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(VENICE COMMISSION)

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(COMMISSION DE VENISE)

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Due to the Covid-19 pandemic, the 128th Plenary Session was held both in Venice and online.

1. Adoption of the Agenda

The agenda was adopted without amendments (CDL-PL-OJ(2021)003ann-e).

2. Communication by the President

The President welcomed the guests and the participants. He presented his recent activities (CDL(2021)035).

He informed the Commission that under the Italian chairmanship of the Council of Europe (November 2021 to May 2022), upon the initiative of Marta Cartabia, Italian Minister of justice and substitute member of the Venice Commission, a conference of ministers of justice on "Crime and criminal justice – the role of restorative justice" would take place in Venice on 13-14 December 2022.

3. Exchange of views with the Regione del Veneto

The Commission held an exchange of views with Mr Cristiano Corazzari, Regional Minister of Culture of the Regione del Veneto, who referred to the successful activities of the Venice Commission during its 30 years of existence the pride of the Regione del Veneto in contributing to its fundamental mission.

The President expressed the Commission's gratitude to the Regione del Veneto for all their support ever since 1998.

Communication from the Enlarged Bureau

The Enlarged Bureau had decided at its meeting on 14 October to propose the Plenary to accept the new request of the Serbian authorities for an urgent opinion on the revised version of the draft Law on Referendum and People's Initiative, in light of the general elections which are to take place in March 2022 and the need to organise a referendum on the constitutional amendments.

The Commission accepted the request of the Serbian authorities for an urgent opinion on the revised version of the draft Law on Referendum and People's Initiative.

As regards the Republic of Moldova, the Enlarged Bureau had examined the request for an urgent opinion on the Law on Prosecutors. However, as the law had already been adopted, it did not find the request for urgency justified. President Buquicchio referred to recent developments in the Republic of Moldova, whereby the Prosecutor General who requested the opinion had been dismissed and was under house arrest for alleged corruption. Mr Buquicchio would travel to Chisinau on 19 October with a Council of Europe delegation and had asked the Bureau for a mandate to discuss this law with the authorities. He observed that there were no objections from the Plenary to this.

As regards Belarus, Mr Rik Daems, the President of the Parliamentary Assembly, had asked the Commission an opinion on the constitutional reform proposals. The text of the proposals had not been received yet. It was hoped that it would be possible to submit the draft opinion would for consideration at the December Plenary Session, in view of the referendum on the constitution which was planned for early 2022.

President Buquicchio reminded the members of developments in Tunisia, where the President in July had suspended by decree the activities of the parliament and with another decree, in September, had granted himself nearly all state powers; he also intended to change the constitution. Mr Buquicchio had issued a public declaration on 26 August 2021, followed by an interview after the second decree in September, stating in no uncertain terms that it cannot be accepted that Tunisia has left the path of democratisation. The constitution can be revised, but

that has to be decided by parliament.

President Buquicchio reminded the Commission of the importance of showing restraint in commenting on sensitive developments (for example, those relating to interstate conflicts). The Venice Commission is a body of legal expertise, at all times politically neutral. Whenever there is a question of interpretation of an opinion issued by the Commission, the members are invited to consult the Secretariat to ensure a uniform approach. Furthermore, members who participate in activities that relate to on-going opinions of the Venice Commission should inform the Secretariat

The Enlarged Bureau had discussed the request of the Hungarian authorities to postpone consideration of the draft joint opinion of the Venice Commission and OSCE/ODIHR on the 2020 amendments to electoral legislation of Hungary until June next year, on account of the elections to take place in Hungary in the first half of 2020. The Bureau considered that, also in light of a number of precedents, it would not be appropriate to grant this request for postponement.

The Commission refused the request of the Hungarian authorities to postpone consideration of the draft joint opinion of the Venice Commission and OSCE/ODIHR on the 2020 amendments to electoral legislation of Hungary until after the upcoming elections.

Mr Buquicchio informed the Commission of the proposal of the Enlarged Bureau to set up a new Sub-Commission on Ombudsman Institutions.

The Commission decided to establish a new Sub-Commission on Ombudsman Institutions.

Mr Kaarlo Tuori spoke on behalf of the Group of Wise Persons on the preparations of the elections to take place in December 2021. Mr Tuori reminded members of the proposal to appoint Gianni Buquicchio as a special representative of the Commission. In the first phase of its work, the Group of Wise Persons had focused on nominations for the Presidency and Vice-Presidency. On 12 October 2021, the Group of Wise Persons had interviewed all candidates. The Enlarged Bureau had endorsed the Group's proposal that the list of candidates be closed at the end of the Plenary Session on 16 October 2021. Candidates not nominated by the Group of Wise Persons would be considered for other positions (on the Bureau and Sub-Commissions). Mr Tuori reminded the Commission that the nominations were only proposals: Elections were to take place in December and other candidates might still stand up during the current session. Persons not nominated by the Group of Wise Persons should reconfirm their wish to be candidates.

The Group of Wise Persons, having interviewed nine candidates for the positions of President and Vice-President, nominated Ms Claire Bazy-Malaurie (France) for President and Mr Michael Frendo (Malta), Ms Herdis Kjerulf Thorgeisdottir (Iceland) and Ms Angelika Nussberger for Vice-Presidents.

The Commission decided that the list of candidates for President and for the other positions at the Venice Commission would be closed at the end of the 128th Plenary Session.

4. Communication by the Secretariat

Ms Granata-Menghini informed the members that the Plenary Session in December would again take place in hybrid format and expressed hope that it would be possible to resume the normal

meetings fully in presence in 2022.

5. Co-operation with the Committee of Ministers

Mr Michele Giacomelli, Ambassador, Permanent Representative of Italy to the Council of Europe referred to the increase in the number of requests received by the Venice Commission, illustrating the trust countries have in the Commission and the competence of its members, and the unique ability of the Commission to attract countries as members beyond the borders of Europe, setting an example of the reach of enlarged agreements of the Council of Europe. Mr Giacomelli referred to the recent presentation of Ms Claire Bazy-Malaurie to the Committee of Ministers of the Commission's 2020 annual report, which showed a further increase in the workload of the Commission during the pandemic. A request for budgetary support of the Venice Commission had been duly received and discussions were currently underway in Strasbourg on the next two-year budget. Decisions on this were expected to be taken soon.

Mr Giacomelli drew attention to the upcoming Italian chairmanship of the Committee of Ministers of the Council of Europe (for the eighth time), from November 2021 to May 2022. Italy would like to forge ahead in three areas: 1) to ensure continuity regarding topics already on the table, such as the access of the EU to the European Convention on Human Rights and artificial intelligence (on which in May a decision would be taken on what the Council of Europe needs to do to ensure respect for human rights in this area; 2) topics which have increased in importance over the last years, such as the protection of the environment and human rights (to which PACE devoted its last session) and 3) topics of special interest to Italy, such the protection of women against violence, children's rights (on which a new Council of Europe strategy will be adopted in March) and culture.

Mr Giacomelli further spoke of the commitment of Italy to support the Venice Commission and gave special thanks to President Buquicchio for all his work in making the Venice Commission such a prestigious committee, also beyond the borders of the Council of Europe.

