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

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

**105<sup>th</sup> PLENARY SESSION**

**Venice, Scuola Grande di San Giovanni Evangelista**  
**Friday, 18 December 2015 - Saturday, 19 December 2015**

**105<sup>e</sup> SESSION PLÉNIÈRE**

**Venise, Scuola Grande di San Giovanni Evangelista**  
**Vendredi 18 décembre 2015 - Samedi 19 décembre 2015**

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

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## 1. Adoption of the Agenda

The agenda was adopted as it appears in document CDL-PL-OJ(2015)004ann.

## 2. Communication by the President

Mr Buquicchio welcomed all the members, special guests and delegations attending the Plenary Session of the Venice Commission as well as newly appointed members. Mr Buquicchio also informed the Commission about his recent activities, which are listed in document CDL(2015)055.

## 3. Communication from the Enlarged Bureau

The Commission was informed that the Enlarged Bureau had decided to recommend to the members to reduce the length of the opinions wherever possible, for example in the description of the draft laws and the relevant international standards.

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

At its October session, the Commission had elected a Committee of Wise Persons, composed of Mr Bartole, Mr Gonzalez-Oropeza and Mr Scholsem, to prepare the elections.

At the beginning of the Plenary Session, Mr Scholsem explained that the Committee had met on 27 November, and had reached a consensus on the proposals. As concerned the candidates, the Committee had taken into account: experience, seniority, a need for renewal and the diversity of professional experience.

At the outset, the Committee proposed a minor amendment to Article 17a.2 of the Rules of Procedure, in order to provide for more flexibility. The new text would read:

**“Article 17a**  
*Scientific Council*

.....

*2. The Commission shall decide every two years upon the composition of the Scientific Council. The First Vice-President may be elected as Chair of the Scientific Council.”*

**The Commission adopted the proposed modification of Article 17a paragraph 2 of its Rules of Procedure.**

A list of candidatures proposed by the Committee of Wise Persons was subsequently distributed to all members.

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

Mr G. Buquicchio (Italy) as President;  
Ms H. Suchocka (Poland) as First Vice-President;  
Mr C. Grabenwarter (Austria) and Ms H. Kjerulf Thorgeirsdottir (Iceland) as Vice-Presidents;

Mr A. Endzins (Latvia), Mr G. Harutyunian (Armenia), Mr I-W. Kang (Republic of Korea) and Ms T. Khabrieva (Russian Federation), as members of the Bureau;

The Chairs of the Sub Commissions and Councils as follows:

Mr J. Helgesen (Norway) (Scientific Council)  
Mr B. Vermeulen (Netherlands) (Fundamental Rights);  
Ms R. Kiener (Switzerland) (Federal State and Regional State);  
Ms V. Bilkova (Czech Republic) (International Law);  
Mr J. Velaers (Belgium) (Protection of Minorities);  
Mr N. Esanu (Republic of Moldova) (Judiciary);  
Mr M. Frendo (Malta) (Democratic Institutions);  
Mr R. Clayton (United Kingdom) (Working methods);  
Mr J.J. Romero (Chile) (Latin America);  
Mr G. Jeribi (Tunisia) (Mediterranean Basin);  
Mr K. Tuori (Finland) (Rule of law)  
Ms L. Err (Luxembourg) (Gender Equality)

The Co-Chair of the Joint Council on Constitutional Justice : Mr E. Tanchev (Bulgaria);

The Vice-President of the Council for Democratic Elections : Mr O. Kask (Estonia);

The Vice-Chairs of the Sub Commissions and Councils (without representation on the Enlarged Bureau):

Mr O. Can (Turkey) Scientific Council  
Mr N. Alivizatos (Greece) (Fundamental Rights);  
Ms S. Cleveland (United States of America) (Federal State and Regional State);  
Mr I. Cameron (Sweden) (International Law);  
Mr Z.M. Knežević (Bosnia and Herzegovina) (Protection of Minorities);  
Mr H. Gstöhl (Liechtenstein) (Judiciary);  
Mr D. Meridor (Israel) (Democratic Institutions);  
Mr R. Barrett (Ireland) (Working methods);  
Mr E.R. Lewandowski (Brazil) (Latin America);  
Mr D. Chagnollaud (Monaco) (Mediterranean Basin);  
Mr W. Hoffmann-Riem (Germany) (Rule of law)  
Ms J. Omejec (Croatia) (Gender Equality)

Mr Buquicchio thanked the Commission for his re-election. Mr Helgesen congratulated him and the new Vice-Presidents. He expressed his intention to devote even more energy to the Scientific Council. Ms Suchocka also expressed her gratitude.

The representatives of the Committee of Ministers and the Parliamentary Assembly of the Council of Europe congratulated the newly elected members.

## **5. Communication by the Secretariat**

The Secretariat informed about practical arrangements for the session.

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

Ambassador Luis Javier Gil Catalina, Permanent Representative of Spain to the Council of Europe, noted that Spain was one of the founding states of the Venice Commission and had supported its activities since its creation. The Ambassador stressed that in spite of the various crises in Europe, Spain remained a resilient democracy committed to the values of the Council of Europe. He also recalled the importance of national sovereignty (article 1.2 of the Constitution) and the unity of the Spanish nation (article 2 of the Constitution).

