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(VENICE COMMISSION)

110th PLENARY SESSION
Venice, Scuola Grande di San Giovanni Evangelista
Friday, 10 March 2017 - Saturday, 11 March 2017

110e SESSION PLÉNIÈRE
Venise, Scuola Grande di San Giovanni Evangelista
Vendredi 10 mars 2017 - Samedi 11 mars 2017

SESSION REPORT
RAPPORT DE SESSION

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1. Adoption of the Agenda

The agenda was adopted without any amendments (CDL-PL-OJ(2017)001ann).

2. Communication by the President

The President welcomed members, special guests and delegations, including several members of the Bureau of the World Conference on Constitutional Justice (WCCJ) attending the Plenary Session of the Venice Commission.

The President then presented his recent activities, as indicated in document CDL(2017)011.

3. Communication from the Enlarged Bureau

The Plenary was informed about the discussions that had taken place at the meeting of the Enlarged Bureau on 9 March 2017. The arrest of Mr Omurbek Tekebaev, member of the Venice Commission in respect of the Kyrgyz Republic was discussed. As Mr Tekebaev is a prominent opposition member, Mr Buquicchio was asked to prepare a letter addressed to the Kyrgyz authorities, to underscore the importance for the matter to be dealt with in line with the rule of law.

4. Communication by the Secretariat

The Plenary was informed that two staff members had recently left the Venice Commission: Ms Amaya Ubeda de Torres, who was working in the Elections, Referendums and Political Parties Division and Ms Caroline Godard, who was the assistant to the President, Secretary and Deputy Secretary of the Venice Commission.

5. Co-operation with the Committee of Ministers

The Venice Commission held an exchange of views with Ambassador Laima Jurevičienė, Permanent Representative of Lithuania to the Council of Europe; Ambassador Stelios Perrakis, Permanent Representative of Greece to the Council of Europe and Ambassador Katya Todorova, Permanent Representative of Bulgaria to the Council of Europe.

Ambassador Jurevičienė said that the Venice Commission's opinions are held in high regard and that the Commission should not be afraid of providing opinions that are not liked. She said that it is important to uphold European standards, not only for the Council of Europe member states, but also for neighbouring countries. The aim of these opinions is to try and encourage countries to respect European standards by providing intellectual support. She concluded by underlining that the co-operation between the Committee of Ministers and the Venice Commission is and remains important.

Ambassadeur Perrakis décrit la Commission de Venise comme étant l'institution par excellence du contrôle non-juridictionnel et du dialogue circulaire avec les pays membres. Il informe la Plénière que la Grèce apprécie beaucoup le travail de la Commission, surtout pendant cette période difficile. Il se réfère aux situations dites « de facto » – compliquées du point de vue du droit international – sur lesquelles la Commission de Venise devrait continuer de se pencher. Une conférence sur « La dignité humaine en période de crise » aura lieu en Grèce à la fin mai 2017, à laquelle la Commission de Venise est invitée à participer, car elle y apporterait une contribution essentielle.

Mme l'ambassadeur Todorova informe la Plénière que la Bulgarie tient en grand estime la Commission de Venise pour son soutien du développement du droit dans ce pays. La Commission reste fidèle à son rôle d'aligner la structure interne d'un pays sur les standards

européens. La Commission a adopté plus de vingt avis sur la Bulgarie. Mme Todorova rappelle que sous la présidence de la Bulgarie, le Comité des ministres a adopté, le 13 avril 2016, un plan d'action du Conseil de l'Europe pour renforcer l'indépendance et l'impartialité du pouvoir judiciaire, suivi par une Conférence de haut niveau des Ministres de la Justice et des représentants de l'ordre judiciaire à Sofia les 21-22 avril 2016, sur le thème « Renforcer l'indépendance et l'impartialité du pouvoir judiciaire, condition préalable à l'Etat de droit dans les Etats membres du Conseil de l'Europe ». Le Président de la Commission de Venise y a participé. Mme Todorova explique ensuite qu'avec la multiplication des difficultés internationales, le patrimoine constitutionnel européen est en train de devenir de plus en plus important.

M. Buquicchio réitère que les menaces globales ont un impact sur la Commission, rendant son travail plus difficile, notamment en raison du mécontentement des autorités de quelques pays à propos des avis de la Commission. C'est pourquoi elle compte sur le soutien du Comité des ministres, de l'Assemblée parlementaire et du Congrès dans ces moments difficiles. M. Buquicchio félicite ensuite la Lituanie, qui sera l'hôte du 4e Congrès de la Conférence mondiale (WCCJ) à Vilnius en septembre 2017. Il soulève également les problèmes financiers auxquels la Commission de Venise fait face en raison de la politique budgétaire de croissance zéro nominale adopté par le Comité des ministres, de sorte qu'une session plénière par année risque d'être supprimée. Il a noté l'importante conférence qui aura lieu en Grèce fin mai, à laquelle il ne pourra malheureusement pas se rendre. En ce qui concerne les situations dites « de facto », en d'autres termes, les conflits gelés, M. Buquicchio souligne que la Commission de Venise a été impliquée dans un bon nombre d'entre eux, entre autre le Kosovo, la Transnistrie, etc., mais qu'il est important de souligner que la Commission de Venise n'est pas un organe politique, mais qu'elle se situe à côté de ces organes politiques pour leur apporter un soutien technique.

6. Coopération avec l'Assemblée parlementaire

M. Philippe Mahoux, membre de la Commission des questions juridiques et des droits de l'homme de l'Assemblée parlementaire, informe la Plénière des activités de l'Assemblée, notamment de l'adoption par la Commission des questions juridiques de rapports sur la compatibilité avec les droits de l'homme de l'arbitrage investisseur-Etat dans les accords internationaux de protection des investissements et de garantir l'accès des détenus à un avocat. La Commission pour le respect des obligations et engagements des Etats membres du Conseil de l'Europe (Commission de suivi) a décidé de faire un rapport périodique de l'ensemble des Etats membres, pas seulement de ceux sous suivi. M. Mahoux ensuite informe la Plénière de la situation préoccupante en Turquie, notamment concernant le respect des droits fondamentaux sous état d'urgence, comme la liberté d'expression, la liberté de réunion ainsi que l'effet sur l'indépendance judiciaire. La Commission de suivi a proposé la réouverture de la procédure de suivi à l'égard de la Turquie, une décision qui devra être entérinée par l'Assemblée parlementaire. Il parle également du rapport sur la fixation de normes minimales pour les systèmes électoraux afin de créer une base pour des élections libres et équitables – qui sera également intéressant pour les activités de la Commission de Venise.

M. Buquicchio ajoute que la Commission permanente de l'Assemblée se réunissait pour l'heure à Madrid dans le cadre de la célébration du 40e anniversaire de l'adhésion de l'Espagne au Conseil de l'Europe. Il ajoute que le rôle de l'Assemblée parlementaire devient de plus en plus important pour la Commission de Venise : trois avis ont été demandés par l'Assemblée. L'un de ces projets a fait l'objet d'une fuite en Allemagne et a été repris dans le Financial Times. M. Buquicchio souligne que cette fuite ne vient ni des membres de la Commission de Venise, ni de son Secrétariat. Il mentionne également les bonnes relations entre la Commission de Venise et d'autres organisations internationales, dont l'UE et l'OSCE/ODIHR, les avis conjoints avec cette dernière contribuant à réduire le « forum shopping » par les Etats. M. Buquicchio mentionne également la Conférence co-organisée par la Commission de Venise et la

Présidence de la Roumanie, qui aura lieu à Bucarest le 6 avril 2017, sur le « Rôle de l'opposition dans un parlement démocratique ». Le Secrétaire Général du Conseil de l'Europe, Th. Jagland, et le Président de la Roumanie, K. Iohannis, inaugureront cette conférence.