6. Co-operation with the Parliamentary Assembly

Mr Constantinos Efstathiou, on behalf of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly (informed the Commission that during its fourth plenary part-session, held in hybrid format at the end of September, PACE had elected the new ECtHR judges for the Czech Republic, Moldova and Russia. It had awarded the 2021 Václav Havel Human Rights Prize to Belarusian human rights activist Maria Kalesnikava.

The PACE session focused on the "right to a healthy environment". The Social Affairs Committee presented a draft additional protocol to the ECHR on the right to a safe, clean, healthy and sustainable environment, which is to be considered by the Committee of Ministers and the Assembly approved a report by the Committee on Legal Affairs and Human Rights on reinforcing civil and criminal liability for acts that might have an impact on climate change or cause severe environmental damage. It furthermore adopted texts on the humanitarian consequences of the conflict between Armenia and Azerbaijan, the situation in Afghanistan, migration pressure at the western border of Belarus, strengthening social rights and the fight against so-called "honour" crimes. The Assembly furthermore debated gender representation in its own ranks and guidelines on the scope of the parliamentary immunities enjoyed by its members, and adopted an opinion on the draft Second Additional Protocol to the Convention on Cybercrime on enhanced co-operation and disclosure of electronic evidence.

As regards the plenary session of the Venice Commission, Mr Efstathiou highlighted that the three opinions on Hungary had been requested by PACE's monitoring committee, as was the opinion on the draft constitutional amendments on the judiciary of Serbia, noting also in respect of the opinions on Armenia and the United Kingdom that the Assembly had in October 2019 endorsed the so-called Venice Principles on the Ombudsman institution (CDL-AD(2019)005).

Mr Efstathiou further outlined that the Committee on Legal Affairs and Human Rights had recently examined issues relating to excessive use of force by law enforcement officers, misuse of the Schengen Information System and had taken note of the recent opinions concerns the Russian law on the so-called "foreign agents" and the Turkish Law on the prevention of the financing of weapons of mass destruction. At its forthcoming meeting, the committee will adopt reports on combating political corruption and on ending forced disappearances.

Mr Buquicchio added that the Committee on Political Affairs and Democracy had recently also invited him for an exchange of views on the situation in Tunisia.

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

Ms Gudrun Mosler-Törnström, Chair of the Monitoring Committee of the Congress explained that the Monitoring Committee was gradually returning to on-site missions, most recently the observation of local elections in Morocco and Georgia. On 17 September 2021, the Monitoring Committee adopted reports on the application of the European Charter on Local Self-Government in Albania, Cyprus, the Netherlands, North Macedonia and Spain, which will be presented to the upcoming session of the Congress in October.

On 23 November 2021, the Monitoring Committee will carry out an additional monitoring visit to Ukraine to update its report of February 2020 on the application of the Charter in Ukraine, in light of the recent reform. In this context, it will discuss complaints by NGOs on the non-holding of local elections in certain regions of Ukraine and the issue of legal personality of local public entities (*hromadas)*.

Another monitoring visit to Turkey will take place at the end of the year, in light of the continued practice of replacing local elected representatives by appointed bodies in the aftermath of the 2019 local elections. In view of the Venice Commission's opinion of June 2020 (CDL-AD(2020)011) on this issue, the Monitoring Committee would much appreciate someone from the Venice Commission or the Secretariat joining this monitoring mission.

Ms Mosler-Törnström also drew attention to the observation of a delegation of the Congress of the local elections in Morocco on 8 September 2021. The report was currently under preparation but would highlight the need for guidance to polling station officials and access for people with disabilities. A delegation of the Congress also took part in a joint observation with ODIHR and the European Parliament of the local elections in Georgia on 2 October 2021. The elections were overall calm, transparent and well-organised, but they took place in an extremely polarised environment, taken hostage by the national situation, with a notable increase in verbal aggression, hate speech and fake news on social media.

8. Follow-up to earlier Venice Commission opinions

The Commission was informed on follow-up to the following opinions (see document CDL(2021)042):

- Georgia - Three opinions on electoral matters: Urgent Joint Opinion of the Venice Commission and the OSCE/ODIHR on the revised amendments to the Election Code (CDL-AD(2021)026); Urgent Joint Opinion on Draft Amendments to the Election Code (CDL-AD(2021)022) and the Joint Opinion of the Venice Commission and the OSCE/ODIHR on draft article 79-1 of the Election Code (CDL-AD(2021)009);

- Republic of Moldova – Joint opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the draft law on amending and supplementing the constitution with respect to the Superior Council of Magistracy (CDL-AD(2020)001); Joint Opinion on the revised draft provisions on amending and supplementing the Constitution, with respect to the Superior Council of Magistracy (CDL-AD(2020)007); Urgent joint Amicus Curiae Brief on three legal

questions concerning the mandate of members of Constitutional Bodies (CDL-AD(2020)033);

- Ukraine - two opinions in the field of the Judiciary: Urgent Joint Opinion of the Venice Commission and the Directorate General of Human Rights and the Rule of Law (DGI) of the Council of Europe on the draft law on amendments to certain legislative acts concerning the procedure for electing (appointing) members of the High Council of Justice (HCJ) and the activities of disciplinary inspectors of the HCJ (Draft law no. 5068) (CDL - AD(2021)018); Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the draft amendments to the Law "on the Judiciary and the Status of Judges" and certain Laws on the activities of the Supreme Court and Judicial Authorities (draft Law no. 3711) (CDL-AD(2020)022);

- Report on Term Limits - Part I – Presidents (CDL-AD(2018)010);

- Poland - Urgent Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on amendments to the Law on the Common courts, the Law on the Supreme court and some other Laws (CDL-AD(2020)017).

In relation to the latter Opinion, Mr Lucio Gussetti of the Legal Service of the European Commission gave an additional update on developments on the rule of law in Poland:

- As regards the interim measures ordered on 14 July 2021 in case C-204/21R, Poland's request to have the order lifted, in light of the ruling of its Constitutional Tribunal (delivered a few hours after the CJEU's order on 14 July) that the interim measures had been imposed *ultra vires* and as such did not impose obligations on Poland, was rejected by the CJEU on 6 October 2021. The order of the Vice-President of the CJEU outlined that the principle of primacy of EU law prohibits Member States from invoking national provisions, including of a constitutional nature, to undermine the unity and effectiveness of EU-law. On 7 September 2021, the Commission asked the CJEU to impose daily financial penalties to incentivise Poland to comply with the interim measures;
- As regards the judgment of 15 July 2021 in case C-791/19 (disciplinary regime of judges), Poland is expected to reply to the letter of formal notice (Article 260 TFEU) by 7 November 2021. Various developments in Poland in the meantime, including the suspension of judges in office by the Minister of Justice or court presidents cast doubt on the likelihood that the required measures will be taken to implement this judgment and the above-mentioned interim measures;
- On 6 October 2021, the CJEU held in a preliminary ruling in case C-487/19 (on whether the process of appointment of judges to the Chamber of Extraordinary Control and Public Affairs of the Supreme Court renders judicial benches composed of such judges as not complying with the requirements of "tribunal established by law") that the order of a single judge transferring a judge against his/her will must be declared null and void, if the appointment of that single judge took place in clear breach of fundamental rules on the establishment and functioning of the judicial system. In a reaction to this preliminary ruling, both the Prime Minister of Poland and the Minister of Justice issued public statements, respectively calling the judgment an attempt to deliver a blow into the very essence of the stability of the legal system in Poland and stating that the Court of Justice "is not a court but a political body of the European Union".