Ambassador Eva Tomič, Permanent Representative of Slovenia to the Council of Europe reiterated the support of her authorities to the Venice Commission, noted its unique and invaluable role in crisis areas and in the prevention of conflicts as well as its efficiency and impressive geographical scope of action. Ambassador Tomič reminded the Commission of the crucial role played by the opinion (delivered in 2000) in solving the constitutional crisis in Slovenia in a peaceful and constructive way. The Ambassador also stressed the importance Slovenia gave to the EU accession to the ECHR.

Ambassador Jari Vilén, Head of the European Union Delegation to the Council of Europe, expressed the appreciation of the EU for the Commission's expertise, reputation and its enlarged geographic scope of action and praised the highly efficient and well-established co-operation between the two institutions. The Commission opinions served as the basis for the ENP Progress Reports and the ELARG Regular Reporting. The EU appreciated in particular the added value brought by the Venice Commission to the process of constitutional reform in Ukraine in general and the Commission's role in the Minsk implementation process in particular. The Ambassador also noted the need to a pan-European approach in the South and East Mediterranean and Central Asia. The current immigration crisis should be traced back to the routes in the home countries of the immigrants. The EU was ready to continue supporting, including financially, the work of the Commission in the Council of Europe member States, but also in the neighbouring countries of Central Asia and the South Mediterranean.

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

Mr Arcadio Diaz Tejera, Member of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, informed the Commission that the Assembly's Committees had recently adopted reports inter alia on access to internet, on rights of children and on NGO activities where the Commission's work was extensively quoted. The Assembly had also held exchanges of views with the Polish PACE delegation on the recent worrisome developments in the country.

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

Mr Andreas Kiefer, Secretary General of the Congress, updated the Commission on the Congress's recent activities regarding the so-called "road maps" for Georgia and Portugal completed in 2015 and the forthcoming ones for Armenia and Moldova. A report on the implementation by France of the Charter for Local Self-Government – which celebrated its 30<sup>th</sup> anniversary - was in the pipeline; a committee of independent experts was created to propose solutions to remedy the lack of awareness of the Charter amongst national judges.

## **9. Co-operation with the Council of Europe Development Bank**

Mr Rolf Wenzel, Governor of the Council of Europe Development Bank, stressed the complementarity of the Bank and the Commission work; they intervened often in the same member States; the Commission's action was a prerequisite for the Bank's intervention. Strengthening of the structure of the judiciary along with the migrant and refugee emergency assistance and long-term integration policies were the current priorities of the Bank.

## 10. Follow-up to earlier Venice Commission opinions

The Commission was informed on follow-up to:

*First Opinion on the draft amendments to the Constitution (Chapters 1 to 7 and 10) of the Republic of Armenia ([CDL-AD\(2015\)037](#)) and Second Opinion on the draft amendments to the Constitution (in particular to Chapters 8, 9, 11 to 16) of the Republic of Armenia ([CDL-AD\(2015\)038](#))*

Ms Granata-Menghini recalled that the co-operation between the Venice Commission and the Constitutional Commission of Armenia had started with the opinion on the concept paper of the reform, adopted in October 2014, and had been pursued through several expert meetings and two preliminary opinions, issued in July 2015 and subsequently endorsed by the Commission in October 2015. Further changes had been made to the draft constitutional amendments, which had then been adopted by parliament and submitted to a constitutional referendum on 6 December 2015. The Preliminary results released by the Central Electoral Commission showed that 63.5% of the voters had voted in favour, with a turnout of 50.51%. The constitutional amendments had therefore been adopted. Opposition groups, NGOs and, the media had alleged serious irregularities. A cross-party delegation of PACE had observed the referendum and found that the relatively low turnout was due to the political interests alleged to be the real motive for the reform. The reform process was considered not to be sufficiently inclusive. The PACE delegation mentioned several problems, notably the inaccuracy of the electoral lists, which had been identified by the Venice Commission and the OSCE/ODIHR in previous reports.

As regards the implementation of the constitutional amendments, a new Electoral Code was to be prepared before June 2016. The President of Armenia had pledged to conduct the most open and inclusive discussions on it. When in Venice in October 2015, Mr Sahakyan, Speaker of the Armenian parliament, had expressed his conviction that the Venice Commission would support Armenia in the implementation of the constitution, and the Commission had expressed its willingness to do so. It was therefore to be expected that the Venice Commission would soon be requested to work on the new electoral code.

*Amicus Curiae Brief on the Compatibility with the non-Discrimination Principle of the Selection of the Republic Day of the Republika Srpska ([CDL-AD\(2013\)027](#))*

In its 2013 Amicus Curiae Brief adopted at the request of the Constitutional Court of Bosnia and Herzegovina (BiH), the Venice Commission expressed the view that, in the specific circumstances of BiH, the selection of 9 January as the Republic Day of the Republika Srpska (RS) was likely to give rise to discrimination against the members of the Bosniak and Croat people and others who live in the RS. In its decision of 26 November 2015, the Constitutional Court of BiH concluded, largely in line with the Venice Commission's position, that the choice of the Republic Day of the RS was unconstitutional, and instructed the National Assembly of the RS to harmonise the concerned provision with the Constitution of BiH. The decision raised strong criticism among political leaders of the RS, who called on the Court to repeal the decision and on the BiH Parliament to adopt a new law on the Constitutional Court (*inter alia* to remove the "foreign" judges), failing which they would call a referendum on the matter and consider withdrawing from the common institutions of the BiH state.

