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(VENICE COMMISSION)

COMMISSION EUROPEENNE POUR LA DEMOCRATIE PAR LE DROIT
(COMMISSION DE VENISE)

121st PLENARY SESSION
Venice, Scuola Grande di San Giovanni Evangelista
Friday, 6 December - Saturday, 7 December 2019

121e SESSION PLÉNIÈRE
Venise, Scuola Grande di San Giovanni Evangelista
Vendredi 6 décembre- Samedi 7 décembre 2019

DRAFT SESSION REPORT/PROJET DE RAPPORT DE SESSION

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1. Adoption of the Agenda

The agenda was adopted without any amendment (CDL-PL-OJ(2019)004ann).

2. Communication by the President

The President welcomed members, special guests and delegations, and informed the Commission about the newly appointed members and substitute members and presented his recent activities, as set out in document CDL(2019)044.

He presented his condolences to Albania following the recent earthquake and to France following the fatalities of soldiers in Mali.

The President informed the Commission that the Veneto Region had launched a fundraising campaign for the renovation of the Scuola, where the Commission meets, following the damage caused by the recent exceptionally high water.

He also informed the Commission that the Council of Europe had adopted the budget of the Organisation, including the budget of the Venice Commission. For the first time after several years, the budget will return to zero real growth. However, due to an increase in fixed costs, the budget will remain tight.

The President finally informed the Commission that the President of the Italian Republic will attend the session commemorating the 30th anniversary of the Commission, which will take place on 8 October 2020 morning in Palazzo Ducale.

3. Communication from the Enlarged Bureau

The Commission was informed that at its meeting on 5 December 2019, the Enlarged Bureau proposed to abandon the position of First Vice-President of the Commission and to elect instead three Vice-Presidents.

Due to the increasing number of participants in the plenary sessions of the Commission and with a view of better accommodating participants within the Scuola, the Enlarged Bureau informed the Commission that the secretariat will put in place a system of registration as from the next session.

Finally, and following the on-going institutional crisis in Albania regarding the issue of the appointment of judges to the Constitutional Court, the Enlarged Bureau gave its authorisation to issue an urgent opinion in the event of a request on this issue.

4. Communication by the Secretariat

The Secretary of the Commission gave practical information about the session and reminded the Commission of the importance of providing in advance of the sessions written interventions to facilitate interpretation.

5. Election of the President, 3 Vice-Presidents and 4 members of the Bureau as well as Chairs and Vice-Chairs of the Sub-Commissions

At its October 2019 session, the Commission had elected a Committee of Wise Persons composed of Mr Esanu, Ms Hermanns, Mr Kuijer and Ms McMorrow, to prepare the elections.

At the beginning of the Plenary Session, Ms McMorrow presented the proposed list of candidates for the various offices on behalf of the Committee of Wise Persons, taking into account Article 4 of the Revised Statute.

Ms McMorrow underlined that several criteria had been taken into account by the Committee of Wise Persons in order to establish a renewed list of candidates for the various offices, in particular the respective competencies of the members, gender equality, geographical repartition, availability of members and inclusivity. Ms McMorrow underlined the increasing internal and external scrutiny regarding the functioning of the Venice Commission. It is therefore important to ensure a continuing impartiality in the election of members to the various positions as well as a rotation of key roles among the Commission. The ultimate goal is to ensure wider and broader participation among members.

On the following day, the Commission proceeded with the elections. It elected for a term of two years:

Bureau:

President: G. Buquicchio (Italy)
Vice-President: C. Bazy-Malaurie (France)
Vice-President: P. Dimitrov (Bulgaria)
Vice-President: R. Kiener (Switzerland)

Bureau members:

H. Kjerulf Thorgeisdottir (Iceland)
V. Bílková (Czech Republic)
M. Frendo (Malta)
T. Khabrieva (Russian Federation)

Sub-Commissions and Councils:

Scientific Council
Chair: J. Helgesen (Norway)
Vice-Chair: Y. Atar (Turkey)

Fundamental Rights
Chair: B. Vermeulen (Netherlands)
Vice-Chair: J. Omejec (Croatia)

Federal and Regional State
Chair: J. M. Castella Andreu (Spain)
Vice-Chair: P. Carozza (USA)

International Law
Chair: I. Cameron (Sweden)
Vice-Chair: F. Maiani (San Marino)

Minorities
Chair: J. Velaers (Belgium)
Vice-Chair: W. Newman (Canada)

Judiciary
Chair: R. Barrett (Ireland)
Vice-Chair: Z. M. Knežević (Bosnia and Herzegovina)

Democratic Institutions
Chair: K. Tuori (Finland)
Vice-Chair: D. Meridor (Israel)

Working Methods
Chair: B. Mathieu (Monaco)
Vice-Chair: T. Otty (United Kingdom)

Latin America
Chair: J. Otálora Malassis (Mexico)
Vice-Chair: J. L. Sardon (Peru)

Mediterranean Basin
Chair: G. Jeribi (Tunisia)
Vice-Chair: K. Feniche (Algeria)

Rule of Law
Chair: S. Holovaty (Ukraine)
Vice-Chair: Q. Qerimi (Kosovo)

Council for Democratic Elections
President:[1] O. Kask (Estonia)

Constitutional Justice
Chair:[2] N. Alivizatos (Greece)
Vice-Chair: A. Varga (Hungary)

The Commission recognised the need to ensure a gender-balance in the Sub-Commission on Gender Equality. It therefore postponed the election of the Chair and Vice-Chair of the Sub-Commission on Gender Equality until the March 2020 Plenary Session.

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

Mr Leen Verbeek, Chair of the Congress Monitoring Committee, informed that the Monitoring Committee had conducted monitoring visits to Turkey and Portugal as well as a post-monitoring visit to the Republic of Moldova.

Following the Congress election observation report on municipal elections held in Turkey last year, the Congress might request an opinion from the Venice Commission on the constitutionality and compliance with general principles of the rule of law regarding the non-appointment as mayors of HDP candidates and the dismissal of mayors in the south-east of Turkey.

Following the observation of the October 2019 local elections in the Republic of Moldova, the head of the Congress delegation referred to the importance of respecting the principles of the Venice Commission's Code of good practice in electoral matters both in the relevant legislation and in practice.

[1] Elected by the Council. The Vice-President was elected by the Council from among the representatives of the Assembly and the Congress.
[2] Also Co-Chair of the Joint Council on Constitutional Justice. The other Co-Chair is elected by the liaison officers.

Additionally, a Congress delegation had conducted a mission to Sarajevo and Mostar, with a view to the forthcoming local elections in Bosnia and Herzegovina in 2020 and in the light of the recent decision of the European Court of Human Rights concerning the failure to hold local elections in Mostar during the last 11 years.

Furthermore, Mr Verbeek thanked the Venice Commission for the adoption of the Principles on the protection and promotion of the Ombudsman institution that the Congress unanimously endorsed.

7. Follow-up to earlier Venice Commission opinions

The Commission was informed on follow-up to:

Principles on the Protection and Promotion of the Ombudsman Institution ("The Venice Principles") (CDL-AD(2019)005)

Ms Granata-Menghini informed the Commission that at its 37th Session on 30 October 2019, the Congress had endorsed the Venice Principles, as explained by the representative of the Congress. In addition, on 16 October 2019, the Committee of ministers had adopted Recommendation CM/Rec(2019)6 of the Committee of Ministers to member States on the development of the Ombudsman institution, which had been prepared by the CDDH in consultation with the Venice Commission and in parallel with the preparation of the Venice Principles, which the Recommendation complemented.

On 30 October 2019, the Congress endorsed the Venice Principles and called upon “its Committee on the Honouring of Obligations and Commitments by Member States of the European Charter of Local Self-Government (Monitoring Committee) to promote the Venice Principles among relevant interlocutors during its visits when monitoring the situation of local and regional democracy in member States of the Council of Europe.

