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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

68TH PLENARY SESSION

(Venice, Scuola Grande di San Giovanni Evangelista)
Friday, 13 October (9.30 a.m) –
Saturday, 14 October 2006 (1.00 p.m.)

MEETING REPORT

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1. Adoption of the agenda

The agenda was adopted as it stood.

2. Communication from the Secretariat

Mr Buquicchio told the Commission that Mr Malinverni had been elected judge of the European Court of Human Rights in respect of Switzerland. On behalf of all the members, he thanked Mr Malinverni sincerely for everything he had done for the Commission since its inception. Mr Buquicchio welcomed the new members and substitute members, namely Mr Velaers, member for Belgium, Ms Kucsko-Stadlmayer, substitute member for Austria, Ms Nussberger, substitute member for Germany, and Mr Sosso, substitute member for Monaco. The Commission was then invited to observe a minute's silence in memory of Mr Zahle, member for Denmark, who had died the previous summer.

The Commission was informed about moves to organise, with the Council of Europe's North-South Centre in Lisbon, a forum on "Constitutionalism - the key to democracy, human rights and the rule of law" on 28 and 29 November 2006. The event would provide a good opportunity for fresh initiatives by the Venice Commission in the field of intercultural dialogue. Mr Buquicchio also said that the Commission had been invited by the Parliamentary Assembly to submit its contribution to a report on the state of human rights and democracy in Europe. This report would form the subject of a major Parliamentary Assembly debate in April 2007, in which the President of the Commission would be asked to speak. Lastly, members' attention was draw to the forthcoming world congress of the International Association of Constitutional Law to be held from 11 to 15 June 2007, under the heading "Rethinking the boundaries of constitutional law".

3. Co-operation with the Committee of Ministers

As part of its co-operation with the Committee of Ministers, the Commission held an exchange of views with Ambassador Ettmayer, Permanent Representative of Austria to the Council of Europe. After pointing out that the Venice Commission could be cited as an example in terms of its competencies and the close co-operation that it had managed to establish with the European Union, Ambassador Ettmayer reminded members that for some time now, the Committee of Ministers had been discussing a Memorandum of Understanding (MU) between the European Union and the Council of Europe. In his view, it was only right that this Memorandum should give due weight to the role played by the Venice Commission, including from the point of view of co-operation with the European Union. Care should also be taken to ensure proper co-ordination between the Venice Commission's role and that of the Forum for the Future of Democracy.

Ambassador Petkov, Permanent Representative of Bulgaria to the Council of Europe, joined the previous speaker in congratulating the Venice Commission on the quality of its work and said it was a credit to the Council. In the case of the Balkan states, of which Bulgaria was one, the Commission's constitutional and electoral expertise played a valuable role from the point of view of Euro-Atlantic integration. Ambassador Petkov said his government intended to continue drawing on the Commission's expertise.

Ambassador Perelygin, Permanent Representative of Ukraine to the Council of Europe, also wished to highlight the close co-operation that had developed between the Commission and his country. This co-operation was part of a long tradition, the Venice Commission having played a major part in the development of democracy in Ukraine. Looking ahead to the future, Ukraine would continue to seek the Commission's expert advice on numerous issues. Reiterating the Austrian Ambassador's comments, Ambassador Perelygin said he would insist that due

emphasis be given to the Commission's contribution in the Memorandum of Understanding currently being negotiated.

4. Co-operation with the Parliamentary Assembly

Mr Schieder referred to moves by the Assembly to take stock, in an annual report, of democracy and human rights in all the member states, old and new. The report would provide the basis for an annual PACE debate in an effort to raise awareness of the Council of Europe's contribution in this area. The Assembly hoped that the President of the Venice Commission would take part in the discussions which it was planned to hold at the April 2007 session.

Mr Schieder then went back over the latest texts adopted by the Assembly, in particular the report on institutional balance within the Council of Europe, which explicitly mentioned the Venice Commission among the main Council of Europe bodies. This reference should be seen as a special acknowledgement of the Commission's work on the legal advice front. In its report, the Assembly called for the setting-up of a 7-member group of wise persons to advise on institutional matters and act as mediator between Council of Europe bodies.

Mr Jurgens also emphasised the importance of extending the oversight of compliance with human rights and democratic requirements to all member states, as at present only 13 of them were covered by the Monitoring Committee. It was accordingly anticipated that every year, the report on human rights and democracy would look more specifically at the situation in 11 countries. That would address the oft-repeated criticism that long-standing members of the Council of Europe were treated more leniently than new members. The Assembly had also adopted a report on the execution of ECHR judgements and Mr Jurgens suggested that this be distributed to all members of the Commission. The report called *inter alia* for national parliaments to be more involved in monitoring the execution of judgments concerning their countries. The Assembly had also adopted a report on ratification of the Framework Convention for the Protection of National Minorities by Council of Europe member states. In the light of the difficulties in interpreting the Framework Convention, due to the fact that it contained no definition of the concept of national minority, Mr Jurgens thought that this question might well crop up again in the Venice Commission in the future.

Mr Kuijper from the European Commission drew attention to the delay and complications surrounding negotiations over the Memorandum of Understanding, partly because of uncertainty after two countries rejected the draft constitutional treaty. Mr Kuijper was confident, however, about the outcome of the discussions on the Memorandum, saying that the pragmatic approach taken up until now, and which tied in with the Juncker report, should help to put co-operation between the Council of Europe and the European Union on a more formal footing. The European Commission, for its part, set great store by the work of the Venice Commission and would continue supporting it in the future.

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

Co-operation with the Congress of Local and Regional Authorities of the Council of Europe did not give rise to any discussion.

6. Follow-up to earlier Venice Commission opinions

Opinion on possible constitutional and legislative improvements to ensure the uninterrupted functioning of the Constitutional Court of Ukraine (CDL-AD(2006)016);

Following the parliament's failure to appoint and swear in several judges, the number of serving judges had been insufficient to form a quorum and the Court had been rendered inoperative. In

December 2005, the Commission, echoing the concerns expressed by the Lithuanian Presidency of the Conference of European Constitutional Courts, had adopted a declaration inviting the parliament to appoint the judges and to swear them in.

