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(VENICE COMMISSION)

COMMISSION EUROPEENNE POUR LA DEMOCRATIE PAR LE DROIT

(COMMISSION DE VENISE)

126th PLENARY SESSION
(online)
19-20 March 2021

126e SESSION PLÉNIÈRE
(en ligne)
19-20 mars 2021

DRAFT SESSION REPORT / PROJET DE RAPPORT DE SESSION

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http://www.venice.coe.int e-mail : venice@coe.int
F-67075 Strasbourg Cedex Tel : + 33 388 41 30 48 Fax : + 33 388 41 37 38.

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Due to the Covid-19 pandemic, the 126th Plenary Session was held online.

1. Adoption of the Agenda

The agenda was adopted without any amendments (CDL-PL-OJ(2021)001ann).

2. Communication by the President

The President, Mr Gianni Buquicchio, welcomed the new Members of the Venice Commission, as well as special guests and delegations and referred to his recent activities as set out in document CDL(2021)008.

The President invited the Commission to observe one minute of silence in memory of Mr Alain Lancelot, former substitute member of the Venice Commission in respect of France; Mr Franz Matscher, former member of the Venice Commission in respect of Austria; and Mr Silvano Longhin, warden of the Scuola Grande di San Giovanni Evangelista.

The President moved on to congratulate Ms Marta Cartabia, member of the Venice Commission in respect of Italy, on her new appointment as Minister of Justice of Italy, and Mr Ioannis Ktistakis, substitute member of the Venice Commission in respect of Greece, on his election as judge in respect of Greece at the European Court of Human Rights. Mr Ktistakis addressed the Commission expressing his satisfaction of his experience on the Commission.

The President further informed the Commission about a new diploma on the rule of law , which had been established by the University of Strasbourg in co-operation with the Bulgarian authorities, and encouraged the Commission to support it.it.

President Buquicchio finally welcomed a very dense agenda with numerous important opinions and guests; he reminded the Commission that pursuant to Articles 3a2 and 13 of the Rules of procedure, national members and members who presented a conflict of interest were required not to take part in the voting and to exercise restraint during the discussions of relevant opinions.

3. Communication from the Enlarged Bureau

The Commission was informed on the discussions which took place at the online meeting of the Enlarged Bureau on 18 March 2021.

The Commission was called on to decide on the procedure to be followed for the upcoming elections, in December 2021, of the Commission's President, Vice-Presidents, members of the Bureau and all the other Commission's offices, for a two-year term.

The Enlarged Bureau proposed as follows:

- Pursuant to Article 6.1b of the Rules of Procedure, the elections would be prepared by a "Committee of wise persons" elected by the Commission, on the proposal of the Enlarged Bureau. Such election would take place at the 127th Plenary Session (2-3 July 2021).The Wise Persons may be full or substitute members who are not interested in any of the positions and offices of the Commission for the next term (December 2021-December 2023). Candidate-Wise persons were invited to manifest themselves to the Secretariat before the July Session. The number of wise persons would be decided by the Enlarged Bureau. The Commission would then appoint the Wise Persons.

- Between July and October 2021, members interested in being considered as candidate for any position would be invited to contact the Wise Persons. The Wise Persons would decide on the procedure to be followed for the election of the new President. The election to the other offices would take place according to the usual, consensual procedure.

- At the 128th Plenary Session (15-16 October 2021), candidates for the position of President would have the possibility of presenting their programme to the Plenary.

- At the 129th Plenary Session (10-11 December 2021), the Commission would proceed:
  - At the opening of the session, with the election of the President;
  - On the second day of the session, with the election to the other positions.

Mr Grabenwarter and Mr Kask expressed their availability as Wise Persons.

The Commission approved the procedure for the December 2021 elections to the Commission's offices.

Mr Buquicchio informed the Commission of his intention to resign as President at the July Session, while he would remain at the disposal of the Commission. Numerous members expressed their gratitude to Mr Buquicchio for the exceptional guidance he had provided to the Commission for so many years, and their hope to be able to count on his continued participation in the Commission's work. Mr Grabenwarter stressed the need to ensure a smooth transition and proposed that, after his resignation, Mr Buquicchio be nominated as Special Representative of the Venice Commission. The Commission approved this proposal.

The Commission was informed that the Enlarged Bureau supported two requests for urgent opinion, both filed by the Speaker of the Verkhovna Rada Mr Dmytro Razumkov on 15 March 2021.

The Commission authorised the preparation of two urgent opinions, to be issued prior to the 127th Plenary Session:

- on the draft law on amendments to some laws of Ukraine on the procedure for electing (appointing) members of the High Council of Justice and on the activities of disciplinary inspectors of the High Council of Justice, and
- on the draft law on draft amendments to the code of administrative offenses and the criminal code of Ukraine regarding the improvement of responsibility for the declaration of inaccurate information and failure to submit a declaration.

The Commission was further informed of the significantly increased number of opinion requests which had been received since the beginning of the year. While this was a very positive sign of the trust which member states and the requesting Council of Europe bodies placed in the Commission, such a workload put a undoubted strain on the Commission's members and especially its Secretariat. In order to ensure the necessary quality of the opinions, and pending solutions notably to increase the human resources of the Secretariat, it would become necessary to limit the involvement of the Commission and of its Secretariat in all non-essential activities, such as the preparation of general reports and participation in conferences.

The Commission decided to focus on the preparation of country-specific opinions and to reduce its involvement in all non-essential activities until further notice.

The Commission was also informed about an initiative pending before the parliament of Armenia to amend the organic law on the Armenian People's Defender, removing the prohibition to lower the financial contribution to the budget of the institution in respect of the previous financial year.

The Commission decided to follow the situation and to consider it again at its 127th Plenary Session.

4. Communication du Secrétariat

Ms Simona Granata-Menghini, following her appointment by the Secretary General of the Council of Europe as Director, Secretary of the Venice Commission as of 1 February 2021, expressed her pride and honour to have been entrusted with this challenging task and her conviction that it was the recognition of the collective commitment and success of the whole Commission and of its Secretariat.

Elle informe ensuite la Commission des détails techniques de connexion à la plateforme Kudo, et explique que les créneaux dans l'ordre du jour ont été déterminés en fonction de la participation des – très nombreux - représentants des autorités et également des membres de la Commission en raison du décalage horaire. Elle remercie les membres de leur disponibilité.

5. Co-operation with the Committee of Ministers

Within the framework of its co-operation with the Committee of Ministers, the Commission held an exchange of views with Mr Ivan Orlić, Ambassador Extraordinary and Plenipotentiary, Permanent Representative of Bosnia and Herzegovina to the Council of Europe, and Mr Spyros Attas, Ambassador, Permanent Representative of Cyprus to the Council of Europe.

Mr Orlić thanked the Venice Commission for its expert assistance in last year's discussions regarding the constitutional and electoral reforms in Bosnia and Herzegovina and noted the importance of the Opinion on the draft Law on amendments to the Law on the High Judicial and Prosecutorial Council, on the agenda of this plenary session, for the ongoing reform efforts in Bosnia and Herzegovina. Mr Orlić stressed that the Venice Commission continues to enjoy a high reputation among ordinary people despite the waning regard of the people for State authorities but also for some of the other mechanisms of the Council of Europe.

Mr Attas stressed that the Venice Commission had played a role in the Council of Europe's endeavour to strengthen and ensure democracy, including during the COVID-19 pandemic. In particular, he emphasised the Committee of Minister's appreciation of the Commission's ability to provide opinions rapidly to States on a wide range of issues. He underlined the Commission's achievements in promoting the effectiveness, independence and impartiality of the judiciary, which in turn enabled the Committee of Ministers to supervise the enforcement of the judgments of the European Court of Human Rights more efficiently.