Armenia, Joint Opinion on the Amendments to the Judicial Code on integrity and disciplinary liability of Judges (CDL-AD(2019)024)

The Joint Opinion adopted in October 2019 was generally positive, insofar as concerned the ordinary judiciary. The Commission was more critical about the early retirement scheme provided for the judges of the Constitutional Court: the Joint Opinion stressed that such retirement should be truly voluntary and that simultaneous retirement of judges should not perturb the normal functioning of the Constitutional Court. The Minister of Justice of Armenia informed the Commission that in November 2019 the draft had been re-worked and submitted for the Government’s approval. Many of the recommendations of the Joint Opinion were reflected in the new draft: for example, the ethics and disciplinary commission would no longer give advisory opinions, and the mandate of the current president of the SCJ would not be terminated. Some of the elements of the reform remained unchanged. Thus, instead of a full appeal against decisions of the Supreme Judicial Council in disciplinary matters the new draft law provided for a sort of a reopening, which had been deemed insufficient in the Joint Opinion. As regards the Commission for the Prevention of Corruption, its next composition would be elected with the participation of a pre-selection body, the Competition Council, to which the opposition parties would have the right to nominate candidates. Certain amendments were made to the proposal concerning the early retirement scheme for the Constitutional Court judges: if more than three judges of the Constitutional Court accept the offer and resign, the election for the vacant positions would be held within 15 days. This was supposed to address one of the concerns of the Joint Opinion (that the simultaneous retirement of so many judges may paralyze this institution). However, it remained to be seen whether the retirement would be truly voluntarily and would not be used for ulterior purposes, as stressed in the Joint Opinion.

Armenia, Opinion on the constitutional implications of the ratification of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) (CDL-AD(2019)018)

This Opinion was adopted in June 2019 and received much attention as a result of which the Venice Commission was invited to present it at several events. Ms Bilkova presented the Opinion at the meeting of the *Council of the European Union's Working Party on Fundamental Rights, Citizen's Rights and Free Movement of Persons (FREMP)* in Brussels on 23 October 2019, where it was well received. She also presented the Opinion on 31 October to 1 November 2019 during the Council of Europe High-Level visit to Armenia, organised by the Directorate of Human Dignity, Equality and Governance, to raise awareness on the Istanbul Convention and facilitate the path to its ratification. Mr Kuijer then took up the relay and presented the Opinion at the meeting of the *Gender Equality Commission of the Council of Europe (GEC)* in Strasbourg, on 14 November 2019, followed by a presentation at the joint hearing of the LIBE-FEMM committees of the European Parliament, in Brussels, on 2 December 2019 on *"The ratification of the Council of Europe Convention on prevention and combating violence against women and domestic violence"*.

Mr Lucio Gussetti informed the Venice Commission about the most recent developments regarding the ratification of the Istanbul Convention by the EU. To this effect, the European Parliament has officially requested an opinion from the Court of Justice of the European Union (CJEU) on the internal procedures on the division of competence between the Member States of the EU and the EU itself. The CJEU's opinion is expected by the end of 2020 or beginning of 2021 and will have ramifications on future ratifications of important international conventions by the EU.

Mr Buquicchio said that the Istanbul Convention was experiencing much resistance and referred to the recent example of Slovakia, where the Parliament had refused to ratify this Convention – notwithstanding the Venice Commission's Opinion on this Convention.

North Macedonia, Opinion on the Draft law on Prevention and Protection against Discrimination (CDL-AD(2018)001)

The draft law was revised in the light of the recommendations of the March 2018 opinion and adopted in May 2019. The adopted text implements two main recommendations of the opinion. They both concern the Commission for Protection against Discrimination, which is one of the key actors of the implementation of the anti-discrimination Law in North Macedonia. The possibility for a person to complain to an administrative body within the Ministry of Justice against the Commission against Discrimination on the ground that the Commission failed to examine his or her complaint within the legal deadline was removed, as recommended by the Venice Commission. The adopted text provides also for the possibility to ensure a pluralist representation of the social forces involved in the protection and promotion of equality in the composition of the Commission, which was another main recommendation of the opinion. The law implemented also a number of the Opinion's secondary recommendations which significantly improved the quality of the law especially its clarity.

However, a number of recommendations of the opinion aimed at providing additional safeguards for the Commission against Discrimination to accomplish its duties independently and efficiently remain outstanding. These recommendations include: requiring higher than a simple majority for the election and dismissal of members of the Commission against Discrimination, further clarifying the election procedure and dismissal grounds of its members, providing for a unique but longer mandate for its members, and providing sufficient safeguards

against arbitrary and disproportionate reduction of the budget of the Commission against Discrimination.

Republic of Moldova, Joint Opinion on the legal framework governing the funding of political parties and electoral campaigns (CDL-AD(2017)027)

In parallel with the amendments to the Electoral Code addressed during the last session of the Venice Commission, the Law on Political Parties was revised on 15 August 2019. These amendments follow two key recommendations of the Joint Opinion:

- Permit private contributions, within clearly defined limits, by citizens of Moldova from their revenues obtained outside of the country, subject to adequate requirements of transparency and close supervision;
- Further reduce annual ceilings for private donations to political parties and to electoral contestants: these ceilings were drastically reduced (for example, the caps for donations by physical persons were reduced from 200 to 6 monthly average salaries);

The two other key recommendations (significantly enhance the supervision and enforcement of the rules on party and campaign financing and strengthen the regime of sanctions available for infringements of party and campaign funding rules) still remain to be implemented.

Ukraine - Final Opinion on the Law on Government Cleansing (Lustration Law) (CDL-AD(2015)012)

In June 2015 the Commission adopted its Final opinion on the Lustration law of Ukraine which followed the interim opinion adopted in December 2014. The law targeted two different periods: the Soviet communist regime and the “power usurpation by President Yanukovich”. The Commission criticised the insufficient individualisation of the lustration measures in respect of both periods.

On 17 October 2019, the European Court of Human Rights issued a judgment in the case of Polyakh and others v. Ukraine which concerned the compatibility with Article 8 ECHR of the lustration procedure of five career civil servants. The Court largely relied on both the interim and the final opinions of the Venice Commission, while pointing out that the respective roles are different, in that the Court’s examination is carried out with respect to the specific circumstances of the case and not in abstracto.

The Court expressed the doubt that the lustration law may pursue “the politicisation of the civil service”. It found that the “very restrictive and broad in scope” measures lacked proportionality on account of their application regardless of the specific functions performed by the applicants and without any individual assessment of their conduct. As regards the application of lustration measures in respect of involvement in the Communist regime, the Court noted their imposition more than twenty-three years after, in the absence of suggestion of specific wrongdoing, requires a strong justification which the Ukrainian authorities have failed to give.

Uzbekistan - Joint opinion on the draft Election Code (CDL-AD(2018)027)

The Election Code was adopted in March 2019 and entered into force in June 2019. the adopted Election Code does not seem different in substance from the draft Code submitted for review.

The 2018 opinion underlined several positive developments in the electoral legal framework of Uzbekistan, including: the codification of separate election-related laws; the removal of provisions for reserved seats; more transparency in the work of election commissions; support

signature requirements; the establishment of a single electronic voter register; and a better equality of opportunities and conditions for contestants during the campaign period.

However, the adopted Election Code fails to address other recommendations raised in the 2018 opinion, in particular:

- To review the overall campaign finance regulations in order to ensure transparency and accountability of the use of public money and administrative resources;
- To avoid undue restrictions on voting rights based on incapacitation, on-going criminal proceedings and conviction;
- To review the length of residency requirement, in respect of candidacy rights;
- To review procedures for the appointment of lower-level commissions to better safeguard their independence, which should be assessed during the next elections;
- To ensure transparency of tabulation and publication of election results.

The next parliamentary elections scheduled on 22 December 2019 will be held within this new electoral legal framework.

> *Poland - Opinion on the Draft Act amending the Act on the National Council of the Judiciary; on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts (CDL-AD(2017)031)*

Mr Dürr informed the Commission about recent judgments of the Court of Justice of the European Union (CJEU) concerning Poland. On 5 November 2019, the CJEU decided in infringement proceedings that the fixing of different retirement ages for male and female judges violated EU law. The legislation had been amended in the meantime (same retirement age for male and female judges) but the implementation for judges who had already retired and the calculation of their pension remained open issues.