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

The Commission held an exchange of views with Ms Gudrun Mosler-Törnström, President of the Congress since October 2016 and the first woman to hold this function. She informed the Plenary about the Congress' current activities, including its co-operation with the Venice Commission. A concrete example of this co-operation was the draft joint opinion on the draft Checklist for compliance with international standards and best practices preventing misuse of administrative resources during electoral processes at local and regional level (see item 12). This draft joint opinion was discussed during the Council for Democratic Elections' meeting and Ms Mosler-Törnström said that it would be a source of inspiration for further consolidation of the Checklist. Mr Richard Barrett would present the work in progress to the Congress at its next Plenary Session. Ms Mosler-Törnström went on to explain that the type of malpractice addressed by the Checklist had made its way into European political culture and was particularly relevant in municipalities due to the specific and close links between incumbents, candidates, public employees and voters. She also referred to the Congress' new programme of South-Med Partnership, which is complementary to efforts made by the Venice Commission and other Council of Europe bodies in the Southern Mediterranean countries. This initiative's aim is to meet the objectives of the Council of Europe's neighbourhood policy at the local and regional level.

Mr Buquicchio praised the good co-operation between the Congress and the Venice Commission, which takes place in a number of fields, ranging from the Checklist to the constitutional reform process in Ukraine. In this respect, he underlined that Mr Alain Delcamp had played a pivotal role in the process. He concluded by saying that he was sure the good co-operation with the Congress would continue under Ms Mosler-Törnström's presidency.

8. Exchange of views with the Director of the OSCE/ODIHR

Mr Michael Georg Link, Director of the OSCE/ODIHR, informed the Plenary that his mandate was coming to an end and that his successor would soon be chosen in Vienna, Austria. He said that the joint opinions and guidelines in the field of elections were a core area of co-operation between the Venice Commission and the OSCE/ODIHR. This co-operation was an important added value, combining resources to address issues together and preventing states from "forum shopping" between international organisations. He said that, in the current political climate, it was important not to fall into the trap of placing security over democratic institutions; that on the contrary, security can only be achieved through democratic institutions i.e. one cannot be dissociated from the other. He concluded that the Venice Commission and the OSCE/ODIHR were and would remain mutually compatible and that their co-operation would continue.

Mr Buquicchio wished Mr Link all the best in his future endeavours and hoped that his successor would continue with the exemplary co-operation that has been established between the two organisations.

9. Follow-up to earlier Venice Commission opinions

The Commission was informed on follow-up to:

Opinion on the Act on the Constitutional Tribunal of Poland (CDL-AD(2016)026)

Mr Markert informed the Commission that the EU Commission had adopted a complementary Rule of Law Recommendation, which *inter alia* requested Poland to ensure that any reform of the Law on the Constitutional Tribunal respects the judgments of the Constitutional Tribunal, takes the Venice Commission's opinions fully into account and ensures that the effectiveness of the Tribunal as a guarantor of the Constitution is not undermined. However, the constitutional crisis remained unresolved. New legislation that entered into force on the day after the end of the mandate of the President of the Tribunal, no longer focused on the Tribunal's procedure but on its presidency. It provided that the Tribunal's General Assembly for the election of candidates for a new Tribunal President should be chaired not by the Vice-President, who has a constitutional mandate, but by an acting President who would be the judge who has the longest experience in the judiciary in general. This person happened to be a recently appointed judge. The new legislation enabled the election of the candidates for the President of the Tribunal by a minority of the judges, contrary to the case-law of the Tribunal. Indeed, the acting President who was appointed on 20 December 2016 as the permanent President of the Tribunal by the President of Poland had been nominated only by a minority of the judges. She included into the Tribunal the so-called 'December' judges who had been elected on a legal basis that had been found unconstitutional by the Tribunal. The new President had also sent the Vice-President on forced vacation with immediate effect, thus affecting the Tribunal's voting majority. Furthermore, acting as the Prosecutor General, the Minister of Justice had challenged the election of three judges who had been appointed already in 2010. On 16 January 2017, the President of the Venice Commission expressed his concern about the worsening situation at the Tribunal (http://www.venice.coe.int/webforms/events/?id=2352). In parallel, the Prosecutor General also challenged the election of the President of the Supreme Court who supported the Constitutional Tribunal and who had spoken out against a judicial reform that would severely restrict the independence of the ordinary judiciary.

Opinion on the Emergency Decree Laws of Turkey nos. 667-676 adopted following the failed coup of 15 July 2016 (CDL-AD(2016)037)

Mr Markert informed the Commission about the extension of the state of emergency in Turkey, in January 2017, for 3 further months, and about the upcoming constitutional referendum. The Government continued to legislate through emergency decrees, thus circumventing normal democratic procedures. A delayed parliamentary control of the emergency decree laws was another source of concern. The adoption of Decree Law no. 684 reducing the duration of the detention in custody without access to a judge was a welcome development. Decree Law no. 685 provided for the creation of an inquiry commission mandated to examine cases of dismissed public officials or liquidated entities. However, the members of this commission would be essentially appointed by the executive. The potential workload of this commission was huge; it was doubtful that it would follow due process guarantees and issue individualised decisions.. It was positive that the decisions by the Commission could be appealed to the administrative courts and reviewed by the Constitutional Court.

Amicus curiae brief on the Law on the Transitional Re-evaluation of Judges and Prosecutors of Albania (Vetting Law) (CDL-AD(2016)036)

In its 2016 *amicus curiae* brief, the Venice Commission had examined the compatibility with international standards of the Law "On the Transitional re-evaluation of judges and

prosecutors in the Republic of Albania" (the Vetting Law) adopted by the Parliament in August 2016, which determined, as a way to re-establish trust in the judiciary, specific rules for the transitional re-evaluation of judges and prosecutors. The Commission noted that the final decision concerning the vetting process rests with the independent vetting bodies with judicial character, which creates sufficient guarantees against interference by the Government in the functioning of the judiciary.

On 22 December 2016, the Constitutional Court, referring also to the *amicus curiae* brief, decided (by 6 votes against 2) in favour of the Vetting Law. Consequently, the suspension of the law decided by the Constitutional Court is now lifted and the process of electing the members of the vetting bodies is currently underway. The Vetting Law enforcement appears as one of the key conditions of the European Union to open negotiations for EU membership of Albania.

Joint Opinion on the Draft Constitutional Law of Armenia on Political Parties (CDL-AD(2016)038)

The constitutional law on political parties of Armenia was adopted on 16 December 2016, following the constitutional mandate. The law has liberalised the formation and registration of political parties in Armenia, reducing the number of founding members, as well as the minimum number of members required to register the party, and the requirements for territorial representation of parties.

The joint opinion contained four key recommendations:

- to avoid over-regulation in the intra-party organisation - the law has now introduced more freedom, as unanimity is required only for establishing the party and more internal freedoms are guaranteed;

- to improve the rules concerning the financing of political parties - this has been reflected in the new law by detailing the maximum caps for donations, including rules on credits, loans and debts;

- the draft did not include any rule to promote and encourage intra-party gender equality - the adopted law makes a reference to the prohibition of discrimination based on gender;

- finally, the joint opinion recommended clarifying the rules on suspension of political parties and the meaning of "gross violation of the law" - these rules still need further clarification.

Opinion on the draft Constitutional Law on the Human Rights Defender of Armenia (CDL-AD(2016)033)

The Constitutional Law of the Republic of Armenia "On the Human Rights Defender" was adopted by the National Assembly on 16 December 2016.