*Opinion on the draft Law on the Constitutional Court of Montenegro  
([CDL-AD\(2014\)033](#))*

This opinion was adopted by the Venice Commission at its 100<sup>th</sup> Plenary Session in October 2014, welcoming the draft Law as providing a firm basis for the work of the Constitutional Court – nevertheless pointing to a number of provisions that needed to be improved.

The Law was adopted on 4 March 2015, taking most of the Venice Commission's recommendations into account. A number of recommendations were omitted, including a need to clearly determine the judge's behaviour that can lead to serious sanctions. No legal aid is foreseen for constitutional complaints and the possibility for the Constitutional Court to initiate proceedings *proprio motu* had not been excluded. This could potentially bring the Constitutional Court into the political arena, which should be avoided.

The other recommendations by the Venice Commission were taken on board – including the possibility for judges to remain at the Court after the expiration of their term of office until their successor takes office.

*Opinion on the draft Laws on courts and on rights and duties of judges and on the  
Judicial Council of Montenegro ([CDL-AD\(2014\)038](#))*

In its 2014 Opinion, the Commission recommended increased safeguards for the internal independence of judges and the external independence of the judiciary. While there was still scope for improvement, the adopted law reflected the authorities' effort to implement those recommendations: the legal positions of principles adopted by the plenary of the Supreme Court and by the plenary meetings of the judges were no longer mandatory; likewise, the hierarchical relation between courts of different levels allowing a superior court to monitor the work of a lower level court and that of judges therein had been reconsidered and the reference to the work of judges removed. Similarly, the right of a court president to examine cases assigned to a judge had been limited to situations where objective circumstances indicate that the judge had not fulfilled his or her duties in compliance with the law. The supervisory powers of the executive had been specified and limited to questions of organisation and administration of courts.

*Avis sur le projet de loi organique relative à la cour constitutionnelle de la Tunisie  
([CDL-AD\(2015\)024](#))*

Cet avis saluait le projet de loi organique relative à la Cour constitutionnelle de la Tunisie qui devrait contribuer à un fonctionnement efficace de cette Cour.

Cette loi a été adoptée par l'Assemblée des représentants du peuple le 20 novembre 2015. La plupart des recommandations n'ont cependant pas été retenues, notamment les recommandations conseillant la Cour de ne pas dépendre du gouvernement pour la nomination de son secrétaire général, pour le règlement de l'organisation du secrétariat ainsi que pour la désignation d'un comptable public et recommandant que les principaux effets d'une décision devraient être définis par la loi – et ne devraient pas être laissés à l'entière discrétion de la Cour elle-même. D'autres éléments ont été ajoutés à la loi adoptée, notamment, les candidats à la qualité de membre de la Cour constitutionnelle ne peuvent pas avoir occupé de poste de responsabilité partisane dans un parti politique (centrale, régionale ou locale) ou être déjà candidat d'un parti ou d'une coalition pour des élections présidentielles, législatives ou locales durant au cours des 10 dernières années – pour assurer que les futurs membres de la Cours ne soient pas politisés. En ce qui concerne l'immunité contre les poursuites pénales d'un membre de la Cour pendant l'exercice de ses fonctions, elle peut être levée à la majorité absolue des membres dans le cas de flagrant délit – et le membre concerné ne participera ni au vote ni au scrutin.



*Opinion on draft constitutional amendments in the field of the judiciary in Bulgaria*  
([CDL-AD\(2015\)022](#))

In its opinion on draft constitutional amendments in the field of the judiciary adopted in October 2015, the Venice Commission welcomed the effort to reform the Bulgarian Supreme Judicial Council, and in particular its proposed division into two separate chambers for judges and prosecutors. Specific recommendations were made regarding certain important aspects of the Council's organisation and operation. On 16 December 2015 the Bulgarian Parliament adopted the concerned constitutional amendments. However, the changes operated to the quotas initially proposed by the government for the election of members of the Council's two chambers drew criticism that they would both weaken the independence of the courts and strengthen the role of the Prosecutor General. This also resulted in the resignation of the Minister of Justice, one of the main promoters of the reform. In a letter sent to the former minister, President Buquicchio thanked him for his commitment to the reform of the Bulgarian judiciary and expressed the hope that his resignation would not mean a slowdown of the reform but a political signal of its importance for the Bulgarian society.