Mr Gussetti also drew attention to various recent ECtHR judgments as regards Poland, such as *Xero Flor w Polsce sp. z o.o. v. Poland* (application no. 4907/18, concerning the Constitutional Tribunal), which was followed by a ruling of the Constitutional Tribunal of Poland on 16 June 2021 declaring the judgment "non-existent", as it had been issued without legal basis and in violation of the ECtHR's competences. The Minister of Justice of Poland submitted a motion to the Constitutional Tribunal on 27 July 2021 requesting it to declare Article 6(1) ECHR unconstitutional. Additionally, mention was made of ECtHR judgments *Broda and Bojara v. Poland* (applications no. 26691/18 and 27367/18, on the dismissal of court presidents and vice

presidents) and *Reczkowicz v. Poland* (application no. 43447/19, on the Disciplinary Chamber of the Supreme Court) and the most recent GRECO report.

Mr Gussetti finally referred to various developments in Poland, such as the ruling of the Criminal Chamber of the Supreme Court on 16 September 2021 that a newly appointed judge in the Criminal Chamber could not be considered a judge within the meaning of Polish criminal law; the six judgments of the Supreme Administrative Court of 21 September 2021, relying on the CJEU judgment in case C-824/18 of 2 March 2021, partly invalidating NCJ resolutions which provided the basis for the appointment of judges to the Chamber of Extraordinary Control and Public Affairs; the refusal of several judges to adjudicate in benches composed of judges appointed by the newly composed NCJ (and the subsequent disciplinary motions made against them); the news on the forthcoming justice reform which will reportedly primarily focus on the structure of ordinary courts; the selection of three newly appointed judges to the office of the President of the Civil Chamber of the Supreme Court and the discontinuation of the sitting of the College of the Supreme Court on 30 September 2021 due to the refusal of Supreme Court judges appointed before 2018 to participate in the work of the College "until the activities of the Disciplinary Chamber are completely discontinued".

9. Albanie

Mémoire amicus curiae sur la compétence de la Cour constitutionnelle d'Albanie en matière de validité des élections locales du 30 juin 2019

M. Pinelli indique que l'avis porte sur trois questions posées par la Cour constitutionnelle d'Albanie. La première question concerne l'interprétation de l'article 131 (1) e) de la Constitution, qui traite de l'éligibilité du Président de la République, des députés et des « fonctionnaires des organes prévus par la Constitution », ainsi que de la vérification de leur élection. Le projet de mémoire exprime l'avis que les conseillers municipaux et les maires sont des « fonctionnaires des organes prévus par la Constitution », mais que la compétence de la Cour constitutionnelle ne comprend pas l'examen de la validité des élections locales. Cela n'empêche pas la Cour constitutionnelle d'exercer son contrôle sur la législation électorale.

La deuxième question porte sur les principes de périodicité des élections et de pluralisme politique et leur interrelation. Ces principes ont peu de chances d'entrer en conflit l'un avec l'autre car ils s'expriment dans des types de règles très différents. Le Parlement dispose d'une large marge d'appréciation pour décider de fournir une base légale au report des élections ; en l'absence d'une telle base, la Cour constitutionnelle pourrait considérer le report comme inconstitutionnel.

M. Pinelli rappelle la position de la Commission de Venise sur la question des boycotts, qui, s'ils peuvent être un moyen légitime d'exprimer son désaccord dans le discours politique, ne doivent pas empêcher la tenue d'élections régulières.

Concernant la (troisième) question de savoir si, dans un climat d'incertitude juridique, les actions des autorités publiques et des partis politiques ont violé le droit des électeurs à avoir un choix significatif, le projet de mémoire déclare qu'il relève de la responsabilité conjointe des autorités publiques et de l'ensemble de l'échiquier politique de restaurer la confiance dans les institutions albanaises et dans le processus électoral. Cela inclut la responsabilité de toutes les parties prenantes de promouvoir le dialogue politique entre les forces politiques ainsi qu'entre les institutions nationales, telles que la Commission électorale centrale. Cela implique également de rétablir un choix significatif pour les électeurs. Tous ces éléments sont des conditions préalables essentielles, mais non exclusives, à des élections démocratiques.

La Commission adopte le Mémoire amicus curiae sur la compétence de la Cour constitutionnelle d'Albanie en matière de validité des élections locales du 30 juin 2019 (CDL-AD(2021)037), préalablement approuvé par le Conseil des élections démocratiques lors de sa réunion hybride du 14 octobre 2021

10. Slovak Republic

Opinion on two questions regarding the organisation of the legal profession in the Slovak Republic and the role of the Supreme Administrative Court in the disciplinary proceedings against lawyers

Mr Alivizatos explained that the Opinion examined not a legislative proposal but two general questions, formulated by Ms Kolíková, the Minister of Justice of the Slovak Republic. The first concerned the possibility to split the currently existing single Slovak Bar Association (the SBA) into several independent Bars. The second question concerned the potential role of the newly created Supreme Administrative Court (the SAC) in the disciplinary proceedings against lawyers.

On the first point, the Ministry argued that the corporatist management of the legal profession called for the reorganisation of its self-governing structures. The SBA, to the contrary, argued that their record was impeccable, and that the reform was not needed.

According to the Opinion, there is no single model of the organisation of the Bar; there are countries where several bars co-exist but most often this is the result of a particular historical development. The rationale for the proposed fragmentation of the SBA was unclear. Fragmentation based on the free choice of lawyers might lead to the competition amongst bars, to the politization and lowering of professional standards. Geographic principle of fragmentation (creation of regional bars) is better than a sectoral one (creation of specialist bars). In any case, all Bars should operate under similar rules and it might be necessary to keep the central "umbrella organisation" (akin the SBA) with regulatory and supervisory functions.

Entrusting the SAC with a power of full review of disciplinary decisions taken by the Bar would be an acceptable solution in principle, especially given that the lawyers would be represented by two members of the disciplinary panel of the SAC. This could accelerate disciplinary proceedings, but it might also be detrimental to self-regulation; the currently existing model, with the courts exercising only a "cassation"-type of review of decisions taken by the disciplinary bodies of the Bar was therefore preferable.

Minister Kolíková thanked the Commission and the rapporteurs for their thorough analysis and stressed that the proposals discussed in the Ministry have not yet taken shape of a legislative proposal or even a concept-paper. It was important to receive guidance from the Venice Commission before proceeding further in this direction. The idea of the disciplinary panel of the SAC consisting both of judges and lawyers would be a step forward. The Venice Commission' recommendation concerning multiple Bars would be taken in consideration. The Ministry would engage in the dialogue with the SAC and the SBA.

The Commission adopted the Opinion on two questions regarding the organisation of the legal profession in the Slovak Republic and the role of the Supreme Administrative Court in the disciplinary proceedings against lawyers (CDL-AD(2021)042).

