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

**86<sup>th</sup> PLENARY SESSION**  
**Venice, Scuola Grande di San Giovanni Evangelista**  
**Friday, 25 March 2011 (9.00 a.m.) -**  
**Saturday, 26 March 2011 (1.00 p.m.)**

**SESSION REPORT**  
**RAPPORT DE SESSION**

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## TABLE OF CONTENTS

1.	Adoption of the Agenda .....	3
2.	Communication by the President .....	3
3.	Communication by the Secretariat .....	3
4.	Co-operation with the Committee of Ministers .....	3
5.	Co-operation with the Parliamentary Assembly .....	5
6.	Co-operation with the Congress of Local and Regional Authorities of the Council of Europe.....	5
	Interim joint opinion with the OSCE/ODIHR on the law on making amendments and supplements to the law on freedom of conscience and religious organisations of the Republic of Armenia (CDL-AD(2010)054) .....	6
	Amicus curiae brief for the Constitutional Court of Bosnia and Herzegovina on certain provisions of the election law of Bosnia and Herzegovina, of the Constitution of the Federation of Bosnia and Herzegovina and on the statute of the city of Mostar (CDI-AD(2010)032) .....	6
	Joint Opinion on the Law on the Judicial System and the Status of Judges of Ukraine (CDL-AD(2010)026) .....	6
	Opinion on the Act on the state language of the Slovak Republic (CDL-AD(2010)035) .....	7
8.	Tunisie .....	7
9.	Hungary .....	8
~	Opinion on questions arising in the framework of the preparation of a new constitution of Hungary .....	8
10.	Ukraine .....	9
~	Opinion on the Concept Paper for the establishment and functioning of the Constitutional Assembly in Ukraine.....	9
~	Opinion on the draft law on languages in Ukraine.....	10
11.	Serbia .....	11
~	Opinion on the draft law on altering and amending the law on election of members of Parliament of Serbia.....	11
~	Joint opinion by the Venice Commission and OSCE/ODIHR on the Law on the Financing of political activities of Serbia. ....	12
~	Byelaws drafted as a result of the amendments made to the laws on the High Judicial Council and on Judges of Serbia .....	12
12.	Turkey .....	13
13.	Bolivia .....	14
14.	Kyrgyzstan .....	15
15.	Report of the meeting of the Sub-Commission on Democratic Institutions (24 March 2011) .....	15
16.	Rule of law .....	15
17.	Good governance .....	16
18.	Report of the meeting of the Sub-Commission on the Protection of Minorities (24 March 2011) .....	16
19.	Rapport de la réunion du Conseil des élections démocratiques (24 mars 2011).....	16
20.	Other constitutional developments .....	17
~	Bulgaria .....	17
~	Italy .....	17
~	Kazakhstan.....	17
21.	Report of the meeting of the Scientific Council .....	18
22.	Report on the World Congress on Constitutional Justice (Rio de Janeiro, 16-18 January 2011).....	19
23.	Adoption of the annual report of activities .....	19
24.	Other business .....	20
25.	Dates of the next session and dates of sessions in 2011 .....	20
	Link to the list of participants .....	20

## **1. Adoption of the Agenda**

The Agenda was adopted as it appears in document CDL-OJ(2011)001ann.

## **2. Communication by the President**

Mr Buquicchio welcomed new members to the Venice Commission: Mr Francesco Maiani, member from San Marino and Mr Zoran Pazin, substitute member from Montenegro. He also welcomed the numerous guests for this session.

Mr Buquicchio further informed the Commission of his activities, which are listed in document CDL(2011)011.

## **3. Communication by the Secretariat**

Mr Markert informed the Venice Commission about the discussions held during the Bureau meeting concerning the enlargement of the Venice Commission and that events in North Africa had shown that the Venice Commission has an important role to play in crisis situations. He said that the Bureau supported the Venice Commission's flexibility and welcomed the fact that Israel, Morocco and Tunisia were already members and that new members would be joining the Commission in the near future.

Mr Buquicchio updated the Commission about the situation and possible co-operation with Northern Africa. A delegation of the Commission had already visited Tunisia, and new delegations would soon be visiting Cairo, Egypt (which last year had showed interest in joining the Commission), followed by Morocco, to meet with the authorities. The King of Morocco had created an *ad hoc* Constitutional Commission, the president of which was Mr Mennouni, the Moroccan member of the Venice Commission; Mr Lamghari, the Moroccan substitute member of the Venice Commission, had been also appointed to this *ad hoc* Commission.

Mr Markert informed the Venice Commission that the Secretariat had, for the first time, applied the new working methods for this Plenary Session (notably, session documents had been sent out two weeks instead of one week in advance). The only exceptions to this new rule were the documents for Hungary and Serbia, as these requests had been received late. However, due to public holidays in France, documents for the June Plenary Session would only be sent out on Monday, 6 June 2011.

## **4. Co-operation with the Committee of Ministers**

Ambassador D. Batibay, Chair of the Ministers' Deputies and Permanent Representative of Turkey to the Council of Europe, informed the Commission that the Committee of Ministers closely followed the work of the Venice Commission, in particular within the framework of its Rapporteur Group on Democracy. He noted that although the Venice Commission's main focus was new democracies in Central and Eastern Europe, older democracies were increasingly turning to it for advice and that he was pleased that his own country had started a fruitful co-operation with the Venice Commission.

Ambassador Batibay informed the Venice Commission that Turkey was keen for the Council of Europe to develop a neighbourhood policy, in which the Committee of Ministers believed the Venice Commission had a crucial role to play. With the recent events in the Southern Mediterranean countries, the Commission had the opportunity to contribute also to the realisation of the Council of Europe values of democracy, the rule of law and the respect for human rights in this region. He informed the Commission that Foreign Minister Davutoğlu had

visited Tunisia with the Secretary General of the Council of Europe and said that Turkey had granted €50 000 to the Venice Commission for co-operation with Tunisia.

Mr Buquicchio explained that, although the Venice Commission was considered one of the highest priorities in the Council of Europe, funding was lacking for more staff to deal with all the activities. Funding received for projects, he said, could only be used to hire temporary staff once the projects were in place. This meant that the existing permanent staff had to deal with the setting up of the various incoming projects. For this reason, he said, the Venice Commission Secretariat urgently needed additional permanent staff.