On 19 November 2019, the CJEU decided a preliminary request from the Labour and Social Security Chamber of the Polish Supreme Court requesting whether the participation of the new National Council of the Judiciary (NCJ) in the appointment of the judges of the new Disciplinary Chamber of the Supreme Court (both of which had been criticized in the Venice Commission's Opinion) was in accordance with EU standards of judicial independence. The CJEU decided that, according to Article 47 of the EU Charter of Fundamental Rights, EU Law must not be applied by a court, the appointment of which gives rise to legitimate doubts as to influence of the legislature and the executive. The CJEU did not directly decide on the independence of the Disciplinary Chamber but provided clear criteria to be used by the requesting Polish Supreme Court in deciding on this issue. Based on this preliminary ruling, the Labour Chamber of the Supreme Court decided on 5 December 2019 that the Disciplinary Chamber was not sufficiently independent and that its decision was inapplicable. The CJEU ruling has wider implications because all Polish judges can assess the validity of a judicial panel with the participation of a judge appointed by the NCJ. The Polish Deputy Minister of Justice Kaleta criticized this decision as a "dangerous precedent because it indicates the primacy of EU law over national law". He was of the opinion that this decision would not affect the work of the NCJ and the Disciplinary Chamber as it concerned only an individual case.

8. Report on the inclusion of a not internationally recognised Territory in a State's Nationwide Constituency for Parliamentary Elections

Mr Cameron, Chair of the Sub-Commission on International Law, stressed that this report had two main components: one related to electoral standards and one related to international law standards. The first component had been examined at the meeting of the Council for Democratic Elections; the second at the meeting of the Sub-Commission. The Sub-

Commission proposed a number of amendments following the discussions and also the formal and informal comments received by the rapporteurs.

Ms Peters stated that the request had been made by the Rules Committee of the Parliamentary Assembly against the background of the verification of the credentials of the Russian delegation. The question put to the Commission was nevertheless an abstract one. It related to members of parliament elected in a nation-wide territory and not to those elected directly in an annexed territory. It had to be analysed in respect of two sets of standards: electoral and international law ones. There existed a tension between the clear illegality under international law of any annexation and the interests of the persons living in the annexed territory. International law placed an indisputable obligation on both states and international organisations not to recognise an annexation either explicitly or implicitly. Further, International Humanitarian Law imposed on the occupying power not to make any permanent institutional changes. However, there existed no specific international rules on the organisation of elections. It was necessary to avoid that an act by a third State or by an international organisation could be seen as an implied recognition of the annexation. Some exceptions could be envisaged (the so-called “Namibia exception”, which the European Court of Human Rights had also applied in its case-law). In this context, it needed to be stressed that an election must reflect the will of the people; annulling an election may only occur when irregularities, even if they are serious, may have affected the outcome.

Therefore, the obligation not to recognise an annexation implicitly is a clear one, but it allows for practical limitations; like states, international organisations have to decide how to meet this obligation in each concrete case. As concerns the ratification of the credentials of the annexing state, the effects on the voting rights of the population should be examined. In order for an election to be considered free and fair, it must respect certain preconditions, including the free exercise of political freedoms; it is difficult for an election organised in an occupied territory to meet these preconditions. However, the impact of the irregularities on the results of the election needs to be taken into account: if such effect was minimal, the elections stand. It must be stressed that this conclusion does not cure the illegality of the annexation.

In conclusion, international organisations have the obligation not to recognise an annexation implicitly, but they may nonetheless decide not to reject the credentials of the delegation of the annexing State if the impact on the election results as concerns a nationwide constituency has been minimal. This decision falls within the margin of manoeuvre of international organisations and does not entail a recognition, either explicit or implicit, of the annexation.

In the ensuing discussion, it was stressed by several members that the obligation not to recognise an annexation was a very strong and serious one, and it was dangerous to recognise a wide margin of appreciation to states and international organisations in this respect. Attention was drawn to recent case-law of the European Court of Justice on the Western Sahara and on the Occupied territories in Palestine.[3]

It was stressed nonetheless that the report did not indicate in any way that international organisations were free not to abide by their obligations, it stated instead that the appropriate manner to do so needed to be searched for in each individual situation.

Mr Kovler stressed that in his view the right to vote and to be elected guaranteed by Article 3 of Protocol 1 was not subject to limitations. The rapporteurs referred to the case-law of the European Court of Human Rights to the effect that limitations are possible but should not be disproportionate.

[3] This designation shall not be construed as recognition of a State of Palestine and is without prejudice to the individual positions of Council of Europe member States on this issue.

The Commission adopted the report on the inclusion of a not internationally recognised territory in a State's nationwide constituency for parliamentary elections (CDL-AD(2019)030), previously examined by the Council for Democratic Elections and by the Sub-Commission on International Law on 5 December 2019.

Ms Khabrieva did not participate in the vote.

9. Ukraine

Draft Opinion on the Law on Supporting the Functioning of the Ukrainian Language as the State Language

Ms Kjerulf Thorgeirsdottir began her presentation by explaining that the present draft opinion had been requested by the PACE Monitoring Committee and that the rapporteurs had made a number of amendments to it, taking into account the written comments submitted by the government of Ukraine and Mr Varga as well as the views expressed by members during the joint meeting of the Sub-Commissions on 5 December.

She then reminded the Commission that the State Language Law is the fourth Ukrainian text assessed by the Venice Commission in the field of language policy. Its overarching purpose, as indicated already in its name, is to support the Ukrainian language as the sole State language. She also reminded that Language policy is an extremely complex and sensitive issue and the source of tension within Ukraine and with kin-States of national minorities of Ukraine. It is also a highly politized issue especially due to the recent developments and conflict with Russia.

Ms Kjerulf Thorgeirsdottir outlined the main three concerns expressed in the general comments section of the draft opinion:

1) The lack of adequate consultation of representatives of national minorities and indigenous peoples in the process of adoption of the law.

2) The unbalanced approach adopted in the State Language Law between the promotion of the State language and the protection of minority languages. While the draft opinion fully recognized the legitimate aim of strengthening the State language, it stressed that the measures taken to achieve this legitimate purpose had to be adequately balanced with guarantees and measures for the protection of the minority languages. The State Language Law failed to sufficiently safeguard minorities' linguistic rights. The draft opinion recommended that in order to secure that balance, the authorities should prepare without any unnecessary delay the Law on Minorities, foreseen in the State Language Law, and to consider postponing until the adoption of the said Law the implementation of the State Language Law's provisions which are already in force.

3) The non-compliance of the State Language Law with the principle of non-discrimination. Several provisions of the Law provide for a differential treatment between different categories of languages in areas such as education, scientific publications, print media, book distribution, etc.: (a) the languages of indigenous peoples; (b) English; (c) the languages of national minorities that are EU official languages; (d) the languages of minorities that are not EU official languages (in particular Russian). Ms Kjerulf Thorgeirsdottir explained that the explanation provided by the Ukrainian authorities during the visit in order to justify this differential treatment - the European ambitions of Ukraine, the century of oppression of the Ukrainian language in favour of Russian which created de facto a privileged status for Russian in Ukrainian society - was not convincing from the perspective of human rights in general and the prohibition of discrimination in particular. Therefore, the draft opinion recommended that the legislator repeal

the provisions of the Law providing for a differential treatment to the extent that the distinction between those languages is not based on an objective and reasonable justification.

In its specific comments section, the draft opinion draws the attention of the legislator to the non-compatibility of several provisions of the State Language Law with the international commitments of Ukraine and recommends that those provisions are revised in order to ensure their compliance with international standards. Additionally, the draft opinion invites the legislator to consider repealing or at least revising the mechanism of complaint and sanctions set forth in the Law with a view to monitoring the enforcement of the provisions imposing the use of Ukrainian. In order to promote a fair balance, the legislator should entrust a duly-constituted institution or body with the responsibility to monitor the implementation of the legal provisions on the use of minority and indigenous languages.

Mr Vasyl Bodnar, Deputy Minister of Foreign Affairs, stressed that the State Language Law was adopted to strengthen not only the State language but also the sovereignty and resilience of Ukraine against the Russian aggression, which would use the Russian language as one of the tools of influence. In his opinion, the State Language Law would also provide the possibility for persons belonging to national minorities who are isolated to fully integrate into Ukrainian society. Mr Bodnar underlined that pursuant to international texts the protection and promotion of minority and regional languages should not be to the detriment of the official languages and the need to learn them.

