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(COMMISSION DE VENISE)

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SESSION REPORT
RAPPORT DE SESSION

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1. Adoption de l'ordre du jour

L'intervention de M. Mohammed Benabdelkader, Ministre délégué auprès du Chef du gouvernement, chargé de la réforme administrative et de la fonction publique du Royaume du Maroc, aura lieu vendredi 6 octobre à 14.30, au lieu du samedi 7 octobre.

2. Communication du Président

Le Président invite les membres à consulter la liste de ses activités récentes (voir le document [CDL\(2017\)028](#)) et se tient à disposition des membres pour compléter l'information.

3. Communication du Bureau élargi

Le Bureau élargi a été informé des restrictions budgétaires auxquelles le Conseil de l'Europe et la Commission de Venise doivent faire face. La Fédération de Russie ayant suspendu sa contribution financière au budget du Conseil de l'Europe à partir de juin 2017, toutes les entités du Conseil de l'Europe ont été invitées à réduire leur budget d'activités d'ici la fin de l'année. Pour la Commission de Venise, ces restrictions budgétaires ont pour principale conséquence de devoir renoncer cette année à l'interprétation de et vers le russe pendant les sessions plénières et de devoir reporter certaines activités à 2018. Des mesures supplémentaires pourraient intervenir si la situation devait perdurer en 2018.

4. Election du Comité des Sages

En vertu de l'article 6, paragraphe 1bis du règlement intérieur révisé, la Commission a, sur proposition du Bureau élargi, élu un « comité de sages », qui préparera les élections aux différentes fonctions au sein de la Commission, qui se tiendront lors de la session plénière de décembre 2017. Le Comité des Sages est composé de M. Bartole, M. Esanu, Mme Hermanns et Mme McMorrow. Chaque membre peut se porter candidat pour tous les postes à pourvoir auprès des « sages ».

5. Communication du Secrétariat

M. Markert complète les informations relatives à la situation budgétaire de la Commission, en l'informant que le budget augmentera de 0.5 % en 2018. En conséquence d'une augmentation de la contribution au budget général du Conseil de l'Europe, cependant, le budget de la Commission pour les dépenses opérationnelles subira une réduction d'environ 60.000 euros, ce qui aura inévitablement des conséquences sur les activités.

6. Co-operation with the Committee of Ministers / Coopération avec le Comité des Ministres

Ambassador Predrag Grgić, Permanent Representative of Bosnia and Herzegovina to the Council of Europe, underlined the importance of Venice Commission's opinions in the legal order of his country. In particular, he stated that the several *amicus curiae* briefs which had been prepared by the Commission had significantly contributed to the understanding of the legal situation and of the role of the Commission.

Mr Buquicchio pointed out that the Commission has assisted Bosnia and Herzegovina from the very beginning of the State, by contributing to the implementation of the Dayton Agreement so that a unified country respecting the rule of law and Council of Europe standards could emerge.

M. l'Ambassadeur Jean-Baptiste Mattei, Représentant permanent de la France auprès du Conseil de l'Europe rappelle combien les avis de la Commission ont une autorité juridique et morale indiscutables et sont devenus des textes de référence tant pour le Comité des Ministres

que pour l'Union européenne. Il relève que la Commission prouve la force d'attraction considérable des valeurs européennes au-delà du continent. Le Conseil de l'Europe fait face à plusieurs défis. Tout d'abord, les difficultés financières suite à la suspension de la contribution de la Fédération de Russie au budget général fragilisent l'institution. Par ailleurs, la remise en cause des éléments de base de l'état de droit par certains pays membres comme la contestation de l'autorité de la Cour européenne des Droits de l'Homme sont également des points préoccupants. A cet égard, le Comité des Ministres a pour la première fois fait recours à l'article 46.4 de la Convention Européenne des Droits de l'Homme. Dans ce contexte, l'expertise de la Commission est d'autant plus importante qu'elle permet de réagir en temps réel aux atteintes aux valeurs du Conseil de l'Europe. M. Macron, Président de la République française fera une allocution à la Cour Européenne des Droits de l'Homme, le 31 octobre, à Strasbourg.

M. L'Ambassadeur Marco Marsili, Représentant Permanent de l'Italie auprès du Conseil de l'Europe souligne combien les avis de la Commission ont permis au fil des années le développement d'une conscience juridique commune. Face aux risques auxquels est confronté le continent, le partage des valeurs communes paraît essentiel. A cet égard M. l'Ambassadeur Marsili félicite la Commission pour son investissement dans les régions voisines comme le Maroc ou la Tunisie.

M. Buquicchio remercie les autorités italiennes pour leur soutien et leur hospitalité continus envers la Commission.

Mr Helgesen presented the comments to be provided to the Committee of Ministers in view of its reply to Parliamentary Assembly Recommendation [2110\(2017\)](#) concerning the "implementation of judgments of the European Court of Human Rights". As stated in the conclusions, the Commission stands ready to play an active role in the execution of the ECtHR's judgments, by providing legal opinions for the Committee of Ministers in deciding whether general measures taken by members States should be considered as sufficient or by assisting the member states in bringing their existing legislation which generated violations of the European Convention on Human Rights into conformity with the latter and in ensuring compliance of their draft legislation with the ECHR.

The Commission adopted the elements for the Committee of Ministers in view of its reply to Parliamentary Assembly Resolution 2110(2017) on "the implementation of the judgments of the European Court of Human Rights" ([CDL-AD\(2017\)017](#)).

7. Coopération avec l'Assemblée parlementaire

Mme Anne Brasseur, ancienne Présidente de l'Assemblée parlementaire du Conseil de l'Europe, fait part de sa préoccupation pour la non-exécution des décisions de la Cour européenne des droits de l'homme, ce qui met en cause les acquis du Conseil de l'Europe. L'Assemblée parlementaire elle-même doit surmonter la crise liée aux allégations de corruption de certains de ses membres. Ceci concerne certains parlementaires entre autres d'Italie, de la Belgique et d'Allemagne qui avaient participé à l'observation d'élections en Azerbaïdjan. Le Président de la Commission des questions juridiques et des droits de l'homme a démissionné parce qu'il n'avait pas déclaré qu'il était membre d'une association qui recevait des fonds de l'Azerbaïdjan. Le Président de l'Assemblée parlementaire, auquel on reproche également un voyage en Syrie organisé par la Russie, bien que désormais privé du droit de représenter l'Assemblée, n'a pas démissionné jusqu'ici. Madame Brasseur souligne la gravité extrême de cette situation, qui mine la réputation de l'Assemblée et de tout le Conseil de l'Europe

A un stade ultérieur de la session Mme Brasseur informe la Commission que M. Agramunt vient de démissionner en tant que Président de l'Assemblée.