11. Ukraine

Draft law "On the principles of state policy of the transition period"

Ms Nussberger informed the Commission that the draft law "On the principles of state policy of the transition period" was intended to provide the general legal framework for measures to be taken in the temporarily occupied territories during the transitional period, both in the Donetsk and Luhansk oblasts and the Autonomous Republic of Crimea and the city of Sevastopol. The assessment of the draft law was complicated by the fact that it needed to be complemented by more specific legal acts and that it targeted several different problems arising out of the current situation with a view to future (uncertain) developments. The opinion acknowledged that the draft law had been prepared through an inclusive process, but it recommended that the people directly concerned be more involved in the further stages.

The opinion also noted that the draft included definitions of terms which were not always congruent to the respective terms used in public international law. In particular, the definitions of the central terms of “transitional period” and “transitional justice” were rather narrowly conceived and took a one-sided approach to the transitional period. According to international standards transitional justice was a holistic concept which must address the crimes and human rights violations perpetrated by all the parties to the conflict and aim for reconciliation. The opinion included a number of specific recommendations which called for clearer and more precise regulations to ensure they comply with international standards. *Inter alia*, the provisions on liability for criminal offences committed in connection with the temporary occupation (which were potentially discriminatory), on disqualification/lustration (which needed to take into account the relevant case-law of the European Court of Human Rights and previous opinions of the Venice Commission), on the right to truth (which followed a one-sided approach) and on convalidation of civil status acts and other official documents which were fulfilled in the temporarily occupied territories (which needed to include a human rights perspective) should be substantially amended.

Mr Ihor Yaremenko, Deputy Minister for European Integration in the Ministry for the Reintegration of the Temporarily Occupied Territories of Ukraine , acknowledged that the opinion offered a number of useful recommendations to further improve this important draft law. At the same time, he expressed concerns about certain references to the so-called Minsk agreements and about the view expressed in the opinion that the conflict also had an intra-state dimension. He furthermore stressed that this was only a framework law and that more precise regulations would follow, in separate legal acts. Finally, Mr Yaremenko thanked the Commission for its readiness to provide further assistance, notably as concerns further implementing legislation.

Ms Nussberger indicated that several changes proposed by the Government of Ukraine had been taken into account in the final version of the opinion, for example with respect to the amnesty provisions and the intra-state dimension of the conflict.

The Commission adopted the Opinion on the draft law of Ukraine “On the principles of state policy of the transition period” (CDL-AD(2021)038).

12. Serbia

Draft opinion on constitutional amendments

Mr Martin Kuijer explained that the draft opinion for Serbia on the draft Constitutional Amendments on the Judiciary and the draft Constitutional Law for the implementation of the Constitutional Amendments was based on two requests: the first by the Chairperson of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe (PACE) on 5 February 2021 and the second by the Speaker of the National Assembly of Serbia on 9 July 2021.
The draft Amendments and the draft Constitutional Law on their implementation were limited to the sections of the Constitution regarding the judiciary and constituted a first and necessary step in the constitutional reform process, but did not constitute the completion of this process nor a comprehensive revision of the entire Constitution of Serbia. For the judicial reform to succeed in bringing the Serbian judiciary into line with European and international standards, organic laws will need to be reformed to regulate important elements, such as eligibility criteria for judicial office.

This opinion, therefore, did not deal with judicial reform as such, but only with the draft Amendments and the draft Constitutional Law for their implementation. As the PACE’s request was wider in scope, it might be the subject of a second opinion, should the PACE consider it necessary in the context of the amendment/adoption of other laws in this constitutional reform.

Mr Kuijer added that there currently appeared to be the necessary political momentum in Serbia to achieve this first step of the constitutional reform. Although the process could be

characterised as sufficiently inclusive and transparent, having only one party with over the required 2/3rd majority of the seats in the National Assembly, coupled with the near absence of the parliamentary opposition, led to the need for an inclusive approach to lend legitimacy to the constitutional reform process among all institutional actors and political forces in Serbia. For this reason, the Venice Commission would like to urge the Serbian authorities to continue to actively seek the participation and involvement of the opposition.

The draft Amendments were generally in line with the Venice Commission's earlier recommendations. The opinion notably welcomed the removal of the National Assembly's competence to elect court presidents, the Republic Public Prosecutor and public prosecutors and to decide on the termination of their office, to elect judges and the deputy public prosecutors. It welcomed the introduction of the principle of non-transferability of judges and of functional immunity for judges and prosecutors as well as the removal of the probationary period for judges and prosecutors and the HJC will no longer be dissolved if it does not render a decision within 30 days.

Mr Kuijer then turned to the issues that needed improvement, notably the anti-deadlock mechanism in the HJC and HPC consisting of a five-member commission, the composition of which should be reconsidered; the two alternative suggestions for the composition of the HJC: the first alternative was clearly preferable with a majority of members being judges appointed by their peers; while the two-thirds majority requirement in the parliamentary vote was welcomed and should be kept, eligibility criteria designed to reduce the risk of politicisation should be added due to the current political situation; the possibility should be provided for the HPC to nominate just one candidate for the post of Supreme Public Prosecutor to the National Assembly for validation/confirmation in order to depoliticise the appointment process as much as possible; in the composition of the HPC, there were now fewer prosecutors than in the past – this was not to be recommended; there was a difference between the HJC and the HPC with respect to the inclusion of *ex officio* members – ideally, the two positions of *ex officio* members of the HPC should be abolished and there should be six public prosecutors elected by their peers; the members elected by the National Assembly should also not have any present or future hierarchical (or *de facto*) subordination links to the Supreme Public Prosecutor and represent other legal professions.

Finally, regarding those members of the Constitutional Court who were appointed by the National Assembly, it was regrettable that this opportunity for constitutional revision had not been seized to introduce: (a) the need for a qualified majority vote in the National Assembly, and (b) an adequate anti-deadlock mechanism.

Mr Tuori then explained that it had been proposed in the Sub-commission to put additional emphasis on the fact that the constitutional amendment process should be seen as part of a larger, more comprehensive, reform process and the importance for the parliamentary and extra-parliamentary opposition to take part in this entire reform process.

Mr Tuori then recalled that while in in its 2010 Report on the Independence of the Judicial System Part I: The Independence of Judges (CDL-AD(2010)004), the Commission had stated that *"In all cases the council should have a pluralistic composition with a substantial part, if not the majority, of members being judges. With the exception of ex-officio members these judges should be elected or appointed by their peers*.", it had then aligned with the standard set in this respect by the Committee of Ministers' Recommendation CM/Rec(2010)12), that *"not less than half the members of such councils should be judges chosen by their peers from all levels of the judiciary and with the respect of pluralism inside the judiciary*".

Mr Ivica Dačić, Speaker of the National Assembly of Serbia, explained that the Serbian authorities' openness coupled with the Venice Commission's willingness to provide professional assistance in this process had resulted in an improved text of the draft constitutional amendments. The National Assembly continued to do its utmost to make the constitutional reform process as transparent and inclusive as possible in order to reach the widest possible consensus. He assured the Venice Commission that the National Assembly

will do its best to encourage the participation and involvement of the parliamentary and extra-parliamentary opposition. He underlined that there was a need in Serbia to see the constitutional reform process as going beyond party lines or any other political interest.

Mr Dačić noted that these draft constitutional amendments on the judiciary were indeed a necessary and important first step in the Serbian constitutional reform process but did not constitute the completion of this process. He also said that it was his duty to share with the Venice Commission that it was unfortunately the target in Serbia of those who misrepresent its role as a kind of "sovereign" who orders and imposes solutions on Serbia. These views were partly appeased through public debates in which the role of the Venice Commission was explained.