In its opinion on ways of ensuring the uninterrupted functioning of the Court, adopted in June 2006, the Commission had held that: 1) a judge should remain in office until his or her successor took office, 2) the swearing-in procedure should be simplified, for example by allowing judges to take the oath in written form, and 3) an authority which failed to exercise its power of appointment should devolve that power to the remaining appointing authorities.

Following the formation of a new government in Ukraine, the political stalemate had been resolved and the parliament had taken the necessary steps to ensure that all the vacancies in the Court were filled. The Court was once again operational therefore. The parliament had also passed a law prohibiting the Court from dealing with matters concerning the constitutionality of the constitutional amendments introduced in 2004.

Ukraine's Minister of Justice, Mr Zvarych, said that the Commission's opinion would provide a framework for improving Ukraine's legislation in the years ahead. The ban on reviewing the constitutionality of the constitutional amendments should apply only to the content of these provisions, which were now an integral part of the Constitution, but should not prevent the Court from reviewing the procedure governing their adoption.

Opinion on amendments to the Law on the Constitutional Court of Armenia (CDL-AD(2006)017);

With reference to the opinion on amendments to the Law on the Constitutional Court of Armenia, adopted in June, the President of the Court, Mr Harutyunian, said that the adoption of the Court's rules of procedure – the Charter – had helped resolve two of the issues raised in the opinion.

The Charter now stated that any appeal against a decision denying an individual application which had been the subject of a ruling by the Court's staff would be examined by the Constitutional Court judges and not only by its President.

Another point concerned the establishment of committees to gather evidence in the case of disputes relating to the results of referenda and in the case of electoral disputes. These investigatory committees consisted of one member of the Constitutional Court (who acted as chair) and employees from the electoral commissions, as well as Members of Parliament and local and international observers, all of which could create problems with regard to the separation of powers. Under the Charter adopted by the Court, it was not the committees that reported to the Court, but only the participating Constitutional Court judge. The other participants could then present the Court with their own individual opinions, but separately from the judge's report.

Opinion on the two draft laws amending law N° 47/1992 on the organisation and functioning of the Constitutional Court of Romania (CDL-AD(2006)006);

In March, the Commission had adopted an opinion on two draft laws amending the law on the Constitutional Court of Romania. Under these amendments, candidates for the position of Constitutional Court judge who were or had been members of a political party or whose family members were or had been leaders of political parties in the past five years could not become judges, which was clearly excessively restrictive. All candidates were further required to have served as a judge or prosecutor in the twelve years prior to applying for the post, which greatly reduced the pool of suitable individuals and might even be unconstitutional. As far as challenging a Constitutional Court judge was concerned, the proposed amendments would

require the adoption of special provisions rather than application of the Code of Civil Procedure: these provisions must make it clear that any such challenge was applicable only in procedures where an individual interest of a party was at stake and must also prevent the occurrence of *non liquet* situations in the Court.

Following the Commission's report, the two draft amendments to the law on the Constitutional Court criticised by the Commission had not been adopted by Parliament.

Mr Aurescu confirmed that the Commission's opinion had been a major factor in the debates in both chambers of the Romanian parliament and that both drafts were about to be finally rejected.

Opinion on the draft law of the Republic of Romania concerning the support to Romanians living abroad (CDL-AD(2004)020rev);

Mr Aurescu recalled that a draft law on Romanians living abroad had been prepared by the previous government in consultation with the neighboring states, and had been positively assessed by the Venice Commission in 2004; it had however not been submitted to Parliament. The new Government had recently resumed this initiative and had prepared a new draft which corresponded in substance to the previous one, with some technical differences. This new draft had been positively assessed by the OSCE High Commissioner on National Minorities. It was likely to be adopted by the end of the year. A public initiative aimed at supporting this draft was likely to take place before the end of the year, and the Commission and its Secretariat were invited to participate in it.

Opinion on the international legal obligations of Council of Europe member States in respect of secret detention facilities and inter-State transport of prisoners (CDL-AD(2006)009).

At the request of PACE and in connection with Mr Dick Marty's inquiry into alleged CIA operations in Europe, in March 2006 the Commission had adopted an opinion on the international legal obligations of Council of Europe member States in respect of secret detention facilities and inter-state transport of detainees. This opinion was extensively referred to by the Joint Committee on Human Rights of the UK parliament, when it discussed, on 26 May 2006, the UK government's responsibility in respect of allegations of extraordinary renditions. In particular the Committee relied upon the Commission's findings in respect of the obligation of member states not to return an individual to a State where he or she faces torture and the conditions of immunity of state aircraft.

7. Armenia

Mr Closa Montero told the Commission about the request for an *amicus curiae* opinion by the Constitutional Court of Armenia on the constitutionality of the provisions of the Law on Political Parties, according to which political parties were to be dissolved if they did not participate in the parliamentary elections twice or if they won less than one per cent of the vote. Mr Closa Montero was preparing comments, which would be sent to the Constitutional Court of Armenia by the end of October. The document would be based on Articles 11 and 17 of the ECHR, the case-law of the European Court of Human Rights, Parliamentary Assembly documents, the Venice Commission's Guidelines on prohibition and dissolution of political parties and analogous measures (CDL-INF(2000)001) and the Venice Commission's opinions on the relevant legislation in various countries, including Armenia (CDL-AD(2003)005).

Mr Colliard told the Commission about the request for an *amicus curiae* opinion by the Constitutional Court of Armenia on the constitutionality of the provisions of the Election Code, according to which judges could sit on the central electoral commission and other electoral

commissions. He pointed out that the Code of Good Practice in Electoral Matters was broadly in favour of including judges in electoral commissions. These judges, however, should be less senior than those in charge of the case and should obviously not be the same people. Several members took the floor, pointing out the pros and cons of having judges in electoral commissions. Mr Colliard said that the Code of Good Practice in Electoral Matters, which was generally in favour of such arrangements, must remain the benchmark but that it was important not to confuse the different functions. That would be the thrust of the comments which were to be forwarded to the Armenian authorities by the end of October.