M. Philippe Mahoux, membre de la Commission des questions juridiques et des droits de l'homme, insiste que nonobstant ces problèmes le travail de l'Assemblée parlementaire continue. Les enquêtes ont déjà résulté en plusieurs démissions. L'Assemblée a créé un groupe d'enquête externe indépendant chargé d'examiner les allégations de corruption au sein de l'APCE, composé de Sir Nicolas Bratza, M. Jean-Louis Bruguière et Mme Elisabet Fura.

M. Mahoux informe les participants en particulier que la Commission des questions juridiques et des droits de l'homme de l'Assemblée parlementaire avait approuvé son rapport sur la « Liste des critères de l'Etat de droit » de la Commission de Venise. La Commission avait aussi approuvé le rapport sur les « Nouvelles menaces contre la primauté du droit dans les Etats membres du Conseil de l'Europe » pour lequel le rapporteur, M. Fabritius, s'était largement basé sur les avis récents de la Commission de Venise (concernant notamment la Pologne et la Turquie). Ces deux rapports seront débattus conjointement lors de la prochaine session d'octobre. Le Président de la Commission de Venise participera à ces débats.

M. Buquicchio remercie l'Assemblée de l'avoir invité à s'exprimer en session plénière et il exprime son souhait que cette première invitation sera suivi par de futures occasions.

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

Mr Anders Knape, President of the Chamber of Local Authorities of the Congress, highlighted the excellent co-operation between the Venice Commission and the Congress in the framework of the Council for Democratic Elections and referred to the decentralisation process in Ukraine as a concrete example of this co-operation. The Congress was seriously worried about the situation of local democracy in Turkey but also in Poland. Due to the difficult budgetary situation, scheduled visits to Turkey and Azerbaijan have had to be postponed. The next plenary of the Congress, on 18-20 October 2017, would focus on the monitoring results in Serbia, Italy and Switzerland, on electoral missions to Finland and Armenia and linguistic diversity, notably in the Flemish region around Brussels. The Congress would also deal with migration and the fight against corruption. The Congress, the Parliamentary Assembly (PACE) and the Venice Commission thus had many fields of common interest.

Mr Leen Verbeek, Chair of the Congress' Monitoring Committee, informed the Commission that in the framework of the monitoring of Latvia, the Congress had learnt that the Constitutional Court of Latvia had directly applied the European Charter of Local Self-Government. This should be an example for other courts. The Venice Commission's input to the Congress' Checklist for compliance with international standards and best practices preventing misuse of administrative resources during electoral processes at local and regional level had been very important for the Congress. The Congress would participate in the Commission's and PACE's London conference on the misuse of administrative resources. Future co-operation might develop on the long-term integration of migrants and IDPs. The Venice Commission's on-going work on referendums would be particularly valuable to the Congress in its analysis of the suspension of the Vice-President of the Congress, the mayor of Chisinau, by way of a referendum, which had violated the Charter.

9. Follow-up to earlier Venice Commission opinions

Opinion on the proposal by the President of the Republic of Moldova to expand the President's powers to dissolve Parliament ([CDL-AD\(2017\)014](#))

The opinion adopted by the Venice Commission in June 2017 concerned a decree of the President of the Republic of Moldova calling for a nationwide referendum, aimed primarily at the enlargement of the President's power to dissolve the Moldovan Parliament. The main issue raised in the opinion was that, in a Parliamentary regime, the President's dissolution power should not be discretionary. Dissolution is to be used only in certain specific situations, to overcome political deadlocks. In addition, the opinion expressed doubts as to whether the Moldovan Constitution permits the President to initiate such a referendum.

The presidential decree was challenged before the Constitutional Court of Moldova, which on 27 July 2017 had declared the decree unconstitutional. Essentially, the Court decided that the President had no power to call for a referendum aiming at constitutional amendments. In addition, the Court found that the proposed extension of the President's dissolution powers was incompatible with the logic of a parliamentary regime and the President's role as a neutral arbiter. In this judgement, extensive direct and indirect references to the Venice Commission's opinion were made.

Joint opinion on the draft laws of the Republic of Moldova on amending and completing certain legislative acts (electoral system for the election of the Parliament) ([CDL-AD\(2017\)012](#))

The Commission was informed that contrary to the recommendation in its previous opinion, the law replacing a purely proportional with a mixed electoral system had been adopted by the Parliament of the Republic of Moldova on 20 July 2017. The Law however implemented at least partially two recommendations concerning the way of establishing constituencies and the diminution of the thresholds for parliamentary representation in the proportional component.

On 14 September 2017, the Monitoring Committee of the Parliamentary Assembly had requested the Venice Commission's opinion on the legal framework governing the funding of political parties and campaigns, as well as the recent amendments to the electoral legislation of the Republic of Moldova. The opinion on the legislation on the funding of political parties and campaigns should be prepared for the December 2017 plenary session. The opinion on the recent amendments to the electoral legislation would be submitted to the Commission for adoption in March 2018, after the delimitation of electoral constituencies and would address the follow-up to the 2017 Opinion.

Opinion on the draft Law on the Constitutional Court of Ukraine ([CDL-AD\(2016\)034](#))

On 13 July 2017, the President of Ukraine enacted the Law on the Constitutional Court. In its Opinion on the draft law, adopted in December 2016, the Venice Commission had made three main recommendations: that the Law should provide for a maximum number of members of the three screening committees for the judges and the law should clearly set out whether these committees are permanent or established ad hoc. However, the adopted law left the decision on the composition of the screening committees to the President and the Rada (in its Rules of Procedure). As concerns the judicial quota, the selection is to be made by the Council of Judges, followed by an open vote by the Congress of Judges. The second main recommendation concerned the procedure to follow when a senate (chamber) wishes to deviate from previous case-law. While the Commission had recommended that the senate should be obliged to relinquish jurisdiction in favour of the grand chamber, the adopted law only provided that the senate may relinquish jurisdiction. Finally, the draft law had excluded persons who had participated in any political activities during the last two years before their candidacy,

from being candidate for the position of judge of the Constitutional Court. The Opinion had recommended removing this limitation. This recommendation was followed in the adopted law.