Ms Iryna Podoliak, Deputy Minister of Culture, Youth and Sport of Ukraine, reminded that a number of the provisions of the State Language Law would come into force gradually. She explained that the current language policy of Ukraine is supported by over 80 percent of Ukrainian society. She also emphasized the importance of taking into account the century old oppression of the Ukrainian language and the protection of the use of the Russian language as a pretext by Russia to occupy some parts of Ukrainian territory. Therefore, the protection of the State language and sovereignty of Ukraine are interrelated. As regards the differential treatment of languages, the promotion of EU languages is justified, in her opinion, by the aspiration of Ukraine to integrate the EU and by the fact that, in view of the current language situation in Ukraine, there is no need to promote the use of the Russian language.

The subsequent discussion focused on the question of whether Ukraine's ambition to become a member of the EU is a legitimate ground for a preferential treatment of minority languages that are at the same time the official languages of the EU vis-à-vis to other minority languages and on the margin of appreciation of States in regulating the use of languages.

The rapporteurs introduced additional amendments to the draft opinion taking due account of the suggestions made by some members during the discussion of this item.

The Commission adopted the opinion on the Law on Supporting the Functioning of the Ukrainian Language as the State Language (CDL-AD(2019)032), previously examined at the joint meeting of the Sub-Commissions on National Minorities, on Federal and Regional State and on Fundamental Rights on 5 December 2019.

Opinion on Amendments to the Legal Framework governing the Supreme Court and Judicial Governance Bodies

Mr Tuori explained that the request from the Parliamentary Assembly had referred to draft law No. 1008, which had since been adopted as Law No. 193-IX and entered into force on 7 November 2019. The Law had been prepared hastily, without impact evaluation and without consulting relevant stakeholders. It had been enacted before the previous reform had been fully implemented. The main issues concerned the structure of the bodies of judicial governance and

the reduction in size of the Supreme Court. Due to the co-existence of the High Council of Justice (HCJ), a constitutional body, and the High Qualification Commission of Judges (HQCJ), the structure of the bodies of judicial governance was already complicated. Law No. 193-IX introduced two more bodies, with mixed national and international composition: the Selection Board for members of HQCJ and the Integrity and Ethics Board which mainly monitors the activity of members of the HJC and HQCJ. The role of these new bodies is problematic because the Constitution only acknowledges the existence of the HJC. With the entry into force of the Law, the previous HQJC was immediately dissolved, which is regrettable because it was in the middle of filling some 2000 vacancies at the first and second instance courts.

Law No. 193-IX also reduced the number of judges of the Supreme Court from a maximum of 200 (currently 193) judges to a maximum of 100 judges. All judges had already been vetted in a procedure approved by international organisations including the Venice Commission. 75 judges had been appointed only in May 2019. The reduction of the number of judges was later justified with the aim of ensuring the uniformity of the case-law of the Supreme Court and the transformation of the Supreme Court into a real cassation court which would deal only with precedents.

As such, these aims are commendable but the order of proceeding was wrong: initially the first and second instance courts should be strengthened where there are some 2000 vacancies. The current draft law which introduces procedural filters should have been adopted first and only after these reforms had taken effect and the backlog been cleared, the required number of judges could be estimated. The Ukrainian authorities and civil society had also expressed a disappointment in the previous vetting process, not all judges would meet the criteria of integrity. However, according to the opinion, such cases cannot justify a new comprehensive vetting process of all judges of the Supreme Court. The selection of the 100 remaining judges would be in the hands of the new HQCJ but the Law contains only vague selection criteria and the procedure is to be decided by the HQCJ itself, instead of being regulated in the law. The judges who are not selected for the smaller Supreme Court, can be transferred to courts of appeal but they can also be dismissed. Reducing the number of judges in this way entails severe problems with the independence and irremovability of the judges. Upon request by the Supreme Court, the constitutionality of the Law is now examined by the Constitutional Court. The stability of the judiciary is a precondition for the independence of the judiciary. The impression has to be avoided that after each change of majority the structure of the judiciary is changed and the composition of the courts is at the disposal of the new majority. This is detrimental to the independence of and confidence of the population in the judiciary. The rapporteurs proposed some amendments based on comments by the authorities and members.

Mr Ivan Lishchyna, Deputy Minister of Justice of Ukraine, Agent of Ukraine before the European Court of Human Rights, expressed satisfaction that the draft opinion welcomed several aspects of Law No. 183, notably as concerns the relations between the HJC and the HQCJ. This was not a new reform but a continuation of the on-going 2016 reform. It was much better to fix upcoming problems right away, rather than to wait until the end of the reform. The remarks concerning the disciplinary procedure, notably on deadlines, were very useful. It had been necessary to terminate the mandates of the members of the HQCJ because the activity of several members had been blocked by judicial procedures and injunctions. As concerns the reduction of the number of judges from 200 to 100, this might seem draconian but, until May 2019, the Supreme Court had had only 120 judges and had not complained of being overloaded. The increase to 200 judges had not been based on any needs evaluation and no arguments had been presented for it; notably the criminal and commercial chambers had no backlog. The backlog was composed of 90 per cent of cases coming from the previous Supreme Court. The explanatory memorandum had indeed not referred to the reduction of the number of Supreme Court judges but the Government had undertaken a thorough comparative study of the size of Supreme Courts, which showed that with 200 judges, Ukraine had twice as many judges as other countries. Parliament was currently preparing legislation turning the

Supreme Court into a real cassation court. The reduction of cases would therefore intervene probably even before the number of judges was reduced to 100.

The Commission adopted the Opinion on Amendments to the Legal Framework governing the Supreme Court and Judicial Governance Bodies of Ukraine (CDL-AD(2019)027), previously examined by the Sub-Commission on the Judiciary on 5 December 2019.

Draft amicus curiae Brief for the Constitutional Court of Ukraine on the early termination of the mandate of Members of Parliament.

Mr Otty explained that the brief concerned constitutional amendments providing three grounds for the loss of the mandate of MPs in Ukraine. Each of the three cases was problematic with reference to earlier consistent and long-standing Venice Commission reports. The automatic loss in case of non-affiliation to a party ran counter to the principle that members of parliament represent the population as a whole and not a specific party. Absenteeism could lead to sanctions, but the latter needed to be proportionate. Non-personal voting may also warrant sanctions, but requires an individualised examination.

Mr Otty stressed that the brief did not of course pre-empt the decision of the Constitutional Court.

The Commission adopted the amicus curiae brief for the Constitutional Court of Ukraine (CDL-AD(2019)029, previously examined by the Sub-Commission on Democratic Institutions on 5 December 2019.

10. Bulgaria

Mr Qerimi introduced the draft Opinion on draft amendments to the Criminal Procedure Code and the Judicial System Act on criminal investigation against top magistrates, requested by the Minister of Justice of Bulgaria, Mr Danail Kirilov. The draft was examined on 5 December 2019 by the Sub-Commission on the Judiciary.

The draft amendments under examination were intended to address an issue identified by the European Court of Human Rights in the case of *Kolevi v. Bulgaria* in 2009, namely the *de facto* impossibility to bring the Prosecutor General to criminal liability. This situation was partly due to the hierarchical organisation of the prosecution service and to the composition of the Prosecutorial Chamber of the Supreme Council of Magistracy. In June 2019 the Bulgarian authorities proposed to introduce a mechanism of suspension of the Prosecutor General pending criminal proceedings against him/her, in order to ensure the independence of such investigations.

It was positive that the proposal had been thoroughly discussed in Bulgarian society; however, this mechanism might not achieve the stated goal. All such investigations will necessarily start within the prosecution system, still largely dependent on the Prosecutor General. Moreover, a decision of the Supreme Council of Magistracy will be needed to order a suspension. Given that 11 members of the Supreme Council (out of 25) are either prosecutors and investigators elected by their peers, or have prosecutorial background, it will be difficult to reach the necessary qualified majority of 17 members. More generally, it is important to ensure that “lay members” of the Prosecutorial Chamber of the Supreme Council of Magistracy are really “lay”, i.e. represent other professions.