Ambassador G. Šerkšnys, Permanent Representative of Lithuania to the Council of Europe, stated that his country had the OSCE Chairmanship and considered that tackling the long-“frozen” conflicts was high-priority; he therefore addressed one of the main areas of work of the Venice Commission, that of settlement of ethno-political conflicts. In this respect, he informed the Venice Commission about developments in Georgia and Moldova. Regarding the latter, he reminded the Venice Commission that it had been involved in the Transnistria settlement plans and that the “Five Plus Two” negotiations, which were suspended in 2006, were now being resumed. The Venice Commission should contribute to this process. He explained that many agreements had been made in violation of Moldovan laws and the Constitution, an issue which needed to be addressed.

Ambassador Šerkšnys said that with respect to Georgia, no satisfactory settlement had been reached after the 2008 Russian-Georgian war, but that the Final Opinion of the Venice Commission on the draft amendments to the Law on occupied territories of Georgia (CDL-AD(2009)051) provided good guidelines for the Georgian authorities. He informed the Venice Commission that the Committee of Ministers expected to receive the next consolidated report on the results of the “Conflict in Georgia”.

Mr Buquicchio stated, with respect to Georgia, that the Law on occupied territories could be re-examined soon, as it contained a provision setting out its own reconsideration two years after the adoption, a deadline that would be reached at the end of 2011.

Ambassador V. Ristovski, Permanent Representative of “the former Yugoslav Republic of Macedonia”, thanked the Venice Commission for its support to his country during its presidency of the Committee of Ministers from May to November 2010. He reminded the Venice Commission that, together, they had organised the Conference on “Strengthening subsidiarity: integrating the Court’s case law into national law and judicial practice”, which was a part of the reform process for ensuring the long-term effectiveness of the Convention system, launched at the Interlaken Conference in February 2010. He concluded by saying that the issues of good practices and Advisory Opinions of the Court found their adequate expression in Chapters B and D of the Follow-up Plan of the draft Declaration of the High Level Conference on the Future of the European Court of Human Rights, which would be held in Izmir, Turkey on 26-27 April 2011.

L’Ambassadeur L. Dominati, Représentant Permanent de la France auprès du Conseil de l’Europe, a informé la Commission de Venise que la France continuera à la soutenir et à suivre ses activités avec attention, notamment en ce moment important pour la Commission ainsi que pour le Conseil de l’Europe en vue des événements qui vont au-delà des pays membres et qui ont un effet sur l’ensemble de la paix et le droit dans le monde. Ambassadeur Dominati a conclu sa présentation en expliquant que nous sommes en présence d’une nouvelle vague de démocratie qui va au-delà de l’Europe et que la Commission a su réagir à cette vague avec rapidité, force et intelligence, soutenue par la France et le Comité des Ministres du Conseil de l’Europe.

## **5. Co-operation with the Parliamentary Assembly**

Mr S. Holovaty updated the Venice Commission on the work of the committees of the Parliamentary Assembly and mentioned in particular the adoption of Mr D. Marty's report on allegations of human organ trafficking in Kosovo and the joint debate on the situation in the Balkans on the basis of several reports, the debate on the situation in Belarus after the presidential elections and the situation in Hungary following the current affairs debate on the functioning of democracy.

Mr Holovaty also informed the Commission that the Committee on Legal Affairs and Human Rights had re-elected Mr Pourgourides as its Chair and that he himself had been elected as second vice-chair and reappointed as representative with the Venice Commission. At the beginning of March 2011, the Committee had adopted a report on Strengthening torture prevention mechanisms in Europe. He concluded by informing the Venice Commission that Ms M. Beck (rapporteur, Germany/ALDE) was going to request an opinion from the Venice Commission on specific aspects of her work on the Rule of Law in Council of Europe member states: upholding the authority of the Parliamentary Assembly's recommendations.

With respect to the report on strengthening torture prevention, Mr Buquicchio informed the Venice Commission that Mr Latif Hüseyinov, member from Azerbaijan, had been elected chair of the European Committee on the Prevention of Torture of the Council of Europe.

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

Mr L.O. Molin, Chairman of the city council of Örebro (Sweden), had been appointed Chair of the Monitoring Committee, which was created in the context of the Congress' reform in October 2010. He explained that the Monitoring Committee's role was to monitor the European Charter of Local Self-Government and that he believed the Congress should consult the Venice Commission when necessary for advice on particular issues concerning visits the Congress makes to countries where a specific matter of concern had been raised. It should also inform the Venice Commission on observations it made during local elections. He reminded the Commission that the Congress recently submitted a request for an opinion to the Venice Commission on the electoral code of Bulgaria.

The Congress secretariat added that, according to a report adopted on 31 October 2010 by the Congress, the elections in Ukraine did not meet European standards mainly due to the newly adopted Law on local elections adopted three months before Election Day. The recommendations made by the Congress on these elections concerned two points: (1) the Congress invited the Ukrainian authorities to refrain from adopting new rules on elections within one year of elections and (2) the Congress asked the Ukrainian authorities to submit electoral legislation on local and regional elections to the Venice Commission for an opinion prior to the adoption by Parliament (in view of the next elections in 2012 in Ukraine).

Mr Buquicchio reminded the Commission that it had also co-operated with Congress on work with respect to the Georgian Constitution, especially on the issue of local autonomy. He thanked the Congress for inviting him that same week to the hearing on Tunisia and other Arab countries.

## **7. Follow-up to earlier Venice Commission opinions**

The Commission was informed on follow-up to:

- *Interim joint opinion with the OSCE/ODIHR on the law on making amendments and supplements to the law on freedom of conscience and religious organisations of the Republic of Armenia (CDL-AD(2010)054)*

The Commission was informed that in February 2011 a delegation had attended a Conference organised by the OSCE Office in Yerevan on the topic of freedom of religion and religious organisations. Subsequently, the delegation held a constructive exchange of views with the Deputy-Minister of Justice of Armenia on the progress made in the preparation of a revised draft law on freedom of religion and religious organisations. It was informed that a new draft law, taking into account the Venice Commission-OSCE/ODIHR recommendations on the previous draft, would be soon submitted to the Venice Commission for assessment.

- *Amicus curiae brief for the Constitutional Court of Bosnia and Herzegovina on certain provisions of the election law of Bosnia and Herzegovina, of the Constitution of the Federation of Bosnia and Herzegovina and on the statute of the city of Mostar (CDL-AD(2010)032)*

Ms Granata-Menghini stated that in its amicus curiae opinion of October 2010 the Commission had found that the manner of election of the City Councillors of Mostar (minimum and maximum thresholds of representation of the three constituent peoples and the others) and the indirect elections of the Mayor of the City of Mostar did not violate international standards, while the lack of a city-area electoral constituency for the Central Zone of Mostar violated these standards.