6. Co-operation with the Parliamentary Assembly

The Commission held an exchange of views with Mr Boriss Cilevičs, Chair of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe (PACE) on co-operation with the Assembly. Mr Cilevičs informed the Commission on selected activities of the Parliamentary Assembly concerning the COVID-19 crisis and artificial intelligence as well as the elections of the Parliamentary Assembly's new Secretary General, Ms Despina Chatzivassiliou-Tsovilis, the new Deputy Secretary General of the Council of Europe, Mr Bjørn Berge, and the new judges of the European Court of Human Rights in respect of Switzerland and Greece. Mr Cilevičs noted the importance of several Venice Commission opinions for recent deliberations of the Parliamentary Assembly, in particular, the Commission's recent opinions concerning Malta, which heightened the impact of the Parliamentary Assembly's interventions in that country. In its deliberations on the situation in Belarus during the upcoming session in April, the Parliamentary Assembly expects to draw on the Venice Commission's opinion on the compatibility with European standards of certain criminal law provisions used to prosecute peaceful demonstrators and members of the "Coordination Council" of Belarus.

7. Co-operation with the Congress of Regional and Local authorities of the Council of Europe

The Commission held an exchange of views with Mr Leendert Verbeek, Chair of the Congress' Monitoring Committee. Mr Verbeek acknowledged the Venice Commission's co-operation with the Monitoring Committee during his tenure. He informed the Commission that at its latest meeting in February, the Monitoring Committee had adopted a report providing effective guidelines to member States on how to use local referendums in line with the Council of Europe's standards, such as the European Charter on Local Self-Government, as well as international standards and best practices. Moreover, the Congress had recently published the second volume of the Human Rights Handbook for Local and Regional Authorities on social rights at the local level. The third volume would be dedicated to environmental rights. Finally, in response to the current pandemic, the Monitoring Committee had developed a report on the implementation of the European Charter on Local Self-Government during times of crisis.

8. Exchange of views with the EU Commissioner for Neighbourhood and Enlargement Negotiation

The Commission held an exchange of views with Mr Olivér Vàrhelyi, European Commissioner for Neighbourhood Policy and Enlargement Negotiation. Mr Vàrhelyi provided an overview of the Venice Commission's accomplishments in the countries under his portfolio and acknowledged the partnership of the European Union with the Venice Commission in developing a common legal space aligned with European standards and practices. He also noted the European Union's role in enforcing Venice Commission standards and recommendations, while stressing the importance that opinion requests be made sufficiently ahead of reforms so as to enable lawmakers to take the Venice Commission's recommendations into account meaningfully.

The President concluded by acknowledging the ways in which the European Union uses its influence on its candidate states in order to ensure that the recommendations of the Venice Commission are heard. He expressed his conviction that through their continued partnership, the European Commission and the Venice Commission could provide efficient assistance to the relevant countries in strengthening the rule of law and in establishing solid domestic regimes for the protection of fundamental rights and the consolidation of democratic institutions.

9. Follow-up to earlier Venice Commission opinions

The Commission was informed on follow-up to the following opinions (see document CDL(2021)012):

Albania: Final Opinion on the revised draft constitutional amendments on the Judiciary (15 January 2016) (CDL-AD(2016)009);

Armenia: Joint opinion of the Venice Commission and the OSCE/ODIHR on draft amendments to the legislation concerning political parties (CDL-AD(2020)004);

Kosovo: Opinion on the "draft law on amending and supplementing the Law no. 03/l-174 on the Financing of Political Entities (Amended and Supplemented by the Law no. 04/l-058 and the Law no. 04/l-122) and the Law no. 003/l-073 on General Elections (Amended and Supplemented by the Law no. 03/l-256)" (CDL-AD(2018)016);

Turkey: Opinion on the suspension of the second paragraph of Article 83 of the Constitution (parliamentary inviolability) (CDL-AD(2016)027);

Turkey: Opinion on articles 216, 299, 301 and 314 of the Penal Code (CDL-AD(2016)002);

Turkey: Opinion on the amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a National Referendum on 16 April 2017 (CDL-AD(2017)005);

Turkey: Opinion on the duties, competences and functioning of the criminal peace judgeships (CDL-AD(2017)004);

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

10. Armenia

Mr Hamazasp Danielyan, Member of Parliament and main Rapporteur on the draft amendments to the Electoral Code of the Republic of Armenia, reminded the Commission of the chronology of the ongoing electoral reform and stressed the inclusiveness of the reform process. He informed that in 2019, the newly elected legislature had started to work on amendments to the Electoral Code and a working group had been established for this purpose, composed of the different political factions. Representatives of the Venice Commission and ODIHR had been consulted as well as representatives of the civil society, the Ministry of Justice and other national institutions. Following the COVID-19 pandemic and the developments in Nagorno-Karabakh, the reform had had to be postponed. The National Assembly had therefore submitted the package of draft amendments to the Electoral Code and other legislation to the Venice Commission and the OSCE/ODIHR on 4 March 2021.

Mr Danielyan further stated that the electoral system, which retained a proportional system removing the existing territorial candidate lists, had been initially accepted by all political factions. Such a system enjoyed a broad popular support, based on a recent opinion poll conducted by the International Republican Institute (IRI). He highlighted other important aspects of the package of amendments, including provisions for a greater transparency in the conduct of elections. The draft amendments also provided for a better representation of women in politics; provisions for holding elections during emergency periods, such as pandemics; improved transparency of electoral processes as a whole and a stronger overseeing of campaign financing.

Mr Danielyan concluded by stressing the importance of receiving the joint opinion of the Venice Commission and the OSCE/ODIHR before the Commission's next plenary session in order to be able to amend the relevant legislation in time, especially in view of early parliamentary elections in 2021.

Mr Kask reminded the Commission of the composition of the team of rapporteurs and experts and that the opinion would be prepared jointly with the OSCE/ODIHR. He indicated that online meetings would be held for the preparation of the opinion. Mr Kask also stressed that the opinion would assess the proposed simplified electoral system as well as the level of consensus of this reform on the Armenian political scene. The opinion would also address the provisions regarding the holding of elections during the pandemic as well as the issue of voters' lists.

The Commission authorised the rapporteurs to issue an urgent opinion on the draft amendments to the Electoral Code and other legislation of the Republic of Armenia prior to the 127th Plenary Session (2-3 July 2021).

11. Belarus

Mr Kuijer presented the draft opinion on the compatibility with European standards of certain criminal law provisions used to prosecute peaceful demonstrators and members of the "Coordination Council," requested by the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe on 21 December 2020. This draft opinion dealt with the authorities' response to the demonstrations following the announcement of the results of the presidential elections held in August 2020.

He explained that the drafting of the opinion had been severely complicated by the initial refusal by the Belarusian authorities to hold an exchange of views with the rapporteurs, resulting in various questions remaining largely unanswered. It was only in the last drafting stages of the opinion that the rapporteurs had received substantive comments from the Belarusian authorities, for which the rapporteurs were grateful. Although the comments were taken into account where appropriate, it would have been preferable to have such information at the early stages of the drafting of the opinion.

The opinion made a deliberate choice in exercising restraint when describing the relevant facts, as the Venice Commission is not a fact-finding body. In the absence of a (virtual) visit with the capital or any written replies by the authorities as to the factual context, the draft opinion limited itself to a timeline of events on which there appeared to be agreement.

The draft opinion took account of the relevant provisions of the International Covenant on Civil and Political Rights, which entered into force for Belarus in 1973, and referred to the interpretative guidance offered by the European Court of Human Rights when applying relevant provisions of the European Convention on Human Rights. Although not a member, Belarus is a candidate country for membership of the Council of Europe as well as an associate member of the Venice Commission. The draft opinion, however, acknowledged that these standards were not legally binding on Belarus.

With respect to the substance of the draft opinion, Mr Kuijer explained that the regulatory framework was characterised by overregulation of the procedural aspects of holding assemblies. Domestic law created a complicated compliance procedure with a rigid and difficult authorisation procedure, while at the same time leaving administrative authorities a very wide margin of discretion for the application of the legislation in force. This could mean that spontaneous peaceful demonstrations or counterdemonstrations are *de facto* prohibited, which the draft opinion referred to as being contrary to international human rights standards.

