need to be taken against ill intentioned post holders. The 2007 amendments did not address the recommendation made by the Venice Commission in its two previous opinions to have the Supreme Judicial Council elected by a qualified majority but even created a further incoherence by introducing such a majority for the inspectorate. If the Bulgarian authorities feared that a qualified majority would lead to a blocking of the appointment process for the members of the Council, an alternative would be to have them selected by a technical committee and to give Parliament only the choice to accept or reject a proposal made by this committee. It was most important that the governmental majority should not have power over the Judiciary. Another issue was the use of the term citizen, the Bulgarian authorities had explained that the term "citizen" should be read as everyone and a restriction was made only when the Constitution talked of "Bulgarian citizen". While there was no present danger, the opinion recommended changing these terms. The tone of the provisions on the protection of minorities was rather restrictive. Article 11(4) did not allow for the creation of political parties along ethnic lines. The limitations to human rights in the Constitution did not correspond to those in the European Convention on Human Rights. The Bulgarian side had pointed out that this was not a real problem as the Convention ranked above ordinary law in the national legal system however the opinion nonetheless recommended also making this clear in the Constitution itself. The meeting in Sofia had enabled a number of issues to be settled. *Inter alia* it had been made clear that the word "to pass" the reports by the Judiciary to Parliament had to be read as "to take note". The limitation of the immunity of magistrates was to be welcomed.

Mr van Dijk underlined that the Commission was called to further Democracy through Law and had to give its opinion on the basis of the texts submitted to it. Of course, the Commission took into account the importance of legal practice, which could result in customary constitutional law. Nonetheless the Commission had to verify whether the constitution provided for sufficient

guarantees. Legal practice could be challenged and may change over time. The Commission had made the same point in the opinion on the evaluation of the Constitution of Finland, which was adopted at the same Session. These remarks should not be seen as criticism but as a constructive support to improve the Constitution.

Mr Neppi Modona highlighted that the critical issues were the chair of the Supreme Judicial Council and the election of 11 out of 25 of its members by a simple majority in Parliament. A better balance might be achieved by having only one third of the members elected by Parliament with a qualified majority.

The Minister of Justice of Bulgaria, Ms Miglena Tacheva, thanked the rapporteurs for the opinion, which she found generally positive. The separation of powers did not imply that the Judiciary should not be accountable. Institutional checks and balances were a part of judicial independence. The constitution was a living document and needed to be seen in the light of its application. The issue was not so much the quality of the texts but rather in their implementation. In this area weaknesses and deficits remained. The 2007 amendments had not yet become fully operational and it was too early to assess their impact. The Minister expressed her appreciation for the attention of the Venice Commission and the recommendations made. It was crucial to have a dialogue based on respect and equality. The opinion would be used for the elaboration of the judicial reform programme 2008 to 2013. Mr Jarasiunas agreed that a constitution has to be seen in the light of its interpretation by the Constitutional Court. The Bulgarian Court had interpreted the original text in the light of European standards.

Mr Helgesen thanked the Minister for her open attitude and pointed out that the Venice Commission always sought to treat its partners respectfully. On behalf of the Monitoring Committee, Mr Holovaty also thanked the rapporteurs. The opinion would be most useful in the Committee's post-monitoring dialogue with Bulgaria. The functioning of the Judicial Council and probationary periods for judges were problems common to a number of countries.

Mr Zorkin suggested using a more cautious wording as concerns the freedoms of religion, expression and association, which were guaranteed by the Convention but which could be implemented in various forms according to national interest. The opinion should not rule out the prohibition of political parties based on ethnic or religious grounds. Allowing parties based on religion could lead to protecting those who negate the constitutional values. Ms Palma insisted that the acceptance of the separation of State and religion should be a criterion for the admissibility of parties. Mr van Dijk replied that the opinion only reflected the Strasbourg case-law. Parties on ethnic or religious lines have to be allowed unless they endanger the independence of the state or violate criminal law by calling for violent action. Mr Helgesen concluded by suggesting adding references to the limitation clauses contained in the paragraph 2 of Articles 9, 10 and 11 respectively to the opinion.