In a Decision on admissibility and merits of 26 November 2010 (U9/09), the Constitutional Court of Bosnia and Herzegovina had reached the same conclusions. However, the Court had found in addition that the constituency boundaries as they stand in respect of the number of voters violated Article 25 ICCPR.

- *Joint Opinion on the Law on the Judicial System and the Status of Judges of Ukraine (CDL-AD(2010)026)*

Mr Markert pointed out that in its Joint Opinion on the Law on the Judicial System and the Status of Judges of Ukraine, the Commission had found the drastic reduction of the jurisdiction of the Supreme Court a major problem. Most of its powers had been shifted to the high specialised courts and a new High Specialised Court on Civil and Penal Matters had been set up. Following this opinion, Parliament had amended the law and given the Supreme Court the competence to decide in cases of conflicts between the high specialised courts. However, the number of judges of the Supreme Court continued being reduced to 20 and judges who did not accept a position in another court would be dismissed. This was problematic according to European standards and the Constitution of Ukraine.

Mr Kivalov informed the Commission that on 12 January 2011 the President of Ukraine had adopted a decree setting out an action plan for meeting Ukraine's obligations towards the Council of Europe. The recent amendments to the Law on the Judicial System and the Status of Judges provided for a new process of selection of judges under the authority of the High Qualification Commission, which was in line with Venice Commission recommendations. Parliament was currently working on draft amendments extending the powers of the Supreme Court. Nine of the 20 members of the High Judicial Council were judges. Together with the two prosecutors, there was a judicial majority in the Council.

– *Opinion on the Act on the state language of the Slovak Republic (CDL-AD(2010)035)*

Ms Granata-Menghini stated that in the opinion adopted in October 2010, the Commission had found in particular that some provisions of the Act on the State Language of the Slovak Republic did not meet international standards, notably: the obligation to use the state language in areas where the minority population does not reach 20%; the duty for private persons to use the official language in contacts with the authorities; the obligation to use the state language in judicial and administrative proceedings and the non-recognition of contracts drafted in minority languages. The Venice Commission had recommended, in addition, a number of further improvements.

On 2 February 2011 the Slovak parliament adopted a set of amendments to the Act on the State language. Only one of the four main recommendations, relating to the recognition of contracts, had been addressed, and only in part.

## **8. Tunisie**

M Buquicchio informe la Commission que, suite à la visite du Président du Comité des Ministres du Conseil de l'Europe et ministre turc des Affaires étrangères M Davutoğlu et du Secrétaire Général du Conseil de l'Europe, M Jagland en Tunisie le 21 février 2011, les autorités tunisiennes ont invité une délégation de la Commission de Venise à se rendre à Tunis afin de discuter des possibilités de coopération. M Buquicchio rappelle que la Tunisie est membre de la Commission de Venise depuis mars 2010. La délégation de la Commission s'est donc rendue à Tunis les 16 à 19 mars et a rencontré le Premier Ministre, le Ministre des Affaires Etrangères, le Président de la « Haute Instance chargée de la réalisation des objectifs de la révolution, de la réforme politique et de la transition démocratique » ainsi que des représentants de la société civile. Au cours de ces entretiens, la délégation de la Commission a souligné que la transition démocratique ne devra pas être faite dans la précipitation. Elle a également souligné la nécessité de coordonner et rationaliser les généreuses contributions et offres d'assistance qui parviennent à la Tunisie depuis de nombreux pays ainsi qu'organisations internationales. A l'issue de la visite, il a été convenu avec les interlocuteurs tunisiens que la Commission de Venise se chargera d'un programme de « formation des formateurs » sur la préparation des élections pour l'assemblée constituante, prévues le 24 juillet 2011. Un juriste tunisien sera également indiqué par le Président de la Haute Instance pour servir de liaison avec la Commission de Venise et assurer une interaction rapide et efficace. M Buquicchio informe la Commission que la Turquie a effectué une contribution volontaire de 50 000 euros pour les activités en Tunisie et exprime sa gratitude.

M Nouicer, secrétaire d'Etat au Ministère des Affaires Etrangères de la Tunisie, souligne que le peuple tunisien est orgueilleux de la révolution qu'il a menée contre l'exclusion, le favoritisme et la spoliation des valeurs humaines dont il avait été victime, et souligne que cette révolution a été menée de manière spontanée, sans idéologie ni encadrement politique. La Tunisie s'est donc donnée l'occasion historique d'obtenir la liberté, la paix sociale, la démocratie. Ce mouvement est irréversible.

Le gouvernement provisoire travaille dans ce but. La constitution a été suspendue le 1<sup>er</sup> mars, et le 19 mars le parlement, le conseil constitutionnel et le comité économique et social ont été suspendus. Une « Haute Instance chargée de la réalisation des objectifs de la révolution, de la réforme politique et de la transition démocratique » a été créée et prépare la loi sur la Commission Électorale Indépendante et la loi sur l'Assemblée Constituante. L'organisation d'élections libres et indépendantes le 24 juillet 2011 est la priorité du gouvernement. L'Assemblée constituante écrira une nouvelle constitution qui devra refléter les caractéristiques importantes et les aspirations du peuple tunisien, tels l'émancipation de la femme, la liberté de culte et la modernité.

Certes, le peuple tunisien est confronté à de grands défis, et les dangers sont nombreux, notamment la confusion entre démocratie et réclamation sociale, l'opportunisme politique, la fragilité de l'économie et la situation sécuritaire dans le voisinage. Cependant, à ce stade le gouvernement peut exprimer une modeste satisfaction tout en étant conscient de l'ampleur des tâches qui restent à accomplir.

Le futur régime politique est l'objet des discussions, et les juristes tunisiens disposent de la sagesse et la compétence nécessaires à faire le bon choix. L'expertise de la Commission de Venise peut néanmoins s'avérer précieuse, et le gouvernement tunisien est pleinement disposé à coopérer de manière substantielle avec la Commission. Dans ce contexte, M Nouicer annonce la nomination de M Raafa Ben Achour, constitutionnaliste renommé et ministre délégué auprès du Premier Ministre, comme membre suppléant de la Commission de Venise.

Mme Anne Brasseur, membre de l'Assemblée Parlementaire et rapporteur sur la situation en Tunisie, exprime le soutien de l'APCE pour cette révolution sans meneurs et sans idéologie, qui a permis aux jeunes tunisiens de se libérer de l'ancien régime cléptocratique. Elle annonce que le Président de l'APCE et les président des groupes politiques se rendront en Tunisie en mai. Elle souligne à cet égard, comme M Buquicchio, qu'il est essentiel que les efforts internationaux de soutien à la Tunisie soient coordonnés.