As regards the application of criminal law provisions, some of the main concerns expressed in the draft opinion were: (1) the criminalisation of *non-violent* demonstrators; (2) the application of certain provisions due to the use of vague notions; (3) the (criminal) responsibility of organisers of a demonstration on account of acts imputable to participants and (4) the severity (and unclarity) of the sentences enshrined in the Criminal Code.

Mr Nikita Belenchenko, Representative of Belarus to the Council of Europe, informed the Venice Commission that presidential elections had taken place in Belarus in August 2020 which had experienced unprecedented pressure as a result of external interference exercised on a sovereign state, notably through demonstrations. Constructive dialogue could not take place due to this pressure exerted by a small minority of the population of Belarus. This internal pressure was coupled with pressure that emanated from outside forces, which included the unfriendly steps taken by the Council of Europe, calling for sanctions and appointing rapporteurs who had reached dubious conclusions on the situation in Belarus. In this respect, Mr Belenchenko underlined the good co-operation with the Venice Commission, a legal body, which took into account the majority of the authorities' comments and corrected factual errors in its draft opinion. This showed that the Venice Commission was ready to engage in a constructive dialogue with Belarus.

Mr Belenchenko went on to explain that there was a dialogue with the population of Belarus on the amendments to the Constitution. In this respect, a Constitutional Commission had been set up to put forward proposals which would be submitted to a referendum. In the time leading up to the referendum, the Constitutional Commission intended to take on board the views of as many stakeholders as possible, including civil society. The National Assembly was in full agreement with this dialogue as legitimising the constitutional and legislative reforms. In this respect, the Venice Commission might be called upon to assist the Belarusian authorities, who were ready to listen to the Venice Commission's advice as a leading authority on constitutional justice.

Mr Buquicchio stressed the importance of a dialogue between Belarus and the Venice Commission, stating that the Venice Commission was at the disposal of the Belarusian authorities for any assistance they may need in the constitutional and legislative reform.

The Commission adopted the Opinion, requested by the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, on the compatibility with European standards of certain criminal law provisions used to prosecute peaceful demonstrators and members of the "Coordination Council" of Belarus (CDL-AD(2021)002), previously examined by the Sub-Commission on Fundamental Rights at its online meeting on 18 March 2021.

12. Bosnia and Herzegovina

Ms Bílková presented the draft Opinion on the Draft Law on amendments to the Law on the High Judicial and Prosecutorial Council (HJPC) of Bosnia and Herzegovina, requested by the Minister of Justice. This draft law responded to the criticism raised against the Law on the HJPC and the actual performance of the HJPC by making certain emergency fixes in the legal framework. As change needed time, this proposal brought targeted amendments to the Law on the HJPC but the Commission expected a comprehensive legal act to be developed by next year and stands ready to support the national authorities in this process. The Draft Law focused on four problematic areas, namely, conflicts of interest and transparency, disciplinary procedures for judges and prosecutors, judicial review of HJPC decisions and removal of HJPC members. The draft Opinion welcomed the explicit rules set out to define the conflict of interest and those related to the Integrity Unit which should be established to check compliance with these rules. It also welcomes that HJPC members may also be subject to disciplinary provisions and the requirement that decisions on appointment needed to be motivated and submitted to judicial review. The draft Opinion also formulated some recommendations. Notably, it noted that some provisions were drafted in a very general manner and needed to be made more precise. Secondly, the lists of disciplinary offences were to be tailored to the different categories. The lists for judges and prosecutors should be maintained with some changes, while a specific list should be drafted for members of HJPC as member of HJPC. Thirdly, decisions of the HJPC needed to be justified and subjected to judicial review. Finally, clearer rules on the functional independence, composition and operation of the Integrity Unit should be provided, including on the role of external experts and how to select them. This draft opinion had the potential of improving the current draft law in preparation of the complete law to be drafted in the course of next year.

Mr Josip Grubeša, Minister of Justice of Bosnia and Herzegovina, thanked the Venice Commission for the opinion and its recommendations as well as for all previous opinions. The Minister announced no objection to the position of the Venice Commission. He acknowledged that the judicial reform, which included the reform of the HJPC, had been going on for several years and testified the diligent and careful work that had been done and which certainly required a more extensive period of time. The overarching goal of BiH was to align to European standards in the interest of whole country, and he expected that the Parliamentary Assembly would support the amendments as they aimed at improving the efficiency of and the trust in the judiciary. The Minister stated that BiH accession to the EU was a key objective contributing to ensuring peace, justice, freedom and security. The proper implementation of the rule of law and alignment with the EU *acquis* was an extremely complex and long-lasting process. The multi-layer structure of the country and the specific cultural and traditional context made it difficult for external observers to grasp the peculiarities of BiH and to understand its difficulties in improving the legal framework. However, this should not be an excuse to avoid achieving the objective to align to European standards and follow the Venice Commission recommendations. The Minister concluded by thanking once more the Commission and ensuring that this draft law is not politically influenced, and it genuinely aimed at improving the performance of the judiciary along the path of the European integration.

Mr Mathieu agreed with the report and its wording. He considered that a general discussion on the matter of liability of judges was called for.

Mr Hamilton welcomed the draft law but emphasised that the Venice Commission expected a fully-fledged reform. A long period of time had elapsed since the last draft law on HJPC had been submitted to the Venice Commission and eventually not adopted. This reform was very limited, and he feared that the adoption of these limited amendments may be used as an excuse for the process to stagnate again for a long time.

Mr Varga agreed with the opinion and referred to Mr Mathieu's point on the responsibility of judges. He stated that even in 2021 it happened, and it was not very rare, that not only politicians but also people, NGOs, and sometimes even the hierarchy of the judiciary, mismatched the professional responsibility of judges on how they decide, with disciplinary responsibility. We should agree that a professional mistake, misinterpreting the law, should not lead to a disciplinary measure because it was a professional mistake. He also stated that that judicial councils were not corporate institutions, they were not there to protect the judges and prosecutors, they worked as did the Ministry of Justice in the past, having the responsibility not towards the electors but towards the whole country.

Mr Bílková thanked the participants for their comments and agreed that the responsibility of judges is a topic for general reflection, but it cannot be discussed in the context of a specific opinion on a certain country. In reply to a question by Ms Bernoussi as to the gender-balance in the composition of the HJPC, she pointed out that there are no criteria in the law, nor for the ethnical composition, and this was also a point of criticism which the Commission hoped would be discussed and integrated within a year in the new law.

Minister Grubeša added that in accordance with the by-law adopted by the HJPC, there must be an equal number of men and women. This was not written in the law but in the by-law, an internal act.

The Commission adopted the Joint opinion on the Draft Law on amendments to the Law on the High Judicial and Prosecutorial Council (HJPC) of Bosnia and Herzegovina (CDL-AD(2021)015).

13. Georgia

Joint opinion on the Draft amendments to the Election Code, the Law on Political Associations of Citizens and the Rules of Procedure of the Parliament of Georgia and Joint opinion on Draft Article 79[1] of the Election Code of Georgia

Mr Frendo underlined that the draft opinion on the Draft amendments to the Election Code, the Law on Political Associations of Citizens and the Rules of Procedure of the Parliament of Georgia recommended reconsidering all the amendments submitted. He stressed that while parliamentary boycotts were a legitimate means of expressing disagreement in political discourse, lengthy boycotts could hinder meaningful parliamentary dialogue and that the place for political interaction and debate was the Georgian Parliament. Mr Frendo thus pointed out that any party must have the space to function properly and engage in dialogue with other political forces in order to avoid tensions that would erode the proper functioning of parliament. Depriving a political party of all public funding was therefore an excessively invasive and disproportionate measure. The total deduction of the salary of a Member of Parliament who failed to attend all sittings without good reason also appeared to be a disproportionate sanction. The draft opinion also raised concerns about the denial of free airtime to parties that did not receive public funding, which appeared disproportionate and unfounded and would further reduce access to the information the public needed in order to make an informed choice in elections.