10. Georgia

In its Opinion on the draft revised Constitution of Georgia adopted at the June 2017 Plenary Session, the Venice Commission welcomed the move towards a proportional election system while it criticised that three features of the proposed new system, taken together, limited its positive effects: the 5% threshold rule in legislative elections, the distribution of unallocated mandates to the winning party and the prohibition of party blocs. Following the adoption of this Opinion, the Georgian parliament adopted an amended version of the draft Constitution at second reading on 23 June 2017. The present Opinion deals with this second version of the draft Constitution. Ms Kiener explained that, as the Georgian authorities had informed the Venice Commission that the Parliament would hold its third and final reading in September, the draft opinion had already been made public in order to enable the opposition parties, as well as the majority, to discuss the draft Constitution in light of the Venice Commission's recommendations.

The Opinion reiterated the previous overall positive assessment of the constitutional reform process in that it completes the evolution of Georgia's political system towards a parliamentary system. However, the Commission regretted the postponement of the entry into force of the proportional election system to October 2024. The Commission nonetheless welcomed the commitment of the parliamentary majority (in their letter of 20 September to the Venice Commission) to reduce the election threshold to 3% and to allow party blocks in the 2020 elections in order to alleviate the negative effects caused by the postponement. The second draft maintained the 5% threshold and disallowed party blocks as from 2024. It also replaced the bonus system in the distribution of unallocated mandates by a very complex system which still favoured the strongest party. Therefore, the Commission welcomed the commitment by the parliamentary majority to abandon this complex system of distribution and to introduce the system of proportional distribution of unallocated mandates as from 2024.

While recognising that a number of amendments made to the previous draft Constitution followed its previous recommendations, the Venice Commission also made a number of additional recommendations pertaining to the fundamental rights catalogue and the judiciary. The Commission also reiterated that any major constitutional reform must reach the widest possible consensus.

Mr Kobakhidze, Speaker of Parliament, underlined the importance of the co-operation with the Venice Commission during this constitutional reform and reiterated their initial commitment that no amendment negatively assessed by the Venice Commission would be adopted by Parliament. He presented the main differences between the first version of the draft amendments and the current version and stressed that the system of checks and balances and the rule of law in the amended Constitution would prevent the establishment of any autocratic government in Georgia.

Ms Anna Dolidze, chief legal adviser to the President of Georgia, criticised the failure to forge a dialogue between the ruling party and the opposition parties and the lack of consensus during the whole constitutional process. She informed the Commission about the list of suggestions to the ruling party agreed by the President and the opposition parties, including the postponement of the introduction of an indirect election system for the President and the establishment of a two chamber parliament.

The Commission adopted the draft opinion on the draft revised Constitution of Georgia as adopted in the second reading on 23 June 2017 ([CDL-AD\(2017\)023](#)).

11. Armenia

Ms Arpine Hovhannisyan, Vice-President of the National Assembly of Armenia, presented the progress in the implementation of the 2016 constitutional amendments. Twelve laws had been listed as a priority; some of these (the electoral code, the law on political parties, the law on the human rights defender) had been successfully prepared with the Venice Commission's assistance. The others were in the pipeline, notably the Judicial Code. They would be submitted to parliament before the end of the year. Seventeen further laws were to be prepared by April 2018.

Ms Hovhannisyan was confident that, also thanks to the close and fruitful co-operation with the Venice Commission, the implementation of the Constitution would be of high quality and meet international standards and best practice.

Opinion on the draft Judicial Code

Mr Neppi Modona introduced the draft opinion, requested by the then Minister of Justice of Armenia, and approved by the Sub-Commission on the Judiciary on 5 October 2017. The Draft Judicial Code was prepared following the constitutional reform of 2015; the reform had received a generally positive assessment by the Venice Commission.

In particular, the draft opinion found that the composition of the Supreme Judicial Council (SJC) was more balanced; the Council of Courts' Presidents had been abolished and its powers given to the SJC. Courts' Presidents could not be members of the SJC, which was a positive step. Also, the Judicial Department might remain an autonomous body with administrative functions vis-à-vis the courts, but should function under the SJC's control. Some provisions of the Draft Code would benefit from clarification, especially as regards the criteria and method of performance evaluation and the appointments procedures, the rules of conduct of judges etc. Nevertheless, the Draft Code was excessively detailed and lacked flexibility; furthermore, no right of appeal to a court of law was provided for judges against SJC's decisions in disciplinary matters.

Mr Arthur Hovhannisyan, First Deputy Minister of Justice of Armenia, informed the Commission that the Ministry was in the process of revising the Draft Code. The revision would take into account most of the key recommendations of the Venice Commission: a common sitting of the chambers of the Court of Cassation would be introduced, in order to avoid jurisdictional disputes; the wording of the provision enabling lower courts to derogate from the case-law would be changed; the Draft Code would explain better the place of the qualification exams in the appointment procedure; the rules of conduct would be formulated with more precision; the Judicial Department would continue to perform administrative functions. On the question of appeal in disciplinary matters, the Armenian authorities were of the view that the possibility to lodge a complaint before the Constitutional Court should suffice for this purpose.

The Commission adopted the Opinion on the Draft Judicial Code of Armenia ([CDL-AD\(2017\)019](#)).

12. Bulgaria

Mr Kuijer introduced the draft opinion, requested by the PACE Monitoring Committee, and approved by the Sub-Commission on the Judiciary on 5 October 2017. The 2015 constitutional reform of the Bulgarian judiciary had brought many positive changes (such, as, for example, the separation of the Supreme Judicial Council (SJC) into two chambers, one for judges and one for prosecutors). However, not all previous Venice Commission recommendations had been fully implemented, and further changes were needed.