8. Croatia

The Commission examined, with a view to adoption, the draft opinion prepared by Mr Vogel (CDL(2006)065) on the Law on the financing of political parties in Croatia (CDL(2006)064). This opinion had been prepared in response to a request from the Croatian authorities to assist them in drafting a law on the financing of political parties. Mr Vogel noted that the draft law provided a sound framework for regulating the financing of political parties in Croatia and was broadly consistent with Council of Europe standards. There were still, however, some points that were unclear and needed amending, in particular as regarded the use of financing derived from sources other than membership fees and donations, and the scope of the special tax regime for political parties. As the opinion was required urgently, it had already been sent to the authorities.

Mr Nick said he had consulted a number of interested parties in Croatia. Although the draft law had been generally well received, the lack of provisions on the financing of election campaigns had drawn comments. Mr Nick and Mr Micallef proposed a few amendments.

The Commission adopted the draft opinion (CDL(2006)065) on the law on the financing of political parties in Croatia. It instructed the secretariat, in consultation with Mr Micallef, Mr Nick and Mr Vogel, to draw up the final version which would be submitted to the Croatian authorities.

9. Kirghizstan

Ms Nussberger informed the Commission that a Commission delegation had visited Kyrgyzstan on 4- 5 July to discuss constitutional reform. The delegation met among others the Speaker and some members of Parliament, the Prime Minister, the Head of the Presidential Administration and the members of a working group set up by the President to prepare new constitutional drafts. During the visit the preliminary version of the three drafts for a new Constitution prepared by this working group was published. One draft was based on a presidential system of government, one draft on a parliamentary system and the third draft on a mixed system.

Thereafter, in early September, the Commission was asked through the OSCE Centre Bishkek to provide within a few days comments on the final version of these drafts (available in Russian only). The preliminary comments appear in document CDL(2006)066. To sum up, the drafts provided for improvements in the field of human rights (including the abolition of the death penalty) and the judiciary. There were however also negative elements in this respect such as the proposed abolition of the Constitutional Court. The presidential draft provided for a super-presidential system without adequate checks and balances, the mixed draft was in reality also presidential since it did not foresee a Prime Minister and the parliamentary draft did not seem very realistic under the present circumstances. The comments therefore recommended combining the positive features of the new drafts with those of the 2005 draft which had been the subject of a Commission opinion.

The Speaker of Parliament, Mr Sultanov, thanked the Commission for its comments. Currently about 20 drafts for a new constitution have been proposed and the parliament is trying to harmonise these. The main question discussed was the distribution of powers between President, Parliament and Government. President Bakiev wanted to strengthen the central bodies and have a Government less accountable to Parliament. In his opinion, to adopt a presidential system would be a step backwards and lead to political conflicts. On the other hand, political parties in Kyrgyzstan were not yet sufficiently developed to move towards a parliamentary system. Therefore a mixed system with the President as a moderator and a Government enjoying more independence from the President should be preferred.

10. Moldova

Mr Haenel outlined his comments on the draft law amending the parliamentary Rules of Procedure of Moldova. The draft rules called for some technical amendments and other more substantive amendments of a political nature.

It would be helpful, for example, to clarify the functioning of the Parliament and the powers of the standing committees, and to update the rules which were extremely complex and overly detailed, making them potentially difficult to understand and implement. On a more substantive note, there were problems with the provisions governing the lifting of parliamentary immunity and with those related to "legislative proposals" which were insufficiently clear, as they implied that MPs could not table draft laws directly, thereby severely curtailing their powers.

Mr Bianku wholly agreed with Mr Haenel and said that some provisions of the draft rules on political factions and the requirement concerning the definition of parliamentary majority and minority would have very awkward legal and political consequences for democracy in Moldova.

Mr Esanu thanked the rapporteurs for their constructive comments, which they had had to produce in a very short space of time. He wished, however, to outline the background to some of the provisions that had been deemed to pose problems. A definition of the concepts of parliamentary majority and minority would be useful for appointing representatives in certain institutions such as the Judicial Service Commission and the Central Electoral Commission. Also, other provisions of the draft rules introduced procedures that already existed in the Constitution, as in the case of parliamentary immunity for example.

Mr Esanu said he would be happy to provide the rapporteurs with any further information they might require in order to prepare the consolidated opinion.

The Commission endorsed the comments made by Mr Bianku, Mr Haenel and Mr Muylle (CDL(2006)074, 075 and 076) and asked the rapporteurs to prepare a consolidated opinion in the light of the discussions and to forward it to the Moldovan authorities.

11. Monténégro

At the end of June 2006, two members of the Venice Commission, Messers Tuori and Bradley, had been requested by the Bureau of the Parliamentary Assembly to prepare, in their personal capacity, a report on the compatibility of the legal order of Montenegro with the Council of Europe standards. In addition, they met with representatives of most public authorities in Montenegro on 28-29 August 2006, and had completed their report by the end of September 2006. This report would assist the Parliamentary Assembly in the preparation of its opinion on Montenegro's request foraccession to the Council of Europe.

Mr Tuori pointed out that Montenegro had already been a member of the Council of Europe for over three years, in its capacity as a federated republic of the State Union of Serbia and Montenegro and that its legal system could not but have improved since then. Accordingly, the report focused on the issues arising from the independence of Montenegro. The need for due implementation of the legislation was however to be underlined.

The Constitution of 1992 needed to be reformed for both technical (Montenegro was no more a federated republic) and more substantial reasons: now that the Charter on Human and Minority rights of the State Union was no longer applicable, the level of human rights protection had drastically decreased. The independence of the judiciary needed to be guaranteed.

The rapporteurs' talks with representatives of the opposition had revealed that there did not appear to be substantial controversies over the main features of the constitution, but rather on issues of a more symbolic nature, such as the state symbols or the position of the church.

The reform was urgent and it was essential that it should be effected on the basis of the largest consensus possible. Both the majority and the opposition had requested the involvement of the Venice Commission, which is ready to assist.