Mme Brasseur félicite la Tunisie pour avoir fait appel à la Commission de Venise, qui pourra apporter une contribution substantielle à travers la compréhension et le conseil, comme elle l'a fait dans le contexte de la réforme constitutionnelle au Luxembourg.

La Tunisie doit s'atteler à obtenir la stabilité du gouvernement, la relance de l'économie et la consolidation du processus démocratique ; la communauté internationale pourra aider le gouvernement tunisien à faire comprendre à son peuple que la transition démocratique demandera du temps.

De nombreux membres interviennent et la Commission toute entière exprime son soutien à la transition démocratique du peuple tunisien et sa disponibilité à y contribuer en fournissant son expertise.

M Molin exprime également la disponibilité du Congrès à assister les autorités tunisiennes, le moment venu.

## **9. Hungary**

- *Opinion on questions arising in the framework of the preparation of a new constitution of Hungary*

In its draft Opinion, the Venice Commission examined three specific questions put by Mr T. Navracsics, Deputy Prime Minister, Minister of Public Administration and Justice of Hungary: the possible incorporation in the new Constitution of provisions of the EU Charter of Fundamental Rights; the role and significance of the preliminary (ex ante) review among the competences of the Constitutional Court; the role and significance of the *actio popularis* in ex post constitutional review.

Mr Tuori underlined at the outset that the Venice Commission's aim was not to examine the draft new Constitution of Hungary (which at the time of the request had not been disclosed) but, according to the request, to give its legal opinion on the above three specific issues. A number of amendments were proposed by the Rapporteurs in the light of the most recent information received in connection with the draft opinion.



The rapporteurs considered that it is not advisable for Hungary to opt for the incorporation of the EU Charter of Fundamental Rights as such into its Constitution, due to potential problems of interpretation and overlapping competences between domestic ordinary courts, the Constitutional Court and the European Court of Justice. Hungary could consider the EU Charter as a source of inspiration and should ensure the full compliance of constitutional and legislative provisions in the human rights field with the ECHR and other binding human rights treaties.

In the draft Opinion, the rapporteurs further recommended that the Constitutional Court's competence for ex ante review be retained and specifically laid down, as well as all other prerogatives of the Court, by the new Constitution. To avoid over-politicizing the constitutional review, the right to initiate the ex ante review should be limited to the President of the country and should take place only after the adoption of the law and before its enactment and, for international treaties, before their ratification. Non-binding ex ante review could be conducted, if needed, by a parliamentary committee or by independent bodies or structures.

The draft Opinion finally considered that the planned abolition of the *actio popularis* by the new Constitution should not be regarded as a violation of European standards, in particular if a fully-fledged constitutional complaint would be introduced. The planned extension of the constitutional complaint to review also individual acts, in addition to normative acts, was welcome. Hungary could however keep some limited elements of *actio popularis*, such as an indirect access to the Constitutional Court via the Ombudsman or other relevant bodies.

In addition, the draft opinion expressed concern with regard to the overall constitutional process, notably the lack of transparency and its very limited timeframe, shortcomings in the dialogue between the majority and the opposition, insufficient opportunities for an adequate public debate. The reported confirmation, by the new Constitution, of the serious limitation of the powers of the Constitutional Court (on budgetary matters) adopted in November 2010, was an additional concern.

In his intervention, Mr T. Navracsics stressed the symbolic importance of the adoption of a new Constitution for Hungary and indicated that the draft new Constitution closely followed the Commission's recommendations on the three specific questions. He informed the Commission that the draft had been made public and submitted to Parliament on 15 March 2011 and that, as part of the efforts made by the Hungarian authorities to allow wider consultation on the new Constitution, the constitution-related debate would be the only item on the agenda of Parliament until the date foreseen for its adoption (18 April 2011).

**The Commission adopted the opinion on questions arising in the framework of the preparation of a new constitution of Hungary, with amendments (CDL-AD(2011)001).**

## 10. Ukraine

- *Opinion on the Concept Paper for the establishment and functioning of the Constitutional Assembly in Ukraine*

Mr Kozyubra, member of the Ukrainian Commission for Strengthening Democracy and the Rule of Law, was invited to present a brief overview of the constitutional reform process in Ukraine. With regard to the future constitutional assembly, Mr Kozyubra insisted on its consultative nature and on the need for an open and transparent selection of its members, who should represent both the various political forces and the academia and civil society sectors. Information was also provided on the recent establishment, by the President of the

country at the initiative of Mr Kravchuk, former President of Ukraine, of a Scientific Working Group in charge of the preparation of the constitutional assembly.

Mr Tuori, in his introduction, indicated that the Opinion had been prepared at the request of the Chair of the Ukrainian Commission for Strengthening Democracy and the Rule of Law. He described the complex constitutional situation prevailing in Ukraine and the difficult challenge facing the Ukrainian authorities in this respect. In addition, he referred to the Venice Commission's repeated calls for a democratic constitution-making process as a precondition for a legitimate constitutional reform (i.e. the Commission's recent Opinion on the constitutional situation in Ukraine (CDL-AD(2010)044)).

The initiative to convene a specialised constitutional assembly was welcomed and the overall assessment of the Concept Paper was rather positive. In particular, the Rapporteurs found commendable that the main guarantees for the respect of the regular constitutional procedure for constitutional amendments had been included in the text. The inclusion of civil society representatives in the composition of the future assembly and the possibility for it to instigate public debates on the constitutional reform was also welcomed.

Despite this overall positive evaluation, the draft Opinion raised a number of issues of concern with regard to the mandate, the size of the future assembly, its internal structures and working methods and, notably, the selection of its members. It noted, in this connection, the important role of the President of the country in the selection of its members and its potential impact on the independence and autonomy of the future assembly.

The parallel functioning, following the establishment of the above-mentioned Scientific Expert Group, of two bodies working on the constitutional reform, was an additional source of concern. While recommending increased clarity on the mandate of the two bodies, the Commission expressed its readiness to co-operate with these bodies and further assist the Ukraine in its constitutional reform. To reflect better the recent developments mentioned before, several amendments to the draft were proposed during its debate.

**The Commission adopted the opinion on the Concept Paper for the establishment and functioning of the Constitutional Assembly in Ukraine, with amendments (CDL-AD(2011)002).**

– *Opinion on the draft law on languages in Ukraine*

Mr Bartole introduced the draft Opinion by providing background information on the specific linguistic situation prevailing in Ukraine. He stressed that the Opinion contained strictly circumstantial conclusions which resulted from the assessment of this specific draft law. Such conclusions were not open to generalisation, and not easily applicable to other countries.