In relation to the draft opinion on Draft Article 79[1]79 of the Election Code, Mr Alivizatos stressed that the provision under analysis should be reconsidered, as the sanction of de-registering a party on the basis of the foreign nationality of a person acting as its political leader appeared to be a disproportionate measure. He added that the notion of "political leader" was not defined by clear and objective criteria. On the issue of dual citizenship, Mr Alivizatos underlined that clear criteria should be established in law to justify restrictions on the participation of foreigners in domestic political life and that such restrictions could be limited to the establishment of political parties, but not to their membership.

Mr Shalva Papuashvili, First Deputy Chairperson of the Committee of Education, Science and Culture of the Parliament of Georgia underlined that the amendments did not aim to ban the right to boycott sessions but that, rather, they sought to ban cases of "sabotage", which were to be distinguished from acts of boycotts. He stressed that the drafters of the law could agree to lower the financial sanctions. Regarding the salary of Members of Parliament, Mr Papuashvili stated that according to the Rules of Procedures of Parliament, if an MP was not a member of a parliamentary committee, it was presumed that he or she was not fully performing the function of MP and his or her salary should therefore be fully deducted. Additionally, he stressed that the text aimed at avoiding the participation of foreign citizens in election campaigns in order to avoid potential foreign influence on the Georgian political scene, which was a legitimate objective and already partly regulated.

Mr Alivizatos underlined his satisfaction insofar as the Georgian authorities were ready to reconsider the proposed measures. He stressed that it was not the duty of the Venice Commission to suggest specific solutions instead of the legislator.

The Commission adopted the Joint opinion on draft amendments to the Election Code, the Organic Law on the Political Associations of Citizens and the Rules of Procedure of Parliament of Georgia (CDL-AD(2021)008) and the Joint opinion on draft Article 79[1] of the Electoral Code (revocation of party registration) of Georgia (CDL-AD(2021)009), both previously approved by the Council for Democratic Elections at its online meeting on 18 March 2021.

Draft joint opinion on Recent amendments to the Law on electronic communications and the Law on broadcasting

Ms Šimáčková introduced the draft joint opinion of the Venice Commission and the DGI on the recent amendments to the Georgian Law on Electronic Communications and the Law on Broadcasting requested by the Monitoring Committee of the Parliamentary Assembly, assessing two new provisions of the Georgian Law on Electronic Communications, Articles 46 No. 1 and 11. The first one gave the Georgian National Communications Commission (GNCC), as the national regulatory authority, the power to appoint a special manager to electronic communications providers in order to remedy certain unlawful acts conducted by them, enabling the special manager to take control over the particular provider. The second provision introduced immediate enforceability of the GNCC's decisions. A first decision under new Article 46 No. 1 was issued in October 2020 in the case of Caucasus Online, one of the leading communications companies in Georgia to reverse the acquisition of shares by a foreign company. New Article 46 No.1 gave the GNCC the right to appoint a special manager with a large range of powers, such as to appoint or dismiss the company's director and members of the supervisory board, to suspend or restrict the company's rights to distribute profits, dividends and bonuses or to file a lawsuit in court against transactions made within one year before the special manager's appointment. The new concept of the special manager was examined against the requirements of the right to property and freedom of expression under the European Convention on Human Rights (ECHR). the acquisition in question could not be reversed despite the application of new Art. 46 No. 1, and as the provision lacked precision, and the legitimacy and proportionality were not demonstrated.

Furthermore, the provision risked causing a chilling effect on the editorial independence of the broadcasting side of electronic communications operators. While acknowledging the difficult

situation the Georgian legislator was faced with, the draft opinion invited the legislator to re-examinee the two amendments in line with detailed recommendations.

Ms Krisztina Rozgonyi (DGI Expert) explained that Art. 46 No. 1 failed to serve the stated aim to control mergers and acquisitions (Articles 26, 27 Law on Electronic Communications) as the impact of non-notified and/or non-eligible transfers of ownership cannot be mitigated simply by managerial actions. Instead, ownership conditions should have been addressed. Moreover, the protection of critical communication infrastructure and favourable market conditions were best served by the investments of the state in such infrastructure and parallel *ex ante* and *ex post* effective market regulation according to international best practices. Subtle ways of so-called soft censorship created by unfavourable working and operating conditions to the media were well documented attacks on media freedom and should be prevented with high caution. Hence the draft opinion suggested reconsidering the new amendments with the utmost attention to avoid unwanted but dangerous situations of restricting media freedom.

Mr Frendo added that although being mindful of the will expressed by the authorities not to revoke a license, such a method amounted to a *de facto* takeover of a company, having no equivalent in European practice.

Ms Ekaterine Imedadze, Commissioner of the Georgian National Communications Commission explained in detail the aim of new Article 46 No. 1, that was to deal with unlawful acts committed by electronic communications providers in violation of competition law rules, notably the mandatory requirement of notification prior to acquisition of shares. In individual cases, warnings and fines are ineffective and suspending authorisations or cancelling a license may not be desirable, leaving the GNCC without any effective mechanism for the execution of its decisions, thus necessitating the amendments in question.

Mr Nikoloz Samkharadze, Chairman of the Committee on International Relations of the Parliament of Georgia added that the exceptional situation and urgency because of the summer recess of parliament required expedited procedures to prevent similar takeovers. Moreover, he underlined the involvement of all stakeholders in the legislative procedures and changes subsequently made to the law as a result of the dialogue.

The Commission adopted the Joint Opinion of the Venice Commission and of the Directorate General of Human Rights and the Rule of Law (DGI) on Recent amendments to the Law on electronic communications and the Law on broadcasting of Georgia (CDL-AD(2021)011).

14. Kazakhstan

Mr Tanase presented the draft Opinion on the Concept Paper for Improving the Legal Framework of the Constitutional Council (hereinafter, the “Concept Paper”), requested by the President of the Constitutional Council of Kazakhstan on 20 January 2021.The Concept Paper set out Kazakhstan’s intention to strengthen the mechanism for the protection of human rights through a more intensive review of the constitutionality of laws and other regulatory acts. Citizens of Kazakhstan did not have the right to apply directly to the Constitutional Council. A mechanism is provided for the indirect exercise of the rights by citizens through the ordinary courts. However, the potential of this mechanism had not been fully developed. The courts rarely referred cases to the Constitutional Council. One of the main reasons for the current situation was the inadequacy of the current procedural legislation.

The Concept paper proposed to separately highlight the possibility of a motion of the parties in the proceedings to appeal to the Constitutional Council; determine a more detailed procedure for the consideration of a motion by the court; establish new requirements for such motions, in particular, written form, motivation and others; establish by law specific grounds for refusal and the possibility to appeal to a higher instance..

The Venice Commission welcomed the express clarification of the parties' right to request ordinary courts to introduce a referral to the Constitutional Council, as well as the proposals of the Concept Paper to clarify the procedure of execution of the decision of the Council. . However, the Commission made several recommendations, notably to provide that for the ordinary judge (judge a quo) reasonable doubt should suffice in order to challenge the constitutionality of a law or other normative act before the Constitutional Council and to remove the ground of "insufficient data" to refuse a referral by motion of the parties; provide that a referral to the Constitutional Council can be adopted in a lighter form, by reference to the arguments to a motion from the parties, whereas rejections of such motions had to be clearly motivated; to provide for the establishment of chambers within the Constitutional Council to deal at least with admissibility decisions in a written procedure.