The Commission adopted the Opinion on the Constitution of Bulgaria with slight modifications (CDL-AD(2008)009).

11. Finlande

La Commission tient un échange de vues avec Mme Tiina Astola, Secrétaire permanente, Ministère de la Justice, et examine, en vue de son adoption le projet d'avis (CDL(2008)002) sur l'évaluation de la Constitution de la Finlande (CDL(2007)073) établi sur la base des observations de MM Bartole, Cameron, van Dijk, Dutheillet de Lamothe, Jensen et Paczolay.

M. Bartole présente le projet d'avis. Il remercie les autorités finlandaises pour leur demande et espère que d'autres anciennes démocraties suivront cet exemple. Il précise que le projet d'avis prend en considération non seulement le texte de la Constitution, mais aussi la pratique. Toutefois, comme celle-ci pourrait changer, il est souhaitable d'apporter des amendements à la Constitution, notamment dans le domaine des droits et libertés fondamentaux, en l'absence d'une clause générale sur la limitation de ces droits, mais en présence de divergences entre le texte de la Constitution et les traités internationaux liant la Finlande. En l'état, le principe de l'interprétation conforme, ainsi que la référence aux travaux préparatoires, permettent d'assurer une pleine conformité avec les standards européens. Il serait toutefois souhaitable d'introduire une clause générale sur la limitation des droits et libertés dans la Constitution. En ce qui concerne le référendum, pratiqué très rarement en Finlande, sur la base d'une loi spéciale, il faut s'assurer que les principes fondamentaux (comme la clarté de la question, l'unité de la matière…) figurent dans une telle loi, mais une révision constitutionnelle n'apparaît pas nécessaire. Il en va de même pour l'élection directe du Président de la République, qui peut être utile pour garantir ses pouvoirs. En ce qui concerne les relations entre les pouvoirs de l'Etat, la principale question concerne les relations entre le gouvernement, en charge des questions européennes, et le Président de la République, en charge des questions internationales. L'avis suggère la création d'un organe chargé de la coordination entre le gouvernement et le Président. Un amendement de la Constitution n'apparaît pas nécessaire sur ce point, mais il serait par contre souhaitable d'y introduire la possibilité de contrôler la conformité des lois aux traités internationaux, même si celle-ci existe déjà en pratique, en tout cas dans le domaine des droits de l'homme. En ce qui concerne l'administration de la justice, le rôle des tribunaux dans la procédure législative pourrait poser problème au regard de la jurisprudence de la Cour européenne des droits de l'homme. L'existence d'un système de contrôle diffus de constitutionnalité est conforme aux standards européens, car les juges finlandais suivent *de facto* le principe *stare decisis*. En conclusion, la situation actuelle est pleinement satisfaisante en pratique, mais la possibilité d'amendements constitutionnels spécifiques pourrait être examinée.

M. Dutheillet de Lamothe rend hommage à la démarche des autorités finlandaises, qui procèdent, en l'absence de crise, à une évaluation de la Constitution, aussi bien sur le plan national qu'international.

Mme Astola souligne combien elle apprécie le travail de la Commission. Les deux visites de la Commission de Venise en Finlande ont eu une grande importance dans le processus d'évaluation de la Constitution entrée en vigueur le 1er mars 2000. En 2002, un groupe de travail présidé par le ministre de la justice a rendu un rapport, dans lequel il a souligné que le but premier de la révision, à savoir le renforcement de la nature parlementaire du régime, avait été atteint. Parmi les points à réexaminer figuraient le contrôle de constitutionnalité et le référendum. Un groupe de travail a été mis sur pied, pour préparer l'activité de la commission parlementaire qui sera créée en septembre 2008 pour examiner la possibilité d'une révision constitutionnelle.