Most of the recommendations made by the Venice Commission were taken into account, notably with respect to making a distinction between the Defender's ombudsman functions and the Defender's functions as the National Preventive Mechanism under the Optional Protocol to the Convention against Torture; adding the possibility for the Defender to have a regional presence to provide effective accessibility to human rights protection across the country; adding clear provisions on the immunity of the means of communication used by the Defender and the staff and that on the termination of the Defender's mandate, a report on the activity of the Defender be presented to Parliament and published.

Opinions on the package of draft laws aimed at the reform of the judicial system of Georgia (CDL-AD(2014)030), (CDL-AD(2014)031) and (CDL-AD(2014)032)

In October 2014, the Venice Commission adopted three joint opinions in respect of Georgia (prepared in co-operation with DG I), concerning the "third wave reform" of the judiciary. The Opinions welcomed in general the proposed improvements and formulated a number of recommendations.

Following those recommendations, the draft laws went through revision and, after the parliamentary elections of October 2016, were adopted by the Parliament in December 2016. The President returned the package to the Parliament considering in particular that Chairpersons of courts should be elected by the judges and not appointed by the Council of Justice and that the 3-year probation period should not be used on appointments from now on.

However, the 3 years' probation period results directly from the Constitution, and the overall assessment of the judicial reform in the three joint opinions is quite positive. On 8 February 2017, the presidential veto was overridden by the Parliament. The package will enter into force on the 30th day following its publication in the Official Journal.

Amicus curiae brief for the Constitutional Court of Bosnia and Herzegovina on the mode of elections in the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina (CDL-AD(2016)024)

The request concerned a case before the Constitutional Court of Bosnia and Herzegovina on whether the mode of election of delegates to the House of Peoples of the Federation of Bosnia and Herzegovina's Parliament – having regard to the specificities of the constitutional situation and the decision of the Constitutional Court on constituent peoples – was compatible with the principles underlying Europe's electoral heritage.

The Constitutional Court rendered its decision on 1 December 2016, referring to the Venice Commission's *amicus curiae* brief and followed some of the recommendations.

It held that certain provisions of the Electoral Law were not in conformity with the Constitution of Bosnia and Herzegovina – because they imply that the right to participate in democratic decision-making exercised through legitimate political representation will not be based on the democratic election of delegates to the House of Peoples of the Federation of Bosnia and Herzegovina by the constituent people who is represented and whose interests are represented by those delegates.

The Constitutional Court therefore held that these provisions were in breach of the principle of constituent status of peoples, i.e. the principle of equality of all constituent peoples.

Opinion on the Draft Code of Judicial Ethics of the Republic of Kazakhstan (CDL-AD(2016)013)

On 21 November 2016 the Assembly of Judges of Kazakhstan adopted a new Code of Judicial Ethics. The original draft, submitted to examination by the Venice Commission earlier that year, had been significantly re-worked and certainly improved, in particular, by removing overly restrictive formulas used by the Draft Code, and improving the overall structure.

Joint Opinion on the Draft Law on the Prosecution Service of the Republic of Moldova (CDL-AD(2015)005)

In February 2016, a new Law on the Public Prosecution Service had been adopted, giving to a very large extent effect to the recommendations and suggestions in the Joint Opinion (prepared by the Venice Commission, the OSCE/ODIHR and DGI) adopted in March 2015. Some of the recommendations made nevertheless required amendments to the Constitution of the Republic of Moldova.

On 25 November 2016, the Moldovan Constitution was amended, in line with the recommendations made in the Joint Opinion, in the part relating to the Prosecutor's Office and the Superior Council of Prosecutors. Under the new provisions, the Prosecutor General is appointed by the President of the country, upon the proposal of the Superior Council of Prosecutors, for a 7 year term of office, which may not be renewed. Under the previous provisions, the Prosecutor General was appointed by the Parliament, at the proposal of the Speaker. In addition, a provision regulating the dismissal of the Prosecutor General (by the President of the country, at the proposal of the Superior Council of Prosecutors, "according to the law, for objective reasons and based on a transparent procedure") had been introduced. The Constitution was also supplemented with a new provision stipulating the role, composition and functions of the Superior Council of Prosecutors (largely following the recommendations contained in the joint Opinion).

Follow up to Final Opinion on the amendments to the Federal Law on the Constitutional Court of the Russian (CDL-AD(2016)016)

This opinion was adopted in June 2016, after the delivery of the first judgment of the Russian Constitutional Court (in the case of Anchugov and Gladkov v. Russia) under the amendments. The Constitutional Court had shown a welcome constructive attitude by interpreting the law as not preventing execution measures from being taken even if a judgment is deemed to be "non executable". However, the recommendation by the Constitutional Court was not binding over the federal legislator or the government. The Venice Commission had made several recommendations for amending the law on the Constitutional Court, and notably that the Constitutional Court should not be tasked with the whole question of the execution of an international judgment but should only be asked to assess the constitutionality of a specific measure of execution. The Commission specified that as just satisfaction did not raise constitutional Issues as such, it was not to be submitted to the Constitutional Court. The provision that no execution measures may be taken if the Constitutional Court finds that the execution of a judgment would be unconstitutional needed to be removed.

The Constitutional Court was subsequently seized of just satisfaction in the case of Yukos, in which the ECtHR had found that there was an incorrect recovery of fines and compensation sums from the YUKOS Company because there was a retroactive application of the law.

In its judgment of 19 January 2017, the Russian Constitutional Court found that given that the YUKOS Company had been a malicious, unscrupulous tax evader, which had been recognized by the ECtHR, paying an unprecedented sum of money from the budgetary system to the shareholders of the Company, as ordered by the ECtHR, while the State budget had not received the huge tax-payments necessary for the enforcement of the public obligations before the citizens of Russia contradicted the constitutional principles of equality and justice. The Court therefore concluded that it was impossible to enforce this judgment of the ECtHR.

10. Turkey

Draft Opinion on the measures provided in the recent emergency decree laws with respect to freedom of the media

Ms Kjerulf Thorgeirsdottir explained that this Opinion, requested by the Political Affairs Committee of PACE, covered three main areas: the liquidation of media outlets by the decree laws adopted during the state of emergency, the criminal proceedings against journalists; and the creation of the inquiry commission tasked, in particular, with the re-examination of some emergency measures.

The opinion recalled some essential findings of the December 2016 opinion on the emergency decree laws; that permanent measures should be enacted in normal legislation, and that emergency measures should remain an exceptional tool connected to the reasons which justified declaration of the state of emergency. Several emergency measures (such as the removal of the sanctions for unbalanced press-coverage during the electoral campaign) clearly have no connection with the reasons behind the state of emergency. As to mass liquidations of media outlets by decree laws, these measures had no basis in any pre-existing legislative provision, which cast doubt on their lawfulness. In addition, these liquidations were ordered without individualised examination of each case and on the basis of very vague criteria ("connections" to "terrorist organisations"). Criminal prosecution of journalists during the emergency period had intensified; whereas formally they were prosecuted as "members" of terrorist organisations, in fact the accusations against them were often based mostly or exclusively on the content of their publications. Such cases should not be qualified under the heading of "membership" of a terrorist organisation. Furthermore, pre-trial detention of journalists, where it is imposed on the sole basis of gravity of charges against them (which are, in turn, based on their publications) was a source of grave concern. The creation in January 2017 of a special inquiry commission tasked with re-examining certain measures ordered under the state of emergency was a positive development, but it was unclear whether this commission would be able to cope with thousands of cases in a speedy manner and give individualised decisions, based on verifiable evidence and respecting at least some basic procedural guarantees. Finally, launching a major constitutional reform (the April 2017 referendum on constitutional amendments) in a situation where media freedom is seriously jeopardised could affect the legitimacy of the process.