Mr Kairat Mami, Chairman of the Constitutional Council of Kazakhstan, thanked the Venice Commission for this draft Opinion. He explained the reforms undertaken by Kazakhstan in the political and legal sphere: a new law on assemblies had been adopted; opposition activities had been legally regulated, the number of citizens for the creation of political parties had been halved; at least 30% of the party lists were now youth and women; the institute of administrative justice would be introduced soon; defamation had been decriminalised; the activities of law enforcement agencies, the Ombudsman and other human rights institutions were being modernised. Mr Mami concluded that the Opinion covered the key issues and expressed the authorities' intention to analyse all the recommendations thoroughly and to take them into account.

The Commission adopted the Opinion on the Concept Paper for improving the legal framework of the Constitutional Council of Kazakhstan (CDL-AD(2021)010).

15. Kyrgyzstan

On 9 November 2020 the Ombudsman of the Kyrgyz Republic, Mr Tokon Mamytov, requested the OSCE Office for Democratic Institutions and Human Rights (ODIHR) to prepare an opinion on the constitutional reform in the Kyrgyz Republic. On 10 December 20202021, ODIHR invited the Venice Commission to prepare a joint opinion.

Ms Nussberger explained that the Joint Opinion focused on the Draft Constitution; however, it did not constitute a full and comprehensive review of the entire constitutional framework of the Kyrgyz Republic. She pointed out that the work on and the adoption of the Joint Opinion should not be considered as any form of endorsement of the process of constitutional reform undertaken in the Kyrgyz Republic. Although the opinion took note of some positive changes in the Draft Constitution, notably the establishment of the Constitutional Court, many provisions regulating the institutional framework and separation of powers, defining the powers and competencies of the President, the Parliament (the Jogorku Kenesh), the Government and the Judiciary, as well as some provisions dealing with human rights and freedoms were not in line with international standards and OSCE commitments. Moreover, the foreseen timeline and procedures leading to the adoption of the constitutional amendments raised serious concerns due to the absence of meaningful and inclusive public consultations and debate in parliament.

The key recommendations of the Joint Opinion were: to ensure that the constitutional reform process allowed for informed, inclusive and meaningful discussions within and outside the Parliament; to review the powers given to the President in order to ensure the separation of powers; to provide stronger oversight capacities to the Jogorku Kenesh, including through committees; to reconsider provisions concerning the Kurultai; to include in the text of the Constitution the main features of the electoral system envisioned for the election of the Jogorku Kenesh; to reinforce the independence of the judiciary from the legislative and executive branches of power; and to revise the provisions pertaining to human rights and fundamental freedoms, avoiding vague wording and language in the formulation of the rights of individuals and the obligations of the State.

Ms Nussberger indicated that the constitutional reform was taking place during the period of *prorogatio*, i.e. the extension of the constitutional mandate, of the current parliament and reminded the Commission that in its *amicus curiae* brief adopted in December 2020, the Commission had stated that the Parliament with such diminished powers, was only allowed to carry out some ordinary functions, whereas it was not allowed to approve extraordinary measures, including constitutional reforms.

Mr Konstantin Vardzelashvili, from the OSCE/ODIHR, added that the Draft Constitution included provisions on recall of MPs which further weakened the position of the legislative power. The proposed powers of the President to single-handedly appoint and dismiss almost the entire administration of the state and/or key office-holders (including the Cabinet of Ministers, Prosecutor General, Ombudsman for Children's rights, etc.) as well as his/her role in the selection and dismissal of judges of the highest (Supreme, Constitutional) and lower level courts should also be reconsidered. Mr Vardzelashvili pointed out that although the Joint Opinion welcomed the re-establishment of the Constitutional Court, provisions ensuring its independence could be further improved.

Mr Tokon Mamytov, Ombudsman of the Kyrgyz Republic, informed the Commission that on 12 March the Parliament had adopted the law on the constitutional referendum to be held on 11 April together with the text of the Draft Constitution. He expressed his doubts as to the possibility to any further revision of the Draft Constitution by Jogorku Kenesh.

Mr Esanu expressed his concern with the content of the Draft Constitution and the reform process in general. In his opinion since the proposal aimed at changing completely the constitutional system, the authorities should find a way to address the main deficiencies of the draft. He expressed his hope that the Parliament would take into consideration the recommendations of the Joint Opinion and review the Draft Constitution after organising informed, inclusive and meaningful discussions within and outside the Parliament. Mr Esanu suggested that the authorities should be duly informed about this position of the Commission. This proposal was supported by the rapporteurs and other members of the Venice Commission.

The Commission adopted the Joint Opinion of the on the draft Constitution of Kyrgyzstan, previously examined by the Sub-Commission on Democratic Institutions at its online meeting on 18 March 2021 (CDL-AD (2021)007).

16. Republic of Moldova

Amicus Curiae brief on three legal questions concerning the constitutional review of the law-making procedures in Parliament

Mr Pinelli explained that the draft *Amicus Curiae* brief was prepared at the request of the President of the Constitutional Court of the Republic of Moldova, Ms Domnica Manole. The Constitutional Court asked the Venice Commission three legal questions: 1) Whether the text "exercises, upon complaint the control of the constitutionality of laws" from article 135 (1) letter a) of the Constitution may be interpreted as it would allow the Constitutional Court to verify the constitutionality of a law in the light of alleged flaws in the procedure for passing it? Is the principle of parliamentary autonomy absolute? 2) Whether the Constitutional Court may verify the constitutionality of the procedure for passing a law in terms of compliance with the rules on parliamentary procedures established by Parliament's Rules of Procedure, which has the status of law, or only in terms of compliance with the rules expressly established by the Constitution? Is there a European consensus on this matter? And 3) Whether there may be established, on the one side, some central elements of parliamentary procedures in the case of passing of laws, the violation of which would lead to finding a law to be unconstitutional and on the other hand some secondary elements of the same procedure the violation of which would not affect the constitutionality of law.

One of the key conclusions of the *Amicus Curiae* brief was that a Constitutional Court may

exercise procedural review of the legislation with reference to the specific rules of law-making entrenched in the Constitution. Many Constitutional Courts went further, and construed general principles contained in the Constitution as implying some specific procedural rules. The Constitutional Court may disregard provisions of the rules of procedure if they deviated from such rules, either directly stated in the Constitution or inferred from the general principles thereof. Furthermore, the *amicus curiae* brief concluded that a Constitutional Court may, at the same time, give a *de facto* effect to certain rules contained in the rules of procedure if it decided that these rules were dictated by the Constitution. However, it should not try to enforce each and every rule contained in the rules of procedure, because the Constitution may sometimes only set a minimal standard and let the legislator choose amongst different possible ways of putting this standard into practice. If a procedural fault was of such an import as to be characterised as an unconstitutionality, the Constitutional Court must intervene. At the same time, it was obvious that more technical rules of internal regulations must be left to parliamentary appreciation.

Mr Pinelli referred to the case law of the Italian Constitutional Court. The most important decision (n° 9/1959) established that, under the Constitution in force, the principle of parliamentary autonomy (or interna corporis acta) was not absolute, but it restricted the Court's scrutiny over violations of parliamentary procedures to those that could be directly related to constitutional provisions, leaving to parliamentary autonomy those provided only by Standing Orders. In a more recent case from 2019, upon the complaint by some Italian Senators that during the procedure of approval of the budget (which required it to be terminated within the last day of each year), the Government had proposed some amendments with too short a time for meaningful examination by Parliament, the Court recognised that the appellants had been provided with the power of raising their claim through the remedy of the "conflict of competences" between State powers, thus enabling the opposition MPs to obtain judicial protection from the parliamentary majority's abuses. Through interpretative means, the Italian Court had provided the MPs with the same powers which they have under the German Constitution, stating explicitly that the Constitutional Court (Bundesverfassungsgericht) may examine a complaint about alleged breaches of the constitutional rights of parliamentarians (Article 93 (1)).

As to the third question posed by the Constitutional Court of Moldova, it is possible to establish central elements of parliamentary procedures, leaving the rest under the protective umbrella of the parliamentary autonomy principle.