Under the draft amendments, the proposed mechanism of suspension of the Prosecutor General is extended to two chief judges – the President of the Court of Cassation and the President of the Supreme Administrative Court. This was not required by the European Court and was not dictated by the Bulgarian Constitution; moreover, the suspension of the chief judges by the Plenary Supreme Council of Magistracy, where judges elected by their peers are in a net minority, is contrary to European standards on judicial independence, so this proposal must be abandoned.

There are several ways how the proposed mechanism of suspension of the Prosecutor General may be made more efficient (for example, by lowering the majority needed to take this decision). Other solutions should also be explored. Thus, the Bulgarian authorities should consider introducing a judicial review of the decisions not to open a criminal investigation. Investigation into such cases may be entrusted to certain existing office holders, such as the Inspector or the Director of the National Investigative Service, provided that their powers and the method of their election are changed in order to make them more independent from the Prosecutor General. Finally, a new figure of an "independent investigator" (or a reserve list of such investigators) may be introduced – but such investigator should not owe his/her appointment to the Prosecutor General, or to the Prosecutorial Chamber dominated by the prosecutors and investigators, should not receive instructions from the Prosecutor General and at the end of his/her mandate should not have to return to the prosecution system.

Ms Anna Paskaleva, First Secretary at the Embassy of Bulgaria in Rome, explained that the draft under examination (proposed in June 2019) had been recently repealed, and that a new legislative proposal had been formulated by the Government. The two chief judges would not be concerned by this new proposal. As to the investigation into the Prosecutor General's alleged criminal acts, such files would be entrusted to an "independent investigator", to be appointed by the Prosecutorial Chamber.

Mr Kuijer welcomed the fact that the Bulgarian authorities had decided to limit the amendments to the situation of the Prosecutor General and exclude two chief judges from this proposal. As to the idea of entrusting the investigation to the "independent prosecution", a lot would depend on who appoints this person. It is important to ensure that the Prosecutorial Chamber has a pluralist composition and is not composed solely of prosecutors and investigators.

The Commission adopted the Opinion on draft amendments to the Criminal Procedure Code and the Judicial System Act on criminal investigation against top magistrates (CDL-AD(2019)031), previously examined by the Sub-Commission on the Judiciary on 5 December 2019.

11. North Macedonia

Mr Velaers introduced the opinion, requested by the Prime Minister of North Macedonia, on the Law on the Use of Languages, which replaced in 2018 a previous Law on languages from 2008. Compared to the latter, the 2018 Language Law considerably extends the use of the Albanian language in public bodies, to the extent that one may say that bilingualism is introduced in the public sphere even though the Albanian community in North Macedonia represents only 25% of the population.

The draft opinion made four types of observations: firstly, it criticized that a shortened procedure was chosen to pass such an important law entailing a politically sensitive and very complex reform of language policy and that the Law was prepared and adopted without effective public consultation. Secondly, the draft opinion assessed – generally positively – the Law in the light of European standards on the protection of minority rights. Many provisions of the Law went beyond the minimum European standards and the draft opinion welcomed the

willingness of the authorities of North Macedonia to improve the linguistic situation of communities. However, the draft opinion had to make three critical remarks: 1) Depriving non-citizens of the linguistic rights recognized to citizens belonging to communities has to be justified in the light of the principle of non-discrimination. 2) Several provisions of the Law imply that citizens are obliged to use minority languages, which constitutes a violation of the right to free self-identification under the Framework Convention for the Protection of National Minorities. 3) Pursuant to the Law, it is up to the municipal councils to decide on the use in public bodies of the languages spoken by less than 20% of the population. This does not comply with the Framework Convention. Moreover, the total discretion left to the municipal councils in this area might result in a very inconsistent implementation of the Framework Convention, which can hardly be deemed to be in compliance with the principle of non-discrimination. 3) The draft opinion drew attention to the uncertainties regarding the meaning and scope of certain provisions of the Law. Mr Velaers underlined that it was not always clear which provisions of the Law apply only to the Albanian language, which ones also apply to other community languages and which legal entities are covered by the linguistic obligations stemming from the Law.

Mr Velaers highlighted that the most important observation of the draft opinion pertains to the implementation of the Law. In certain areas, the Law goes too far by imposing unrealistic legal obligations on both the administrative and judicial public institutions. Mr Velaers reminded that the Council of Europe bodies had already repeatedly criticized the poor and partial implementation of the 2008 Language Law due to the lack of qualified interpreters and translators and insufficient language skills of civil servants. Then, he underlined that compared to the 2008 Language Law, the 2018 Language Law imposes much heavier obligations on the public institutions. For instance, all the administrative proceedings before central institutions will be conducted in both Macedonian and Albanian if an Albanian speaking citizen who participates in the proceedings so requests. Moreover, the Law implies that the communication between civil servants would be in both Macedonian and Albanian languages if one of the participants of the communication is an Albanian speaker. As for the judiciary, all judicial proceedings before courts and public prosecutors – no matter where the institution is located – will have to be conducted in Macedonian and Albanian if one of the participants in the proceedings (parties, judges, prosecutors, etc.) is an Albanian speaker. A failure to ensure translation and interpretation required by the Law throughout the proceedings constitutes a ground for reversal of a judicial decision and for imposing severe pecuniary sanctions. Mr Velaers continued by pointing out that almost all interlocutors the Venice Commission delegation met in Skopje confirmed that the full implementation of this Law would require many years of preparation, significant financial and human resources and should the Law immediately be applied, it would adversely affect the functioning of the public administration and considerably slow down the functioning of the entire judicial system. The draft opinion therefore recommends limiting the obligation to use the Albanian language to written official communication or postponing its entry into force until proper implementation of this obligation appears realistic. The draft opinion also recommends abandoning the provisions of the Law regarding the bilingualism in judicial proceedings and taking the necessary measures to ensure the effective enforcement of the linguistic requirements of the 2008 Language Law, which recognizes the right to use Albanian in judicial proceedings only to the parties thereof.

Finally, the draft opinion advised postponing the enforcement of pecuniary sanctions until the Law is amended to provide legal certainty, to reduce the amounts of fines, which are found by the rapporteurs to be very high, to extend the difference between minimum and maximum amounts of fines, to introduce the element of fault and the principle of proportionality therein.

Mr Bujar Osmani, Deputy Prime Minister of North Macedonia, began his speech by expressing the gratitude of his government for the excellent co-operation with the Venice Commission. He underlined that especially, in the last three years, the Venice Commission's opinions had been

a *sine qua non* condition in the process of building strategies and adopting the laws in the area of the judiciary, which had indeed increased the credibility of the Commission in the country.

Mr Osmani expressed the view that the Law does not amount to any breach of the constitutional provisions since the Constitution itself delegates the power to regulate the use of languages to the legislator. In this regard, he stressed that Article 7 of the Constitution, which is the constitutional basis for the 2018 Language Law, provides for the minimum standards for the use of the official language other than Macedonian – that is to say Albanian – and its paragraph 5 delegates to the legislator the power to legislate for a wider scope of application of the Albanian language by stipulating that “in the organs of the Republic of North Macedonia, any official language other than Macedonian may be used in accordance with the law”.

Mr Osmani also pointed out that there had been long discussions on the 2018 Language Law and the legislative period for its adoption lasted for a period more than eighteen months. Mr Osmani acknowledged that some issues regarding the financial framework and the pecuniary sanctions covered by the Law are to be further analyzed. However, he stated that the government was fully aware of the obstacles in terms of the financial and human resources necessary to implement the Law but had also the full capacity to mitigate them.

The draft opinion was adopted with some amendments taking into consideration the comments received from the government of North Macedonia and a suggestion made by Mr Newman.

The Commission adopted the opinion on the on the Law on the Use of Languages (CDL-AD(2019)033), previously examined at the joint meeting of the Sub-Commissions on National Minorities, on Federal and Regional State and on Fundamental Rights on 5 December 2019.

12. Republic of Moldova

Amicus curiae Brief on the Law on the Prosecutor’s Office

Mr Hunt introduced the Amicus Curiae Brief, requested by the President of the Constitutional Court of Moldova for a pending case before the Court in which some MPs are challenging the constitutionality of recent amendments to the Law on the Prosecutor’s Office.

The Commission had been asked whether the amendments to the Law on Prosecutors regarding the preselection, appointment and removal of the interim General Prosecutor or a new General Prosecutor are apt to affect the competence of the Superior Council of Prosecutors as a constitutional authority which guarantees the principle of the independence and impartiality of the prosecutors.