M. Tuori, en tant que membre de ce groupe de travail, souligne l'utilité de l'avis de la Commission.

Plusieurs membres, ainsi que M. Ladenburger pour la Commission européenne, prennent la parole, pour proposer des amendements ou demander des clarifications. Sur la base de la discussion, le secrétariat introduira quelques amendements dans la version finale qui sera transmise aux autorités finlandaises.

Mme Astola indique qu'elle fera un rapport circonstancié au ministre de la Justice.

La Commission adopte l'avis sur la Constitution finlandaise (CDL-AD(2008)010), avec quelques amendements.

12. Moldova

M. Dutheillet de Lamothe introduit le projet d'avis sur la Loi sur le secret d'état en précisant tout d'abord que l'analyse faite par lui-même et M Cameron se base sur une traduction anglaise de la loi qui est parfois difficile à comprendre.

La loi pose trois problèmes. Tout d'abord, concernant la définition de "secret d'état", elle combine une définition formelle, qui correspond à la solution choisie par la plupart des états et organisations internationales, et une définition matérielle, qui afin de pouvoir couvrir de manière complète toutes les facettes du secret d'état, finit par être trop large. Cette définition entre ainsi en contradiction avec d'autres dispositions.

Deuxièmement, la loi opère une distinction entre une liste nationale des informations classées secret d'État, établie par la commission interministérielle pour la protection du secret d'État, et les listes détaillées par ministère établies par les chefs des administrations d'État qui ont reçu compétence pour procéder à un tel classement ; ces dernières sont seulement approuvées par le chef de l'administration d'État concernée et ne sont pas publiées. Une telle dichotomie entre la liste nationale, entourée de garanties certaines, et les listes par département ministériel, qui n'offrent pas les mêmes garanties, présente le risque d'un développement massif et occulte d'informations protégées au niveau des départements ministériels ainsi que le risque que la commission interministérielle pour la protection du secret d'État n'ait pas une vision d'ensemble et n'assure pas un contrôle réel de l'ensemble des informations protégées.

Troisièmement, la loi moldave sur le secret d'état impose des restrictions à la liberté d'information, de communication et de circulation et le droit au respect de la vie privée des fonctionnaires et des citoyens habilités à connaître les secrets d'état, qui sont parfois excessives.

En conclusion, il apparaît nécessaire d'amender sensiblement la loi moldave de 1994 afin d'éviter le développement d'un système d'informations confidentielles, massif et non contrôlé, qui limiterait à l'excès les droits des citoyens.

M. Esanu, qui en tant que Vice-Ministre de la Justice avait sollicité l'assistance de la Commission, remercie les rapporteurs pour l'analyse détaillée, et souligne que lorsque la Moldova procédera à la révision de la loi, ce qui n'est pas une priorité en ce moment, elle fera appel à la Commission.

La Commission adopte l'avis sur la loi sur le secret d'état de Moldova (CDL-AD(2008)008).

13. Montenegro

Mr. Gstöhl presented the draft opinion (CDL(2008)028) on the amendments (CDL(2008)024) to the State Prosecutors Act of Montenegro (CDL(2008)023), which had been drawn up on the basis of comments by Messrs Broekhoven, Gstöhl and Sorensen (CDL(2008)025, 026 and 027). This opinion had been requested by the Deputy Minister of Justice of Montenegro. The opinion had been prepared jointly with the Directorate of Co-operation of the Directorate General for Human Rights and Legal Affairs of the Council of Europe, which had appointed Mr. Broekhoven as rapporteur. On 28 February 2008, Messrs Broekhoven and Mr. Gstöhl,

accompanied by Mr. Dürr from the Secretariat, met the drafting group chaired by the Minister of Justice in Podgorica. This visit enabled a number of issues raised by the rapporteurs in their comments to be settled.

Problems for the independence of the prosecution did not so much result from the draft amendments but rather from the Constitution itself, which provides that both the prosecutors and the members of the Prosecutorial Council are elected by Parliament without the requirement of a qualified majority. Within this given constitutional framework, the rapporteurs had found the draft amendments well prepared, providing a good basis for the work of the State Prosecutor's Office.