The Commission adopted the *amicus curiae* brief on three legal questions concerning the constitutional review of the law-making procedures in Parliament of the Republic of Moldova. (CDL-AD(2021)016).

Draft amendment to the Law on the People's Advocate

The President expressed the Commission's condolences on the death of the late Mr Mihai Cotorobai, People's Advocate and author of the request for an opinion.

Mr Sorensen reminded the Commission that it had already issued an opinion on the People's Advocate in 2015, and the rapporteurs had noted that most of the recommendations made in 2015 were still valid.

The present opinion concerned a draft amendment to the Law on the People's Advocate aimed at introducing an Advocate on the rights of entrepreneurs. The institution currently consisted of a People's Advocate - the ombudsman with general competence - and a separate People's Advocate for the rights of children. To this office, currently composed of two ombudsmen, the project wanted to add a third ombudsman, for the rights of entrepreneurs.

As to whether it was appropriate to add the task of protecting the rights of entrepreneurs to the existing institution, or whether it should be entrusted to a separate institution, the opinion expressed a number of concerns. Firstly, the addition of a third Advocate would have certain internal operational consequences which the draft law should address by putting in place clear

mechanisms for resolving possible internal conflicts of competence and decision-making. Furthermore, there was a problem vis-à-vis the outside world. Firstly, in the identity of the institution, if the institution were to be perceived more as the protector of companies, which may be large, than of the protection of everyone's human rights. Secondly, conflicts of mission may well arise, as an entrepreneur could very easily become an applicant as well as an object of complaint. These elements could reduce public confidence in the institution. Finally, the opinion expressed certain other concerns, notably about the public consultation process that had apparently not been optimal, and underlined how important was the need for appropriate resources.

Ms Maia Banarescu, People's Advocate for Children, pointed out that the Commission had repeatedly provided not only relevant opinions on the issues raised, but also moral support to continue the work of promoting the values of law, justice and human dignity of the institution.

The main problem was that the powers and role of the People's Advocate for Entrepreneurs' Rights did not comply with the generally accepted standards of the National Human Rights Institution according to the Paris Principles, since the powers of a human rights institution may consist in protecting human rights against violations by economic agents. According to the Constitution, the mandate of the People's Advocate and the People's Advocate's Office, as a national human rights institution, was to ensure the promotion and protection of fundamental human rights; the proposed new functions could be not only contrary to the Constitution, but also be detrimental to the role of National Human Rights Institution as well as to its A status, under the UN system. Moreover, the draft amendment defining a new field of competence for the Institution had not been preceded by any study analysing the implications and benefits of the proposed restructuring project. Finally, Mrs. Banarescu expressed the wish that the opinion of the Commission would be taken into account and help the members of Parliament to take a correct, well-considered and optimal decision, which would contribute to maintaining a functional, effective, independent and autonomous national human rights institution in Moldova, capable of facing the existing challenges related to respect for human rights.

The Venice Commission adopted the Opinion on the on the draft Law amending some normative acts on the People's Advocate of the Republic of Moldova (CDL-AD(2021)017).

17. Montenegro

Mr James Hamilton (expert, former member in respect of Ireland) explained that the opinion on the draft amendments to the laws on the prosecution service (the Law on the State Prosecution Service and the draft Law on the Prosecutor's Office for organised crime and corruption) had been requested by the Ministry of Justice, Human and Minority Rights of Montenegro on 16 February 2021. The need for that legislative reform was explained by the general distrust in the prosecution service, allegations of corruption and domination by the previous majority. The idea of changing the ratio between lay members and prosecutorial members in the Prosecutorial Council was not as such against European standards. However, the reform might not reach its stated goals and might result in a further politicisation of the prosecution service. A change in the name of the Special Prosecutor's Office (dealing with organised crime and corruption) did not justify the replacement of its head. Similarly, the removal of all currently sitting members of the Prosecutorial Council seemed to be unwarranted. The proposed legislation was *ad hominem* and undermined the non-political nature of the office, by increasing the political control of the ruling majority over the prosecution service. The outgoing Prosecutor General should be able to continue to perform his duties ad interim; an anti-deadlock mechanism should be added to the Constitution before the election of a new one. The security of tenure of the current officeholders should be respected.

Mr Vladimir Leposavić, Minister of Justice, Human and Minority Rights of Montenegro, thanked the Commission for its quick reaction and useful recommendations, and recognised that Parliament had proceeded in a somewhat rushed manner with this reform, but only because society demanded urgent changes in the prosecution service. The system created by the previous majority was corrupt, mechanisms of disciplinary liability were not working. The goal of the reform was not to remove specific people from key positions but rather to free the system from the influence of the previous political majority. A working group had been created to give a more thorough consideration to the legislative proposals.

Mr Hamilton replied that prosecutors guilty of misbehaviour should have a right to due process and should not be removed under the pretext of a legislative reform. Mr Frendo noted that the Rule of Law principles should be maintained even in a "lustration" situation.

The Venice Commission adopted the Opinion on the draft amendments to the Law on the State Prosecution Service and the draft law on the Prosecutor's Office for organised crime and corruption of Montenegro (CDL-AD(2021)012).

18. Russian Federation

As concerns the procedure, Mr Alivizatos explained that the 2020 Constitutional amendments had been adopted too fast for thorough consultations on all aspects of the wide-ranging reform: they were adopted within six months but that would have been three months if the COVID crisis had not delayed the procedure. The Constitutional Court had only seven days to prepare its opinion. Even though the amendments were very wide ranging and affected the substance of Chapters 1, 2 and 9 of the Constitution of the Russian Federation, no Constitutional Assembly had been convened. Instead of applying the existing legislation on referendums, an *ad hoc, en bloc* national vote had been held that provided fewer guarantees.

Mr Cameron highlighted the good co-operation of the Russian authorities, which had provided important comments that were reflected in the draft opinion. Nonetheless, some important disagreements remained, for instance on the issue of the constitutional entrenchment of certain legal provisions. Several potential problems were created: the exclusion of the current previous Presidents from the otherwise strict limitation to two terms contradicted the very logic of the amendments. The immunity of former Presidents was very far reaching. Lifting that immunity involved the same procedure as for impeachments. The President had a wide choice to appoint 30 Senators to the Federation Council. Regional autonomy was reduced by shifting powers to joint authority with the Federation. While it was positive that the State Duma obtained additional powers as concerns the appointment of other ministers, the President's competence to appoint "power ministers" was problematic. The establishment of the Council of State on the constitutional level could also be a problem.

As concerns the judiciary, Mr Kuijer pointed out that excluding dual citizens from judicial office was problematic. The President's role in appointing presidents of "other" courts (with the exception of the highest courts) had been constitutionalised and thus reinforced. The same was true for the appointment of the Prosecutor General, also in the light of the new constitutional power of this office to "supervise the implementation of laws". The draft opinion recommended that a clarification of the vague constitutional ground for a dismissal of a judge for violations "tarnishing the honour and dignity of a judge" should be clarified in legislation. That liability should be engaged only for offences with intent, deliberately or with gross negligence. The competence of the President to submit draft laws to an *a priori* control by the Constitutional Court in case of a veto was positive. However, the draft opinion recommended that it should be ensured that *a priori* control would not exclude *a posteriori* control.

Mr Andrey Klishas, Chair of the Federation Council Committee on Constitutional Legislation and State Building of the Russian Federation, thanked the rapporteurs for their professional work. However, a number of specific points should be further examined in the final opinion. The time period of six months for public consultations on the draft amendments was sufficient.

Media, individuals and civil society had been able to provide substantial input. In 1994, the Venice Commission had not complained when the Constitution had been adopted within a month only. It had not been the President but the amending law that gave the Constitutional Court seven days for its opinion on the amendments. A constitutional assembly was foreseen only for the adoption of a new Constitution, which was not the case. The regular amendments procedure under Article 136 had been followed. The question of presidential term limits and immunity were purely national matters. The amendments had been approved by the voters. The presidents of the highest courts were still appointed by the judicial council upon proposal by the President. Even if the number of judges at the Constitutional Court had been reduced, they remained fully independent. The combination of *a priori* and *a posteriori* review achieved the right balance. Implementing laws were being adopted in consultation with civil society and the judiciary.