The draft law (submitted for legal assessment by the Speaker of the Ukrainian Parliament) had engendered heated discussions in Ukraine, within both the political sphere and the civil society. Although it had been submitted to Parliament in September 2010, it was not on the agenda of the current Ukrainian legislature. Further related legislative proposals had been reported, including a draft law on languages under preparation within the executive.

The draft opinion examined the compatibility of the draft law with the applicable international standards on language and minority protection, its conformity with the Ukrainian Constitution, its internal consistency and its regulatory efficiency as part of the Ukrainian

legislation. Particular attention was paid to the possible impact of the draft, if adopted, on the further development of the linguistic landscape in Ukraine.

In the rapporteurs' view, it was a legitimate aim to establish, as recommended by international monitoring bodies in the sphere of language and minority protection, an up-to-date and modern legislation on language use. The draft Opinion nevertheless underlined, in the light of Ukraine's historical, linguistic and political background, the need for an appropriate balance between the promotion and development of the Ukrainian language as Ukraine's constitutionally recognised state language, and the protection of the various regional and/or minority languages in use in Ukraine. In particular, the specific protection provided by the draft law to the Russian language was mentioned as one of the issues deserving, due to its very sensitive nature, careful consideration and a very cautious approach,

The Ukrainian authorities were therefore invited to make efforts to propose a more precise, consistent and balanced legal framework for the use and protection of Ukraine's languages. Adequate attention needed to be paid to the rights and needs of all Ukraine's minorities and their languages, while taking additional measures to confirm the role of Ukrainian as the state language. The availability of up-to-date information on the linguistic composition of the population, based on the individuals' free choice and free expression of their linguistic identity was of key importance.

In the light of the most recent information and of the discussion held, the Rapporteurs and some members of the Commission proposed a number of amendments.

**The Commission adopted the opinion on the draft law on languages in Ukraine in Ukraine, with amendments (CDL-AD(2011)010).**

## **11. Serbia**

- *Opinion on the draft law on altering and amending the law on election of members of Parliament of Serbia.*

Mr Kouznetsov informed the Commission that on 25 February 2011, the Council of Europe office in Belgrade had forwarded to the Venice Commission an official request from the Speaker of the Parliament Ms. Djukic Dejanovic for an urgent expertise of the draft partial changes to the Law on the election of representatives of the Republic of Serbia, regarding blank resignations and the allocation of seats in the parliament.

The draft Law of the Republic of Serbia "Altering and Amending the Law on election of Members of Parliament" concerned Articles 84, 88 and 92 of the law on the election of MPs. Corresponding changes were introduced in Articles 22 and 198 of the Rules of procedure of the National Assembly.

According to the opinion, the text represented a step forward compared to the existing legislation; however, it did not address a number of previous recommendations of the Venice Commission and OSCE/ODIHR. The draft amendments introduced some changes limiting the possibility for political parties to select candidates from the lists at their will and to exercise control over their mandates. Nevertheless, parties still kept some of their discretionary powers. The Venice Commission had on several previous occasions expressed the opinion that parliamentary seats belonged to elected representatives and not to their parties. Further improvements to the legislation were still needed. The opinion also noted that in the middle or

long term an amendment to paragraph 2 of Article 102 of the Constitution of the Republic of Serbia on resignation of MPs seemed indispensable.

**The Commission adopted the Joint Venice Commission OSCE/ODIHR opinion on the draft law on altering and amending the law on election of members of Parliament of Serbia (CDL-AD(2011)005)**

- *Joint opinion by the Venice Commission and OSCE/ODIHR on the Law on the Financing of political activities of Serbia.*

By letter dated 28 February 2011, the Ministry of Justice of the Republic of Serbia requested the Venice Commission, through the Permanent Representation of Serbia to the Council of Europe, as well as OSCE/ODIHR to review the updated version of the Draft Law of the Republic of Serbia on Financing Political Activities.

Mr Hamilton presented the draft opinion. He recalled that the Venice Commission and OSCE/ODIHR had already prepared an opinion on the previous version of the Draft Law of the Republic of Serbia on Financing Political Activities (CDL-AD(2010)048), which was adopted by the Venice Commission at its 85<sup>th</sup> Plenary Session (Venice, 17-18 December 2010). The new text under examination addressed some of the recommendations of the previous opinion. However, some of the critical remarks remained valid. Among other issues indicated in the opinion, the Draft Law would benefit from a greater focus on prevention of possible abuse, infringements and violations, rather than on the imposition of sanctions following their occurrence, addressing the problem of contributions in-kind, creating incentives to increase the participation of women and from detailing a number of provisions.

Representatives of OSCE/ODIHR informed the Commission that the authorities of Serbia were still working on the draft and expressed their hope that the recommendations contained in the opinion would be addressed in the final draft submitted to the Parliament.

After an exchange of views, some amendments were made to the text of the draft opinion.

**The Commission adopted the Joint Venice Commission - OSCE/ODIHR opinion on the law on the Financing of Political activities of Serbia (CDL-AD(2011)006), with amendments.**

- *Byelaws drafted as a result of the amendments made to the laws on the High Judicial Council and on Judges of Serbia*

The Venice Commission was informed that the Serbian authorities had requested, as a matter of urgency, an opinion on the byelaws (draft decisions by the High Judicial Council and the State Prosecutorial Council) drafted as a result of the amendments made to the laws on the High Judicial Council and on Judges. These byelaws, however, had only been received on 11 March 2011, too late for an assessment prior to the Plenary Session.

Mr Hamilton recalled that the recent reform of the Serbian judicial system had resulted in the laying off of all judges and prosecutors of Serbia, as a result of the alleged extent of corruption of judges and prosecutors appointed under the Milosevic regime. Judges and Prosecutors had subsequently been invited to reapply for their positions. However, as this re-appointment process was largely criticised by the international community, especially by the European

Commission, the Serbian authorities were now invited to revisit it. This matter had already been discussed during the meeting between the Serbian authorities, the Venice Commission and the European Commission in December 2010.

Mr Bosković informed the Commission that the biggest concern came from the European Commission on the extreme speed, the sheer scope and scale of the entire re-appointment procedure. He explained that the delay in sending the texts to the Venice Commission had been due to the elections of the standing compositions of the two councils (High Judicial Council and State Prosecutorial Council).