Mr Ranko Krivokapic, Speaker of parliament, informed the Commission that the Constitution of 1992 continued to apply to the new independent Republic of Montenegro with the exception of the provisions relating to the procedure of constitutional reform: he referred in this context to a situation of "procedural discontinuity" in respect of the old State. Parliament was expected to adopt shortly a law on the procedure of adoption and proclamation of the new Constitution. A procedure of adoption by parliament with a two-thirds majority, followed in case of failure by a referendum, was likely to be chosen.

As regards the new Constitution, a draft had been prepared by the Constitutional Council, an expert body, and would be used as the basis for the work of the parliamentary committee to be formed. He pointed out some of the likely features of the new constitution: Montenegro would be a state of "citizens", with no special status for any nation or group; it would be a "rationalized" parliamentary democracy, with the "Slavic" language as the official one. The composition of the Judicial Council was being studied: due consideration would be given to the need to strengthen the independence of the judiciary, notably from parliament.

As regards the timeframe, Mr Krivokapic expected the draft constitution to be finalised within one month, public discussions to be subsequently held during three weeks (the Commission was invited to participate in a public round table during this period) and the text to be adopted in parliament before the end of December, or submitted to referendum at the latest at the beginning of 2007.

Several members of the Commission underlined the need to resolve the issue of the independence of the judiciary in a viable manner, compatible with the applicable European standards. They warned against the risks of appointment by parliament while accepting that parliament should have some role, possibly through the Judicial Council. It appeared very clearly that this matter would be one of the most complex and controversial of the constitutional reform in Montenegro.

12. Serbie

Mr Dimitrijevic informed the Commission that on 30 September all current members of Parliament had approved without debate the text of a new Constitution which now had to be approved by referendum. Despite some flaws, which were partly due to its hasty preparation and adoption in a non-transparent procedure, the text was much better than the previous Constitution from the Milosevic period. Although on the question of human rights the Human

Rights Charter of the State Union, which was no longer applicable, was a better text. A lot would depend on the interpretation of the Constitution. The motive for the hasty adoption of the Constitution was to send a signal through the text that Kosovo remained a part of Serbia. The practical consequences of this seemed uncertain. In the end Serbia would have to accept that decisions of the Security Council took precedence over the text of the Serbian Constitution.

13. Ukraine

a) Possible introduction of the entitlement for former MPs to resume their parliamentary seat in Ukraine upon ceasing their governmental functions

Mr Tuori recalled that this matter had already been discussed by the Commission at its previous Plenary Session. A comparative analysis, stimulated by those discussions, had been carried out and added to the opinion: it now appeared that, with the exception of two countries, where there existed an incompatibility between the mandate of a deputy and his governmental functions, this incompatibility was only temporary and lasted only pending the latter functions. This provisional character of the incompatibility was in line with the necessary co-operation between parliament and the government, which was one important feature of a parliamentary democracy.

In conclusion, the Commission considered that, if the incompatibility was to be maintained in Ukraine, it had to have a clear constitutional basis and needed to be only temporary.

The Commission further considered that the possibility for the parliament to dismiss a single minister was not in line with the principle, adopted in Ukraine, of collective responsibility of the government.

Mr Zvarych, Minister of Justice of Ukraine, thanked the rapporteurs for the preparation of the opinion, which he agreed with in substance. He explained that the question of whether the deputy’s mandate would be interrupted as opposed to terminated was being discussed in Ukraine, and that there seemed to be agreement in favour of a mere suspension. He pointed out that in the case of a single minister, the parliament under the Constitution had a power of dismissal, which was different from a vote of no-confidence, which was instead possible for the government as a whole. Mr Tuori, on the basis of the Minister’s observations, agreed to make some textual changes to the opinion.

The Commission adopted the opinion on the possible introduction of the entitlement for former MPs to resume their parliamentary seat in Ukraine upon ceasing their governmental functions (CDL-AD(2006)035).

b) The draft law on the cabinet of ministers

M Tuori underlined the importance of this law for the functioning of the executive branch of power in Ukraine; its preparation had been requested by the Parliamentary Assembly and was to be welcomed.

He pointed out that the need for a better coordination between the draft law and the Constitution: as it stood, the draft was sometimes in contradiction with it (it failed to state the supremacy of the competences of the President in matters of foreign policy, national security and defence capacity; it did not limit and define the possibility of delegation of powers by the cabinet of ministers; it gave powers to the cabinet of ministers with regard to the Autonomous Republic of Crimea which did not have a constitutional basis); in addition, a constitutional basis for some of the competences which the draft law gave to the cabinet of ministers was needed.

A number of reciprocal interferences between the normative powers of the cabinet and those of the Verkhovna Rada was to be avoided. Certain technical improvements were also suggested.

Mr Zvarych thanked the rapporteurs for the preparation of the opinion and stated that he shared their view about the necessity for some changes. He explained that there had been seven previous attempts to prepare such a law, which had all been vetoed in parliament. The new government had slightly amended the draft with respect to the one which was before the Commission. This draft would be finalised by the government, then submitted to the President who would in turn submit it to parliament.

He agreed that the draft law was too detailed, and it lacked clarity in respect of the delineation of the respective spheres of competence of the President and the Cabinet of Ministers in the areas of foreign policy and national security. As regards the possibility for the government to withdraw a draft law from the agenda of parliament, he underlined that it only related to cases in which the necessary funding was lacking.

The Commission adopted the opinion on the draft law on the Cabinet of Ministers of Ukraine (CDL-AD(2006)032).

c. Draft law on freedom of conscience and religious organisations

Mr Malinverni outlined the draft opinion on the draft law on freedom of conscience and religious organisations in Ukraine (CDL(2006)062). This draft, which was intended to amend the earlier law, had been prepared by the Ministry of Justice in an effort to honour Ukraine's international commitments. Broadly speaking, the draft law was in keeping with international standards regarding freedom of religion or conscience and could be described as liberal. It did nevertheless contain some flaws and could stand to be improved in some areas. The provisions concerning the system of registration of religious organisations and the legal implications arising therefrom were extremely complex, for example, and liable to impose curbs on the necessary autonomy of religious organisations and to hinder the practice of freedom of religion. On some specific points such as the right to freedom of religion or conscience of children, and conscientious objection, the draft was insufficiently clear and ran counter to international standards. The conditions for terminating the activities of religious organisations were too vague and, in their current form, were liable to undermine the principles of legal certainty and proportionality. The issue of the restitution of property would be better addressed in a separate law. It was important, furthermore, that lawmakers be succinct and precise, particularly when restricting the exercise of a major freedom and the draft contained too many vaguely worded provisions that could open the way to arbitrary decisions.