Mr Selahaddin Menteș, Deputy Undersecretary, Ministry of Justice of Turkey, recalled that the purpose of the state of emergency was to combat terrorism and ultimately to restore a normal democratic regime. Measures taken during the state of emergency in respect of the media outlets were not aimed at suppressing media freedom. All cases of media outlets closed by the emergency decrees have been in fact carefully examined; that does not exclude that, despite all precautions, some of the media outlets were closed without sufficient reason. Those journalists who have been detained were active members of various terrorist organisations. Criminal law provisions were not applied retroactively. Finally, Mr Menteș underlined that Turkey remains committed to the values of democracy, human rights and the rule of law.

In the ensuing discussion participants underlined that even in combating terrorism the State should respect human rights, and in particular the freedom of the media.

The Commission adopted the Opinion on the Measures provided in the recent Emergency Decree Laws with respect to Freedom of the Media of Turkey (CDL-AD(2017)007).

Draft opinion on the constitutional amendments adopted by the Grand National Assembly on 21 January and to be submitted to national referendum on 16 April 2017

Mr Barrett explained that the constitutional amendments under examination brought about a shift from a parliamentary system with some features of semi-presidentialism, to a full presidential system. The choice of the political system was a sovereign one, and presidentialism was a legitimate choice in itself, which however required strong checks and balances. Under the proposed amendments, the President, directly elected by the people for a mandate of five years, renewable only once, would exercise executive power alone. The prohibition for the President to be a member, and even the president, of a political party would be lifted, so the President would not be a "pouvoir neutre", but would be actively involved in party politics. The Council of Ministers would be abolished. The President would be free to choose as many ministers and vice-presidents as he or she wished, who would be, individually and not collegiately, accountable to him or her only, not to parliament. The President would be empowered to dismiss them at will. He would be able to choose them from among deputies. This would give him the possibility to influence the deputies and the legislative agenda. One of the vice-presidents, chosen as such by the President, would exercise the executive power in case of vacancy or temporary absence of the President without any democratic legitimacy. The President, vice-presidents and ministers would only be accountable to parliament through a complex procedure of impeachment. The President's political accountability would be virtually non-existent until the end of the mandate and would only occur if he decided to run for a second mandate. The President would also be empowered to appoint and dismiss all top state-officials at will, on the basis of the criteria determined by him or her, with no need for any parliamentary ratification.

The President would have the power to call for early elections of the parliament on any ground whatsoever. This power is fundamentally alien to the strict separation of powers of a democratic presidential system. However, early parliamentary elections would necessarily imply also early presidential elections. In other words, if the President used his power of dissolution of the parliament, he would put at stake his own mandate. Conversely, parliament would be empowered to dissolve itself any time on any ground whatsoever, thus provoking early presidential elections. In principle, this bilateral power to provoke reciprocal early elections was intended, in the mind of the Turkish authorities, as a mechanism of checks and balances. In practice, however, it could not function because the compulsory synchronization of parliamentary and presidential elections, which the constitutional amendments introduced, would deprive the system of an essential check on the president's powers: the possibility for parliament to represent a different political sensibility from the President. Parliament, whose majority of deputies would likely come from the party whose leader is the President, would not represent a hurdle for the President, quite the opposite. In addition, a complacent parliament could give the President the opportunity to run for a third mandate, in case of early bilateral dissolution during the second mandate.

The President would have also the power to issue presidential decrees in all areas relating to executive powers, except in the areas constitutionally reserved to legislation. Legislation would in principle prevail over presidential decrees, but it was doubtful that in practice this principle would be smoothly applied whenever the overlap was not straightforward. The President would have the power to veto laws, and parliament would only be able to overcome the veto with an absolute majority.

The President would also be empowered to declare the state of emergency, during which his power to issue presidential decrees would be unrestricted.

Such a strong President required an extremely strong and independent judiciary to check his powers. Instead, the constitutional amendments weakened the judiciary, by empowering the President, who would not be acting as a "pouvoir neutre", to appoint almost half of the members of the high judicial council, when the other half would be elected by parliament, over which the President had considerable influence. The President would therefore gain control of the High Judicial Council, none of whose members would be a judge elected by his peers as the standards require. Control of the HJC would mean control over nominations, transfers, disciplinary sanctions and dismissals of judges and prosecutors. The President's influence would extend to the Constitutional Court.

In conclusion, the Opinion considered that, despite the positive elements represented by the abolition of the military courts and by the provision for the automatic loss of validity of presidential emergency decrees not ratified by parliament within 30 days, the proposed presidential system concentrated excessive power in the hands of the President, weakened the control of parliament over such power and weakened even further the judiciary. It differed substantially from the system of the United States, where the President had considerably less power than the future Turkish one.

Mr Selahaddin Menteș, Deputy Undersecretary, Ministry of Justice of Turkey, recalled the fruitful co-operation between Turkey and the Venice Commission and stressed that his country was fully committed to co-operating with the Council of Europe even under the currently critical circumstances. He expressed the view that the leak of the draft opinion to the German media raised a serious issue of confidentiality of the Venice Commission's work.

Mr Menteș referred to the Commission's procedure, and stressed the lack of predetermined criteria for the choice of rapporteurs; in his view, appointing members who had previously worked on the country posed the risk of a one-sided and even biased perspective. He also stressed that the opinion had been prepared in only one week after the visit to Ankara, and that Turkey had not been given sufficient time to consider the draft opinion. The draft opinion had been used by "anti-Turk" forces, and had therefore been manipulated, which the Council of Europe ought not to have accepted. The constitutional amendments had been adopted by the Turkish parliament, and the Council of Europe had to respect national sovereignty.

The change of political regime had been on the Turkish agenda for a long time. The amendments aimed at introducing political accountability for the President. The modification of the composition of the High Council of the Judiciary reflected previous Venice Commission recommendations. The amendments abolished military courts and martial law. These were all positive features of the amendments.

As concerned the holding of the referendum during the state of emergency, Mr Menteș recalled that Turkey had a very positive score of past free and fair elections, and had functioning democratic institutions, notably the Constitutional Court. The opinion focussed on the negative aspects of the reform.

Mr Buquicchio stressed that the whole process of preparation, discussion and adoption of the constitutional amendments had lasted less than four months, which had caused the Venice Commission to work very quickly on the opinion. Unfortunately, the Turkish authorities had not requested the Commission's assistance during the preparation of the amendments. The manner of appointment of rapporteurs had been in use for two decades and had proved to be effective. The draft opinion prepared by the rapporteurs had been discussed at length by the sub-commission, and numerous remarks made by the Turkish authorities in reply to the draft

opinion had been taken into consideration in the text submitted to the plenary for adoption, which was the result of the collegial work of the sub-commission.

Mr Leen Verbeek, President of the Congress' Monitoring Committee, informed the Commission that a report expressing concern for the replacement of elected mayors by officers under the state of emergency appointed by the government was to be discussed by Congress at the end of March. The Venice Commission would be asked to prepare an opinion on this matter.

Mr Paasivirta praised the high quality and clear nature of the analysis and recommendations contained in this important opinion. He regretted that the Commission had not been consulted during the preparation of the amendments. He expressed concern about the new composition of the High Council of the Judiciary He finally encouraged Turkey as an EU candidate State and as a member of the Council of Europe to pursue its co-operation with the Venice Commission.

Mr Shlyk informed the Commission that the OSCE/ODIHR was preparing a limited electoral observation mission to observe the referendum.

Several members intervened in the discussions, stressing *inter alia* the freedom of choice by a state of its own political regime. The need for particularly strong checks and balances in a presidential system was underscored.

Finally, Mr Buquicchio praised the polite and constructive attitude of the Turkish authorities.