He explained that it will be important for the citizens of Serbia to be informed about the upcoming constitutional referendum. In addition, to organise and conduct this referendum efficiently, a new "higher quality" law on referendum in line with European standards was needed. The recommendations made by the Venice Commission in its urgent opinion on this Law had been largely taken into account in the new text, which is now the subject of a further urgent opinion by the Venice Commission.

Mr Dačić said that there was no justification for the fact that Serbia had not adopted a new Law on referendum over the past 15 years, since the entry into force of the 2006 Constitution. According to the constitutional law, this should have been done by 31 December 2008. The new draft should create a suitable legal framework to achieve a high degree of democratic legitimacy through the constitutional reform process and through subsequent legal reforms in Serbia.

Ms Maja Popović, Minister of Justice of Serbia, thanked the Venice Commission for this draft opinion on the draft constitutional amendments on the judiciary and for its valuable support. She believed this to be the first step in Serbia's process of further European integration and in establishing a higher level of the rule of law.

Ms Popović explained that the draft constitutional amendments had eliminated most procedural and content related deficiencies of the 2018 text, on which they were based. The positive draft opinion provided constructive recommendations. She proceeded to enumerate which recommendations could be taken into account and those that were based on a misunderstanding due to flaws in the translation into English of the draft constitutional amendments.

The Commission adopted the Opinion on the on the draft Constitutional Amendments on the Judiciary of Serbia and the draft Constitutional Law for the implementation of the Constitutional Amendments, previously examined by the Sub-Commissions on Democratic Institutions and on the Rule of Law at their joint hybrid meeting on 14 October 2021 (CDL-AD(2021)032).

Urgent Opinion on the draft Law on the Referendum and the People's initiatives

Mr Kask focused on two issues. First, the procedural aspect: the draft came out only in 2021 while the Constitution had been amended in 2006, the legislation on referendums had to be updated up to the end of 2008, and a constitutional referendum was imminent. Second, on the substance, the amendments included several positive elements, such as the suppression of the quorum, the regulation of the possibility for the Assembly to take a position on the issue submitted to referendum and the obligation to provide citizens with objective information on the referendum issue. The most critical points concerned: the clarity of the draft, and in particular the differentiation between the various types of referendums (legally binding and consultative; constitutional and legislative; mandatory, initiated by parliament, the executive, or part of the electorate). The rules on complaints and appeals were not very clear either, while some deadlines were not in accordance with revised guidelines on referendums and the

extension of the right to vote in some local referendums to owners of real estate was disputable. This urgent opinion had been issued on 24 September 2021.

Mr Buquicchio reminded the Commission that a new urgent request had been made by the Serbian authorities on a revised version of the draft Law on the Referendum and the People's initiative of Serbia which had been prepared in the light of this first urgent opinion. The new opinion would in particular address the implementation of the opinion now under consideration. The Commission had accepted in the morning to follow the urgent procedure.

The Commission endorsed the Urgent Opinion on the draft Law on the Referendum and the People's initiative of Serbia (CDL-AD(2021)033).

13. Netherlands

Opinion on Legal Protection of Citizens

Mr Barret explained that the subject matter of opinion was unusual because it did not relate to (draft) legislation but to the results of a complex situation in the field of childcare allowances. Problems in this field had brought serious hardship to many parents in the Netherlands. The ensuing crisis had led to the resignation of the Dutch Government. The facts relevant for the opinion had been established in a report of the Dutch Ombudsman and a Parliamentary Inquiry Commission. Within the very wide request for an opinion from the Dutch Parliament, the rapporteurs had to establish the elements on which the opinion could usefully focus.

The childcare crisis had been triggered by a new system of advance payments to parents for childcare services. The control of the validity of these payments came only years later. Then, due to the so-called "all or nothing" approach, not only had the concrete overpayments but in many cases all payments, made for the whole year, had to be returned. This approach by the Dutch tax authorities who were in charge of making and controlling the payments had been validated by the highest administrative court, the Council of State. Only in 2019, in the light of the wide-spread hardship caused, did the Council of State reverse its case-law, now applying principles of good administration and proportionality.

The opinion referred to several applicable rule of law principles, including legal certainty. The opinion made a number of suggestions to avoid similar situations in the future, concerning all three branches of power.

As concerns the legislative power, the draft opinion recommended improving the system of legislative evaluation and the scrutiny of the executive by Parliament. The opinion noted that the narrow governmental multi-party majorities, resulting from the Dutch electoral system, made it very hard for majority MPs to scrutinize the executive because they were seen as endangering the fragile governmental majority. The rights of the Parliamentary minority should be strengthened and committees and MPs should receive sufficient resources to enable scrutiny of the executive.

The executive should improve the information flow within the civil service and at the ministerial level. Access to information and complaint procedure for individuals should be improved. Another aspect was the use of Artificial Intelligence to identify fraudulous claims, which had been applied in a manner discriminating foreigners.

A specific issue concerning the judiciary was the double role of the Council of State, both advising the Government on draft legislation and acting as the highest administrative court. The opinion recommended better separating these two roles. The absence of any constitutional review of legislation (excluded by Article 120 of the Constitution) was also seen as contributing to the problems.

However, the opinion also noted that that the Dutch authorities had reacted to the problems and had taken remedial action, even if this had been done too late.

Ms Judith Tielen, Member of the House of Representatives of the Netherlands, insisted that the crisis had had deep effects in the Netherlands. A documentary available on the Internet showed the suffering that mothers had to endure. The opinion would be a useful basis for the Dutch Parliament for further reforms.

Mr Pieter Omtzigt, Member of the House of Representatives of the Netherlands, insisted that he spoke as an individual MP as the draft opinion had not yet been discussed in the parliamentary committee. He informed the Commission that he had left his own party because of the crisis. While the Government insisted that they had been obliged by the law to recover all payments made in full, the law did not at all impose this "all or nothing" approach. That had been a deliberate choice, as had been proven by the advice to the contrary by the State Advocate. Only the real overpayment should have been recovered. The minority rights of in Parliament were too weak to enable effective scrutiny of the executive branch. 30 MPs could only ask for a debate but they could not request an inquiry. The discrimination of foreigners had not only been based on Artificial Intelligence but had been a deliberate choice. Independent MPs – as he now was - are in a very difficult position because they receive only half of the resources as compared to MPs united in political groups.

Mr Dimitrov pointed out that similar problems would exist also in other countries and that the suggestions in the opinion would be valid also for other countries. Mr Tuori pointed out that the subject matter of the opinion was very unusual. The Secretariat explained that this opinion was similar in some respects to earlier opinions relating to constitutional "situations" (e.g. Bosnia and Herzegovina, Kyrgyzstan, Ukraine).

The Commission adopted the Opinion on the Legal Protection of Citizens in the Netherlands, previously examined by the Sub-Commissions on Democratic Institutions and on the Rule of Law at their joint hybrid meeting on 14 October 2021 (CDL-AD(2021)031), .