Nonetheless the opinion recommended that a prosecutor who is being seconded against his or her will should be allowed to file a non suspensive protest to the Prosecutorial Council. The right to appoint one member of the Council should remain with the Protector of Human Rights, or at least the President of Montenegro should be obliged to consult with the Protector before making his or her proposal for a person with relevant human rights experience. Finally, the deletion of the provision on special reports to be provided upon the request by parliament and by government is to be welcomed. If such a provision were to be re-introduced it should be formulated in a way to exclude requests concerning individual cases.

The Commission adopted the Opinion on the Amendments to the State Prosecutors Act of Montenegro without amendments (CDL-AD(2008)005).

14. Serbia

The Commission held an exchange of views with Mr Slobodan Homen, deputy Minister of Justice of Serbia on the draft Opinion (CDL(2008)032) on the draft Law on the High Court Judicial Council of Serbia (CDL(2008)013) as well as on the draft Opinion (CDL(2008)033) on the draft laws on Judges (CDL(2008)014) and on the Organisation of Courts (CDL(2008)015) of Serbia drawn up on the basis of comments by Messrs Cornu, Hamilton, Heintz and Neppi Modona (CDL(2008)019, 020, 021 and 022).

With respect to the High Judicial Council, Mr Hamilton explained that the Serbian Constitution, in its Article 153, provides for this body's status, constitution and election. It was defined as an independent and autonomous body, which was to provide for and guarantee the independence and autonomy of courts and judges. He pointed out that the Constitution seems to have created an obstacle for the independence of the judiciary and introduced a risk of politicising it by having the National Assembly elect the members of the High Judicial Council without a qualified majority. Mr Hamilton explained that the draft Law on the High Judicial Council attempts to resolve this problem by giving a powerful role to the judges in the election of the majority of the Council, albeit at the risk of creating a constitutional conflict between the National Assembly and the judiciary.

The best solution would be to amend the Constitution, however as this was unlikely to occur in the near future, Mr Hamilton briefly enumerated the suggested amendments that should be made to the draft Law on the High Judicial Council provided in the Opinion.

With regard to the draft Law on Judges, Mr Neppi Modona explained that Article 147 of the Constitution maintains the rule that judges are to be elected by the National Assembly. It provides that, on the proposal of the High Judicial Council, judges are elected by the National Assembly to the position of a judge for the first time and that after three years the High Judicial Council appoints them as permanent judges. He pointed out that the draft Law on Judges provides that the High Judicial Council propose to the National Assembly two candidates for

each judge's position (with respect to judges who must be elected for the first time). In this way, the system leads to a politicisation of the appointments, since the majority of the National Assembly was given the possibility to make appointments of first time judges on the basis of political grounds, and not merely on merit.

Mr Jean-Jacques Heintz found that the draft Law on Judges was in general in line with international and European standards as well as with the standards of the Consultative Council of European Judges (CCJE). But, he nevertheless pointed out that there were a certain number of ambiguities that needed to be clarified. For instance, he found that the judges had an unattractive role due to the fact that they were too supervised e.g. strict working time schedule, no right to an international career, obligatory notification in case of absence from office etc. He also pointed out that the right to training should be clarified and that it should be both a right and an obligation proposed by the High Judicial Council and accepted by the judges.

With respect to the draft Law on the Organisation of Courts, Mr Heintz explained, *inter alia*, that although it was a well-drafted text, important norms such as the right to a fair trial and, more generally, principles deriving from Article 6 of the European Convention on Human Rights should be included in the text; the role of the Supreme Court of Cassation and its competences should be further defined and he stressed the importance of the security of the court and that this should be ensured by a specific "judicial police force" under the overall authority of the High Judicial Council.