**Since the byelaws were only received on 11 March 2011, the Venice Commission authorised the rapporteurs to prepare a draft opinion and to send it to the Serbian authorities before the next session of the Venice Commission in June.**

## 12. Turkey

Mr Hoffmann-Riem stated that the Turkish authorities on 27 September 2010 had requested the Commission's opinion on draft laws implementing the constitutional amendments approved by referendum on 12 September 2010. He explained that the request referred to four draft laws: (1) on the High Council for Judges and Prosecutors, (2) on the Organisation of the Ministry of Justice, (3) on the Organisation of the Constitutional Court and (4) on Judges and Prosecutors. So far, the Venice Commission had adopted an Interim Opinion on the draft Law on the High Council for Judges and Prosecutors (of 27 September 2010) of Turkey.

A fruitful discussion had taken place during the meeting with the Turkish authorities held in Venice, the day before this Plenary Session. Some amendments would be made to the draft Opinion in order to take these discussions into account.

Mr Hoffmann-Riem briefly explained that the draft Law amended the existing law on judges and prosecutors to take into account recent constitutional changes as well as changes made to the Law on the High Council for Judges and Prosecutors and left the structure and most provisions intact. The main changes were consequential on the restructuring of the High Council and the transfer of certain functions to it from the Ministry of Justice. The draft Law also extended the defence rights of judges and prosecutors, especially against disciplinary sanctions. These changes were welcome, nonetheless some problems remained with respect to the independence of the judiciary. The rapporteurs have, however, duly noted that many of the problems raised were due to constitutional provisions, notably Article 159 of the Constitution of Turkey.

Mr Yardimci, from the Ministry of Justice of Turkey, informed the Venice Commission that the Ministry had sent its observations on the draft comments to the rapporteurs and the Secretariat. He said that the Venice Commission had become one of the main reference points in the Turkish reform process and that its opinions strengthened the stance for harmonising the Constitution with European standards. The Law on the High Council for Judges and Prosecutors had been adopted and entered into force. He explained that judicial reforms would be accomplished to a large extent through this Law. The draft Law on the organisation of the Constitutional Court has been sent to Parliament and may be dealt with by the end of this week (i.e. 27-28 March 2011). Amendments had been made to this Law, taking into account the Venice Commission's comments.

The Law on Judges and Prosecutors had been drafted to take into account the reform, which will extend the rights of judges and prosecutors. He said that regional meetings had been organised with judges and prosecutors and the Ministry of Justice to discuss the reform and it

was also posted on websites of the Ministry of Justice, to provide as much information as possible.

Mr Yardimci informed the Venice Commission that constitutional obstacles requiring further amendments would be addressed in the future.

Mr Özbudun expressed the view that having judges working as administrators in the Ministry of Justice did not raise a problem with the respect of the independence of the judiciary, as these judges take up these positions of their own free will and work as civil servants and not as judges. They may, at any point, return to their profession as a judge and this practice existed in other European countries. He also said that, with respect to the degree of centralisation and decentralisation of a system, this should be left to the discretion of the countries themselves because there are arguments for and against both systems. He also explained that it would be difficult to implement the extension of the supervision of heads of courts, as in the Turkish system most courts are single judge courts.

**The Venice Commission adopted the Opinion on the draft Law on Judges and Prosecutors of Turkey (CDL-AD(2011)004), with amendments.**

### **13. Bolivia**

Mr Gstöhl presented the draft opinion on the draft Law on the prosecutors of Bolivia, drawn up on the basis of his comments, as well as those of Ms Paloma Biglino and Mr Nicolás Cabezudo. The opinion had been requested by Mr Nelson Cox Mayorga, Vice Minister of Justice and Fundamental Rights of Bolivia, through the EU Delegation in La Paz. The preliminary draft Law had been prepared by the Ministry of Justice in conjunction with the State Prosecutor General, the Plural Justice Commission of the Chamber of Deputies of the Plurinational Legislative Assembly of Bolivia with the participation of the civil society.

Although the draft Law was a well-structured text and contained many positive elements, from a general perspective, it contained complex and very detailed rules on the status of the Public Prosecutor's Office some of which could have been covered by byelaws instead of appearing with such great detail in the draft Law. Furthermore, the Public Prosecutor's Office appeared to be an institution with very extensive powers and a complex organisation requiring abundant funds.

The draft Law presented a number of shortcomings which were not in line with international standards, in particular as regards independence in the selection of prosecutors, the powers they enjoy, the composition of the National Council of the Public Prosecutor's Office and immunities. Some of the safeguards introduced to ensure the autonomy of the public prosecutor's office, plus specifically the sources of its financial autonomy and the transitional provisions governing the current holders of the posts concerned, should be subject to further revision.

Mr Cox Mayorga and Mr Mario Uribe Melendres, General Prosecutor of Bolivia, thanked the Commission for the draft opinion and stated that the Bolivian authorities would take into account the comments and recommendations in order to improve the draft during the discussion in the Plurinational Legislative Assembly. After an exchange of views, the opinion was adopted.

**The Venice Commission adopted the Opinion on the draft Law on prosecutors of Bolivia (CDL-AD(2011)007).**

#### **14. Kyrgyzstan**

Mr Dürr informed the Commission that five laws on the judiciary were currently being prepared by Parliament. The Law on the Council for Judicial Selection, the Law on the Supreme Court and Local Courts and the Law on Bodies of Judicial Self-Administration were prepared by the Committee on Judicial Reform, whereas the draft Laws on the Constitutional Chamber within the Supreme Court and the Law on the Status of Judges were prepared by the Committee on Constitutional Law. The preparation of these laws had been delayed because of a crisis, which had almost led to the break up of the governing coalition. Consequently, these texts had not yet been submitted to the Venice Commission for opinion.

However, the draft Laws on Parliamentary Elections, on Presidential Elections and on the Composition of the Electoral Commission had recently been submitted to the Venice Commission for opinion.

#### **15. Report of the meeting of the Sub-Commission on Democratic Institutions (24 March 2011)**

Mr Jowell, Chair of the Sub-commission, informed the Commission that, in connection with the study on the role of extra-institutional actors in a democratic system, requested by the Parliamentary Assembly (Resolution 1744(2010), an expert review of the existing legislation in this field in the Council of Europe Member States was under preparation, as a first step aimed at determining the actual scope of the Venice Commission's future study. The Rapporteurs would present the conclusions of the review and their proposals as to the specific scope of the study during the Commission's next session. In addition members were invited to join the group of Rapporteurs on this topic.

#### **16. Rule of law**

The Commission examined, with a view to adoption, the report on the rule of law drawn up on the basis of comments by Mr van Dijk, Ms Haller, Messrs Jowell and Tuori, following its consideration by the Sub-Commission on Democratic Institutions.