The draft opinion focused on three core issues. The first was the powerful position of the Prosecutor General (PG) within the system of judicial governance. Prosecutors are subordinate to the PG; they participate in the plenary sitting of the SJC together with the PG and may even be represented in the Judicial Chamber. There are weak mechanisms of accountability of the PG: it is virtually impossible to remove him/her for a criminal offence, and it is very difficult to use the “impeachment” procedure provided by the Constitution and the Act. The draft opinion suggested some possible solutions to remedy this situation. The composition of the Judicial Chamber was another point of concern, since the SJC Plenary (where judges represent a net minority) had retained some important functions vis-à-vis judges; furthermore, within the Judicial Chamber itself, judges elected by their peers were in a slight minority. The third key issue was the question of inspections and appraisals of judges. The Inspectorate was now endowed with vast powers, overlapping with the powers of the SJC. This needed to be revised, and the Inspectorate needed to have institutional links to the SJC.

Mr Evgeni Stoyanov, Deputy Minister of Justice of Bulgaria, thanked the Venice Commission for the good co-operation but noted that it would not be wise to initiate new constitutional amendments, less than two years after the 2015 constitutional reform which had started to bear fruit – in June 2017 new judicial members of the Judicial Chamber had been elected. As regards the accountability of the PG, a special working group had been set up in order to develop appropriate procedures. The powers of the Inspectorate and of the SJC were not overlapping; checks conducted by the Inspectorate were an important factor to be taken into account in the appraisal process.

In the ensuing discussion it was stressed that many of the recommendations contained in the opinion may be implemented at the legislative level, without further constitutional amendments.

The Commission adopted the Opinion on the Judicial System Act of Bulgaria (CDL-AD(2017)018).

13. Hungary

Mr Vermeulen explained that, in accordance with the decision taken by the Bureau on account of domestic implementation deadlines, the preliminary opinion, prepared at the request of the Parliamentary Assembly, had already been sent to the Hungarian authorities and published on 11 August 2017. The Law of April 2017 amending the 2011 Law on National Higher Education (hereinafter “the Law”) introduced new, more restrictive requirements for the licensing and operation of foreign universities: the need for a prior international agreement between Hungary and the country of origin (preceded, for federal states, by a prior agreement with the federal authorities); the requirement that the foreign university provide higher education in the country of origin; the prohibition on using an identical name, in the foreign language, to that of an existing Hungarian university; new restrictions on programme-co-operation between foreign universities from non-EEA OECD countries and Hungarian universities; more restrictive work permit requirements. The Opinion noted that the new rules would have a major impact in

particular on the operation and even the existence of the Central European University (CEU), established and lawfully operating in Hungary for many years.

According to the opinion, in the absence of unified European norms in the field, the onus falls on Hungary to establish rules for foreign universities on its territory and to apply these rules, with due respect to the rule of law and the fundamental rights principles, to foreign universities wishing to operate on its territory in the future. However, introducing without very strong reasons more restrictive rules, with strict deadlines and severe legal consequences, for foreign universities already operating in the country, appears problematic in the light of the rule of law and fundamental rights principles. The Opinion thus recommended exempting operating universities from the requirement of a prior agreement with their home state and from the campus obligation, removing the name-related prohibition and the new restrictions on programme-co-operation, as well as the non-discriminatory and flexible application of the new work permit requirements.

Mr László Palkovics, Minister of State for Education, Ministry of Human Capacities and Mr Krisztián Kecsmár, Minister of State for EU and international judicial co-operation, Ministry of Justice of Hungary, provided information on the progress made in the negotiations aimed at concluding the international agreements required by the amended Law. On its side, the CEU had taken the necessary steps to fulfil the condition requiring foreign universities to provide educational services in the country of origin. While thanking the Commission for the open and balanced discussions held, the representatives of the Hungarian Government reiterated the aims pursued by the amended law - notably to ensure transparency and protect students in terms of quality education and diplomas - and expressed their disagreement with a number of comments in the Preliminary Opinion, in particular the recommendation that foreign universities already operating in Hungary should be treated differently from new universities wishing to open branches in the country.

The representatives of the European Commission and the OSCE/ODIHR raised issues concerning the discriminatory nature of the amended Law and the lack of consultation prior to its adoption.

The Commission endorsed the preliminary opinion on Act XXV of 4 April 2017 on the amendment of Act CCIV of 2011 of Hungary on Tertiary Education ([CDL-AD\(2017\)022](#)).

14. Venezuela

Mr José Luis Sardon informed the Commission that the Preliminary opinion on legal issues raised by the decree issued by President Maduro on 23 May 2017 calling for the election of a National Constituent Assembly in Venezuela had been prepared at the request of the Secretary General of the Organisation of American States received on 26 June 2017. The authorities of Venezuela had been informed about this request. The opinion focussed on two main issues: whether the Constitution gave the power to the President of Venezuela to call a Constituent Assembly and whether he could establish the rules for the election of its members by decree.

On the first issue the rapporteurs had come to the conclusion that in the light of the wording of the relevant constitutional provisions, against the background of the previous constitutional experience of Venezuela and in the absence of compelling arguments to the contrary, the decision on the convocation of a Constituent Assembly could only be taken by the people of Venezuela in a referendum. On the second question the rapporteurs were of opinion that in accordance with the principle of the rule of law and the Constitution of Venezuela, the power to establish the rules for the election of the National Constituent Assembly belonged to the National Assembly only, which had to adopt a specific piece of legislation. The opinion also

pointed out that the electoral rules established by the relevant presidential decree based on territorial representation violated the democratic principle of equal voting power, and the rules based on sectorial representation entailed a flagrant violation of the democratic principle of equal voting rights. Finally, also in the light of comparative experience, the number of members of the National Constituent Assembly appeared to be too large to enable the Assembly to hold meaningful debates, reach consensus and complete its work within a reasonable timeframe.

In accordance with the decision taken by the Bureau, the preliminary opinion had been transmitted to the Secretary General of the OAS in July 2017.

During the exchanges that followed the presentation of the opinion, several members of the Commission stressed that in Venezuela, the Supreme Court, exercising constitutional jurisdiction, had taken a decision on the constitutionality of the presidential decrees; the position of the Venice Commission in similar cases deserved further discussion. It was proposed to submit this question for consideration to the Scientific Council.