The brief stressed that international standards do not require a country to have a prosecutorial council and do not require the SCP to appoint the PG single-handedly without the involvement of other bodies. The mere involvement of the newly established Committee under the authority of the Ministry of Justice before the SCP does not necessarily bring an unacceptable element of politicisation.

From the national constitutional perspective, however, the Constitution of Moldova goes beyond what is required by international standards by prescribing the powers of the SCP in the process of appointment and removal of the PG. While this is a matter for the Constitutional Court and not for the Venice Commission, any redistribution of decision-making powers which substantially affects the constitutional mandate of a given body requires a constitutional amendment, to avoid compromising the purpose of creating such a body at the constitutional level.

The second question concerned the changes to the composition of the SCP by providing for a majority of non-prosecutors and making the Minister of Justice a member.

From the national constitutional perspective, 7 out of 15 members of the SCP are still prosecutors, and it seems difficult to dispute that this constitutes “a substantial part” of the SCP. The composition of the SCP remains sufficiently pluralistic and with a sufficient representation of prosecutors.

From the viewpoint of international standards, it is crucial that sufficient autonomy must be ensured to shield prosecutorial authorities from undue political influence. The balance of power on the SCP after the amendments is in line with previous VC recommendations. Nor is there any standard against the direct involvement of the Minister as a member of the SCP. The presence of the Minister in the SCP therefore does not seem objectionable.

Finally, the Commission had been asked whether it is “compatible with European good practices” for a law to stop a pending selection process for the General Prosecutor organised by the Superior Council of Prosecutors and to organise a new selection process under the new rules established by the new law.

The brief pointed out that legislative interference in a constitutional appointments process for ad hominem reasons could impinge on the constitutional division of labour between the legislator and the SCP. On the other hand, legislative intervention in a pending procedure which is grossly unfair, inefficient or discriminatory may be justified. It is for the Constitutional Court to decide whether the legislative intervention was justified by weighty considerations or public interest or pursued ulterior motives.

The Commission Commission adopted the Amicus Curiae brief for the Constitutional Court of the Republic of Moldova on the Amendments to the Law on the Prosecutor's Office (CDL-AD(2019)034), previously examined by the Sub-Commission on the Judiciary on 5 December 2019.

Amicus curiae brief on the criminal liability of constitutional court judges

Ms Simackova presented the draft *amicus curiae* brief on the criminal liability of constitutional court judges, requested by the President of the Constitutional Court of the Republic of Moldova. The brief replied to the three questions raised by the President of the Constitutional Court with a comparative law analysis.

The brief found that constitutional court judges should be protected by functional and not general immunity. As constitutional court judges deal with fundamental constitutional questions and politically sensitive issues, failures performed intentionally by these judges in the exercise of their functions, with deliberate abuse, may give rise to disciplinary actions, but should only give rise to penalties, criminal responsibility or civil liability in exceptional cases of extreme deviation from principles and standards of the rule of law and constitutionality.

Although ordinary crimes should be dealt with by the relevant competent court, only the Constitutional Court should decide on the disciplinary liability of its judges in the exercise of their judicial functions. This functional immunity continues to apply to the activities carried out by the constitutional court judge during the exercise of his or her judicial functions in his or her term of office, after the judge's term of office has ended.

As Constitutional Court decisions or judgments are final, reviewing them should be an exception and carried out by the Constitutional Court itself. This task should not be given to any

other public authority, as this would compromise the independence of the Constitutional Court. An internal reexamination (reopening) procedure of the Constitutional Court would be needed rather than a review procedure by other public authorities such as Parliament or the Supreme Court. When there is no such possibility, and if this is warranted in substance, a constitutional amendment may be necessary to overcome a Constitutional Court judgment that was adopted involving a criminal act of one of the Court's judges.

The Venice Commission adopted the *amicus curiae* Brief for the Constitutional Court of the Republic of Moldova on the criminal liability of constitutional court judges (CDL-AD(2019)028).

13. Bosnia and Herzegovina

Mr Scholsem explained that the draft opinion had been prepared in co-operation with the OSCE/ODIHR at the request of the PACE Monitoring Committee. The opinion covers twelve separate laws: the single act of the Republika Srpska, the laws of each of the ten Cantons of the Federation of BiH; the law of the Brčko district. It also examines a draft law prepared by the FBiH in January 2018, still in preparation, and a draft law of the Republika Srpska which was withdrawn from the parliamentary agenda in view of the negative public perception and lack of public support.

During the meetings in Sarajevo, a number of cantonal representatives claimed that adopting legislation in the field of freedom of assembly is within the exclusive competence of the cantons and that the Federation does not have the power to adopt legislation in this field under the Constitution of the Federation. The Venice Commission and the OSCE/ODIHR reiterated their findings in the 2010 Joint Opinion on the Act on Public Assembly of the Sarajevo Canton that under the Constitution of the Federation, guaranteeing and enforcing human rights falls within the joint responsibility of the federal and cantonal authorities. The Commission concluded that in the end, it is the duty of the Constitutional Court of the Federation of Bosnia and Herzegovina, whose primary function is to resolve disputes between cantons and between them and the Federation, to decide on the distribution of legislative competences in this field. For the Commission, however, it is evident that the adoption of a law at the Federation level appears to be the most effective way of harmonising the various laws on the right to freedom of assembly in the Federation. This would also provide clarity and uniformity in the implementation.

The draft opinion reiterated the main recommendations in the 2010 Opinion, namely that the national legislation should clearly articulate three main principles: - the presumption in favour of holding assemblies; - the state's duty to protect peaceful assembly and – proportionality. Moreover, the laws and draft laws under consideration should provide a single definition of "public assemblies" which would cover all forms of gathering for "non-commercial common expressive purposes". The regulation of income-generating "commercial" gatherings, which do not fall in the scope of the right to freedom of assembly, should be excluded and be addressed in a separate law. In addition, spontaneous assemblies, as a means of immediately responding to some incidents should be explicitly recognised in the laws and a clear exception should be provided for this type of assemblies concerning the notification requirement. Concerning the notification procedures, the required information should be limited only to what is justified by the necessity to enable the authorities to make arrangements to facilitate and protect public assemblies and protests; and it should be sufficient for the organisers to notify one single authority (not multiple authorities).

The draft opinion also concluded that the responsibility of the organisers should be limited and the provisions which require the organisers and monitors to assume some form of law enforcement duties, such as ensuring security, should be reconsidered. In particular, the

organisers should not be held liable for the damage caused by the participants of an assembly.

Any content-related prohibition grounds which are not limited to actual incitement to unlawful conduct, violence or armed conflict and which interfere with the expressive purpose of assemblies should be excluded. Notably, the prohibition of an assembly that has been held without proper notification should be excluded. Lastly, the provisions which impose blanket restrictions on the location and time of assemblies should be removed.

The Commission adopted the Joint Opinion on the legal framework governing the right to freedom of assembly in Bosnia and Herzegovina (CDL-AD(2019)026), previously examined by the Sub-Commissions on National Minorities, on Federal and Regional State and on Fundamental Rights on 5 December 2019.

14. Information on constitutional developments in observer States

Argentina

Mr Dalla Via informed the Commission that on 27 October 2019 presidential, parliamentary and several local elections had taken place in Argentina. The National Electoral Court had addressed several challenges in the preparation of these elections.

Priority was given to compliance with political party financing rules. The Court had been assisted by a team of expert auditors. Over 20,000 sanctions had been applied and were being implemented by the Public Prosecutor, the Anti-Corruption Office, the Financial Information Unit and other competent federal and local bodies. In order to maintain a level playing field among candidates, the role of social network and digital technologies was crucial. The NEC had established, based on the Mexican experience, an Account and Profile Register of political groups and candidates, in order to try and certify the authenticity of the sources of information. It had also promoted public awareness, including through a public event co-organised by the Venice Commission in May 2019. An Act of Digital Ethics Commitment was signed by many Argentinian institutions and organisations and by Google, Facebook and Twitter. A debate among presidential candidates, as required by the new law, was successfully organised by the NEC. Efforts towards achieving gender equality on the basis of the 2017 law were pursued. The NEC intended to continue to pursue these goals and counted on the continued co-operation with the Venice Commission.