Mr Pierre Cornu underlined the importance of excluding provisions in the draft laws on Judges and on the Organisation of Courts that could create conflicts between the judiciary and the executive. He explained that the framework must be clearly set out so as to avoid any ambiguities.

The rapporteurs insisted that one of the main issues to be dealt with by the Serbian authorities was the situation of existing judges and the possible re-appointment process that could affect them. They explained that if every single serving judge in Serbia will need to re-apply for his or her job, then a proper transitional process was missing and judicial independence was not ensured.

Mr Homen thanked the Venice Commission for the Opinion and informed the Commission that the draft laws on the High Judicial Council, Judges and the Organisation of Courts were part of a package of judiciary laws prepared in the context of the Serbian National Judicial Reform Strategy. This Strategy was adopted by the National Assembly of the Republic of Serbia in May 2006 to reform the Serbian justice system. He also explained that the re-appointment process will be dealt with by the High Judicial Council, but that so far, this issue was not tabled. As regards the strict working hours for judges, Mr Homen explained that this was necessary to introduce a certain amount of discipline that was currently lacking. As regards the training of judges, he explained that the Ministry of Justice and the Working Group were currently preparing a new law on Judicial Academy Training, which will provide that training at the Academy is a pre-condition to becoming a judge.

The Commission adopted the Opinion on the draft law on the High Judicial Council of Serbia (CDL-AD(2008)006) as well as the Opinion on the draft laws on Judges and on the Organisation of Courts (CDL-AD(2008)007).

15. Ukraine

The President of the Commission, Mr Helgesen, informed the Commission that he had visited Ukraine on 16 to 17 January to take part in a conference on electoral reform. On this occasion

he had met a number of important politicians, including the Speaker and the Minister of Justice. In his talks he had underlined the need to respect the constitutionally defined amendment procedure when amending the Constitution.

Ms Stavniychuk, Deputy Head of the Presidential Administration and Secretary of the National Constitutional Council, said that there was an urgent need for constitutional reform in Ukraine. The President had therefore established the National Constitutional Council with the task of preparing a new version of the Constitution. The Council had met for the first time on 20 February and established five working groups. The concept prepared would be submitted to international experts, including the Venice Commission. The text resulting from the National Constitutional Council would be submitted to the Verkhovna Rada for adoption. If the Verkhovna Rada failed to adopt it, it could be submitted to referendum. This possibility was admitted by a decision of the Constitutional Court. The best way of proceeding was, however, to use the amendment procedures of the existing Constitution. Constitutional reform would provide an opportunity for strengthening constitutional guarantees for human rights, developing direct democracy, improving checks and balances and developing local self-government.

Mr Syrota, Vice-President of the Judicial Policy Committee of the Verkhovna Rada, recalled that the Constitution of Ukraine of 1996 had been prepared in co-operation with the Venice Commission. The constitutional reform process now had to be finalised and this could be done only by the Verkhovna Rada. The aim would be to strengthen the parliamentary focus of the Constitution.

Mr Holovaty noted that even the orange forces in power did not agree on the method of adopting the constitutional reform. The Prime Minister had stated in Brussels that it should be adopted in parliament. On the basis of the positive assessment of the 1996 Constitution by the Venice Commission it was questionable whether Ukraine needed an entirely new Constitution. How many articles would have to be amended for the Constitution to be regarded as a new Constitution? Would not a change of system be required for a Constitution to be new? With respect to the constitutional referendum of 2000 the Venice Commission had insisted on the need to respect the constitutionally defined amendment procedure. The same position had to be taken now.

Mr Tuori agreed that, even when adopting a new constitution, the amendment procedures provided for by the existing constitution had to be respected. It was important to maintain constitutional legitimacy.