14. Hungary

joint opinion on the 2020 amendments to the electoral legislation

Mr Darmanovic informed the Commission thatthe amendments were part of a legislative package adopted at the end of 2020. The amendments included many technical improvements which were welcome. The opinion mainly concentrated on two issues:

1) The need to adopt electoral legislation by broad consensus after extensive public consultations with all relevant stakeholders. This requirement had not been satisfied, as was the case for previous amendments which were submitted for opinion to the Venice Commission and ODIHR in 2012. This was regrettable;
2) On the substance, as agreed by all interlocutors during the online visit, the essential issue was the sudden and dramatic increase of the number of single-member constituencies in which parties need to nominate candidates if they want to participate in the proportional part of the elections: from 27 to 71 constituencies, and from 9 to 14 districts (in addition to Budapest). This amendment was introduced late in the legislative process. The governmental majority stated that the amendments were designed to exclude fake parties, but their main effect is to favour big parties and in particular the incumbent, forcing all opposition to unite if it wants to obtain a significant number of majoritarian seats. The draft therefore recommended significantly reducing the number of single-member constituencies in which parties need to nominate candidates in order to be able to run a national list of candidates.

The Hungarian authorities had asked to postpone the opinion since Hungary will hold legislative election in six months. Mr Darmanovic remarked that there were precedents when the Commission had provided opinions in similar or even shorter periods before elections at request of the Parliamentary Assembly or the Congress of Local and Regional Authorities. There was

ample time for implementing the opinion before the upcoming elections, in particular as concerns the main recommendation.

Ms Kseniya Dashutsina, on behalf of ODIHR, added that the use of cardinal laws was not appropriate in the electoral field, at least for provisions of technical character, as had already been underlined in the past. She also raised the issue of the exclusion from the right to vote of mentally disabled citizens. The draft opinion was largely positive on technical issues, in particular concerning the registration process and the adaptation to the challenges posed by COVID-19.

Mr Csaba Hende, Deputy Speaker of the Hungarian National Assembly, Chairman of the Committee on Legislation, informed the Commission that Article 2 of the Constitution provided that members of Parliament are elected in a manner laid down in a cardinal law, and that similar principles applied to local elections. The amendments contributed to the implementation of constitutional principles, based on recommendations of the National Election Office. A widespread consultation had taken place through the National Election Commission and the National Election Office. On the substance, the rules on the minimum number of individual candidacies were aimed at preventing fake parties from taking part in the elections. The issue of persons restricted in their mental capacity was a complex one, which had not been resolved at European level and would need constitutional revision. Mr Hende regretted that the adoption of the opinion had not been postponed, due to its political impact.

Mr Mathieu stated that recommending amendments less than one year before elections was problematic vis-à-vis the principle of stability of electoral law.

The Commission adopted the Joint Opinion on the 2020 amendments to the electoral legislation of Hungary, previously approved by the Council for democratic elections at its hybrid meeting on 14 October 2021 (CDL-AD(2021)039).

Opinion on the aAmendments on the Act on the Organisation and Administration of Courts and the Act on the Legal Status and Remuneration of Judges adopted by the Hungarian parliament in December 2020

Mr Carozza explained that the opinion expressed concern about the highly expedited timeframe, as well as about the adoption of the package during the state of public emergency, which severely limited any possibility of an inclusive and meaningful public consultation and debate. The process therefore did not appear to be consistent with earlier Venice Commission recommendations and standards regarding the need for a robust and broadly participatory public process, nor even with domestic Hungarian law regarding mandatory consultation.

The opinion drew on the analysis contained in two prior Venice Commission opinions on the judiciary in Hungary in 2012, and in some cases reiterated some of the recommendations made then, especially with regard to the powers of the President of the National Judicial Office. The December 2020 reforms had taken place against the background of other earlier changes relating to the judiciary, in particular a set of significant reforms adopted in 2019. In order to understand the functional impact of the current changes, the draft opinion made some observations about the 2019 reforms as well, including increased powers for the President of the Curia, and the risks of greater politicisation of the judiciary.

Mr Carozza focused on three main areas:
The first regarded the allocation of cases, and particularly the power of the President of the Curia to increase the number of judges (from three to five) of adjudicating chambers for certain categories of cases. While the criteria established by law were suitable for the President of the Curia to set up an adequate case allocation system in the internal rules of procedure, the legislation itself should establish the criteria for increasing to five the number of judges sitting in the panel for certain types of cases. Furthermore, even though the practice and tradition of the Curia may show that its President tends to follow the opinion of the relevant college and the judicial council, it would be advisable to make public and binding their opinion in order to ensure the transparency of the process and to increase the trust of the citizens in the good and impartial

functioning of the judiciary.

The second area pertained to the new rules established to regulate the procedures for uniformity complaints. The institution of this new individual legal remedy overall appeared to represent an improvement and to comply with relevant standards to ensure the uniform application of the law. Nevertheless, the opinion made recommendations aimed at ensuring the independence of each individual judge and expressed concerns regarding the rules for the composition of chambers for uniformity decisions. It recommended increasing the number of judges sitting in the uniformity complaints chamber and removing the prerogative of the President of the Curia to appoint temporary presiding judges or at least to eliminate any margin of discretion in their selection.

Thirdly, with respect to the secondment of judges, the 2020 changes expanded the possibilities for judges to be seconded to other bodies outside the judiciary, and to return to the judiciary in a higher position than they had been in before. As such, the new rules on the assignment of judges to state bodies would not appear to raise major concerns. Clear rules regarding conflict of interest and recusal should ensure that seconded judges could not deal with the same matter as judge and within the executive. In order to avoid that the secondment could serve as a way for the President of the National Judicial Office to promote judges without going through the ordinary procedures, the draft opinion recommended establishing clear, transparent and foreseeable criteria allowing the seconded judges to be assigned to a higher position after their secondment.

Mr Oszkár Ökrös, State Secretary in the Ministry of Justice, regretted that the opinion reopened the issue of the distribution of competences between the President of the National Office of the Judiciary and the National Judicial Council, which was not the core of the 2020 amendments. He also criticised the reliance on the European Commission Rule of Law Report (EC RoL Report). Finally, he insisted that the 2019 amendments did not fall under the scope of the opinion and that the possibility of Constitutional Court judges to become Supreme Court judges did not contain any risk of politicisation. Extensive safeguards applied to both groups. Other recommendations would be duly considered by the Hungarian authorities.

Mr Carozza replied that the reliance of the opinion on the EC RoL Report was for factual purposes only. This was only one source among others and other points of view had also be taken into account. Most of the comments by the Government were addressed by the changes.

The Commission adopted the opinion on the amendments on the Act on the Organisation and Administration of Courts and the Act on the Legal Status and Remuneration of Judges of Hungary, adopted by the Hungarian Parliament in December 2020 (CDL-AD(2021)036).

Opinion on Amendments to the Act on Equal Treatment and Promotion of Equal Opportunities and the Act on the Commissioner for Fundamental Rights of Hungary, as adopted by the Hungarian parliament in December 2020

Mr Pinelli explained that draft opinion assessed the compatibility of legal amendments concerning the merger of Equal Treatment Authority (ETA) with the Commissioner for Fundamental Rights (CFR) with international standards on equality bodies/national human rights institutions. Whilst observing that there is no standard model across the CoE member States for equality bodies/national human rights institutions, the draft opinion underlined that the models chosen have to strengthen the institution and enhance the level of protection and promotion of human rights and fundamental freedoms in the country. The practical effectiveness of the chosen framework for such institutions should be consistent with internationally accepted and recognised standards.