Mr Zvarych said that this draft law, which was very important for Ukraine, had been guided by a liberal approach both in terms of the principle of freedom of religion and in terms of the relationship between church and state. He agreed that the issue of restitution should be dealt with separately, in specific legislation.

The Commission adopted the opinion on the draft law on freedom of conscience and religious organisations in Ukraine (CDL-AD(2006)030).

d. Draft law on peaceful assemblies of Ukraine

Mr Malinverni presented the draft opinion on the draft law on peaceful assemblies of Ukraine, prepared in co-operation with the OSCE/ODIHR; this co-operation had, once more, been very effective and enriching.

Mr Malinverni described the draft law as being very liberal: indeed, public assemblies were submitted to a system of mere *notification*, no prior *authorisation* being required. In addition, very few grounds for termination of a public event were foreseen and the conditions for restricting the exercise of the freedom of assembly were very well defined : in general, therefore, the draft law was in compliance with the applicable international standards and provided strong guarantees for the exercise of this fundamental freedom.

The draft law appeared nevertheless to be excessively detailed, and some shortcomings had been noticed (notably the exclusion of certain categories of public assemblies such as the electoral meetings connected with parliamentary elections; the lack of a definition of spontaneous assembly as opposed to a very detailed list of definitions of other kinds of assemblies; the impossibility for banned organisations to organise assemblies; excessive duties for the organisers; excessive statutory duties of participants; a five-day notice requirement which appeared rather long; a list of blanket restrictions).

Mr Malinverni also informed the Commission that, in the context of the preparation of this opinion, he had participated in a working meeting with the Ukrainian authorities in September in Kiev together with representatives of the OSCE/ODIHR. The meeting had been interesting and fruitful.

Reiterating what Mr Malinverni had said, Ms Achler-Szelenbaum of OSCE/ODIHR also underlined the liberal character of this draft law, which constituted the best law of the kind in the CIS. She pointed out the possibility of improving the draft law and referred to the list of suggestions contained in the opinion.

Mr Zvarych thanked the rapporteurs for the preparation of the opinion, which he agreed with in substance. He was pleased by the Commission's appreciation for the progressive character of the draft law, and considered that most of the suggestions in the opinion could and would be taken up by the Ukrainian authorities.

The Commission adopted the joint opinion with the OSCE/ODIHR on the draft law on peaceful assemblies of Ukraine (CDL-AD(2006)033).

e. Draft law amending the constitutional provisions on the Procuracy

Mr Hamilton and Ms Suchocka as reporting members introduced the draft Opinion (CDL(2006)073). The draft was a step in the right direction but several weaknesses remained. The model chosen of a prosecution service as part of the judicial power was in line with European standards and was to be welcomed, as part of the provisions making the Prosecutor's Office more independent from political pressure. The power of general supervision, which had been criticised by the Commission in the past, was abolished by the draft but there was a risk of its being re-introduced through the back door in the form of the protection of human and citizens' rights through the Public Prosecutor's Office. The law to be adopted following the amendments would be crucial and should reflect the considerations set forth in the draft Opinion, not least with respect to making individual prosecutors less dependent on their superiors.

Mr Medvedko, Prosecutor General of Ukraine, underlined the aim of bringing the system in line with European standards and of safeguarding the prosecution service from political pressure. To make the Public Prosecutor's Office part of the judicial branch was an important step in this respect. None of the General Prosecutors elected since independence had been able to serve

a full 5 year term. Newly elected prosecutors had then dismissed collaborators of their predecessors.

Several speakers expressed basic agreement with the draft Opinion but asked for a redrafting of the conclusions which seemed too positive in tone. It was also questioned whether it was really impossible to immediately abandon the system of citizens' complaints to the prosecution service. One speaker expressed doubts whether there was a need for a constitutional regulation of the prosecution service.

Mr Zvarych, Minister of Justice, said that the draft was a valid attempt to meet some of the previous recommendations of the Council of Europe. It provided for a more independent prosecution service although he personally preferred the system of the prosecution service being part of the executive. The powers of the service remained too broad.

Mr Hamilton expressed the willingness of the reporting members to redraft the conclusions and make some corrections to the text. The revised conclusions were presented after a break and approved by the Commission.

The Commission adopted the Opinion on the draft Law of Ukraine Amending the Constitutional Provisions on the Procuracy as it appears in document (CDL-AD(2006)029).

14. Other constitutional developments

- *Republic of Korea*

Mr Boohwan Han praised the Venice Commission for its work and welcomed the fact that Korea was now a fully-fledged member of the Commission.

Five judges had come to the end of their term, and five new members of the Constitutional Court appointed. The final phase, which was still pending, was the appointment of the president of the Constitutional Court, which had not gone ahead because the parliament had withheld its approval.

The nuclear tests carried out by North Korea remained a major concern for the Republic of Korea. This recent development had jeopardised the prospects for reunification of the Korean Peninsula, and undermined the progress made in relations between the two countries since the Summit on 5 June, which had helped to revive talks at ministerial level. Re-establishing peaceful relations, notably through closer economic ties between the two countries, was a priority for South Korea. The question of North Korea's resumption of nuclear testing would be addressed at political level and also within organisations such as the UN. The Venice Commission's experience would also be extremely valuable in helping to resolve Korea's problems.