## **11. Albania**

Mr Buquicchio informed the Commission that in September 2015 the *Ad Hoc* Committee on Justice System Reform of the Albanian Parliament had requested an opinion of the Venice Commission on the text of the draft constitutional amendments prepared by a group of experts of the *Ad Hoc* Committee. The Albanian authorities expressed their readiness to revise the draft in the light of the Venice Commission's recommendations and to submit a revised text of the draft amendments to the Commission in January 2016, with a view to the adoption of a final opinion in March 2016. Mr Buquicchio praised the Albanian authorities for their efforts to reform the judiciary and their readiness to follow the recommendations of the Venice Commission. He confirmed the Commission's readiness to assist Albania during further phases of this important constitutional reform.

The draft opinion was introduced by Mr Bartole and Mr Hamilton. The draft constitutional amendments covered several areas, including in particular European integration matters, the reform of the Constitutional Court, the creation of the High Administrative Court, the reform of the High Judicial Council and the High Prosecutorial Council and the creation of several new disciplinary bodies for judges and prosecutors. The most important part of the reform concerned the process of vetting all sitting judges and prosecutors, aimed at enabling the removal of corrupt and incompetent judges by the Independent Qualification Commissions functioning under the supervision of "international observers".

The draft interim opinion, previously examined by the Sub-Commission on the Judiciary at its meeting on 17 December 2015, acknowledged the need for a profound reform of the Albanian judiciary which, as emphasised by all local stakeholders during the exchanges held with the rapporteurs, had been facing a deep crisis. The draft amendments proposed a number of institutional solutions which were, for the most part, sound; however, the rapporteurs were concerned by the great complexity of the proposed amendments and suggested that some of the issues be regulated in the implementing legislation. The draft opinion expressed concerns over certain specific proposals (for example, the prominent role played by the Minister of Justice in the disciplinary bodies). The existence of two separate councils (one for the judges and another for the prosecutors) was an acceptable model. The very idea of a temporary mechanism for vetting all sitting judges was also an acceptable solution, given the magnitude of the problem; however, the status of the international observers needed to be clarified and the independence of the Qualification Commissions as well as the due process guarantees for the judges and prosecutors undergoing vetting needed to be strengthened.

Mr Kristaq Traja, Chair of the High Level Expert Group, assisting the Ad Hoc Committee in the reform process, expressed his gratitude to the Venice Commission for the detailed analysis and the constructive criticism expressed in the draft opinion. He invited the rapporteurs, in the final opinion on the revised text, to concentrate on certain crucial points, such as the nature of the appeal body for complaints arising out of the proposed vetting process and the procedures and requirements for the nomination of candidates to the High Judicial Council.

Mr Enkelejd Alibeaj, expert of the Democratic Party, stated that the two major threats for the Albanian judiciary were corruption and politicization, and that a deep reform of the judiciary was needed. He supported some of the main critical remarks made in the draft opinion, called for the simplification of the proposed institutional arrangements and for a system of checks and balances which would reduce political influence of the current parliamentary majority on the judicial appointments and dismissals.

**The Commission adopted the Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania ([CDL-AD\(2015\)045](#)) and authorised the rapporteurs, if need be, to send a preliminary final opinion to the Albanian authorities prior to the March 2016 Plenary Session.**

## **12. Montenegro**

The Montenegrin authorities informed the Commission that the draft law on freedom of religion is currently being revised and sought the postponement of the adoption of the opinion on this version of the draft law. The Bureau accordingly decided to postpone the examination of the opinion on the draft law on freedom of religion of Montenegro to the March 2016 session.

## **13. “The former Yugoslav Republic of Macedonia”**

The opinion was requested in October 2015 by the Directorate of Neighbourhood and Enlargement Negotiations (DG NEAR) of the European Commission and concerned three laws of “the former Yugoslav Republic of Macedonia”: the Law on Courts, the Law on the Judicial Council, and the Law on the Council for Determination of the Facts and Initiation of Disciplinary Procedure for Establishing Disciplinary Responsibility of a Judge, as well as the 2015 amendments to the first two laws. The Sub-Commission on the Judiciary examined the draft opinion at its meeting on 17 December 2015.

The draft opinion was introduced by Mr Neppi Modona and Mr Barrett. They stressed that the Macedonian legislation on the disciplinary liability of judges was unnecessarily complex, incoherent and ambiguous in places and that it put too much emphasis on the statistical performance of the judges and the rate of reversals of their decisions. Such an approach may create a chilling effect within the judiciary and endanger judicial independence. The draft opinion recommended amending the law to ensure that the judges would not be disciplined for delays or under-performance which might be reasonably explained by the malfunctioning of the judicial system as a whole. The opinion also called into question the expediency of the creation of a new body – “the Council for Determination of the Facts” - created in 2015 in order to investigate disciplinary matters, and invited the Macedonian authorities to revise its composition.

Mr Nikola Prokopenko, representative of the Ministry of Justice, explained to the Commission the reasons behind the creation of the Council for Determination of the Facts and its role vis-à-vis other institutions involved in the disciplining and evaluation of judges.

**The Commission adopted the opinion on the Legislation on the disciplining and dismissal of judges and their professional evaluation of “the former Yugoslav Republic of Macedonia” ([CDL-AD\(2015\)042](#)).**

#### **14. Exchange of views with the OSCE High Commissioner on National Minorities**

Ms Astrid Thors, OSCE High Commissioner on National Minorities, thanked the President for the invitation to participate in the Plenary Session and underlined the Venice Commission’s prominent role in promoting constitutional and legal reform in Europe and beyond.