The draft opinion emphasised that independence, including financial and administrative independence, and effectiveness are key factors for ensuring efficient functioning of NHRIs and for securing a desired impact.

Mr Pinelli explained that the Venice Commission is not in a position to state that the merger of ETA with CFR can be taken as *a priori* "downgrading" the mandate of non-discrimination. It is not the form that matters, but the substance. The opinion raised concerns as to the mandate of the CFR, as a result of the merger, to conduct two types of proceedings which are different in nature and outcome. It appears that the new system of protection against discrimination is overall more complicated and thus has the potential to be less effective than the previous one.
Finally, the draft opinion regretted a rushed manner of adopting the law during a state of emergency, without any meaningful consultation with civil society and other stakeholders.

Mr Csaba Hende, Deputy Speaker of the Hungarian National Assembly, Chairman of the Committee on Legislation explained that the merger of ETA with the CFR increases the level of protection of fundamental rights as the Commissioner for Fundamental Rights is an independent constitutional institution. He further explained that the powers of the CFR and the possibilities of sanctioning any breaches of equal treatment are remaining strong after the merger and are in line with relevant EU Directives. Furthermore, Mr Hende stressed that there are 13 countries, including nine EU member States, where Ombudsman institutions/NHRIs also have the function of equal treatment authority. He explained that the CFR as an independent constitutional institution, has full autonomy in the use of its budget, managing its human resources and forming its internal structure. He added that financial resources necessary for the effective functioning of the institution are adequately provided. Mr Hende noted that the Commissioner for Fundamental Rights, Mr Kozma, is aware of the expectations of the Venice Commission and will take its recommendations into consideration.

The Commission adopted the Opinion on the amendments to the Act on Equal Treatment and Promotion of Equal Opportunities and the Act on the Commissioner for Fundamental Rights of Hungary, as adopted by the Hungarian parliament in December 2020 (CDL-AD(2021)034).

15. Preparation of the December 2021 elections

Mr Claire Bazy Malaurie, Ms Angelika Nussberger, Ms Herdis Thorgeirdottir and Mr Michael Frendo addressed the Commission.

President Buquicchio asked all candidates running for the position of President of the Commission to declare themselves before the end of the session.

On behalf of the Group of Wise Persons, Mr Tuori thanked the candidates and informed the Plenary that the Group of Wise Persons would announce its nominations for other positions in the Bureau and for the Sub-Commissions as soon as possible. Mr Tuori also reported that he had been approached by several members pointing out that the nominations for the positions of President and Vice-President did not contain any persons from Central and Eastern Europe. The Group of Wise Persons was conscious of this would look into compensating this lack in regional representation in the other nominations. Mr Tuori expressed hope that the members would look at the nominations as a whole and not only at those for the President and Vice-Presidents.

Ms Suchocka, Ms Trstenjak and Ms Bílková advocated for a better representation of Central and Eastern Europe in the Presidency. This should not be taken as a lack of trust in the candidates but rather as underlining the principle of regional representation.

As concerns other positions, Mr Buquicchio reminded the Group of Wise Persons not forget about members from other parts of the world, outside Europe.

16. Armenia

Opinion on the legislation related to the Ombudsman's staff

Mr Voyatzis explained that the opinion, requested by the Human Rights Defender (hereafter the "HRD"), aimed to clarify the compatibility of Armenia's current legislation with regard to the

independence of the staff of the HRD with relevant international standards. Specific changes made to the HRD legislation by the package of amendments introduced on 21 January 2020 and related to the independence of the institution were addressed. According to international standards, the independence and efficiency of the Ombudsman institution requires the implementation of policies, which guarantee the autonomy of the recruitment processes, staff members' career evolution and position ranking. Hence, issues related to the staff, such as independent recruitment, career policies, rank, salary, education, and training, are all part of this concept of independence.

The analysis of the legal situation of the staff of the HRD before the introduction of the 21January 2020 amendments revealed that the former version of the constitutional law ensured the independence of the staff by providing a series of safeguards for discretionary powers of the Ombudsman in staff policies. All relevant provisions were meant to ensure compliance with the Paris Principles and would today be in line with current international standards, which is commendable.

The new version of the Law changed the legal regime of the Ombudsman institution's staff subjecting it to the civil service regime. This seemed to contradict Article 39 (3) of the Constitutional Law on the HRD, according to which the Ombudsman enjoys full independence and autonomy with regard to personnel matters and related policies. The 2020 amendments, even though they were intended to unify the public service system in general, would significantly reduce the independence of the Ombudsman institution in terms of the independence of the staff, in terms of the independence of the Ombudsman to recruit and implement staff policies in an autonomous manner. Moreover, issues relating to the institution's staff and rank have budgetary consequences. International standards are again consistent in this respect and require securing guarantees of independence for the budget of the institution.

The opinion therefore recommended revising the Ombudsman's legislative framework in order to clarify and guarantee his or her full independence in staff policies, notably recruitment, career, job classification, job descriptions, etc; and ensuring that the Ombudsman's staff system and staff policies are based on clear criteria, linked to the specificities, functions and responsibilities of the institution. It should be avoided that staff-related issues subordinated to any other state body or agency, notably the executive power.

Finally, the opinion invited the legislator to take the opportunity of a possible revision of the constitutional Law on the HRD not only to implement the previous recommendations formulated in the 2006 and 2016 opinions of the Venice Commission which are still valid but also to fully implement all Venice Principles.

Mr Arman Tatoyan, the HRD, affirmed that the designation of the HRD's staff as civil servants is in contradiction with the Constitutional Law on the HRD, and that the amendments have significantly reduced the independence and autonomy of the HRD's institution. This contradicts international standards and requirements. The HRD welcomed the Commission's call to revise the legislative framework of the Defender.

Mr Vache Khalashyan, Acting Head of the Civil Service Office in the Prime Minister's Office, explained that the changes aimed at unifying the system and that some provisions that had not been provided to the rapporteurs would foresee exceptions for the HRD. His Office recently received descriptions of some posts to be filled and this would not cause much difficulties.

Mr Panayotis recalled that the opinion is based on the texts provided for by the Ombudsman institution that some amendments had been made to the draft opinion in response to the authorities' comments, but the Commission's conclusions and recommendations remained the same.

The Commission adopted the Opinion on the legislation related to the Ombudsman's staff in Armenia (CDL-AD(2021)035).

17. United Kingdom

Opinion on the possible exclusion of the Parliamentary Commissioner for Administration and Health Service Commissioner (PHSO) of the United Kingdom from the "safe space"

Mr Helgesen explained that the opinion requested by the PHSO, focused only on the possible exclusion of the PHSO from the "safe space" and did not aim to analyse the Bill as a whole, and even less to give an opinion on the health policy choices provided for in the Bill, nor to the mandate and powers of the PHSO at large.

The possible exclusion of the PHSO from the "safe space" created by the Bill had been analysed in light of the current applicable international standards, notably the Venice Principles. The Bill created a 'safe space' within which participants can provide information to the Health Services Safety Investigation Body (hereafter "the HSSIB") for the purposes of an investigation without fear that it will be disclosed to others. The HSSIB fell into the jurisdiction of the PHSO. The PHSO's role in health was primarily to investigate independently individual and group complaints against health service providers where the complainant has sustained injustice or hardship as a consequence of a service failure or maladministration or a failure in clinical care.