16. Autres développements constitutionnels

- *Afghanistan*

Professor Musa Morafi, Ambassador of Afghanistan in Rome, briefly presented an overview of Afghanistan's development towards democracy. He explained that the first Constitution of Afghanistan was adopted in 1923, which introduced the concept of fundamental rights, but that it failed to bring about a democratic system as the main power stayed in the hands of the Monarch with no clear separation of the three branches of government. The Constitution of 1931, which was adopted after the civil war of 1928-29, introduced peace and stability to the country – however absolute power remained in the hands of the royal establishment. Professor Morafi explained that there was a rubber stamp parliament which had neither a judiciary in the democratic sense nor freedom of expression or freedom of association. In 1964 a new Constitution provided for three branches of government and recognised a long list of fundamental rights and this Constitution was recognised at the time as being the most progressive constitution in the entire Muslim world. However, it still lacked the basic elements of a democratic system.

Professor Morafi explained that the main purpose of today's Constitution (adopted in 2004) was to establish a democratic system and that free, fair and direct elections took place both for the office of the President and for parliament after the Constitution's promulgation.

He informed the Venice Commission that, in conformity with the Bonn Agreement, Afghanistan's judicial system in the Constitution was designed in accordance with Islamic principles, international standards, the rule of law and Afghan legal traditions. In this way, a Supreme Court of nine justices was appointed by the President and approved by the People's Chamber (*Wolessi Jirga*) for a 10 year term with jurisdiction over high and appeal courts.

- *Colombia*

Mr Cepeda, Judge and former President of the Constitutional Court of Colombia, informed the Commission that, at its meeting in November 2006 in Cartagena, the Ibero-American Conference of Constitutional Justice agreed to co-operate with the Venice Commission by contributing to the CODICES database and the Venice Forum Newsgroup.

He then explained that his country's strengths were, for instance, that it has had uninterrupted periodical elections which began in the 19th Century and provide stability and that Congress holds an important role in the system. He explained that Colombia has a long standing tradition of judicial review for constitutionality (~100 years) and that since 1919, an *actio popularis* exists enabling anyone to challenge acts of Congress.

Mr Cepeda explained that Colombia had a mixed diffused and centralised system of constitutional review. During the course of last year, the ordinary courts had dealt with approximately 250,000 constitutional complaints called *tutela*, which were similar to the Spanish *amparo*. All these cases were referred to the Constitutional Court, which had selected 800 of them for decision by way of *certiorari*. On average 25 per cent of the acts that were challenged were found to be unconstitutional. He went on to explain that recent decisions cover such issues as basic liberties, abortion, euthanasia, homosexual rights, equality rights and that 40 per cent of the decisions tend to deal with social rights.

Mr Cepeda went on to explain that the Constitutional Court also carries out an *a priori* review of international treaties in abstract control. It had reviewed, for instance, the *Concordat* between the Vatican and Colombia and struck down a part of it and it was currently reviewing the Free Trade Agreement between Colombia and the USA.

Mr Cepeda informed the Venice Commission that Columbia adhered to international standards on human rights and that these were considered to be a part of the constitutional block.

- *Palestinian National Authority*

Mr Khashan, Minister of Justice, informed the Venice Commission that many difficulties were encountered when drafting the Palestinian Constitution. These included the issues of the status of Jerusalem, refugees, border disputes and the right of return. He explained that the biggest internal challenge was the fact that there was no state, but that there were two governments, one of which was legal. He went on to say that democracy was exercised by the Palestinians themselves and that there was a further need of support for the independence of the judiciary.

Mr Khashan informed the Venice Commission that the Constitution will be reconsidered in the future in order to strengthen the protection of rights and freedoms, especially with respect to their implementation and that international support will be needed to carry this out.

Mr Khashan also informed the Venice Commission that a number of institutions had been created over the past ten months, including a judicial institute and the judicial police. He explained that international support was also needed in this area and that human rights, good governance and the rule of law needed to be further explained and discussed in seminars and/or workshops.

Mr Christopher Newbury, Member of the Institutional Commission of the Congress, informed the Venice Commission that the Congress of Local and Regional Authorities had taken part in the observation of local elections in the Palestinian Territories and that the Association of Palestinian Local Authorities and the Union of Local Authorities in Israel had started a dialogue which seemed very promising.