The co-operation between the HCNM Office and the Venice Commission - both officially and through informal co-ordination mechanisms and working-level consultations - was a good example of how institutions can best leverage their respective strengths. Co-ordination and consistency in the interpretation of relevant international human and minority rights standards had been a constant effort, and the country-specific experience and the thematic knowledge of the Venice Commission had been a great asset. As an example of the HCNM Office having benefitted from the expertise of the Venice Commission, Ms Thors referred to the efforts made to establish a permanent Working Group as a communication platform between the Parliament of the Republic of Moldova and the Gagauz Peoples’ Assembly. Ms Thors further mentioned the Commission’s work on constitutional arrangements in many countries, including in the field of decentralisation, as a useful background for her own reflections on the impact that decentralisation can have on national minorities, and stressed that the HCNM Office sees decentralisation as a key mechanism for limiting conflict in ethnically diverse or post-conflict countries.

Co-operation was also welcome on current topics, such as non-citizens and minority rights, dual voting rights and the treatment of national minorities abroad. She recalled that the *Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations* were published following consultations with Venice Commission members.

Finally, Ms Thors referred to the “de-communization” laws in Ukraine, a topic of particular relevance for the current work of the Venice Commission; she underlined the importance of a balanced and inclusive approach to history, as a way to foster social cohesion, dialogue and mutual understanding within societies.

The President thanked Ms Thors for her praise of the Commission’s work. He stressed that the Commission also highly values the co-operation between the two institutions and stands ready to pursue and strengthen this co-operation in the years to come.

#### **15. Tunisie**

M. Scholsem informe la Commission de l’avancement des travaux sur le projet de loi sur l’instance de bonne gouvernance et de lutte contre la corruption de la Tunisie. Mme Kiener et M Scholsem ont travaillé depuis l’année dernière sur la définition des grandes lignes à prendre en considération, notamment par rapport aux autres instances prévues par la Constitution. Lors d’une réunion à Tunis le 19 novembre, le projet de loi a été présenté à un ensemble d’acteurs locaux par M. Annabi, le Président de l’actuelle instance de lutte contre la corruption.

Le problème principal réside dans le statut juridique de l’instance, les missions et prérogatives de l’instance ; les dispositions de l’actuel projet prévoyant beaucoup d’attributions qui pourraient mener à un risque de chevauchement avec celles du pouvoir judiciaire et par rapport au rôle du gouvernement dans les politiques de lutte contre la corruption. Au vu des

commentaires des rapporteurs et des débats de la réunion, le projet de loi va être à nouveau modifié en coopération avec l'Unité de lutte contre le crime organisé du Conseil de l'Europe et sera envoyé de nouveau à la Commission de Venise pour examen.

## 16. Ukraine

### *Law of Ukraine on the condemnation of the Communist and National Socialist (Nazi) regimes and prohibition of propaganda of their symbols*

Ms Kiener informed the Venice Commission that the Chair of the Parliamentary Assembly's Monitoring Committee, had requested an opinion on 24 September 2015 on the Ukrainian Law "On the condemnation of the communist and national socialist (Nazi) regimes, and prohibition of propaganda of their symbols". The OSCE/ODIHR joined the Venice Commission for this opinion.

The Law was adopted as part of a package of four so-called "decommunisation" laws and that this particular Law was aimed specifically at criminalising communism and national socialism, including propaganda of these regimes. The Venice Commission and the OSCE/ODIHR recognised the right of Ukraine to ban or even criminalise the use of certain symbols of and propaganda for totalitarian regimes, given that such legislation was not uncommon in Council of Europe and OSCE member states. However, although this Law might be considered as pursuing a legitimate aim, its scope was too broad and the sanctions it provided were disproportionate to the legitimate aim pursued. In addition, Law no. 317-VIII's provisions were not precise enough to enable individuals to regulate their conduct according to the law and to prevent arbitrary interference by public authorities. It therefore did not adhere to the three-fold test of legality, legitimacy and necessity in a democratic society.

Mr Sergei Petukhov, Deputy Minister of Justice of Ukraine, explained that Ukraine was in a unique position – along with Belarus – of having suffered most under the communist and national socialist totalitarian regimes. He explained that the archives were finally opened, which allowed Ukraine to obtain information on its history and to address facts that had hitherto been denied. He explained that other states, such as Germany and France, had laws or provisions in their criminal codes on these issues that were broad in scope. He explained that the Law had brought no disagreement within Ukraine and that the population was ready to implement it. However, he did agree that the criminal sanctions this Law provided needed to be revisited, as they could be considered disproportionate. He therefore asked the Commission to adopt this opinion as an interim one.

Ms Nataliia Novak, Member of the Parliament of Ukraine, Chair of the Committee on Legal Policy and Justice underlined that this Law was the fruit of the "Revolution of Dignity" and was extremely important for Ukraine's security, identity and independence.