The Commission endorsed the Preliminary opinion on legal issues raised by the decree issued by President Maduro on 23 May 2017 calling for the election of a National Constituent Assembly in Venezuela ([CDL-AD\(2017\)024](#)).

15. Exchange of views with the Secretary General of the Organisation of American States

Mr Luis Almagro, Secretary General, Organisation of American States thanked the rapporteurs for providing a thorough analysis of the legal framework for calling a Constituent Assembly in Venezuela. In his opinion the Council of Europe and the OAS could be regarded in many aspects as “sister organisations” since both bodies focussed on promoting democracy, human rights and the rule of law. It was based on this conviction and using the existing co-operation agreements between the two organisations, notably the 2011 Memorandum of Understanding, that he had decided to request an opinion on the legality of the Presidential decree through which elections for a Constituent Assembly in Venezuela had been convened. The Venice Commission’s opinion had been welcomed not only by the OAS and its member states but also by a large number of national and international NGOs and individuals who showed their support for its conclusions through social media. The opinion was part of a larger action by the OAS on the Venezuelan case which included presentation of regular reports on the situation and discussions with OAS member States on possible common actions and sanctions which could stop violence in the country and violations of its citizens’ human rights. Mr Almagro also shared with the members of the Venice Commission his views on the impact of the on-going crisis in Venezuela on other countries of the region. The Secretary General of the OAS expressed his hope that co-operation with the Venice Commission would further develop in the future.

16. Co-operation with the Inter-American Court of Human Rights

Mr Eduardo Ferrer Mac-Gregor, Judge at the Inter-American Court of Human Rights, informed the Commission about the latest important decisions taken by the Court. He stressed at the outset that the Inter-American Court had the difficult task of ensuring the protection of the fundamental rights of more than 500 million people. The main problem faced by the institution was the execution of its judgments. In Judge Ferrer’s opinion this issue could be an important area of co-operation between European and Inter-American institutions. As an example of the existing problems in Latin America he referred to the incompatibility of self-amnesty laws with international standards. Judge Ferrer also referred to the new types of cases examined by the Inter-American Court requiring the protection of new specific rights. As an example he made reference to cases against Colombia on the impact of development projects on the

environment; against Costa Rica on gender identification and against Ecuador on the rights of asylum seekers. These cases were an excellent illustration of common challenges faced by European and Latin American countries.

17. Turkey

Mr Velars introduced the draft opinion, prepared at the request of the Congress of Local and Regional Authorities of the Council of Europe.

The draft opinion reiterated that only extraordinary measures should be taken which are required to deal with the threat which made it necessary to declare the state of emergency, and for the duration of the state of emergency. In its 2016 Opinion on the Emergency Decree Laws, the Commission had concluded that the Government had interpreted its extraordinary powers too extensively and had taken measures going beyond what is allowed by the Turkish Constitution and by international law.

Similar concerns were raised by the provisions pertaining to the exercise of local democracy in Decree Law N° 674, both in terms of compliance with the procedural and substantive rules on the state of emergency and with the Turkey's obligations under the European Charter of Local Self-Government. Through the Decree Law, the Law on Municipalities had been amended to enable the central authorities to appoint unelected mayors, deputy-mayors and members of local councils, and exercise, without judicial control, discretionary control over the functioning of the concerned municipalities. This was problematic both in terms of necessity and proportionality. It was particularly worrying that, through emergency legislation not limited to the duration of the emergency regime, the very nature of the system of local government in place in Turkey, based on the election of local authorities by the local population, had been altered.

The draft opinion recommended: that the provisions enabling the appointment of trustees to the positions of mayor, deputy-mayor, local council member, not strictly necessitated by the state of emergency, be repealed; that the new rules be limited to the duration of the state of emergency, and that permanent measures affecting local democracy only be taken, after proper parliamentary debate, through ordinary laws and procedures; that adequate judicial review be provided concerning the measures taken by governors in municipalities where special powers are instituted in this respect, as well as a proper framework for the reinstatement of suspended/dismissed local elected officials and staff.

In the ensuing discussion, the Congress' representatives welcomed the opinion and underlined the importance, in any democratic society, of observing local self-government principles, through local authorities freely elected by the people, as established by the European Charter of Local Self-Government.

The Commission adopted the opinion on the provisions in Emergency Decree Law No. 674 which concern the exercise of local Democracy in Turkey ([CDL-AD\(2017\)021](#)).

18. Ukraine

Opinion on the Draft Law on amendments to the Rules of Procedure and Internal Organisation of the Verkhovna Rada of Ukraine

Ms Suchocka reminded the Commission that this opinion had been requested by Mr Andriy Parubiy, Speaker of the Ukrainian parliament, on 28 February 2017. The submitted draft aimed at bringing the existing Rules of Procedure into line with the current Constitution of Ukraine and at improving the efficiency of the Verkhovna Rada. During the June session the Commission

had already been informed on the progress of work on the opinion and on exchanges of views between the representatives of the Rada and the rapporteurs. The draft law had been assessed on the basis of existing European standards and best practices in other member states.

Ms Suchocka pointed out that the opinion concentrated on four main issues: the respect of the principle of separation of powers; the nature of the act regulating parliamentary procedures; the role of the coalition in parliamentary proceedings and the issue of imperative mandate vs. free mandate. While acknowledging that the draft law reflected the constitutional provisions, the opinion recommended that the rules of procedure should be adopted as an internal act of parliament, could provide for specific procedures aimed at minimising the negative effect of Article 81 of the Constitution (allowing for a revocation of MPs mandate by a political party) and to review the rules on the formation of coalitions. Some provisions of the examined text on the appointment of officials and on the powers of the Speaker could also be reconsidered. Ms Suchocka praised the excellent dialogue between the rapporteurs and the representatives of the Rada and expressed her hope that co-operation between the Venice Commission and Ukraine on the reform of the parliament would continue.

Mr Alain Delcamp insisted that the parliament should be consistent in its institutional development and suggested that future reforms could cover such areas as the budget of the parliament, the operation of its staff and procedures involving different parliamentary groups in the decision-making process on certain issues of the internal management of the parliament and its secretariat.