The Commission adopted the opinion on the constitutional amendments of Turkey, adopted by the Grand National Assembly on 21 January 2017 and to be submitted to national referendum on 16 April 2017 (CDL-AD(2017)005).

Draft opinion on the duties, competences and functioning of the criminal peace judgeships

Mr Esanu explained that the criminal peace judgeships had been established to improve the quality of the reasoning of decisions on protective measures by way of specialisation (decisions on detentions, search warrants, body searches). However, this goal had not been implemented coherently. While the peace judgeships decided on these measures during the investigation phase (before indictment), the trial courts decided on these matters during the prosecution phase. A major flaw of the system was that there were only horizontal appeals - from one peace judgeship to the next - within small groups of peace judges in each region or city. This form of appeals could not be justified by the need of specialisation. Notwithstanding the goal of improving the quality of decisions by specialisation, there were numerous instances when peace judgeships had not sufficiently reasoned their decisions which had a drastic impact on human rights. The heavy workload of the peace judgeships (including decisions on traffic misdemeanours) did not leave them enough time to provide sufficiently individualised reasoning, notably when deciding on detention and – in another competence – when shutting down internet sites. The draft opinion recommended that the competence of the peace judgeship during the investigation phase should be removed and that the general courts should be entrusted with deciding on protective measures. If however the system of peace judgeships were retained, they should be relieved of all duties not related to protective measures, notably the blocking of internet sites and traffic offences which take up a considerable amount of their time. They should no longer have any jurisdiction on the merits and real appeals against their decisions should be introduced. Prosecution should request the release of all persons who were detained on the basis of insufficiently reasoned decisions by the peace judgeships.

Mr Selahaddin Menteş, Deputy Undersecretary at the Ministry of Justice of Turkey thanked the Commission for the draft opinion but found it to be particularly harsh. Peace judgeships had been established also in reaction to recommendations by Mr Perilli, an EU expert who had highly praised the work of the previous liberty judges. The 2014 reform had extended the narrow jurisdiction of liberty judges to protective measures in all cases. Doubts as to the independence of the peace judgeships were inacceptable. The peace judges were appointed like all other judges. They were experienced judges who already before their appointment to the peace judgeships had been part of the judiciary. It was not true that the peace judges were bogged down by work on traffic offences. They did not take decisions on the merits. The peace judges in Ankara had pointed out that they could easily manage their workload. Deciding on the blocking of Internet sites was closely linked to privacy issues and was therefore an appropriate subject for the peace judgeships. If need be, the number of peace judgeships could easily be increased. The draft opinion's negative assessment of the Supreme Judicial and Prosecutorial Council was not part of the mandate for the opinion and had to be removed from it as this was a political and not a legal assessment. There were no standards that an appeal should be available to a higher instance and there was no hierarchy between peace judgeships and the assize courts. The establishment of the appeal system remained in the margin of appreciation of the member States. Cassation review against the decisions of the peace judgeships was available. The negative appreciation of the appeals system was therefore inappropriate. It was inadmissible to infer from individual decisions that the reasoning of the decisions of peace judgeships was insufficient in general. The legislation provided for strict obligations for the reasoning, taking into account the principle of proportionality. Calling for the release of prisoners was unacceptable under the independence of the judiciary. The statistics showed the progress achieved through the peace judgeships. The high number of arrests after the coup was an exceptional situation and could not be considered to be a result of the establishment of peace judgeships. References to the situation after the coup should be removed from the opinion.

Mr Neppi Modona pointed out that, in their proposals for modification, the rapporteurs had already taken into account several points made by the Ministry of Justice, notably the call to release prisoners was no longer addressed to the judges but to prosecution.

The Commission adopted the Opinion on the duties, competences and functioning of the criminal peace judgeships (CDL-AD(2017)004).

11. Kazakhstan

Draft amendments to the Constitution

Mr Papuashvili introduced the Draft Opinion on the draft amendments to the Constitution of the Republic of Kazakhstan prepared at the request of Mr Jaxybekov, Head of the Presidential Administration of the Republic of Kazakhstan. Mr Papuashvili drew the attention of the Commission to the fact that the draft examined by the rapporteurs had been amended after the draft opinion had been prepared. The Commission was informed that the President of Kazakhstan had submitted the revised text of the draft constitutional amendments to Parliament on 1 March and that the text had been adopted on 6 March 2017. The text of the opinion made reference to this important development.

The text examined by the rapporteurs mainly concentrated on the changes in the distribution of powers between the President and other branches of state power. The examined draft law would increase the role of the Parliament and the Majilis (the lower chamber) and redistribute some of the powers currently in the hands of the President of the Republic of Kazakhstan between the Government and the Parliament. In the Rapporteurs' opinion the

changes proposed in the draft amendment concerning the executive branch reduced some of the executive presidential powers and provided more weight to the Government. The – limited - decrease in the powers of the President also led to the strengthening of the parliament. Mr Papuashvili pointed out the second important change concerning the powers of the Constitutional Council. The fact that the Constitutional Council would examine draft constitutional amendments and questions to be submitted to a referendum before they were adopted could be regarded as an important step in the protection of the constitution and constitutional rights and freedoms.

The drafters proposed to limit the constitutional provision on the Prosecutor's office to a general reference to the institution and to move provisions on its main powers to the relevant legislation. This was a positive step paving the way for further reform of the prosecution.

The rapporteurs had positively assessed the proposed change of the constitutional article protecting property rights, which would no longer be reserved solely to citizens of Kazakhstan - the corresponding provision of the examined draft would also cover foreigners and non-residents. It was regrettable that the draft adopted by the Parliament on 6 March did not include this positive change proposed in the initial text.

Mr Talgat Donakov, Deputy Head, Administration of the President of the Republic of Kazakhstan, thanked the Commission for preparing the opinion within a very tight timeframe. The constitutional amendments submitted to the Commission for opinion were a logical follow-up to the previous constitutional reforms in 1998 and 2007. Kazakhstan was following a "step by step" approach to the reform of its state institutions and the current change was an extremely important development. The adopted constitutional amendments would be followed by an important reform of legislation in a number of areas. The text adopted on 6 March by the parliament took into account a number of proposals made by different institutions and Kazakh citizens during the public discussion of the amendments organised in January and February 2017. Mr Donakov underlined that the authorities planned to continue their co-operation with the Commission and to request its opinion on different pieces of legislation on the implementation of the new provisions of the Constitution.

The Commission adopted the opinion on the draft constitutional amendments to the Constitution of the Republic of Kazakhstan (CDL-AD(2017)010).

Draft law of the Republic of Kazakhstan on administrative procedures

Ms Khabriyeva presented the text of the Draft Opinion on the draft law of the Republic of Kazakhstan on administrative procedures. The current law on administrative procedures had been adopted in 2000 and needed revision. In her opinion the draft law was of a very high quality and if adopted would become an important tool for modernising different administrative procedures in Kazakhstan. The examined text followed a number of recommendations found in different international documents, including those of the Council of Europe. However, there were some provisions in the draft that could be reconsidered or further improved. These included the terminology used in different parts of the text, the proposed timeframes for different procedures and the need to include additional references to the procedures concerning appeals to courts.

Mr Talgat Donakov, Deputy Head of the Administration of the President of the Republic of Kazakhstan, stressed that Kazakhstan was conducting an ambitious reform of its state administration aimed at enhancing its performance and transparency. He thanked the Commission for its opinion and underlined its importance for the drafters of the text, suggesting that in the light of its recommendations the authorities might consider the possibility of preparing

a unified Administrative Code. Mr Donakov invited the Commission to continue this fruitful co-operation in the field of administrative reform in Kazakhstan.