Mr Helgesen - following further discussions between the Ukrainian authorities, the rapporteurs, the OSCE-ODIHR and the representatives of the Parliamentary Assembly of the Council of Europe - took note that the Ukrainian authorities were ready to amend the Law and hence proposed to the Commission that this joint opinion be adopted as a joint "interim" opinion.

**The Commission adopted the Joint Interim Opinion on the Law of Ukraine on the condemnation of the Communist and National Socialist (Nazi) regimes and prohibition of propaganda of their symbols ([CDL-AD\(2015\)041](#)).**

*Constitutional amendments relating to the judiciary*

Mr Holovaty expressed his satisfaction for the fruitful co-operation which had taken place between the Venice Commission and the constitutional commission of Ukraine. Intense exchanges and two opinions had resulted in a text which followed almost all the recommendations of the Venice Commission. The only exception related to the 2/3 majority requirements for the appointment by the Verkhovna Rada of 2 members of the High Council of Justice and 6 judges of the Constitutional Court and for its consent to the appointment and dismissal by the President of the Prosecutor General.

Ms Granata-Menghini added that the two main outstanding recommendations had been followed: the power to transfer and promote judges had been explicitly given to the High Council of Justice and it had been clarified that only serious disciplinary violations could lead to dismissing constitutional court judges. As regarded the vetting of the judges, no provision as to the mass dismissal of judges had been added, while provision had been made for the possibility, in case of reorganisation of the Higher Courts, for the relevant judges to either retire or to apply to new positions through the competitive procedure.

In conclusion, with the exception of the qualified majority requirement, all of the Venice Commission's recommendations had been followed in the text submitted to the Verkhovna Rada.

**The Venice Commission took note of the Secretariat's memorandum on the compatibility of the proposed Amendments to the Constitution of Ukraine regarding the Judiciary as submitted by the President to the Verkhovna Rada on 25 November 2015 with the final opinion adopted by the Venice Commission at the October 2015 session ([CDL-AD\(2015\)027](#)).**

**17. Draft summary report on voters residing de facto abroad**

Mr Tanchev presented the report and pointed out that in June 2013, the Council for Democratic Elections had examined for the first time the issue of voters residing *de facto* abroad while still registered as residents in-country. A series of documents and comments had been prepared and the summary report submitted to the Commission for adoption summarised the problems linked to voters who are *de facto* abroad and the solutions found to prevent fraud.

Although the report stated that there was no international standard that provided for the right to vote of citizens residing abroad, the international trend was favourable to out-of-country voting. States enjoyed a wide margin of appreciation with respect to the establishment of residence criteria, even though, according to the European Court of Human Rights, it should not be unlimited. Citizens abroad on Election Day could be divided into three categories: those permanently abroad, who may have double nationality; those who are staying abroad temporarily (for example for academic or employment purposes); and those who are travelling abroad on Election Day (for business or personal reasons). While, according to the report, active electoral registration was the rule for citizens abroad, many national systems provided for passive registration for residents.

In order to prevent impersonation, identity controls at the polling station, provided that they did not undermine the secrecy of the vote, could be made more efficient through the issuance of specific voters' ID documents; other measures would be: the use of biometric measures to identify duplication in records; the adoption of anti-counterfeiting measures for

identity documents; the on-line verification of the identity of voters; controlled destruction of identification documents which remain unclaimed by citizens.

This report was also the result of close co-operation with the Congress, which had produced several reports on the issue.

**The Commission adopted the Summary Report on voters residing *de facto* abroad (CDL-AD(2015)040).**

## **18. Compilations of Venice Commission opinions and reports**

Mr Helgesen presented the compilations on issues concerning constitutional and legal provisions for amending the constitution and on thresholds in the electoral field proposed by the Scientific Council for endorsement at the Plenary Session.

**1. The Commission endorsed the compilations of Venice Commission opinions and reports on constitutional amendment (CDL-PI(2015)023) and on thresholds in the electoral field (CDL-PI(2015)022).**

## **19. Institutional Developments in Observer States**

### *Japan*

Mr Shun Kitagawa, Observer on behalf of Japan presented the latest case-law issued in Japan in the constitutional field, mainly in the area of family law. The Supreme Court of Japan had recently adopted several decisions on this matter, enhancing the principle of equality before the law between men and women, particularly in paternity cases, as well as on the issue of the use of the same family name for married couples. The use of foreign cases and the access to an important amount of case-law coming from many countries promoted by the Venice Commission had been key for the Supreme Court of Japan. These decisions could be found in the CODICES database.

## **20. Co-operation with other countries**

Mr José Luis Sardón informed the Commission that Peru would organise the XI<sup>th</sup> Ibero-American Conference on Constitutional Justice, which will take place in Lima on 28 June- 1 July 2016. A list of questions had been circulated among all the members in order to establish the topic for the conference; the choice had been "The constitutional State and Economic Development".

## **21. Information on constitutional developments in other countries**

### *Poland, Croatia and Bosnia and Herzegovina*

Mr Markert briefly explained the current situation regarding the Law on the Constitutional Tribunal of Poland, which had drawn international attention.