This means the PHSO can consider complaints about unsatisfactory care or treatment. The Bill excluded the PHSO from the "safe space" and hence excluded the PHSO from access to the information within the "safe space". The PHSO may have access to this information through the High Court, however.

The Opinion first recalled the applicable principles of general nature. Further, it stressed that while the PHSO's mandate as such was not affected by the Bill, his or her independent investigatory powers would appear to be affected and be limited. Investigatory powers are dealt with by Principle 16 of the Venice Principles which provides that an ombudsman must have a legally enforceable right to unrestricted access to all relevant documents, databases and materials, including those which might otherwise be legally privileged or confidential: the possible exclusion of the PHSO hence went against this principle.

At the national level the bill affected the powers and mandate of the PHSO, the effectiveness of its action and therefore the credibility of the institution as well as the PHSO's image, which could be weakened by the probable exclusion from safe space. It is in the interest of the citizens to have a strong Ombudsman institution with all the means to carry out its missions.

Although on first sight the intention of the Bill was not to undermine the PSHO, it resulted in a difference in the treatment of cases depending on whether citizens contact the HSSIB or the PSHO; this was not an appropriate solution. The opinion hence invited the authorities to grant the PHSO "unrestricted access" to the HSSIB in order to avoid any restrictions in the investigatory powers of the PHSO, as provided for in Principle 16 of the Venice Principles.

Mr Rob Behrens, Parliamentary and Health Service Ombudsman of the United Kingdom, reminded that his institution investigates routinely 30,000 cases a year, and that for the first time in history the legislation attacked the established right of the Ombudsman to have the same powers as the High Court for the attendance and examination of witnesses and documents. While Mr Behrens did support the objectives of the UK Government in transforming the current Healthcare Safety Investigation Branch (HSIB) into a statutory body, the way the Government proposed to exclude the Ombudsman from the 'safe space' within which the new body will operate was a direct violation of the Venice Principles, and indeed of the United Nations General Assembly Resolution of December 2020 to which the UK Government was a Co-Sponsor. He thus strongly agreed with the conclusions of the draft opinion.

Mr William Vineall, Director, NHS Quality, Safety, Investigations, Department of Health and Social Care, informed the Commission that the draft law contained a wide-ranging reform of the public health system and that the creation of these safe spaces is intended to provide a framework for improving the health care system in the future. The Ombudsman institution was not targeted by

the Bill, neither was the institution completely excluded from the "safe space" since a request for access can be made to the High Court. Within twelve months, an assessment of the impact will be conducted and will be shared with the Venice Commission.

The Commission adopted the Opinion on the possible exclusion of the Parliamentary Commissioner for Administration and Health Service Commissioner from the "safe space" provided for by the Health and Care Bill of the United Kingdom (CDL-AD(2021)041).

18. North Macedonia

Draft Law on the State of Emergency

Mr Cameron presented the opinion, requested by the Minister of Justice of North Macedonia.. The draft law on the state of emergency (SoE) under consideration was supposed to fill the gaps left unregulated in the Constitution. The COVID-19 crisis struck North Macedonia when the parliament was dissolved. As a result, for several months the Government exercised emergency powers without any parliamentary control. The draft law purported to put a limit to the Government's power to legislate by decrees: such decrees would be subordinated to the law on the SoE but otherwise could have a law-changing effect. The Constitution was silent on the substantive limits of the Government's power to legislate, so the draft law formulated principles which should govern the Government's response to the emergency situation (proportionality, temporariness, etc.). The President's power to declare the SoE should be subsidiary to the power of the Assembly to do so. The parliamentary review of the declarations and the decree-laws should not be artificially delayed. The judicial review of the declarations should defer to the assessment of the situation by the Assembly, or, in absence of the sitting Assembly, by the President, but rather be focused on the procedure. The constitutional review of the decree-laws should assess their compliance with the principles set out in the draft law. In general, the draft law set a reasonable balance of powers in the case of the SoE and provided for safeguards limiting the Government's exceptional powers.

Mr Bojan Marichikj, Minister of Justice of North Macedonia, explained the reasons behind the proposed draft law and the need to address the weaknesses in the current legal and constitutional framework revealed by the COVID-19 crisis. The draft law drew on the recent experiences. North Macedonia managed to maintain adequate functioning of its institutions, but the whole system worked under great stress. Article 126 of the Constitution required a special law to be adopted to regulate the Government's powers. The draft law had been prepared by a working group including leading academics and experts. The Government's powers would be henceforth more narrowly defined and governed by the principles of priority, proportionality, public involvement, etc.

In the ensuing discussion the Commission members stressed that, in the context of North Macedonia, the declaration of the SoE transferred to the Government some powers of legislative character, but not full legislative power. While many international human rights treaties provided for a derogation mechanism, it would be possible to limit human rights in a situation of emergency without making a recourse to the derogation. The threshold requirement in the law permitted to separate the SoE from a lower-intensity crisis, governed by the ordinary legislation. The power of the Government to issue decree-laws was justified by the risk of unpredictable situations, which could not be regulated by the pre-existing legislation.

The Commission adopted the Opinion on the draft law on the State of Emergency of North Macedonia (CDL-AD(2021)040)

19. Report of the Council for Democratic Elections (14 October 2021)

Mr Kask informed the Commission about the Venice Commission's activities in the electoral field. In particular, the 18th European Conference of Electoral Management Bodies, dedicated to

"Lessons learned from the impact of the COVID-19 health crisis on electoral processes", would take place online on 29 October 2021. It would be co-organised by the Venice Commission and the National Electoral Committee of Estonia, under the Hungarian Chairmanship of the Council of Europe's Committee of Ministers.

The *amicus curiae* Brief on the competence of the Constitutional Court of Albania regarding the validity of the local elections held on 30 June 2019 and the Joint Opinion on the 2020 amendments to the electoral legislation of Hungary were dealt with above under items 9 and 14.

20. Other business

Mr Varga thanked the Commission for its Opinion on the amendments to the Act on the organisation and administration of the Court and the Act on the legal status and remuneration of judges, which he considered much improved upon in its second version. He informed the Commission that he would share this opinion with colleagues at the Kuria, asking them to implement the recommendations where possible, and would request the Minister of Justice to do so with the recommendations falling within the remit of her Ministry.

Mr Varga also appealed to the Commission to be careful with the terminology used when referring to countries in Central and Eastern Europe, as certain terms could be regarded as offensive. The distinction between old and new democracies was no longer warranted.

Mr Sardon de Taboada addressed the Plenary to speak of the renewed commitment of Peru to the Venice Commission and introduced the current Vice President of the Constitutional Court of Peru, Mr Augusto Ferrero Costa, as the new member on behalf of Peru.

21. Dates of the next Sessions

The Commission confirmed the dates of its next sessions:

129th Plenary Session	10-11 December 2021
130th Plenary Session	16-19 March 2022
131st Plenary Session	17-18 June 2022
132nd Plenary Session	21-22 October 2022
133rd Plenary Session	16-17 December 2022

Sub-commissions meetings as well as the meeting of the Council for Democratic Elections will take place on the day before the Plenary Session.

Link to the list of participants