Japan

Ambassador Takeshi Akamatsu, Permanent Observer of Japan to the Council of Europe, noted that the Venice Commission and Japan share the values of the rule of law, democracy, and human rights. He updated the Commission on the developments in the Supreme Court of Japan, which is less active in constitutional matters than some of its European counterparts, but which occasionally provides interpretation of the Constitution when it examines cases *in concreto*. In 2015, the Supreme Court examined the question of disparity in the value of votes in different electoral constituencies. It concluded that this disparity was discriminatory but did not void the 2014 elections. The Supreme Court invited Parliament to make changes to the electoral apportionment. In the 2017 judgment the Supreme Court returned to this question and evaluated positively the efforts made by Parliament to change the rules, although some disparity remained. Several judges expressed dissenting opinions, and this question is likely to return to the agenda of the Supreme Court. This is an example of the institutionalization of the rule of law in Japan. The 2017 judgment will be transmitted to the Venice Commission Secretariat for inclusion in the Bulletin and in the CODICES Database.

15. Information on constitutional developments in other countries

Spain

Professor Jesus Silva from the University Pompeu Fabra (Barcelona) informed the Commission about a recent judgment of the Criminal Chamber of the Supreme Court of Spain of October 2019 in the criminal proceedings regarding 12 members of the regional government of Catalonia. This case was related to the events of September-October 2017, namely the so-called "referendum on the independence" of Catalonia organized by the regional authorities, which was associated with actions of resistance to the police forces, which had been sent to the ballot centers to prevent the voting process. 9 of the accused were convicted of the crime of sedition, some of them were found guilty of the misuse of public funds (spent on organizing the "referendum"), and disobedience to the decision of the Constitutional Court (which banned the referendum of October 2017). But all accused were acquitted of the charges of "rebellion". "Rebellion", under Spanish criminal law, involves the use of a very specific kind of violence, which was absent in the case of the 12 defendants. Sedition, by contrast, is a crime against public order, but not against the Constitution. The defendants' lawyers submitted that the actions of the accused had been justified by the right to self-determination and the right to protest. The Supreme Court rejected this argument: while citizens may protest against the authorities, none of the ordinary citizens was convicted of sedition. By contrast, public officials cannot use this right as a defense if they organize riots on the streets and resist executing decisions of the Constitutional Court. The most severe sentence was 13 years of imprisonment with life disqualification from holding any public function. Others were sentenced to fines or shorter sentences.

Several participants took the floor and asked questions, in particular concerning the possibility of an appeal to the ECtHR, about cases of those members of the regional government who left Spain and who are now under the European arrest warrant, and about the role of the CJEU in those matters, as well as about the proportionality of sanctions imposed on the public officials in relation to the "referendum".

United Kingdom

Mr Otty informed the Venice Commission about the recent key developments concerning Brexit. These are: the extension formally sought from the EU by the Prime Minister (PM) of the Article 50 process, as required by legislation passed by Parliament – which was granted up to 31 January 2020 or earlier if a deal can be agreed and ratified; the PM's new deal, which gained the approval of the majority in Parliament and that general elections are scheduled for 12 December 2019. The three principal parties have very different positions on Brexit: the Conservative Party supports the PM's deal and wants to leave the EU on 31 January 2020; the Liberal Democrats support the revocation of Article 50 or insist on a second referendum and the Labour Party supports the negotiation of a new deal with a closer alignment to the EU followed by a second referendum (extended to 16-18 year olds and EU citizens with permanent residence in the UK) on these options and on remain.

As regards the constitutional arrangements of the UK: the Conservative Party's manifesto has proposed setting up a Constitution, Democracy and Rights Commission to look into the relationship between government, parliament and the courts and the functioning of the royal prerogative. If this is done properly, it would be akin to a constitutional audit and could be a beneficial development. However, a more troubling assessment would be appropriate if this is done as a result of government not liking to lose high-profile litigation. The Conservative Party's manifesto is silent on the European Convention on Human Rights and the place of the UK in the Council of Europe. The Liberal Democrats and the Labour Party, on the other hand, have both pledged to champion the Human Rights Act and the European Convention on Human

Rights. Whether this will take the UK further down the road to a written constitution remains to be seen.

Discussions revolved around Brexit's effect on the issue of Scottish independence and the difficult situation in Northern Ireland, where paramilitary activity has resurfaced; how the Supreme Court's judgment in *R (on the application of Miller) v. The Prime Minister and Cherry v. Advocate General for Scotland* was received (there were divided views, however most of them were positive). Discussions then touched upon how the man in the street perceives the Brexit process and the concern about misleading information surrounding the process and finally on whether the UK intends to leave the Council of Europe and the ECHR system, which is not on the table for the time being.

16. Co-operation with other States

Georgia

Mr Markert recalled that the Venice Commission had recommended in its Opinions on constitutional reform in Georgia that the country should move from a mixed to a proportional electoral system. While parts of the governing party resisted this proposal, a compromise had been reached and the Constitution provided that this change should not take place with respect to the upcoming parliamentary elections in 2020 but only for subsequent elections. Following public protests on an unrelated issue earlier in the year, the governing party had promised to change this provision and to introduce the proportional system with effect for the next elections. However, when parliament voted on this proposal, the necessary three-fourths majority for the constitutional amendment was not reached. This led to new protests and tensions within society.

Following an initiative by the EU Delegation in Tbilisi a meeting between the majority and the opposition was organised on 30 November by the Speaker of parliament in order to explore possibilities for a compromise. Mr Markert participated together with Mr Barrett in the meeting on behalf of the Venice Commission. The opposition made two demands: when distributing seats in the proportional part of the election, following the German practice, the seats already gained by parties in the majoritarian part of the election should be taken into account. As regards the majoritarian part, multi-member constituencies should be introduced with voters having a single non-transferable vote. The Venice Commission delegation took the position that the so-called German model was welcome as a step towards a proportional system but that its constitutionality could only be assessed by the Constitutional Court. A constitutional amendment explicitly allowing it seemed the best solution. The majority stated that the German model was unconstitutional and any constitutional amendment unrealistic. By contrast, multi-member constituencies were constitutional.

It was expected that further meetings between the majority and the opposition on this topic would take place.

Kazakhstan

Mr Talgat Donakov, Chair of the High Judicial Council of Kazakhstan, informed the Commission that the recommendations of the Venice Commission's 2018 Opinion on the Concept Paper on the reform of the High Judicial Council had been taken into account. In February 2019 a new law had been adopted: now judicial members of the HJC are to be elected by the general assembly of all judges. Specific grounds for the termination of mandate of the members of the HJC is now provided by the law. Salaries for the lay members of the Council representing other judicial professions were fixed at a high level. More generally, the salaries within the judiciary were raised. The use of the lie detector in the recruitment procedures is not henceforth mandatory in all cases, while it still may be used on

a case-by-case basis. Some of the proposals of the Venice Commission are put into the secondary legislation (for example, the system of "cumulative points" obtained at several stages of the recruitment competition is introduced; some excessive requirements of the qualification exam have been removed). Various bodies of judicial governance now have more pluralistic composition. The activities of the Council are undergoing an evaluation by the international experts. The transformation of the Council into a key institution of the judiciary of Kazakhstan is continuing.

Mr Rogov praised the Commission for its support of the legislative reforms in Kazakhstan and informed the Commission about the book "Kazakhstan and the Venice Commission: for Democracy through the Law", published by the Constitutional Council of Kazakhstan and the Foundation of the First President of Kazakhstan.

Mr Bakyt Nurmukhanov, Secretary General of the Constitutional Council of Kazakhstan, informed the Commission about the opening of the Council of Europe's office in Kazakhstan. The Constitutional Council of Kazakhstan will preside, until 2021, the association of Asian constitutional courts and equivalent institutions. The 4th Congress of the Asian Association will be held in Nursultan in August 2020. This Congress is a part of the celebrations dedicated to the anniversary of the Constitution of Kazakhstan. Mr Nurmukhanov invited the Venice Commission to participate in this event. Moreover, the Constitutional Council chairs the Eurasian Association of the constitutional review bodies, which met for the last time in May 2019 in Minsk.