- *United Kingdom:*

Lord Phillips briefed the Commission on the implications of the fight against terrorism for human rights protection in the United Kingdom. The fact was that the methods being deployed by the Government in the fight against terrorism were deemed to be incompatible with the European Convention on Human Rights (ECHR) and the relevant case-law of the Court, as highlighted by a number of recent cases. The first of these cases had to do with the difficulty of sending home alien terrorist suspects if to do so would expose him or her to the risk of treatment contrary to Article 3 of the ECHR, even if such persons posed a threat to national security: a case of this kind was currently before the European Court of Human Rights. The second problem pertained

to the detention of terrorist suspects and Article 5 of the ECHR which prohibited such detention, except in special circumstances. The last problem concerned the guarantee of a fair trial, as provided for in Article 6 of the ECHR. In its assessment of the 2001 Anti-Terrorist Act under which a terrorist suspect could be held indefinitely, the House of Lords had held that even if there could be said to be a “public emergency threatening the life of the nation”, the wording of the act must be regarded as disproportionate to what the situation required and the act was found to be incompatible with the ECHR. The Government had then passed a new Act in 2005, the Prevention of Terrorism Act, allowing it to impose Control Orders which placed restrictions on those suspected of terrorism, including the obligation to stay in their residence for 18 hour s per day, orders which were quashed by the Court of Appeal. The Government had then imposed fresh orders to allow 14 hour residence obligation, the lawfulness of which would almost certainly be challenged in the courts before long. These cases showed the courts’ determination to uphold the rule of law and the values derived from the ECHR in the United Kingdom, including in the difficult context of the fight against terrorism.

The full text of Lord Phillips’ address is available on the Commission’s website http://www.venice.coe.int.

15. Azerbaijan

Mr Aurescu, rapporteur on the subject, reminded members that the opinion sought from the Venice Commission concerned the law on freedom of assembly, which had been in force for nearly 8 years. He told the Commission that he had attended a round table held in Baku on 19 September by the OSCE Mission and the Azerbaijani authorities, during which the provisions of the law and its practical implementation had been examined. These discussions had helped to clarify a number of points and to avoid misunderstandings. Although the draft opinion pointed to numerous shortcomings in the law, it also recognised that it contained some important safeguards and that the system of notification introduced by the law was less restrictive than a system of prior authorisation. The draft opinion contained two changes which had been proposed by the rapporteurs after consulting the ODIHR/OSCE, whose experts had recently studied the 1998 law on freedom of assembly. Mr Aurescu ended by saying that the Commission would be happy to assist the authorities should they decide to improve the law by introducing amendments.

On behalf of the rapporteurs, Ms Flanagan explained that the draft opinion focused on improvements to the wording of the law, but that these needed to be coupled with genuine progress in the way the legislation was implemented by the competent authorities. The right to freedom of assembly, for example, should not be interpreted restrictively and the presumption in favour of holding assemblies ought to be articulated more clearly. Curbs on freedom of assembly should be permitted only under strict conditions. Broadly speaking and even though it possessed some positive features, the law regulated the exercise of freedom of assembly in excessive detail. Also, the definitions that it provided were unnecessary and bore no relation to the grounds for imposing restrictions provided for in the ECHR. As for the notification procedure, which was perfectly permissible *per se*, failure to comply with its requirements, many of them highly technical, should not automatically result in a gathering being banned. Also, the right to hold spontaneous demonstrations and counter-demonstrations was not sufficiently protected in law.

Mr Paczolay, who was also a rapporteur, explained that he and his colleagues had assessed only the provisions of the law, not its implementation. Monitoring and observation of the last presidential elections, and later the parliamentary elections in Azerbaijan had shown, however, that there were real problems when it came to actually exercising freedom of assembly, hence the present draft opinion. He went on to say that the provisions on the responsibility of participants and organisers were too vague and needed clarifying. As for the responsibility of

the security forces and their duty to facilitate the conduct of gatherings, these should undoubtedly be included in the law.

Mr Huseynov took the floor to draw the rapporteurs' attention to the fact that certain provisions had been misquoted, probably because of mistranslation of the texts submitted to the Commission. He said that, if necessary, he could provide the Secretariat with English translations that were more faithful to the Azerbaijani original.

Mr Aliyev, on behalf of the Office of the President of Azerbaijan, told the Commission that the law on freedom of assembly had been drawn up in 1997-98 with the help of experts from the ODIHR/OSCE. He also said that his authorities would be grateful for any practical advice the Commission could provide, so that the law could be duly amended before the next elections.

Ms Achler-Szelenbaum, from the ODIHR/OSCE, told the Commission that, as Mr Aurescu had stated, the ODIHR had also assessed the law on freedom of assembly, including from the point of view of its implementation. This assessment, which would be published shortly, was very much in line with the Venice Commission's. The OSCE was likewise willing to hold further discussions with the Azerbaijani authorities in an effort to improve the law.

The Commission adopted the opinion on the law on freedom of assembly in Azerbaijan with the amendments proposed by the rapporteurs and correction of the translation errors (CDL-AD(2006)034).

The Commission went on to hold an exchange of views with Mr Shahin Aliev, Head of the Department of Legislation and Legal Expertise, Office of the President of Azerbaijan, on the electoral code of Azerbaijan. Mr Aliev said that co-operation between the Venice Commission and the Azerbaijani authorities in electoral matters had been going on for several years. He asked for further details of a number of recommendations produced by the Venice Commission and the OSCE/ODIHR.

Mr Garrone said that two rapporteurs had been appointed to work on Azerbaijan's electoral code. Mr Aliev was invited to contact the Secretariat if he had any queries about the Venice Commission's and OSCE/ODIHR's opinions.

16. Study on the role of the second chamber

Mr Garrone presented the report on "Second chambers in Europe: parliamentary complexity or democratic necessity?" (CDL(2006)059) prepared by Senator Gélard (France) based on members' contributions on the role of the second chamber (CDL(2006)011). This report focused on the composition and appointment of second chambers in Europe and the functions and powers of second chambers, and set out the arguments for and against them. In his conclusions, Mr Garrone emphasised the need for a second chamber in federal and regional states. He called for diversification of representation and said that second chambers must be able to recruit the desired quality of members.

Several members took the floor, saying that the issue of the second chamber had already been addressed in numerous publications. They proposed that the Venice Commission take note of the report but that it refrain from embarking on a more in-depth study. A few amendments were proposed. The secretariat would contact the members who had submitted written contributions, asking them for their comments, if any.