Mr Pavlo Pynzenyk, First Deputy Chair of the Committee on the Rules of Procedure and Internal Organisation of the Verkhovna Rada, thanked the Commission and its rapporteurs for the excellent level of dialogue and for the opinion. The Committees of the Rada involved in the preparation of the draft law highly appreciated the work of the Commission's rapporteurs. He thought that the adoption of this first set of amendments would facilitate further reforms of the Rada based on international recommendations, including those made in the Venice Commission's opinion.

The Commission adopted the Opinion on the Draft Law on amendments to the rules of Procedure and Internal Organisation of the Verkhovna Rada of Ukraine (CDL-AD(2017)026).

Opinion on the draft law on anti-corruption courts and on the draft law on amendments to the law on the judicial system and the status of judges (concerning the introduction of mandatory specialisation of judges on the consideration of corruption and corruption-related offences)

The opinion had been prepared at the request of Mr Andrii Parubiy, Speaker of the Parliament of Ukraine. Mr Hamilton explained that two drafts had been submitted to Parliament, one establishing a High Anti-Corruption Court (HACC) for grand corruption cases as well as a separate Appeal Chamber at the Supreme Court (draft law No. 6011) and one introducing specialisation of judges at all courts which would be competent for all corruption cases (draft law No. 6529). In the rapporteurs' view, the measures foreseen by the latter draft were neither realistic nor necessary in order to address the main concern i.e. the ineffective handling of high-profile corruption cases by existing courts. The rapporteurs became convinced during the discussions in Kiev that the rapid establishment of a specialised anti-corruption court, with international involvement in the selection of its judges, was needed in Ukraine, given the fact that high-profile corruption cases are particularly sensitive and complex. Mr Hamilton stressed that at the same time, such a move should not

put into question the credibility of the on-going judicial reform process. While draft law No. 6011 provided a good basis for the establishment of the HACC in line with Council of Europe and Venice Commission standards, several recommendations needed to be taken into account, in particular regarding the conformity of the draft with the Constitution. It was advisable that the President of the Republic submit to parliament his own draft law, which should be in line with the Commission's recommendations.

Ms Anastas pointed out that the HACC as foreseen by draft law No. 6011 had clear characteristics of a *specialised* court – rather than a *special* court or *extraordinary* court, which are prohibited by the Constitution. Nevertheless, in order to dispel any doubts about the constitutionality of the law, specific rules on anti-corruption courts and judges should be limited to what is necessary for them to work effectively, so as to make it clear that such courts cannot be regarded as special or extraordinary courts and that they do not jeopardise the unity of the judiciary. The rapporteurs had met with a wide variety of authorities and representatives of the Ukrainian society in order to form a clear opinion on this highly sensitive matter.

Mr Oleksyi Filatov, Deputy Head of the Presidential Administration of Ukraine, stressed that while the President of the Republic had not initiated the draft laws under scrutiny, he appreciated very much the preparation of the present opinion by the Venice Commission. He expressed the view that a new draft law on the establishment of an anti-corruption court, which he himself would submit to parliament, would need to be prepared,. Mr Filatov indicated that three issues would be of particular importance in this context: the draft law would have to be in line with the general framework of the judicial reforms; it should not conflict with the principle of Ukraine's sovereignty; and it should be in conformity with the Constitution. Mr Filatov underlined that the matter was too important for Ukraine to take any risks that the law could be successfully challenged before the Constitutional Court.

Mr Pavlo Pynzenyk, First Deputy Chair of the Rules of Procedure and *Verkhovna Rada* Work Organisation Committee, stressed that the matter was very complex and that the opinion of the Venice Commission would therefore be a very useful guideline for the preparation of a new draft law. He expressed the hope that the opinion would also help reduce the current political tensions surrounding this topic.

The Commission adopted the opinion on the draft law on anti-corruption courts and on the draft law on amendments to the law of Ukraine on the judicial system and the status of judges (concerning the introduction of mandatory specialisation of judges on the consideration of corruption and corruption-related offences) (CDL-AD(2017)020).

19. Mémoire amicus curiae pour la Cour européenne des droits de l'homme en l'affaire Berlusconi c. Italie, sur les garanties procédurales minimales qu'un Etat doit fournir dans le cadre d'une procédure de retrait d'un mandat électif

Mme Bazy Malaurie souligne en premier lieu que si la déchéance d'un parlementaire peut paraître contradictoire avec la légitimité populaire de son élection, il échet de se rappeler qu'il appartient au parlement de décider des règles applicables au retrait d'un mandat électif. La Cour européenne des Droits de l'Homme a posé à la Commission une question précise sur les garanties procédurales qu'un état doit fournir dans le cadre d'une procédure de retrait du mandat. Une telle ingérence dans le droit d'être élu doit avoir une base légale, poursuivre un but légitime et respecter le principe de proportionnalité. En l'espèce, le but légitime est le bon fonctionnement des institutions ainsi que le respect des lois par tous : les parlementaires et les candidats se doivent de respecter la loi au même titre que tout autre citoyen. Le retrait n'est

cependant envisageable que pour les infractions graves. Pour ce qui est de la légalité, il est souhaitable que le retrait soit prévu par la constitution ou par une loi organique, si possible.

Le mémoire *amicus curiae* s'est basé sur une analyse comparée des règles applicables dans 62 pays. Il en ressort que les processus qui font suite à la prononciation du jugement de condamnation pénale sont variés. Dans la grande majorité des pays, le parlement qui prononce le retrait du mandat suite à la condamnation pénale a une compétence liée. Tel n'est pas le cas en Italie. Rarement, le parlement se prononce sans une intervention préalable d'un juge pénal. L'intervention du juge a comme effet important d'individualiser la sanction, permettant le respect du principe de la proportionnalité. Néanmoins, comme la Cour européenne l'a dit dans sa jurisprudence concernant la privation du droit de vote, une telle intervention n'est pas nécessaire lorsque la loi contient des critères d'application suffisamment précis pour éviter des sanctions « générales, automatiques et d'application indifférenciée ».