This Law, in its version adopted on 26 June 2015 by the outgoing Parliament, provided for the election by the outgoing Parliament of the successors of all judges of the Constitutional Tribunal whose mandates expire in 2016. This included judges whose mandates would expire after the end of the term of the outgoing Parliament. The result of this Law was that five judges had been elected by the outgoing Parliament, whose oaths were not accepted by the President of

Poland. Their election was then cancelled by the new Parliament, which, on the basis of amendments to the Law, elected five new judges, whose oaths were accepted by the President of Poland. These amendments also provided for the early termination of the mandate of the Tribunal's President and Vice-President.

The Constitutional Tribunal's judgment of 3 December 2015 held that the provisions of the Law allowing the previous Parliament to advance the election of two out of the five judges, was unconstitutional. However, the election of the three other judges was held to be valid and the President of Poland was therefore held to be under the obligation to accept their oaths.

The Secretary General of the Council of Europe subsequently made a statement welcoming the clarification provided by the Constitutional Tribunal and stating that the Venice Commission was available to assist, should the Polish authorities wish to seek advice on this matter.

The second judgment of 9 December 2015 found that the provisions of the Law allowing the election of three of the judges by the new Parliament (replacing the three judges that had been constitutionally elected by the previous one) were unconstitutional. The new Parliament had therefore elected too many judges. The Constitutional Tribunal held that the President of Poland was under the obligation to accept the oaths of the three judges elected earlier. It also held that the taking of the oath was a formal procedure and that the term of the judges started with their election, not on the day on which they took their oaths. Finally, the early termination of the term of office of the Constitutional Tribunal's President and Vice-President was found to be unconstitutional.

On 15 December 2015, draft amendments to the Law on the Constitutional Tribunal were introduced in the Parliament, which would require a very high quorum for the Tribunal (13 out of 15 judges) as well as a majority of two-thirds for its decisions instead of a simple majority of judges, as is the case now.

Ms Jasna Omejec informed the Venice Commission on how the judges of the Constitutional Court of Croatia were also encountering problems. She therefore proposed that the President of the Venice Commission monitor not only the situation in Poland, but also in Croatia. Should the situation degenerate between sessions to such an extent that the Venice Commission should intervene, the President should then make a Presidential declaration.

Participants agreed that the President of the Venice Commission should give a statement if and when necessary to show that the Venice Commission is the guardian of constitutional justice. However, a public statement for Poland at this point was premature.

A number of participants suggested adding the situation of Republika Srpska (RS) to the list of situations to be monitored. In this respect, Mr Knežević informed the Venice Commission that the situation in Bosnia and Herzegovina was indeed difficult after the decision of the Constitutional Court. RS is unwilling to accept the decision of this Court because of the presence of international judges, claiming that this presence should be the subject of a referendum.

Mr Buquicchio explained that, having contributed to the establishment of all constitutional courts in greater Europe since 1989, the Venice Commission's activities in the field of constitutional justice were indeed very important. The Venice Commission was also at the origin of the establishment of the World Conference on Constitutional Justice that now brings together almost 100 constitutional courts or equivalent bodies. He explained that without constitutional review, democracy cannot exist. The Venice Commission therefore supports constitutional courts or equivalent bodies when their independence or existence is threatened.

**The Commission asked its President to follow the situation of the Constitutional Courts of Bosnia and Herzegovina, Croatia and Poland closely, including by making, where appropriate, public statements in consultation with the Bureau in view of the importance of constitutional justice in a democratic state and the special role of the Venice Commission in promoting it in Europe and world-wide.**

## **22. Co-operation with the Inter-American Court of Human Rights**

Mr Roberto Caldas, Vice-President of the Inter-American Court of Human Rights and President of the Court since 1 January 2016, informed the Commission about the most critical challenges faced by the Court. It was the first intervention by the Court at a Plenary Session in Venice, and Mr Caldas stressed the need for international co-operation in the present context of democratic crisis and attacks on the independence of the judiciary. He also insisted on the need to encourage the application of international human rights standards at the national level.

Even though the Venice Commission and the Court had different mandates, they both share the common task of consolidating a common international law heritage in the field of democracy, the Rule of Law and human rights. The co-operation with the Venice Commission had made it possible for the Commission to prepare a report on the freedom of expression and freedom of association of judges this year, at the request of the Inter-American Court, which had a pending case in this field in 2015 (*Lopez Lone et al. v. Honduras*). The comparative report presented to the Venice Commission was very useful for the Court, which gave it serious consideration and adopted its final decision on 5 October 2015.

The Inter-American Court of Human Rights affirmed its strong commitment to working with the Commission, to continuing with the exchange of case-law and comparative reports, as well as through the participation in the different seminars and conferences which have largely contributed to the dissemination of the Inter-American Court case-law in the region.

## **23. Co-operation with the International Ombudsman Institute**

Mr Rafael Ribo, Chairman of the European Chapter of the International Ombudsman Institute (IOI), informed the Commission about the threats which a number European national ombudsman institutions had been facing in the recent years (budget cuts, removal of powers, reduction of personnel, etc.). He invited the Venice Commission to reflect on how it could support the ombudsman institutions and invited the Commission to take part in a conference organised by the IOI in April in Barcelona, where those issues will be discussed

## **24. Award by the International Centre for Parliamentary Studies (ICPS)**

The Venice Commission had applied for three awards from the International Centre for Parliamentary Studies (ICPS): the International Institutional Engagement Award, the Gender Equality Award and the Minority Participation Award. The ICPS is a non-profit institution based in the United Kingdom and the prizes aim at fostering democracy by distinguishing electoral bodies and prominent people working in the field.