A seminar on second chambers was to be held in 2007 by the Congress of Local and Regional Authorities of the Council of Europe, in association with the Venice Commission, at which Senator Gélard would be invited to present his report.

Mr Bartole said he had recently attended a seminar in Strasbourg on territorial representation within the second chamber, with the focus on the representation of federated and regional entities. For the seminar to be held with the Congress, he suggested adopting a broader approach. Mr Colliard proposed that the seminar address the subject by focusing on the main issues (was the state a federal one or not? Were elections direct or indirect?).

The Commission took note of the report on “Second chambers in Europe: parliamentary complexity or democratic necessity?” (CDL(2006)059) and decided to forward it to the Congress of Local and Regional Powers of the Council of Europe.

17. Report of the meeting of the sub-commission on democratic institutions (12 October 2006)

Mr Jowell, chair of the Sub-Commission on Democratic Institutions, informed the Commission that a study on the constitutional aspects of civilian command authority over the armed forces in their national and international operations was being prepared at the request of the Committee of Ministers (See Reply to Parliamentary Assembly Recommendation 1713 (2005) on democratic oversight of the security sector in member states, paragraph 6). The working group, composed of Messrs Closa Montero, Helgesen, Ozbudun, Aurescu, Haenel and Born, had produced two excellent preliminary reports, which would now be developed on the basis of the fruitful discussions held during the sub-commission meeting. Members would shortly be requested to provide information about their own country.

18. Report of the sub-commission for the protection of minorities (12 October 2006)

Mr Bartole, who had chaired the sub-commission on an ad hoc basis, reported on the discussions surrounding the draft study (CDL-MIN(2006)002) on non-citizens and minority rights, to which eight rapporteurs had contributed. Following a preliminary exchange of views, the speakers had agreed that the document covered most of the relevant issues in depth and that it provided an excellent basis for reaching a consensus on this tricky subject. Some speakers thought, however, that the document could be more explicit on some points, in particular its main objective and its target readership, and suggested that various passages be amended, including the conclusions. Noting that the sub-commission would need a little more time to complete the discussions and be in a position to ask the plenary session to adopt the draft study, Mr Bartole said it had been agreed that the rapporteurs would submit a slightly revised text at the plenary session in December. Before this, however, there was to be a half-day meeting of the sub-commission (on the Thursday afternoon), which would be devoted entirely to this matter.

Ms Lazarova Trajkovska, Vice-President of the Council for Democratic Elections, said that the sub-commission, like the Council for Democratic Elections, had examined the document on dual voting for persons belonging to national minorities, prepared by the Office of the OSCE High Commissioner on National Minorities, and also the comments made by Ms Durrieu, rapporteur appointed by the Council for Democratic Elections (CDL-EL(2006)029). After discussing the subject and, more broadly, other ways of facilitating the representation of minorities in national parliaments, the sub-commission had agreed that due account should be taken of the wide variety of models that existed in the different European states. Under the applicable standards on protection of national minorities, states had considerable discretion in

determining how effective participation by minorities in public affairs was to be achieved. That margin of discretion should enable them to take account of their particular historic and social circumstances, while at the same time complying with Article 3 of the additional protocol to the ECHR and Article 25 of the UN's International Covenant on Civil and Political Rights and relevant case-law. After the discussion, the sub-commission instructed Mr Bartole to prepare comments on the issues raised by the two documents examined, with a view to continuing the discussion in the spring of 2007.

Mr Nick took the opportunity afforded by the sub-commission's report to inform the Venice Commission that the Croatian authorities were planning to devote the UniDem seminar in the spring of 2007 to national minorities and, more specifically, to issues arising from their representation and participation in public life (dual voting rights, exemption from electoral quorum, reserved seats, dual majority rule, situation with regard to non-nationals, etc). The University of Zagreb would be willing to co-host this seminar, by arrangement with the Commission Secretariat, in May 2007.

19. Report of the meeting of the Council for Democratic Elections (12 October 2006)

Ms Lazarova Trajkovska reported on the outcome and conclusions of the meeting.

The Council had examined the guidelines on referendums (CDL-EL(2006)024rev) and had adopted them with a number of amendments (see CDL-EL(2006)024rev2).

The Commission adopted the guidelines on referendums, as amended by the Council for Democratic Elections (CDL-AD(2006)027), and decided to forward them to the Parliamentary Assembly and to the Congress of Local and Regional Authorities of the Council of Europe.

Following the adoption of Parliamentary Assembly Resolution 1496 (2006) on "Belarus in the aftermath of the presidential election of 19 March 2006", the Venice Commission had prepared a draft joint opinion with the OSCE/ODIHR on the electoral legislation of Belarus (CDL-EL(2006)030; cf. CDL-EL(2006)028). The Council for Democratic Elections had adopted this text as it stood.

The Commission adopted the joint opinion with the OSCE/ODIHR on the electoral legislation of Belarus (CDL-AD(2006)028), and decided to forward it to the Parliamentary Assembly.

Ms Lazarova said that the Council for Democratic Elections had also examined the document produced by the OSCE High Commissioner on National Minorities on dual voting, and that Ms Durrieu, rapporteur for the Council, had delivered her comments on this document. A seminar on this subject, as suggested by Mr Nick, would be most welcome.

20. Redistribution of posts within the enlarged Bureau

Mr Buquicchio told the Commission that elections for the chair, the Bureau and the chairs of the sub-commissions were to be held in March 2007. It was best to wait until then, therefore, so that all these appointments could be renewed/made at the same time, thereby providing a better overview of who did what. In the meantime, however, the Commission needed to elect a chair of the sub-commission on human rights and a chair of the sub-commission on democratic institutions, as both of these sub-commissions were due to meet before March 2007. On a proposal from the enlarged Bureau, Mr Helgesen was elected Chair of the sub-commission on human rights and Mr Jowell - Chair of the sub-commission on democratic institutions.