De l'avis de la Commission de Venise, il n'est pas nécessaire que la procédure de retrait du mandat offre toutes les garanties d'une procédure pénale, car l'ingérence dans le droit d'être élu dérive de la condamnation par le juge pénal, et non pas du retrait prononcé par la suite par le parlement. En particulier, il ne paraît pas indispensable de rendre possible un recours à la cour constitutionnelle, lorsque la possibilité pour un parlementaire d'avoir accès à une telle juridiction n'existe pas déjà.

M Delcamp tient à souligner la souveraineté parlementaire dans l'exercice de la déchéance : avec l'emprise croissante des partis politiques, les prérogatives du parlement risquent de poser un problème en termes de sécurité juridique. Pour cette raison, un recours contre la décision du parlement pourrait se révéler nécessaire.

M Alivizatos pour sa part souligne et se félicite de ce que le droit parlementaire est désormais assujéti aux grands principes de droit : par exemple, la procédure d'impeachment a été remplacée par la procédure pénale.

La Commission adopte le mémoire *amicus curiae* pour la Cour européenne des droits de l'homme en l'affaire Berlusconi c. Italie, sur les garanties procédurales minimales qu'un Etat doit fournir dans le cadre d'une procédure de retrait d'un mandat électif (CDL-AD(2017)025).

MM Bartole et Neppi précisent qu'ils se sont abstenus de participer à la discussion de ce mémoire.

20. Co-operation with International IDEA

Mr Sumit Bisarya, Senior Project Manager of International IDEA, described the main areas of IDEA's activity as well as its different types of programme (constitutional design, constitutional building, constitutional awareness), its organisational structure and working methods. He also informed the Commission of several recent projects implemented by IDEA (in Yemen, Myanmar and, in particular, in Ukraine).

21. Co-operation with the Bingham Centre for the Rule of Law

Mr Murray Hunt, Director of the Bingham Centre for the Rule of Law, informed the Venice Commission on past and future co-operation. Mr Hunt stressed that the Venice Commission is known not only for its "flexibility, reactivity and clairvoyance" but also for the quality of its work. He highlighted the important role played by Sir Jeffrey Jowell (former member of the VC and former Director of the Bingham Centre) in the preparation of the Rule of Law Checklist, and

expressed regret over the continuous attempts to undermine the rule of law in some societies. He presented the current work of the Bingham Centre, in particular in the context of Brexit. In the ensuing discussion, members of the Venice Commission underlined the importance of co-operation between the Bingham Centre and the Venice Commission.

22. Information on constitutional developments in other countries

Spain

The President reminded the Commission of his exchange of letters with the President of Catalonia (Spain). In his letter, Mr Buquicchio had underlined that not only the referendum as such, but also the co-operation with the Venice Commission needed to be carried out in agreement with the Spanish authorities.

The Secretary of the Commission drew attention to several reports and opinions of the Commission which were related to the right to self-determination, including the report "Self - determination and secession in constitutional law" of 12 January 2000 ([CDL-INF\(2000\)002](#)). On that basis, there were good arguments to consider that a referendum on self-determination of Catalonia in the manner conducted on 1 October 2017 was not permitted under the Spanish Constitution and not in line with Venice Commission standards.

Ms Anne Brasseur, Former President of the Parliamentary Assembly of the Council of Europe, informed the Commission of a request made to the Assembly to hold an urgent debate on the situation in Catalonia during its upcoming session in Strasbourg.

23. Co-operation with other countries / Coopération avec d'autres pays

Maroc

M. Mohammed Benabdelkader, Ministre délégué auprès du Chef du gouvernement, chargé de la réforme administrative et de la fonction publique rappelle que la coopération qui s'est engagée entre son Ministère et la Commission de Venise dans la mise en œuvre du Programme UNIDEM-Med, programme de renforcement des capacités juridiques des hauts cadres de l'Administration de la Région MENA, s'inscrit dans la dynamique de partenariat et de l'adhésion du Royaume du Maroc aux accords, conventions et activités du Conseil de l'Europe. Le Royaume du Maroc a introduit des réformes institutionnelles profondes sur la base des orientations de Sa Majesté le roi Mohammed VI et des principes consacrés dans la constitution de 2011. Le système constitutionnel est basé sur la consolidation de l'Etat de droit et de l'élargissement du champ des libertés individuelles et collectives et de la garantie de leur exercice, la consolidation du principe de séparation et d'équilibre des pouvoirs, une volonté d'ériger la justice au rang de pouvoir indépendant, la consécration constitutionnelle de la pluralité de l'identité marocaine, la constitutionnalisation d'instances en charge de la bonne gouvernance, des droits de l'homme et de la protection des libertés. Le Ministère de la Réforme de l'Administration se félicite d'avoir pu organiser quatre séminaires régionaux Unidem Med, à Rabat, depuis le lancement du programme en 2013.

Afin de consolider la coopération pour la mise en œuvre de ce programme, un Mémorandum d'Entente entre le Maroc et la Commission de Venise a été préparé : il est maintenant signé par M. Benabdelkader et par M. Buquicchio.

*Palestine*¹

Mr Ali Abu Diak informed the Commission about the recent developments in Palestine. On 13 May 2017 local elections had been held in the West Bank. Local elections in Gaza had had to be postponed for political reasons. A Committee on the judicial reform met in September and took a decision to prepare a report on the areas in which legislation on the judiciary had to be revised. The Committee agreed on a 6-month deadline for the presentation of its report and Mr Abu Diak expressed his hope that the authorities could co-operate with the Venice Commission in the framework of this exercise.

24. World Conference on Constitutional Justice

Mr Buquicchio informe la Commission que la Conférence mondiale réunit désormais 112 Cours constitutionnelles et instances équivalentes. En tant que secrétariat de la Conférence mondiale, la Commission de Venise a co-organisé le 4e Congrès Conférence mondiale du 11 au 14 septembre 2017 à Vilnius avec la Cour constitutionnelle de Lituanie. 91 Cours constitutionnelles et institutions équivalentes ont participé au Congrès, soit au total 422 participants, y inclus plusieurs membres de la Commission. Le thème du 4e Congrès était « l'État de droit et la justice constitutionnelle dans le monde moderne ». Lors du Congrès, Ben Vermeulen a présenté la Liste des critères de l'Etat de droit de la Commission de Venise. Des participants de tous les continents ont fait référence à la Liste des critères dans leurs interventions.