Mr Jowell presented the draft report. He pointed out that the rapporteurs had received many proposals for amendment from the members of the Commission and he thanked everyone for their contributions. One of the main objectives of the document was to identify the exact definition of what was the "rule of law". Mr Jowell recalled that there was a certain difference between the meaning of "Rule of law", "Etat de Droit" and "Rechtstaat". The rapporteurs had discussed the different aspects of these principles and tried in the report to identify the main features of the rule of law. Page 9 of the document listed the main elements for the definition of the rule of law such as legality, legal certainty, prohibition of the arbitrary, access to justice and judicial review, respect for human rights and equality before the law.

During the discussion following the presentation of the draft report participants focused on such issues as the role of the private bodies, the extent to which the principle of the rule of law could be applied to them as well as the relation between public and private authority. Several speakers made reference to the problem of interrelation between the traditional understanding of the rule of law principle and the rule of constitutional law.

Some Venice Commission members were of the opinion that the principle of the rule of law, being part of public law, could not be fully applicable to private parties, and proposed to complete the text of the report with corresponding references. However, most members took a more cautious approach and suggested that this issue be part of a different study by the Commission; they invited the Scientific Council to consider the possibility of preparing additional studies on new challenges in the field of the implementation of the rule of law principle.

**The Commission adopted the report on the rule of law (CDL-AD(2011)003rev)**

## **17. Good governance**

Mr Kask presented the “stocktaking on the notions of good governance and good administration” and explained that there existed diverging views of Commission members on the usefulness and democratic legitimacy of the notion of good governance, which was not and ought not to be used as a legal concept. In consultation with the Scientific Council, he proposed not to carry out an exhaustive study on this matter, but rather to purport elements of reflection which could be used in further works. The stocktaking traced the origins of the two notions and further examined them both at the international and at the national level.

Mr van den Brande indicated that the Committee of the Regions had adopted a White paper on multilevel governance.

Several members intervened in the ensuing discussions and the text of the stocktaking was amended accordingly.

**The Commission took note of the stocktaking on the notions of good governance and good administration (CDL-AD(2011)009).**

## **18. Report of the meeting of the Sub-Commission on the Protection of Minorities (24 March 2011)**

Mr Velaers, Chair of the Sub-commission, informed the Commission that, at the meeting of 24 March 2011, the Sub-Commission had examined the Draft opinion on the Draft Law on Languages in Ukraine and endorsed it, including a number of amendments proposed by the Rapporteurs. The Sub-Commission therefore supported the adoption of the Draft Opinion by the Commission in plenary session.

## **19. Rapport de la réunion du Conseil des élections démocratiques (24 mars 2011)**

M. Colliard informe la plénière sur la 36<sup>e</sup> réunion du Conseil des élections démocratiques, qui s’est tenue le 24 mars.

Le Conseil a été informé de la visite des représentants de la Commission en Tunisie en mars, et notamment sur la possible coopération en matière de formation de l’administration électorale, ainsi que sur les activités récentes en Albanie, en Géorgie, en Moldova et sur la préparation de la 8e Conférence européenne des administrations électorales (Vienne, 12 – 13 mai 2011).

Le Conseil a également adopté l’avis conjoint avec l’OSCE/BIDDH sur la révision de la législation électorale relative aux démissions en blanc et à l’attribution des sièges.



Le Conseil a été informé de l'avancement des travaux sur le projet de rapport sur le vote à l'étranger ; un projet encore amendé devrait être soumis à la Commission en juin.

Le Conseil a aussi débattu de la question des droits électoraux des citoyens handicapés et a décidé d'envoyer une lettre au Comité d'experts sur la participation des personnes handicapées à la vie politique et publique (CAHPAH-PPL) en reformulant et en expliquant le sens d'un amendement à la Déclaration sur la participation aux élections des personnes handicapées ([CDL-AD\(2010\)036](#)) adopté par le Conseil en 2010.

M. Colliard informe la Commission que le Conseil a aussi examiné le projet de rapport sur le financement des campagnes électorales (voir le document [CDL\(2011\)012](#)) préparé à la demande de la Commission des questions politiques de l'Assemblée parlementaire. Le rapporteur sur la question, M. Esanu, est invité à compléter le rapport avec des informations supplémentaires concernant les bonnes pratiques de financement des campagnes dans les pays membres avant la transmission du rapport à l'Assemblée parlementaire.

## **20. Other constitutional developments**

### *– Bulgaria*

The Venice Commission was informed that the Bulgarian authorities had submitted, for legal opinion, a fourth revised version of the draft Law on forfeiture in favour of the State of illegally acquired assets. In the rapporteurs' view, this version does not appear to have overcome the problems previously highlighted by the Commission. It was therefore agreed with the Bulgarian authorities not to adopt an opinion on the draft at the Commission's March 2011 session and instead to hold another discussion between the authorities and the Venice Commission. The final opinion on this matter would be prepared and submitted to the Commission for adoption at its June 2011 session.

### *– Italy*

Mr Bartole informed the Commission that, at the beginning of March, the Council of Ministers had adopted a draft constitutional law to reform the judiciary. Among the major proposals the draft introduced was the division of the careers of judges and prosecutors. At the moment, judges and prosecutors share the same career, which means that judges may be prosecutors in one case and then return to being a judge. The new draft will completely separate the two careers. Another change concerned the creation of two separate superior councils, one for judges and one for prosecutors, both presided over by the President of the Republic. There is currently only one, composed of 2/3 of judges elected by judges and 1/3 of the members elected by Parliament. In the two new councils, 50% of the members will be judges or prosecutors, respectively. Another change concerned the competences of prosecutors. At present, the exercise of the prosecutor's authority is compulsory whenever a crime is denounced. According to the new rule, the activity of the prosecutor will be ruled by an act of Parliament, which will determine the priorities of the prosecutorial activity. The enlargement of the judges' civil responsibility was another new point, although this could give rise to several objections. This draft was a kind of "anthology" of all the possible limitations of judicial power, and the cumulative effect of all the provisions taken together could be quite important. In any case, the draft should be in conformity with the Constitution, European standards as well as Venice Commission standards.