21. Co-operation with the Southern African Judges Commission

Mr Buquicchio outlined the background to this co-operation, and to the recent visit by Southern African judges to Venice and then Strasbourg. It was planned to put this promising co-operation on a more formal footing, drawing on existing agreements with the ACCPUF and bearing in mind the possibility that other similar agreements might be concluded with the Union of Ibero-American Constitutional Courts being set up in Chile and the Arab Union of Constitutional Courts. The Commission was accordingly invited to adopt the draft co-operation agreement currently before it (CDL(2006)068). After discussing, *inter alia,* whether to keep Article 5 of the draft agreement, the Commission decided to adopt the proposed text as it stood, on the understanding that it would continue to make cautious use, as in the past, of public statements.

22. Other business

This item was not discussed.

23. Date of the next session and proposed dates for the 2007 sessions

The Commission confirmed that its 69th plenary session would be held on 15 and 16 December 2006.

The Commission also changed the date of its June 2007 session and confirmed the dates of the other plenary sessions in 2007:

70th Plenary Session	16-17 March
71st Plenary Session	1-2 June
72nd Plenary Session	19-20 October
73rd Plenary Session	14-15 December

Sub-commission meetings and meetings of the Council for Democratic Elections would take place as usual on the day before the plenary sessions.

LIST OF PARTICIPANTS

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ARMENIA/ARMENIE : Mr Gaguik HARUTUNYAN
AUSTRIA/AUTRICHE : M. Christoph GRABENWARTER (Apologised/Excusé)
Ms Gabriele KUCSKO-STADLMAYER
AZERBAIJAN/AZERBAIDJAN Mr Lätif HUSEYNOV
BELGIUM/BELGIQUE : Mr Jan VELAERS
BOSNIA AND HERZEGOVINA/ BOSNIE-HERZEGOVINE M. Cazim SADIKOVIC
BULGARIA/BULGARIE : Mr Anton STANKOV (Apologised/Excusé)
CHILE Mr José Luis CEA EGANA (Apologised/Excusé)
CROATIA/CROATIE : Mr Stanko NICK
CYPRUS/CHYPRE : Mr Frixos NICOLAIDES (Apologised/Excusé)
Mr Mr Myron NICOLATOS
CZECH REPUBLIC/ REPUBLIQUE TCHEQUE : Mr Cyril SVOBODA (Apologised/Excusé)
DENMARK/DANEMARK : Mr John LUNDUM (Apologised/Excusé)
ESTONIA/ESTONIE : Mr Oliver KASK (Apologised/Excusé)
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Mr Hubert HAENEL
GEORGIA/GEORGIE : Mr John KHETSURIANI (Apologised/Excusé)
GERMANY/ALLEMAGNE : Mr Georg NOLTE
Ms Angelika NUSSBERGER
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IRELAND/IRLANDE : Ms Finola FLANAGAN
Mr James HAMILTON
ITALY/ITALIE : Mr Antonio LA PERGOLA (**Président/President**)
Mr Sergio BARTOLE
Mr Guido NEPPI MODONA
REPUBLIC OF KOREA/ REPUBLIQUE DE COREE Mr Kong-hyun LEE (Apologised/Excusé)
Mr Boohwan HAN
KYRGYZSTAN/KYRGHYZSTAN : Ms Cholpon BAEKOVA
LATVIA/LETTONIE : Mr Aivars ENDZINŠ
LIECHTENSTEIN : (Apologised/Excusé)
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SERBIA / SERBIE	Mr Vojin DIMITRIJEVIC
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TURKEY/TURQUIE :	Mr Ergun ÖZBUDUN
UKRAINE :	Mr Serhiy HOLOVATY Mr Konstantyn MAZUR
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Ambassador Ivan PETKOV, Permanent Representative of Bulgaria to the Council of Europe
Ambassador Yevhen PERELYGIN, Permanent Representative of Ukraine to the Council of Europe

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Mr Peter SCHIEDER, President of the Committee on Foreign Politics, Austrian Parliament
Mr Erik JURGENS, Member of the Committee on Legal Affairs and Human Rights

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Mr Ian MICALLEF, Président de la Chambre des pouvoirs locaux
Mr Keith WHITMORE, Président de la Commission Institutionnelle

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EUROPEAN COMMUNITY/COMMUNAUTE EUROPEENNE
Mr. Pieter J. KUIJPER, Directeur au Service Juridique de la Commission européenne

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ALGERIA/ALGERIE
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M. Nabir ZERIBI

M. Mohammed FADENE

ARGENTINA/ARGENTINE
Mr Juan Carlos MAQUEDA, Judge, Supreme Court (Apologised/Excusé)

AZERBAIJAN/AZERBAÏDJAN
Mr Shahin ALIYEV, Head of Department of Legislation and Legal Expertise, Office of the President of the Republic of Azerbaijan
Mr Ilgar GURBANOV, Deputy Director of Department of Legislation and Legal Expertise, Office of the President of the Republic of Azerbaijan

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Mr Iskak MASALIEV, Chief of the Parliament Commitee on constitutional legislation, state device, legality, justice reforms and human rights
Ms Aida SALYANOVA, Chief of the Department of Commitee on constitutional legislation, state device, legality, justice reforms and human rights

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Mrs. Mirjana LESEVSKA, Liaison Officer, Constitutional Court

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Mr Roman ZVARYCH, Minister of Justice
Mr Olexandre MEDVEDKO, Prosecutor General
Mr Grygory TITARCHUK, Head of the Main Department for organisational and legal maintenance, Prosecutor General's Office
Mr Alexander PRYKHODKO, Deputy Head, Main Investigation Department, Division for supervision over investigation, Prosecutor General's Office
Mr Alexander TYMOSHENKO, Prosecutor General's Office
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UNITED KINGDOM/ROYAUME UNI
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Mr Günter SCHIRMER

CONGRESS OF LOCAL AND REGIONAL AUTHORITIES OF THE COUNCIL OF EUROPE/CONGRES DES POUVOIRS LOCAUX ET REGIONAUX DU CONSEIL DE L'EUROPE :
(Apologised/Excusé)

INTERPRETERS/INTERPRETES
Ms Maria FITZGIBBON
Mr Derrick WORSDALE
Mr Artem AVDEEV
Mr Vladislav GLASUNOV

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