At the prize giving ceremony, held in Puerto Vallarta (Mexico) on 14 November 2015, the Venice Commission received the International Institutional Engagement Award and was also shortlisted for the two other awards for which it had applied (the Gender Equality Award and the Minority Participation Award). The Council for Democratic Elections' work was instrumental in this success.



**25. Conference on “The Constitutional Protection of Vulnerable Groups: a Judicial Dialogue” and meeting of the Sub-Commission on Latin America (Santiago, 4-5 December 2015)**

On 4 and 5 December 2015, the Venice Commission, in co-operation with the Constitutional Court of Chile, organised a Conference on “The constitutional protection of vulnerable groups: a judicial dialogue”, which was held in Santiago de Chile. Members of the Venice Commission from both Europe and Latin America participated to this Conference, as well as judges from the European Court on Human Rights and the Inter-American Court on Human Rights. Constitutional courts from over 12 Latin American countries were represented, including Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Mexico, Paraguay, Peru and Uruguay.

The idea of this Conference was to foster a judicial dialogue on the topic, which was complex due to the many angles of the definition of “vulnerability”. A constructive transversal dialogue was proposed, with four specific topics chosen for debate: protection of migrants as vulnerable groups; minorities and indigenous populations and their vulnerability; protection of disabled persons; protection of vulnerability based on age, which included both children and the elderly. The Inter-American Court on Human Rights’ case-law was chosen and presented on each specific topic, followed by a comparative perspective from the European Court of Human Rights and, finally by three national examples relating to the implementation of case-law were presented.

The Conference was followed by the meeting of the Sub-Commission on Latin America, which was held in Santiago on 5 December 2015. The Sub-Commission discussed several key issues. Firstly, from an institutional perspective, ambassadors from all Latin American countries not members of the Commission were invited to the Sub-Commission meeting and were invited to nominate a representative or a liaison officer from their State, which would ensure better communication in the future on on-going constitutional reforms in the region. Secondly, it was decided to translate relevant Venice Commission opinions and reports into Spanish, in order for them to be disseminated in conferences and seminars. Finally, a working group on the issue of the implementation of International Human Rights decisions and national margin of appreciation will be created, to include both the European and the Inter-American experiences.

**26. Report of the meeting of the Council for Democratic Elections (17 December 2015)**

Mr Endzins informed the Commission about the meeting of the Council for Democratic Elections, held on 17 December 2015. The summary report on voters residing *de facto* abroad, dealt with under item 17 of the agenda, was adopted at this meeting. The Council was informed about the award received by the Commission from the International Centre for Parliamentary Studies (ICPS), and was given a presentation of all the different activities developed in the electoral field, such as in Ukraine (legal assistance on the local election reform) or in Strasbourg (on e-voting) and the assistance given to the PACE in election observation missions (to Turkey, Ukraine and Azerbaijan). The Venice Commission further developed its co-operation with the Congress, which headed the *ad hoc* Committee observing the local elections in Ukraine. Future activities, such as the participation in the Conference organised by the Carter Center in January 2016, the first electoral expert debates which will be organised with the Central Electoral Commission of Romania in April 2016, as well as the 13<sup>th</sup> Conference of Electoral Management Bodies, which will take place on 14-15 April in Bucharest, were also introduced.

**27. Report of the meeting of the Sub-Commission on the Rule of Law (17 December 2015)**

Ms Cleveland recalled that, in the 2011 report on the Rule of law, six core elements had been identified, which the Commission had decided to itemise in detail in a checklist based on European and international standards. The working group had thus prepared a draft checklist. Subsequent to very fruitful discussions at the meeting of the Sub-Commission, it had been decided to expand three areas: corruption, non-discrimination and protection against arbitrary interference by the government, notably through surveillance. A revised checklist would be submitted to the Sub-Commission and subsequently to the Plenary for adoption in March 2016.

**28. Information on the Association of former Venice Commission members**

Ms Finola Flanagan informed the Commission that in December 2014 the Association of Former Members and Substitute Members of the Venice Commission (further – AFM) had been founded, its Statute adopted and its President (Ms Finola Flanagan) and Secretary General (Ms Tatiana Mychelova) elected. The AFM counted more than 40 members. At its meeting on 18 December the AFM was to reflect in particular on the concrete means of achieving its aims stated in Article 4 of the Association's Statute, i.e. on a possible contribution and support to the activities of the Commission.

**29. Other business****30. Dates of the next sessions**

The schedule of sessions for 2016 is confirmed as follows:

106 <sup>th</sup> Plenary Session	11-12 March 2016
107 <sup>th</sup> Plenary Session	10-11 June 2016
108 <sup>th</sup> Plenary Session	14-15 October 2016
109 <sup>th</sup> Plenary Session	9-10 December 2016

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](#)