The Commission adopted the the opinion on the draft law of the Republic of Kazakhstan on administrative procedures (CDL-AD(2017)008).

12. Draft Checklist of the Congress of Local and Regional Authorities of the Council of Europe for compliance with international standards and best practices preventing misuse of administrative resources during electoral processes at local and regional level

Mr Kask introduced the draft joint opinion by the Venice Commission and the OSCE/ODIHR on the draft checklist of the Congress of Local and Regional Authorities of the Council of Europe for compliance with international standards and best practices preventing misuse of administrative resources during electoral processes at local and regional level, drawn up at the request of the Congress, and already adopted by the Council for Democratic Elections. He reminded that the Venice Commission had already adopted a report and guidelines on the issue, and that the different national backgrounds had to be taken into account: what is considered misuse in some countries is not necessarily so in others.

The draft opinion welcomed the document prepared by the Congress. The structure of the document could however be made clearer and some repetitions avoided. It would also be desirable to state in the introduction to whom the checklist would be addressed (*e.g.* election observers). The draft opinion included also a number of minor amendments, which had been accepted by the Congress representatives.

Mr Shlyk, on behalf of the OSCE/ODIHR, also welcomed the document, which would be useful for electoral management bodies, candidates, national administrations, as well as observers. This document was a natural, practical extension of the joint Venice Commission-OSCE/ODIHR guidelines in the field and had already been taken into account by OSCE/ODIHR election observers.

The Commission adopted the Joint Opinion by the Venice Commission and the OSCE/ODIHR on the draft checklist of the Congress of Local and Regional Authorities of the Council of Europe for compliance with international standards and best practices preventing misuse of administrative resources during electoral processes at local and regional level (CDL-AD(2017)006).

13. Armenia

The Commission was informed about the progress made in the work on the draft opinion on the draft Constitutional Law on the Constitutional Court of Armenia. The request for this opinion had been made by Ms Arpine Hovhannisyan, Minister of Justice of Armenia, in a letter of 8 February 2017. She had expressed the wish that the opinion be issued as a preliminary opinion before the end of March, prior to the parliamentary elections of 2 April 2017.

The Commission agreed to authorise the rapporteurs, if necessary, to send a preliminary opinion to the Armenian authorities prior to the June Plenary Session.

14. Georgia

The Commission was informed on plans for constitutional reforms in Georgia following the President's visit to Tbilisi in January 2017. A constitutional commission composed of members of Parliament, former Presidents of the Constitutional Court and civil society representatives had been established to prepare draft amendments to the Constitution, with the aim of moving towards a parliamentary system of government.

The President had been assured that, in the constitutional revision process, no change would be adopted without the Venice Commission's prior approval. In this context, a visit of the rapporteurs had been scheduled for the end of March 2017 with a view to the adoption of an opinion in June 2017, subject to the transmission by the Georgian authorities, in due time, of the draft constitutional amendments.

15. Republic of Moldova

Joint Opinion on Draft Law No. 281 amending and supplementing certain legislative acts in relation to the so-called "mandate of security"

Mr Cameron explained that the draft law had been prepared as part of the legitimate efforts made by the Moldovan authorities to improve the legal framework for the protection of the "state security", and for combating extremism, in the light of increasing threats in these fields. In particular, the use of special investigation measures outside criminal proceedings, under the authority of a "security mandate" granted by a judge had been proposed. This was a highly sensitive file for Moldovan society, and the related legislative process had been marked by several closely related and/or competing pending draft laws. The proposed mechanism had already been assessed in 2014 by the Venice Commission and DGI.

The draft opinion positively noted that some of the 2014 recommendations had been taken into account in the draft law. These included the limitation (to 30 days) of the initial maximum period of authorisation of special measures with a maximum of two years for authorisation renewal, and the access of the concerned prosecutor and judge to secret information, instrumental for a meaningful control over coercive measures.

However, a number of key aspects still had to be addressed, including the general issue of the accountability of the Service. The draft opinion recommended in particular: to provide clearer and more precise conditions for court authorisation of a security mandate; to specify the circumstances for emergency authorisation and to provide reasonable timeframe for subsequent review by the judge; to better specify the grounds for deferring notification to the person targeted by the security mandate and strengthen related safeguards. In addition, more specific and narrow definitions for the proposed new extremism offences were recommended, as well as increased human rights safeguards in relation to the measures for combating extremist activities carried out through electronic communication networks and systems.

Given the existence of parallel pending drafts dealing with intelligence and security matters, the draft opinion stressed the need to ensure clarity and consistency of the future legislation, as regards both concepts and procedures and institutional aspects.

The Commission adopted the Joint Opinion of the Venice Commission, the Directorate of information society and action against crime and of the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Draft Law n° 281 of the Republic of Moldova amending and completing Moldovan Legislation on the so-called "Mandate of security" (CDL-AD(2017)009).

Amicus curiae brief on the criminal liability of judges

Mr Holmøyvik introduced the draft *amicus curiae* brief for the Constitutional Court of the Republic of Moldova on the criminal liability of judges, prepared following the request made by Mr Alexandru Tănase, President of the Constitutional Court of the Republic of Moldova, by letter dated 12 January 2017.

The Supreme Court of the Republic of Moldova had requested the Constitutional Court to review the constitutionality of Article 307 of the Criminal Code (on the issuance by a judge of a sentence, decision, ruling or judgment that is contrary to the law). In this context, the Constitutional Court had addressed several questions to the Venice Commission that revolved around the issue of whether or not a judge could incur criminal liability for rendering a decision that was then overruled by a higher court.

The draft Amicus curiae brief concluded that a balance needed to be struck between a judge's immunity as a means to protect him or her against undue pressure and abuse from other state powers or individuals (functional immunity) and the fact that a judge is not above the law (accountability). Disciplinary actions, penalties, criminal responsibility or civil liability should only arise where judges' failures were performed intentionally, with deliberate abuse or, arguably, with repeated, serious or gross negligence. It therefore resulted that in order to hold a judge personally liable for his or her decision, it was not sufficient to refer to the fact that the decision had been overturned by a higher court.

The Commission adopted the *amicus curiae* brief for the Constitutional Court of the Republic of Moldova on the criminal liability of judges (CDL-AD(2017)002).

16. Slovakia

Mr Clayton informed the Commission that the President of Slovakia, who had requested this opinion, had refused to appoint seven out of eight candidates for judges because he considered that they did not fulfil the professional requirements. Only one out of four vacancies at the Constitutional Court had been filled and the Court had only ten instead of 13 judges. As a consequence, the length of proceedings at the Court had increased steadily. The Slovak institutions had been unable to resolve this dispute. In his request for opinion, the Slovak President had asked whether Interpretation no. 4/2012 of the Constitutional Court relating to the appointment of the Prosecutor General would also apply to the appointment of the judges of the Constitutional Court. The draft opinion contained a detailed chronology which showed the complexity of the situation. This opinion had been particularly difficult because the Venice Commission had been called upon to decide on questions of fact and of national procedure. Replying to these questions would have turned the Commission into a fourth instance. The draft opinion refused to assume this role and refrained from deciding whether there was a difference between the oral pronouncement and the written reasoning of a relevant decision of the Constitutional Court. However, the opinion recommended that the Court's judgments should be pronounced only once the written judgement was available. The Senates (chambers) of the Court should be able to refer issues of major constitutional importance to the plenary. In order

to avoid a second candidate selection procedure, the draft opinion also recommended that the President or his or her representatives should participate actively in the parliamentary hearings of candidates. The draft opinion also proposed that in electing candidate judges, the National Assembly should decide by qualified majority. A constitutional amendment to this effect should include appropriate anti-deadlock mechanisms.