### *– Kazakhstan*

Mr Dürr informed the Commission that on 14 January 2011, the Parliament of Kazakhstan had adopted amendments to Article 42 of the Constitution of Kazakhstan, which provides for a two-

term limit for the office of the President. Since an amendment in 2007 the first President, Mr Nursultan Nazarbayev, was excluded from this limitation. The 2011 amendment provided furthermore that the term of office of the President could be extended by referendum. Various reports referred to the intention to extend the current mandate until 2020. However, President Nazarbayev did not enact this amendment and referred it to the Constitutional Council. The news about this referral reached the Chairman of the Council while he was at the World Conference on Constitutional Justice in Rio de Janeiro. He consulted with Venice Commission members present and the Secretariat who raised serious concerns about this amendment. A request for an *amicus curiae* opinion was not possible due to the short deadlines under which the Council had to decide. President Buquicchio wrote a letter to President Nazarbaev warning that this amendment would be in conflict with the principles on which the work of the Venice Commission is based. A copy of this letter was sent to Chairman Rogov. In its decision, the Constitutional Council found the amendment to be in conflict with the Constitution because of its ambiguity as to the length of the extension of the term of the President. Chairman Rogov sent a letter to Mr. Buquicchio thanking him for the valuable advice given.

- *Maroc*

M. Dürr a informé la Commission que dans un discours, tenu le 6 mars 2011, le Roi Mohamed VI de Maroc avait annoncé une réformé constitutionnelle profonde. Les principaux volets de cette réforme seront:

- une régionalisation, tenant compte de la pluralité de l'identité marocaine ;
- l'élargissement du champ des droits de l'homme et un renforcement du système garantissant ces droits ;
- un renforcement du pouvoir judiciaire et notamment des compétences du Conseil constitutionnel ;
- l'introduction du principe que le gouvernement doit jouir de la confiance du Parlement ;
- l'introduction du principe que le premier ministre émane du parti ayant obtenu le plus grande nombre des votes ;
- la consolidation du rôle des partis politiques ;
- le renforcement des institutions de lutte contre la corruption.

Le Roi a nommé une commission ad hoc pour la révision de la Constitution sous la présidence de M. Mennouni, membre marocain de la Commission de Venise. M. Lamghari, membre suppléant de la Commission, a été nommé membre de cette commission ad hoc.

A cause de la charge de travail importante de MM. Mennouni et Lamghari, ils ne pouvaient pas participer à la session plénière de la Commission et un séminaire, prévu pour début mai en coopération avec l'Association marocaine de droit constitutionnel, dont M. Lamghari est le président, a dû être reporté. Dans une lettre à M. Mennouni, M. Buquicchio a exprimé la disponibilité de la Commission pour toute forme de coopération avec la Commission de Venise dans le processus de réforme constitutionnelle. La visite à Rabat, les 28 et 29 mars, d'une délégation du Conseil de l'Europe, dans laquelle la Commission de Venise sera représenté par Mlle Martin du Secrétariat, pourrait être occasion pour discuter de cette possibilité.

## **21. Report of the meeting of the Scientific Council**

Mr Helgesen informed the Commission about progress in the update and preparation of compilations of key extracts of opinions and reports of the Venice Commission. These documents were extremely useful for both the Venice Commission itself, in that they enabled consistency to be maintained, and for the public, in that they enabled them to understand and follow the development of theories and standards by the Commission. Compilations on the protection of minorities and on constitutional justice would be submitted to the Commission for adoption in June, while a new one on freedom of assembly would be prepared shortly. Once adopted, compilations would be put on the Commission's website and constantly updated.

As concerned seminars, Mr Helgesen reminded the Commission that a conference on the linguistic rights of minorities would take place in Oslo in the Autumn. A conference on constitutional design was envisaged in Helsinki in spring 2012. There was interest from of the Scientific Council, as proposed by Ms Biglino, Spanish member of the Commission, in holding discussions and conferences on the constitutional processes in Northern Africa, if these countries also showed interest.

Ms Haller asked the Plenary to reconsider her proposal for a study on "Islam in Europe and human rights", which the Scientific Council had previously decided not to take up. After discussion, it was underlined that it is the task of the Scientific Council, according to the newly adopted guidelines on the working methods of the Commission, to take these decisions. Mr Helgesen invited Ms Haller if she so wished to elaborate her proposal further and submit it again to the Scientific Council.

## **22. Report on the World Congress on Constitutional Justice (Rio de Janeiro, 16-18 January 2011)**

Mr Dürr informed the Commission about the very successful 2nd Congress of the World Conference on Constitutional Justice, which had been organised together with the Federal Supreme Court of Brazil in Rio de Janeiro on 16-18 January 2011. 88 constitutional courts and equivalent bodies from the various regional and linguistic groups (Asian, Arab, European, French speaking, Ibero-American, New Democracies, Portuguese speaking, Southern African) had participated and important courts such as the Federal Constitutional Court of Germany and the Supreme Court of Canada, which had not participated in the 1st Congress in Cape Town, did so at the 2nd Congress.

The topic of the Congress was "Separation of Powers and the Independence of Constitutional Courts and Equivalent Bodies". There were excellent discussions, not least because a strict 5 minute limit for interventions prevented lengthy papers from being read out. This left enough time for exchange between the courts. The discussions revealed that similar problems existed in the various regions. Even if a number of safeguards were in place, often the personal attitude of the individual judge was decisive, notably his or her "duty of ingratitude" towards the appointing body.

An important part of the Congress was devoted to the establishment of the World Conference as a permanent body. Already the declaration adopted at the 1st Cape Town Congress had called upon a Bureau, composed of representatives of the regional and linguistic groups, to prepare a draft statute for the Conference. At the Rio Congress, this draft statute was discussed at separate meetings of the groups, within the Bureau and at the plenary. The most difficult issue had been the question of mandatory or voluntary financial contributions by the future members. Following the Congress, a new draft statute had been elaborated and would be sent to all courts in April asking them to state their preference on the alternatives. On the basis of the replies, the Bureau will meet on 23 May 2011 in Bucharest on the occasion of the Congress of the Conference of European Constitutional Courts and could adopt the final version of the Statute and could open it for accession.

## **23. Adoption of the annual report of activities**

The Commission examined and adopted the report of activities for 2010 and expressed satisfaction for the quality and the quantity of the work carried out. The Commission was informed that the President would present the Annual Report to Council of Europe's Committee of Ministers in September 2011.

**24. Other business**

As there was no further business, Mr Buquicchio and Mr Markert thanked all the members

**25. Dates of the next session and dates of sessions in 2011**

The schedule of the remaining sessions for 2011 was confirmed as follows:

87 <sup>th</sup> Plenary Session	17-18 June 2011
88 <sup>th</sup> Plenary Session	14-15 October 2011
89 <sup>th</sup> Plenary Session	16-17 December 2011

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

[Link to the list of participants](#)