Outre le thème principal, le 4e Congrès a aussi été l'occasion d'établir un bilan de l'indépendance des Cours constitutionnelles membres de la Conférence mondiale. Au sein du Bureau de la Conférence mondiale, il n'y a pas eu de consensus sur une déclaration en soutien de la Cour suprême de Kenya qui avait été attaqué violemment par le Président de Kenya. Par contre, la Commission de Venise continuerait à défendre les cours constitutionnelles sous pression. L'Assemblée générale de la Conférence mondiale a élu le Conseil constitutionnel de Djibouti et les Cours constitutionnelles de de la République Dominicaine, de l'Indonésie et de l'Italie comme membres du Bureau. Le Bureau de la Conférence mondiale a accepté l'offre du Conseil constitutionnel de l'Algérie d'organiser le 5e Congrès en 2020. A cette occasion le Conseil constitutionnel de l'Algérie s'était engagé que toutes les cours membres pourraient participer au Congrès.

M. Habchi exprime la satisfaction du Conseil constitutionnel d'Algérie d'être choisi comme hôte du 5e Congrès et il invite tous les membres de la Commission de Venise à participer à cet événement

25. Information on Conferences and Seminars

The Venice Commission, in co-operation with the OSCE/ODIHR and with a financial contribution from the Japanese government, organised a Round Table on the issue of foreign funding of associations on 4 October 2017 in Venice. The Round Table gathered together Venice Commission members, national and international experts as well as representatives of civil society organisations including representatives of the INGO conference of the Council of Europe. The purpose of the Round Table was to develop international standards concerning the foreign funding of associations in order to deepen the legal discussion in this field and to develop good practices in promoting an enabling environment for the cross-border activities of

¹ This designation shall not be construed as recognition of a State of Palestine and is without prejudice to the individual positions of Council of Europe member States on this issue. / Cette dénomination ne saurait être interprétée comme une reconnaissance d'un État de Palestine et est sans préjudice de la position de chaque État membre du Conseil de l'Europe sur cette question.

NGOs. The conclusions of this roundtable would also be used in the preparation of the “Review” requested by the Secretary General. Ms Herdis Kjerulf Thorgeirsdottir explained that the main discussion during the Round Table concerned the issue of whether “transparency” as such can be considered as a legitimate aim by itself for imposing restrictions on foreign funding of civil society organisations, or, whether the notion should rather be considered as a means to achieve other legitimate aims such as prevention of terrorism financing or money laundering.

Mr Marcin Walecki from the OSCE/ODIHR welcomed this timely initiative of the Venice Commission, since many states are currently developing and implementing new legislation restricting foreign funding of associations, and praised the high level of discussions during the Round Table. He underlined that the study which will be prepared by the Venice Commission would feed into the update of the joint Guidelines on Freedom of Association prepared by the Venice Commission and the OSCE/ODIHR.

Ms Cleveland also welcomed the constructive discussions during the Round Table and underlined that “transparency” can be an important means to achieve a number of legitimate aims but it can also be used by States as a pretext to further restrict the legitimate activities of civil society organisations.

26. Compilations of Venice Commission opinions and reports

Compilation of Venice Commission opinions and reports relating to Electoral Dispute Resolution

Mr Helgesen explained that the compilation firstly refers to Commission documents and/or reports and opinions regarding the applicable international standards with regard to the effective systems of appeal concerning electoral disputes. It then compiles quotations from the Commission’s relevant opinions and reports/studies concerning the main procedural aspects of election dispute resolution, *inter alia*: competent bodies, risks of conflicts of jurisdiction, fair hearing, time limits, access to legal remedies, appeal bodies.

Mr Helgesen drew attention to interesting trends and challenges stemming from the compilation, *inter alia*, the importance of avoiding positive as well as negative conflicts of jurisdiction among the relevant bodies (electoral commissions and courts mainly) in charge of receiving and dealing with electoral disputes; the length of time limits electoral judges have to deal with electoral disputes (reference documents and opinions recommend a short deadline, but they should not lead to a denial of justice); the importance of avoiding rejection of complaints based on procedural grounds and analysing the substance of complaints (this remains a bad and significant trend in a number of states, procedural rules being used to prevent addressing politically sensitive issues); the need to develop powers of appeal bodies in domestic laws, i.e. the possibility for the electoral judge to annul elections when significant irregularities have been observed which may have affected election results.

Finally, Mr Helgesen stressed that this compilation should be seen in a broader perspective and that the Venice Commission was working on the existing legislation of member States dealing with this matter and would later issue a comparative study on Electoral Dispute Resolution on that basis.

The Commission endorsed the Compilation of Venice Commission opinions and reports relating to Electoral Dispute Resolution ([CDL-PI\(2017\)030](#)).

27. Report of the meeting of the Sub-Commission on Latin America (5 October 2017)

Mr Sardon informed the Commission of the results and conclusions of the meeting of the Sub-Commission on Latin America held on 5 October 2017.

During the meeting the President of the Venice Commission informed the Sub-Commission about his participation in the Permanent Council of the Organization of American States (OAS). In addition, the Sub-Commission discussed the opinion on legal issues raised by the decree issued by President Maduro on 23 May 2017 calling for the election of a National Constituent Assembly in Venezuela and held an exchange of views with the representatives of the Organization of American States. The Sub-Commission took note of the OAS's proposal to co-operate on the issue of the re-election of State officials. The Commission was also informed about the proposals of co-operation with Mexico in 2018. Based on the set of proposals submitted by the Electoral Tribunal, the Sub-Commission had decided to propose to the Council for Democratic Elections to consider the possibility of launching specific studies on the use of social media in electoral campaigns and on the issue of non-partisan candidates and political parties in electoral process.

28. Other business

There were no items under other business.

29. Dates of the next sessions

The final session for 2017 was confirmed as follows:

113 th Plenary Session	8-9 December 2017
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The schedule of sessions for 2018 was confirmed as follows:

114 th Plenary Session	16-17 March 2018
115 th Plenary Session	22-23 June 2018
116 th Plenary Session	19-20 October 2018
117 th Plenary Session	14-15 December 2018

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](#)