Mr Róbert Madej, Chairman of the Constitutional and Legal Affairs Committee of the National Council of the Slovak Republic, welcomed that the draft opinion was fully in line with the Commission's 2014 opinion. The President had not respected the National Council's proposals for candidates. This endangered the functioning of the Constitutional Court and in turn the protection of human rights and checks and balances in Slovakia. A solution had to be found soon because after a major rotation in 2018, only one judge might remain at the Court. Mr Madej agreed with the conclusions of the draft opinion, and notably the call for the Constitutional Court's decisions to be respected. However, he was worried that it might be difficult to obtain a qualified majority for the election of candidates as recommended. He also feared that the opinion's recommendations might be misused to further delay the solution of the problem.

Mr Jan Mazak, Adviser to the President of the Slovak Republic, pointed out that the President of Slovakia had requested an opinion in substance on whether Interpretation no. 4/2012 on the appointment of the Prosecutor General was applicable to the appointment of judges of the Constitutional Court but the draft opinion did not give a reply to these questions, probably due to the short time available. Instead, the draft opinion merely referred to decision no. 45/2015 of the Constitutional Court which had found inadmissible the request of the President for an interpretation of the Constitution. The conflict between the President and the National Council remained unresolved because the Constitutional Court had refused to settle it by way of an interpretation. This rejection of the President's request by the Court suffered from a lack of legitimacy. It was this very decision that had led to the President's request for independent international legal advice from the Venice Commission. Referring back to that decision would reduce the persuasiveness of the opinion.

During the discussion, the question was raised as to what should occur if a Constitutional Court gave unconvincing decisions and thus became a co-constituent power. The reply given was that, in such cases, the judgements would have to be implemented but the constituent power would be able to amend the Constitution.

Another issue discussed was whether Parliament should elect constitutional court judges with a qualified majority. In some countries it would be difficult to obtain a qualified majority. On the other hand, it was pointed out that a qualified majority ensured that the parliamentary minority was involved in the selection process and this fostered co-operation between the political parties. Appropriate anti-deadlock mechanisms needed to be put in place.

The rapporteurs welcomed that the President of Slovakia had publicly declared that he would follow the opinion whatever its outcome. Due to the critical situation at the Constitutional Court, the crisis had to be solved on the basis of the current legislation, before the implementation of the opinion's recommendations on how to avoid similar situations in the future.

The Commission adopted the opinion on questions relating to the appointment of judges of the Constitutional Court of Slovakia (CDL-AD(2017)001).

17. Spain

Mr Neppi Modona informed the Commission that the opinion had been postponed several times, firstly because there had been repeated elections in Spain, then because cases against the amendments were pending before the Constitutional Court. According to the Spanish Government, the purpose of the amendments was to ensure the execution of judgments of the Constitutional Court. The amendments decisively increased the role of the Court in ensuring the execution of its own judgments. The Court could do so *inter alia* by annulling any act contradicting its decisions and by repetitive coercive penalty payments that had been increased 10-fold to up to 30,000 Euros. According to the draft opinion, such payments could be considered as criminal charges under Article 6 ECHR as far as individuals are concerned. The Court could also suspend authorities and civil servants who refused to implement the Court's judgments. The amendments remained unclear as to whether elected officials could be suspended and the draft opinion recommended specifying the personal scope of these provisions. The draft opinion recognised that decisions of the Constitutional Court had to be implemented and that measures to ensure this were legitimate but it recommended not attributing such powers to the Constitutional Court itself because this could undermine its perception as a neutral judge of the laws. However, there were no European standards in this area, so that the amendments could not be considered as contradicting any standards.

Mr Rafael Andrés Leon Cavero, Government Agent of the Ministry of Justice of Spain, thanked the Venice Commission for the opinion which would provide important guidance for the application of the law. The amendments increased the possibility of enforcing the effectiveness of the Constitutional Court's judgements and thus the effectiveness of the Constitution itself. As a part of the judiciary, it was normal for the Constitutional Court to enforce its own decisions. This had always been part of the conception of the Court. He welcomed that the opinion underlined the final and binding character of the judgments of the Constitutional Court. The Court would not itself enforce the measures under the amendments but it would call on other powers, notably the ordinary judiciary, to assist it in these tasks. The comparative study that was part of the draft opinion showed that it was not only in Spain that the Constitutional Court contributes to the execution of its own judgments. The coercive payments would be imposed in a prudent manner. Since their introduction in 2007, the Court had never imposed such payments. Members of Parliament enjoyed inviolability and could not be suspended under the amendments, only their administrative functions could be suspended.

The Commission adopted Opinion on Amendments to the Institutional Law on the Constitutional Court of Spain (CDL-AD(2017)003).

18. Interaction between the Majority and the Opposition in a Democratic Society

Ms Kiener informed the Commission on the progress made in the process of updating its 2010 Report on the role of the opposition in a democratic parliament. The aim was, following the recommendations of the Secretary General of the Council of Europe in his 2016 report on the "State of democracy, human rights and the rule of law: a security imperative for Europe", to broaden the analysis and examine also the responsibilities incumbent upon the majority, and its interaction with the opposition. The rapporteurs had already held two meetings during which they examined developments and trends in this area, in particular in the light of the opinions adopted in recent years by the Commission in respect of a number of countries (Hungary, Romania, Poland), and agreed on key issues to be addressed in the framework of the report.

Mr Aurescu informed the members that the Commission was also organising, in co-operation with the Presidency of Romania, an international conference on the same topic. The conference, to be held on 6-7 April 2017 in Bucharest under the patronage of the Secretary General of the Council of Europe and of the President of Romania, was intended as an opportunity for participants from different countries to discuss expectations, good practices and lessons learned with regard to the interaction majority-opposition from the experience of the last few years and to identify ways to make this interaction more constructive and more effective.

19. Report of the meeting of the Scientific Council (9 March 2017)

Mr Helgesen informed the Commission that the Scientific Council had endorsed the compilation on referendums, noting that the Commission's work had referred mostly but not exclusively to constitutional referendums.

The Scientific Council had decided to launch a study focussing on the dangers of abuse of referendums. Mr Alivizatos proposed to start by a questionnaire analysing the referendums having taken place in Europe. The study would build on previous works of the Venice Commission, notably the guidelines on referendums, and would move from the premise that referendums should not be seen as an alternative to representative democracy, but as a complement to it.

The Commission endorsed the compilation on referendums (CDL-PI(2017)001).

In addition, Mr Helgesen informed the Plenary that the Scientific Council had also discussed the extent to which the Commission should enter into issues of interpretation of domestic law when preparing an *amicus curiae* brief. There was a risk for the Commission to be dragged into considerations about domestic law principles and arguments and to become the final arbiter of domestic disputes. The question of whether more defined rules on this matter were necessary was raised. It was decided to start a thorough reflection of these questions.

20. Rule of law oversight in the European Union

Mr Carlos Closa Montero and Mr Dimitry Kochenov informed the Commission on their research project concerning Rule of Law oversight in the European Union, to which Mr Kaarlo Tuori, Venice Commission member, had contributed. They noted that the European Union does not have effective legal tools to prevent backsliding of rule of law standards in some of the member-states and that the TEU Article 7 procedure was unlikely to be used due to political constraints.

In the ensuing discussion, speakers acknowledged difficulties in defining the scope of the concept of the rule of law and its various manifestations, but stressed that it nevertheless has a well-defined normative core. In this context, the practical importance of the Rule of Law checklist developed by the Venice Commission in 2016 was emphasised, as well as the importance of a dynamic approach to the interpretation of this evolving concept.