Mr Pyotr Tolstoy, Deputy Chairman of the State Duma of the Federal Assembly of the Russian Federation, pointed out that the amendments could have been adopted by Parliament and the entities of the Federation only but the nation-wide vote provided full legitimacy for the amendments. Russia moved faster than other countries and the Constitution had to keep up with changes in society. Presidential powers had been shifted to Parliament. The President was not part of the executive power; he ensured that the branches of power were separated and work together harmoniously. National specificities of the distribution of powers in the Russian legal system should be taken into account. The interim opinion would be useful for the preparation of the implementing legislation.

During the discussion, Mr Mathieu pointed out that adopting constitutions by referendum rather than in Parliament was a valid procedure. Issues that were part of values, such as patriotism, could be dealt with also on the constitutional level and the freedom of the states had to be preserved to consider whether marriage was open for persons of the same gender or not. Every country had its "constitutional moment" but sometimes no consensus could be achieved. In countries where the President had special competences in the field of foreign affairs and security and, it was natural that the President also could appoint the respective ministers. France was an example that showed that the President could work well together with a government from a different party than his own.

The Commission adopted the interim opinion on constitutional amendments of the Russian Federation, and the procedure for their adoption, previously examined by the Sub-Commission on Democratic Institutions at its online meeting on 18 March 2021 (**CDL-AD(2021)005**).

19. Spain

Mr Cameron explained that the opinion on the Citizens' Security Law of Spain of 2015 had been requested by the PACE Monitoring Committee in 2015, but the preparation of this opinion had been postponed, first due to the change of the Government and then because the constitutionality of the 2015 law had been under review by the Constitutional Court of Spain (the CCS). In November 2020 and January 2021, the CCS delivered two judgments essentially confirming the validity of the 2015 law, and the work on the opinion resumed. The opinion relied on the findings of the CCS judgment, which, in turn, was based on the ECtHR case-law. The 2015 law was an "umbrella law" on police powers, covering many topics, so the rapporteurs focused on those aspects thereof which had given rise to criticism in Spain. The first aspect was the indeterminacy of some provisions of the law defining police powers and offences of the breach of public order (such as "disrespect" of the police or "disobedience to the authorities"). This indeterminacy could be compensated by instructions reflecting the recent constitutional jurisprudence, implementing these instructions through training and follow-up mechanisms, internal and external, including parliamentary control. The next problematic provisions noted in the opinion were those governing body searches in public places: such searches should be possible only in connection with serious offences. The third problematic area was the concept of spontaneous demonstration which was not recognised under the Spanish law. The law should provide for the principle of toleration of

such demonstrations and the inevitable nuisances caused by them. The level of penalties seemed to be unreasonably high, and there were procedural obstacles hindering access to judicial review. Mr Cameron outlined the modifications made to the opinion following comments by the members and by the Spanish Government.

Mr Barrett continued by commenting on a provision allowing rejection of aliens at the border in the Spanish towns of Ceuta and Melilla. The Commission did not have enough factual information about this situation; the practice of rejection at the border did not appear to be contrary to the international obligations of Spain per se, but under the condition that asylum-seekers could have a reasonable opportunity to request asylum in the official "entry points" and could obtain individualised treatment there, and that police officers enforcing the "rejection at the border" policy might act differently if the circumstances so required.

Ms Cristina Gallach, Secretary of State for Foreign Affairs, recalled that Spain was a State with solid democratic traditions, but not necessarily a "perfect democracy". Respect for human rights, democracy and the rule of law remained the State's priority in its internal and foreign policy. The Government of Spain was committed to reforming the 2015 law, in line with the international obligations of Spain, but the issues regulated in the law remained very sensitive. The reform process was already in motion, and the opinion of the Venice Commission came at the right moment and would become a point of reference in the reform process.

The Commission adopted the Opinion on the Citizens' Security Law of Spain (CDL-AD(2021)004) previously examined by the Sub-Commission on Fundamental Rights at its online meeting on 18 March 2021.

20. Ukraine

Joint opinion of the Venice Commission and the OSCE/ODIHR on the draft Law on Political Parties

Mr Vilanova Trías presented the draft joint opinion of the Venice Commission and the OSCE/ODIHR on the draft Law on Political Parties of Ukraine which had been requested by the Chair of the Parliamentary Committee on Legal Policy. This legislative initiative was welcomed, as was the constructive and open dialogue with the authorities and other stakeholders during the drafting process and video meetings. While care needed to be taken to ensure consistency with other legal acts of Ukraine, the scope of the present opinion was limited to the draft Law on Political Parties. A matter of concern was the tendency to overregulate the internal life of political parties. Moreover, while acknowledging the legal drafters' objective to strengthen national parties, the draft regulations might also have discriminatory effects against small, in particular regional, parties.

Ms Meaghan Fitzgerald, Acting Head of the ODIHR Democratization Department, drew attention to the fact that the draft law had been the subject of extensive consultations with a broad range of stakeholders. She highlighted positive features of the draft such as new rules to strengthen the transparency of the registration and functioning of political parties, to establish more effective funding and financial reporting requirements and to further delineate the powers of oversight bodies in terms of party finance monitoring. At the same time, the draft opinion included a number of specific recommendations, for example, to further simplify the registration of political parties, to remove the requirement on parties to enter their members in a Unified Register, to amend the rules on donations to political parties, to define more precisely the mandates and competences of oversight bodies and to introduce a wider range of proportionate sanctions in case of violations of the rules.

Mr Andrii Kostin, Chair of the Committee on Legal Policy of the Verkhovna Rada, expressed his gratitude for the professional assistance provided by the rapporteurs which would help Ukraine find the right balance for political party regulation, in line with European standards and at the same time taking account of the context in Ukraine. He stressed that this was a

challenging task which would require a broad political consensus. Ms Victoria Podgorna, Vice-Chair of the Committee, noted that after the recent adoption of the Electoral Code it was timely to reform the legislation on political parties. The authors of the draft law had aimed, inter alia, at responding to society's demands for strengthening the parties' interaction with the society and developing internal party democracy. The 2020 Joint Guidelines on Political Party Regulation had been taken into account, with the objective of finding the right balance between party autonomy on the one hand and more precise regulations on the other hand which should strengthen the parties' role in the democratic system. Several comments by the Committee on the draft opinion had been taken into account by the rapporteurs, in particular regarding the recommendations relating to internal party democracy and sanctions.

The Commission adopted the Joint Opinion of the Venice Commission and the OSCE/ODIHR on the draft Law on Political Parties of Ukraine (CDL-AD(2021)003) previously approved by the Council for Democratic Elections at its online meeting on 18 March 2021.

Opinion on the draft law on Constitutional Procedure and alternative draft law on the procedure for consideration of cases and execution of judgements of the Constitutional Court

Mr Carozza explained that the current opinion was a follow-up to the two urgent opinions endorsed at the last session, notably the urgent opinion on the reform of the Constitutional Court. The current opinion welcomed that the President had abandoned his draft law for dismissing all judges. The draft law on constitutional procedure provided a number of improvements for the Constitutional Court, notably as concerns transparency and publicity and the reasoning of decisions; it regulated the issue of the recusal of judges, which had been a cause for concern; it enhanced access to constitutional adjudication; the formation of senates and boards was improved. In line with the earlier recommendation, a decision by a senate annulling a legal provision could be confirmed by the Grand Chamber. The decisions of the Court were limited to the scope of the complaint. Nonetheless the draft law should be further improved as concerns disciplinary proceedings which should not be initiated by the President; this competence should instead be given to the national anti-corruption agency. In disciplinary proceedings, dismissal was the only available sanction; lesser, graduated sanctions should be introduced and be applied by simple majority within the Court. The Constitutional Court should be able to review a decision if a judge was convicted of bribery in respect of that adjudication. While it was unusual that the draft law required a 2/3 majority for decisions in the Grand Chamber, such a requirement could be justified temporarily until a certain percentage of judges were appointed under the new appointments system. This 2/3 threshold should be calculated in respect of the judges who had been appointed, not the total number of judges. It was essential that the appointment process be improved through a competitive selection with international participation, but this was not part of the current draft law. This was a serious missed opportunity. No vacancy y on the Constitutional Court should be filled until these improvements were implemented.