Mr Buquicchio recalled that the programme of co-operation between the Venice Commission and the Union of Arab Constitutional Courts and Councils provided for a special focus on the needs of the Palestinian Judiciary. Co-operation could therefore be extended to take into account the needs expressed by the Minister.

- *Kyrgyzstan*

Ms Cholpon Baekova recalled that the Constitutional Court annulled two versions of the Constitution last year due to procedural violations when these texts were adopted. The Constitutional Court had been heavily attacked by parliament for this decision. The President thereafter submitted a new version of the Constitution to referendum and this version was adopted with a large majority. This stabilised the constitutional situation in Kyrgyzstan and Ms Baekova disagreed with some of the criticisms in the Venice Commission's Opinion on the constitutional situation in Kyrgyzstan (CDL-AD(2007))045), which was adopted at the last Plenary Session.

Ms Svetlana Sydykova, the new Chairman of the Constitutional Court of Kyrgyzstan, explained that Kyrgyzstan had made good progress towards the respect of rights and freedoms, which were set out in detail in the preamble to the Constitution, and by abolishing the death penalty.

With respect to the events that had happened over the past few years, Ms Nussberger and Mr Pougourides underlined that not enough progress was being made in Kyrgyzstan towards democracy.

Mr Buquicchio reminded the Commission that the Constitutional Court of Kyrgyzstan had already been in danger of being dissolved several years ago and that the Venice Commission had contributed to Court's survival. He also referred to the EU/Venice Commission Joint Programme and that a conference should be organised in Kyrgyzstan during the course of this year.

17. Report of the Meeting of the Sub-Commission on Democratic Institutions (13 March 2008)

Mr Tuori, informed the Commission that the Sub-Commission had discussed two items, which were both related to the Commission's planned activities in reply to the Parliamentary Assembly Recommendation on the State of Democracy in Europe, and to the conclusions of the Forum for the Future of Democracy.

As concerned the procedure for amending a Constitution, the Sub-Commission had examined a draft vademecum of pertinent previous opinions and had identified certain aspects which were of particular interest. It had subsequently decided to set up a working group which would present a preliminary report in view of the preparation of a study on constitutional amendments.

As concerned the second item of the agenda, namely the role of the opposition, the Sub-Commission noted that the Parliamentary Assembly had already carried out substantive and extensive work on this matter. The Venice Commission had also previously examined some aspects of the role of the opposition.

Three members of the Commission, Messrs Bartole, Paczolay and Sanchez Navarro, had worked on this matter and were invited by the Sub-Commission to carry out a survey of the existing case-law of constitutional courts and to make a proposal as to a possible study.

18. Adoption du rapport annuel d'activités 2007

La Commission adopte le projet de rapport annuel d'activités 2007 (CDL(2008)011).

19. Autres questions

M. van Dijk informe de l'avancement des travaux des Mélanges La Pergola.

20. Dates des prochaines sessions

La Commission confirme la date de sa 75e session plénière : 13-14 juin 2008.

En outre, la Commission est invitée à prendre note des dates de ses sessions plénières en 2008 :

76e Session plénière	17-18 octobre
77e Session plénière	12-13 décembre

Les réunions des sous-commissions ainsi que la réunion du Conseil des élections démocratiques auront lieu la veille des sessions plénières.

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BOSNIA AND HERZEGOVINA/ BOSNIE-HERZEGOVINE	M. Cazim SADIKOVIC
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LIECHTENSTEIN :	Mr Harry GSTÖHL
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Mr. Mykhaylo VYDOINYK, Chief consultant of the Interparliamentary Relations Directorate, Secretariat of the Verkhovna Rada of Ukraine
Mr. Volodymyr YATSENKIVSKY, Consul General of Ukraine in Milan
Mr Maksym NELIN, Vice Consul, Consulat General of Ukraine in Milan

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Ms Gay McDougall, UN Independent expert on minority issues (Apologised/Excusée)

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