21. Co-operation with other countries

Palestinian National Authority

Mr Ali Abu Diak, Minister of Justice of the Palestinian National Authority, greeted members of the Venice Commission on behalf of the President of the Palestinian National Authority. He informed the Commission about the on-going reform of the institutions of the Palestinian

Authority, in particular the local elections reform, about the establishment of specialised courts (electoral, juvenile), the establishment of the Constitutional Court by presidential decree in 2016, the adoption of the new law on access to information and cyber-crime, etc. He also expressed serious concerns in relation to certain recent decisions taken by the Knesset and by the Supreme Court of Israel. In response President Buquicchio recalled that the role of the Venice Commission is to advise the authorities on legal matters and that resolution of major political controversies is not in its remit.

22. Information on constitutional developments in other countries

Hungary

Mr Varga informed the Commission that in December 2016 the Hungarian Parliament had finally elected four new judges of the Constitutional Court and its President (Parliament elects the Court's President by qualified majority, the judges elect the Vice-President). The Court had 15 judges but since February 2015 one vacancy remained unfilled and since April 2016 there were four vacancies. The Court had still been able to work as each of the two panels could be filled with substitute members from the other panel. Some political groups in Parliament had refused to participate in the election process. The others could not find a compromise on the basis of sharing the vacancies between them. Finally, the governing parties and the opposition party "Politics can be Different" agreed to elect the judges and the President not on the basis of dividing the vacancies between them but by proposing candidates who were acceptable to the other parties by consensus. Thus, one Supreme Court (Kuria) judge and three university professors were elected. The Vice-President of the Court was elected as its President. In Parliament, the election of the deputy ombudsman for the protection of environmental rights was also very positive as he obtained 95% of the votes.

Amendments to the four main procedural codes of Hungary had been prepared (and three of them had already been adopted) on the basis of consensual input from academia and the professional bodies. The Ministry of Justice abandoned its project of establishing separate administrative courts. However, upon request by the President of Hungary, the Constitutional Court annulled an unclear provision in the cardinal law on courts relating to administrative jurisdiction ("court acting as administrative appellate court"). In another judgment, the Court confirmed that photos of police officers can be made public without the consent of the officer concerned if this is important for the public and if *prima facie* this publication is not abusive (no close-up photos of fights).

In November 2016, the Constitutional Court handed down an important judgment on the transfer of competences to the EU under Article E.2 of the Basic Law. The Court ruled that such transfers are limited by the Hungarian constitutional identity, which is rooted in the Historical Constitution. In joining the EU, Hungary had not given up sovereignty but had allowed for the common exercise of some competences. The Basic Law had not established but only recognised the pre-existing fundamental value of the constitutional identity. Therefore, it could not be abandoned through accession to international treaties. This judgement had also settled the discussion following the referendum on migration.

Roumanie

Mr Toader informe la Commission des développements les plus récents intervenus en Roumanie dans les domaines législatif et constitutionnel. Plus particulièrement, M. Toader présente l'ordonnance d'urgence n° 13 (OU 13) adoptée par le Gouvernement roumain le 31 janvier 2017 et les développements législatifs, constitutionnels et sociaux y relatifs. Il fait notamment référence à la justification de l'adoption de l'ordonnance, à ses potentiels effets et au mécontentement suscité par cet acte normatif au sein de la société, en raison

notamment des circonstances de son adoption (à une heure tardive dans la nuit), de son potentiel impact sur la lutte anti-corruption, ainsi que du manque de communication du gouvernement à son égard.

La Commission est informée de l'ampleur des mouvements sociaux engendrés par l'adoption de l'ordonnance d'urgence et à son abrogation par une autre ordonnance d'urgence du Gouvernement (n° 14), approuvée par la suite par loi par le Parlement. M. Toader fournit également des informations concernant le contentieux constitutionnel suscité par l'OU 13. Il souligne que, dans sa nouvelle fonction de ministre de la Justice (depuis le 23 février 2017), il veillera à ce que le recours aux ordonnances gouvernementales soit évité et à ce que, lors de l'adoption des actes normatifs, le respect de standards internationaux applicables, y compris ceux de la Commission de Venise, soit assuré.

23. Co-operation with the International Ombudsman Institute

Mr Rafael Ribo, Chairman of the European Chapter of the International Ombudsman Institute (IOI), informed the Venice Commission on the recent activities of the IOI Europe, and in particular on the conference held in April 2016 on counter-terrorism measures. He also informed the Commission about threats to the ombudsman institutions in various parts of Europe, and in particular in Poland. He invited the Venice Commission to reflect on possible measures which would protect the ombudsman bodies from such threats.

24. Adoption of the Annual Report of activities 2016

Mr Buquicchio informed the Commission that he would present the annual report of activities 2016 to the Committee of Ministers on 21 June 2017.

The Commission adopted the draft annual report of activities 2016.

25. Information on Conferences and Seminars

The Commission was informed on the results and conclusions of the Conference of Arab Electoral Management Bodies on "Strengthening the Independence of Electoral Management Bodies" which took place in Tunis on 7-9 February 2017. This event was co-organised by the Organisation of Electoral Management Bodies of Arab countries, the Independent electoral authority of Tunisia, the Venice Commission and UNDP. The activity focused on different aspects of electoral administration bodies' independence. Participants discussed the impact of the procedures of nomination of members of electoral bodies, their relations and interaction with other state institutions and their financial independence.

The Commission was also informed on the preparation of the 5th Intercultural Workshop on Democracy organised in the framework of the Cyprus Presidency of the Committee of Ministers of the Council of Europe and in co-operation with the Ministry of Foreign Affairs of Cyprus, entitled "Interaction between Constitutional Courts and similar jurisdictions and Ordinary Courts", to take place in Nicosia on 3-4 April 2017. Constitutional Courts and Councils as well as representatives of ordinary jurisdictions of Algeria, Egypt, Jordan, Lebanon, Morocco, Palestinian National Authority and Tunisia had confirmed their participation in the event. The workshop would address, among other issues, such topics as the independence of the judiciary, access to justice and individual complaints procedures.

26. World Conference on Constitutional Justice

Mr Dürr informed the Commission that following the plenary session, the Bureau of the World Conference on Constitutional Justice would hold its 11th meeting in Venice. Since its establishment in 2011, 105 Constitutional Courts and equivalent institutions had become members of the World Conference. With the recent accession of the High Court of Australia, the Conference was represented on all five continents. The Conference was an independent organisation, with its own Statute and budget, but the Venice Commission acted as the secretariat of the Conference. The Conference's Bureau was composed of representatives of ten regional and linguistic based groups of courts, the previous and future hosts and three courts elected by the General Assembly (Austria, Lithuania and Turkey). The main topic of the 11th Bureau meeting was the preparation of the 4th Congress on "the Rule of Law and Constitutional Justice in the Modern World" which would be held in in Vilnius, Lithuania, on 11-14 September 2017. At the congress, Mr Vermeulen would present the Commission's Rule of Law Checklist. The members of the Venice Commission had been invited to the congress but the Commission could not cover their expenses. The budget of the World Conference would support the participation of member courts from Least Developed Countries.

27. Report of the meeting of the Council for Democratic Elections (9 March 2017)

Mr Kask, elected as the new Chair of the Council for two years, expressed gratitude to the members of the Council for their trust. He also informed the Commission on the results and conclusions of the meeting held on 9 March 2017, and described past and future co-operation of the Council with the ODIHR and PACE in the field of election observation, organisation of seminars and workshops, and about the upcoming projects in the Republic of Moldova and in Georgia.

28. Other business

There were no items under other business.

29. Dates of the next sessions

The schedule of sessions for 2017 was confirmed as follows:

111th Plenary Session 9-10 June 2017
112th Plenary Session 6-7 October 2017
113th Plenary Session 8-9 December 2017

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