Mr Andrii Kostin Chairperson of the Committee on Legal Policy of the Verkhovna Rada (Parliament) of Ukraine welcomed the opinion and pointed out that the co-operation with the Venice Commission could be extended also to other issues. The urgent opinions had helped in restoring the anti-corruption infrastructure that had been destroyed by the Constitutional Court.

Ms Olha Soviryia, Deputy Chairperson of the Committee on Legal Policy, Chairperson of the Sub-committee on Political Reform and Constitutional Law, pointed out that some of the recommendations of the opinion had already been taken on board, notably as concerned disciplinary measures. However, in her view the recommendation not to change Article 11 of the Law on the Constitutional Court should be removed. The criteria for becoming a judge of the Constitutional Court were set out exhaustively in the Constitution and excluding persons exercising political activities was unconstitutional. Even voting in elections could be seen as a

political activity. Politicians should be obliged to resign from their office once there were elected/appointed as judges but a political office could not prevent a candidacy.

Mr Carozza explained that only active membership in Parliament was concerned. This issue could be addressed in the framework of a wider reform of the appointments system but not in the current law on constitutional procedure.

The Commission adopted the opinion on the draft law on Constitutional Procedure (draft law no. 4533) and alternative draft law on the procedure for consideration of cases and execution of judgments of the Constitutional Court (draft law no. 4533 -1) of Ukraine (CDL-AD(2021)006).

21. PACE Recommendation 2192(2020) on the Rights and obligations of NGOs assisting refugees and migrants in Europe

Ms Silvia Grundmann, Head of Division at the Venice Commission Secretariat introduced the draft Secretariat Memorandum on Parliamentary Assembly Recommendation 2192(2020), "Rights and obligations of NGOs assisting refugees and migrants in Europe". She explained its rationale with a focus on the Joint Guidelines on Freedom of Association of the Venice Commission and the OSCE/ODIHR (CDL-AD(2014)046) and relevant opinions concerning Azerbaijan, Belarus, Hungary, and Kyrgyzstan as well as two comments received and amendments made reflecting them.

The Commission endorsed the Secretariat Memorandum on Parliamentary Assembly Recommendation 2192(2020), "Rights and obligations of NGOs assisting refugees and migrants in Europe" (CDL-AD(2021)014).

22. Compilation on law-making procedures and the quality of the law.

Mr Helgesen introduced the Compilation on law-making procedures and the quality of the law. He explained – with reference to the opinions adopted at the current session – the importance of this topic in the Commissions' "jurisprudence", and described different blocks of questions dealt with by the Compilation (parliamentary autonomy in procedural matters, techniques of legislative drafting, the law-making procedures as such, role of the Constitutional Court in enforcing procedural rules, etc.). Ms Bazy Malaurie noted the importance of the Compilation as a working tool in the preparation of the opinions but also in the outside work of the members.

The Commission endorsed the Compilation of Venice Commission opinions and reports on law-making procedures and the quality of the law (CDL-PI(2021)003).

23. Annual report of activities 2020

Ms Simona Granata-Menghini, Director and Secretary of the Venice Commission, presented the draft annual report of activities 2020, highlighting the exceptional output of the Commission despite the pandemic situation necessitating to resort to written procedures and online meetings. A total of 41 documents had been adopted: 32 opinions on constitutional amendments and legislative texts or specific legal issues as well as nine texts of transnational interest, amongst them three *amicus curiae* briefs and ten opinions issued pursuant to the urgent procedure. Furthermore, 20 seminars and conferences were (co)organised and legal support was provided to four election observation missions of the Parliamentary Assembly of the Council of Europe, as well as three e-Bulletins on Constitutional Case Law and an e-Bulletin
working document for the Conference of European Constitutional Courts published, as was the jubilee volume "Thirty-year quest for democracy through law" with contributions of some sixty authors – members and former members of the Venice Commission.

The Commission adopted the Annual Report of Activities 2020 (CDL(2021)006).

24. Report of the meeting of the Council for Democratic Elections (18 March 2021)

Ms Simona Granata-Menghini informed the Commission that the Council for Democratic Elections had discussed and approved the draft joint opinion on the draft Law on Political Parties of Ukraine, the draft joint opinion on the Draft amendments to the Election Code, the Law on Political Associations of Citizens and the Rules of Procedure of the Parliament of Georgia as well as the draft joint opinion on Draft Article 79[1] of the Electoral Code of Georgia (see items 13 and 20).

The Council for Democratic Elections had also re-elected Mr Oliver Kask as its Chair and had elected Mr Stewart Dickson as its Vice-Chair, both for a term of two years.

25. Other business

Ms Hanna Suchocka informed the Commission about the assistance that the Council of Europe was providing to the Ukrainian authorities on its Decentralisation reform. On 1 March the Bureau had authorised Ms Suchocka to represent the Commission in an exchange of views between the Council of Europe, the European Union, representatives of embassies and experts concerning the problem of local self-government in Ukraine. This virtual event took place on 12 March 2020. The main result of the meeting was the recommendation to give legal personality to local authorities in Ukraine in order to bring it in full conformity with the European Charter on Local Self-Government and the European legal tradition underpinning it. Ms Suchocka expressed the Commission's position that the legal personality of local authorities should be enshrined at the constitutional level rather than at the statutory level. However, no agreement was reached on this question. Ms Suchocka concluded by stressing the Commission's continued readiness to assist and participate in further discussions concerning decentralisation in Ukraine.

Mr Thomas Markert, former Secretary of the Venice Commission, informed the Commission about his co-operation with the European Bank on Reconstruction and Development (EBRD). Mr Markert was invited by the EBRD to present the Venice Commission at a meeting with its board and its management, which took place in February 2021. Although the EBRD's main aims had an economic focus, its articles of agreement also referred to the values of human rights, the rule of law and democracy. In recent years, the EBRD had begun to attach to its country strategies a political assessment of compliance with these values. This assessment was largely based on assessments by international organisations, including the Commission's opinions. Due to its reliance on Venice Commission opinions the EBRD was very interested in understanding how the Commission works; about 80 people followed Mr Markert's presentation. Mr Markert further informed that he had presented the Commission at a conference in Berlin in preparation of the German chairmanship of the Committee of Ministers of the Council of Europe.

Mr Pieter Omtzigt, member of the House of Representatives of the Netherlands and member of the Dutch delegation at the Parliamentary Assembly of the Council of Europe, informed the Commission about the so-called "childcare benefits scandal" which was at the origin of the request for an opinion "on the rule of law in the Netherlands", which had been lodged on 25 February by the Speaker of the Dutch House of Representatives. The Commission has been asked to examine the extent of legal protection of citizens under administrative law and the system of checks and balances. The opinion will be prepared most likely for the October session.

The President informed the Commission about the imminent retirement of Helen Monks and Derrick Worsdale. He thanked them for their services and awarded them the Medal of Honour, which is reserved for members of the Commission or the Secretariat who leave after ten years of service.

26. Dates of the next sessions

The Commission decided, upon proposal by the Enlarged Bureau, to hold the 127th Plenary Session in a hybrid form, partly from Venice and partly online. The dates of this session were moved to 2-3 July 2021.

The Commission confirmed its schedule of sessions for 2021 as follows:

128th Plenary Session	15-16 October 2021
129th Plenary Session	10-11 December 2021

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

Link to the list of participants