17. Information on Conferences and Seminars

7ème Atelier interculturel de la Démocratie, Les Conseils supérieurs de la magistrature et l'indépendance du pouvoir judiciaire, Strasbourg, 28-29 octobre 2019

Mme Bazy-Malaurie rappelle que le programme de ces ateliers a été conçu en 2012 comme l'un des projets de coopération avec les pays du sud de la Méditerranée. Ces ateliers sont des lieux d'analyse et d'échange des pratiques et des expérience partagées entre les institutions des Etats d'Europe et du monde arabe. Les présentations faites lors de l'atelier ont donné lieu à des échanges spontanés et souvent animés. Le 7ème atelier avait pour thème les conseils supérieures de la magistrature et l'indépendance du pouvoir judiciaire. Il a réuni plusieurs pays du sud de la méditerranée et d'Europe et en particulier des représentants du conseil consultatif des juges européennes et du conseil consultatif des procureurs européens.

Lors de l'atelier l'accent a été mis sur les conseils en tant qu'organismes aptes à assurer l'indépendance et le bon fonctionnement du système judiciaire. Ces dernières années des pays participants à l'atelier ont mené à bien des réformes qui visaient à restructurer les organes de gouvernance du pouvoir judiciaire. Le partage au cours de l'atelier a permis de faire assortir des principes importants dans ce domaine : 1) s'agissant du cadre juridique, il est nécessaire que les principes de bases soient définis au niveau constitutionnel. L'accent doit être mis également sur la mise en œuvre. 2) La tendance actuelle est le renforcement des conseils en matière de nomination/promotion et discipline des juges. Toutefois, il a été également souligné lors de l'atelier que le corporatisme et les influences politiques doivent être évités. Même lorsque les juges ont la majorité dans la composition des conseils, le rôle très positif des personnalités extérieurs dans ces conseils a été souligné. 3) Les relations des conseils avec les pouvoirs législatif et exécutif : les équilibres sont très difficiles à trouver alors qu'en fait un dialogue est toujours nécessaire entre les institutions.

D'autre sujets tels que la nécessité des ressources suffisantes pour le pouvoir judiciaire, la bonne administration des tribunaux et de leurs personnels ont été abordés. Plusieurs

participants ont affirmé que ce type de rencontre permet aux conseils respectifs de préparer les futures reformes et d'identifier les domaines de futures coopérations avec leurs paires.

10th UniDem Med Regional Seminar, Leading Innovation in the Civil Service: from Rule of Law Standards to Leadership, Amman, 4-6 November 2019;

Ms Kjerulf-Thorgeirsdottir explained that the 10th UniDem Med Regional Seminar had been organised by the Venice Commission in co-operation with the Prime Minister of Jordan and with the Institutional Performance and Policy Department and the General Personnel of Palestine.[4] The Seminar was the result of extensive co-operation with Jordan and Palestine which was a good example of the real impact of UniDem in terms of co-operation on the issues of the modernisation of the civil service of the Southern Mediterranean. The Jordanian and Palestinian authorities expressed their readiness to deepen co-operation with the Venice Commission and the Council of Europe on issues related to the rule of law. The discussion at the Seminar revolved around the importance of the public service's respect for the rule of law in ensuring the stability of reforms and improving citizens' trust. Integrity, transparency, anti-corruption measures, evaluation of civil servants and e-governance were among the themes discussed by the participants. The Jordanian authorities requested the Venice Commission's support to develop training courses on the implementation of the rule of law principles in public administration.

XIVth Inter-American Meeting of Electoral Management Bodies, Panama City, 13-14 November 2019

Mr Vargas Valdez informed the Commission that the meeting held in Panama City had been co-organised by the Electoral Tribunal of Panama and the Organization of American States.

Mr Vargas Valdez also confirmed the organisation of the first inter-continental conference of electoral management bodies in 2020 in Mexico, which will gather representatives of electoral management bodies from Europe and the Americas. This exceptional event will be co-organised by the National Electoral Institute and the Electoral Tribunal of the Federal Judiciary of Mexico, the Organization of American States and the Venice Commission. The exact dates and venues will be communicated in due course.

IXth International Congress of Comparative Law, Legal Values in the Comparative Law Focus, Moscow, 2-3 December 2019

Mr Helgesen informed the Commission about the IXth International Congress of Comparative Law, held at the Institute of the Legislation and Comparative Law in Moscow on 2-3 December 2019, with the support of the Director of the Institute, Ms Taliya Khabrieva, and Mr Anatoly Kovler. The title of this conference was "The Legal Values in the Comparative Law Focus". There were over 400 participants from 15 states, several current and former members of the Venice Commission attended. The Institute builds bridges between the Venice Commission and the Russian legal community, especially young scholars. Some recent publications of the Institute related to the Venice Commission were presented at the Congress. Mr Helgesen spoke about the Venice Principles on the ombudsman institutions.

Mr**.** Mathieu briefly explained that in his presentation on "common values" as a factor cementing the political society, he had stressed the necessity to define the interrelation between "national" values and "common" values.

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[4] This designation shall not be construed as recognition of a State of Palestine and is without prejudice to the individual positions of Council of Europe member States on this issue.

18. Report of the meeting of the Council for Democratic Elections (5 December 2019)

Mr Kask informed the Commission that the Council had examined a revised draft of the report on election dispute resolution, in view of the adoption of the final version of the report by the Commission in 2020. It had taken note of the work of the Congress on local referendums, to be co-ordinated with the revision of the Code of Good Practice on Referendums, as well as of the situation in Georgia (possible revision of the electoral system for the 2020 elections) and in Turkey (appointment of some mayors instead of those elected and dismissal of mayors). It had also taken note of the activities of the OSCE/ODIHR in the electoral field.

The Report on the Inclusion of a not internationally recognised Territory in a State's Nationwide Constituency for Parliamentary Elections was dealt with under item 9 above.

19. Other business

Ms Granata-Menghini recalled that the Venice Principles had been endorsed by the Parliamentary Assembly in October 2019. PACE had also adopted Recommendation 2163(2019) whereby it recommended that the Committee of Ministers "consider establishing a mechanism of appropriate composition and mandate to which the Council of Europe member states could regularly report on the situation and activities of their ombudsman institutions, including the state of implementation of the Venice Principles". On 16 October 2019, the Committee of Ministers adopted Recommendation CM/Rec(2019)6 of the Committee of Ministers to member States on the development of the Ombudsman institution.

The Committee of Ministers had now invited the Venice Commission to provide comments on Assembly Recommendation 2163 (2019). The Commission could encourage the Ombudsman institutions of its member States, also through the assistance of the different world and regional associations of Ombudsman Institutions with which the Commission maintains active co-operation, to seek the Commission's opinion on any law or constitutional and/or legislative amendments affecting them. It would assess these constitutional and legislative texts against the background of the Venice Principles and of the relevant Recommendations of the Committee of Ministers, notably CM/Rec(2019)6.

The Commission could recommend that pending the possible establishment of a specific reporting mechanism as recommended by PACE, the Committee of Ministers should hold thematic debates, at regular intervals and/or whenever necessary, on the situation and activities of Ombudsman institutions, including on the state of implementation of the Venice Principles, in particular in the light of such Commission's opinions.

The Commission adopted the Comments on PACE Recommendation 2163 (2019) on Ombudsman İnstitutions in Europe - the Need for a Set of Common Standards (CDL-AD(2019)035).

Ms Granata-Menghini also informed the Commission that the date of the celebration of the thirtieth anniversary of the Commission was now fixed at 8 October 2020. It would take place in Palazzo Ducale, in the presence of the President of the Italian Republic. The Plenary Session would take place on 9 October 2020 at the Scuola Grande di San Giovanni Evangelista as usual while sub-Commission would take place on 7 October at a location to be defined.

20. Dates of the next sessions

The date of the 2020 sessions were confirmed as follows:

122nd Plenary Session	20-21 March 2020
123rd Plenary Session	19-20 June 2020
124th Plenary Session	9 October 2020
125th Plenary Session	11-12 December 2020

The Thirtieth Anniversary will be celebrated on 8 October 2020.

The meetings of the Sub-Commissions as well as the Council for Democratic Elections will take place the day before the Plenary Session.

Link to the list of participants