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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

64TH PLENARY SESSION

Venice, Friday 21 O!ctober 2005 at 9.30am -

Saturday 11 October 2005 at 1pm

SESSION REPORT

1. Adoption of the Agenda

The agenda was adopted without amendment.

2. Communication by the Secretariat

Mr Buquicchio reported on developments since the previous session. Chile had joined the Commission on 1 October 2005. Mr Cea Egana, the President of the Constitutional Court, had been appointed as member with Mr Colombo Campbell, a member of the Constitutional Court, as his substitute.

M. Holovaty, the member for Ukraine, had been appointed Minister of Justice in Ukraine.

Ms Suchocka had been asked to be a member of the Group of Wise Persons, set up at the Council of Europe Summit in Warsaw to examine the long-term effectiveness of the European Convention on Human Rights and its control mechanism.

3. Address by the Secretary General of the Council of Europe

Mr Terry Davis remarked that the full significance of the link between democracy and law was expressed in the Venice Commission's official name, the European Commission for Democracy through Law, because, as he put it, law would be dictatorial without democracy and democracy would be farcical without law.

He pointed out that, as a member of the Parliamentary Assembly, he had already had repeated opportunities to acquaint himself with the Commission's impact on the Council of Europe's work. Now, as Secretary General, he wished to convey the conclusions of the Third Council of Europe Summit, held in May 2005 in Warsaw, where a very clear decision had been taken to centre Council of Europe activities on respect for and promotion of human rights, democracy and the rule of law. It made good sense that the Summit had both acknowledged the importance of the Venice Commission's work and urged states to make ever increasing use of its services.

The large turnout for this session, including representatives of numerous Council of Europe bodies and guests from Council of Europe member and non-member countries, reflected the importance attached to the work of the Commission fifteen years after its establishment.

The Venice Commission continued to be the Council of Europe's rapid reaction force on constitutional matters. It had proved itself as a weapon of democratisation - inspired by Council of Europe standards - that could be deployed quickly and effectively anywhere in the world.

Lastly, as a result of its hard work and its expertise, the Commission had earned the highest ratings in terms of recognition and respect by politicians, media and the general public alike

4. Co-operation with the Committee of Ministers

In the context of its co-operation with the Committee of Ministers, the Commission exchanged views with Ambassador Joaquim Duarte, Chair of the Ministers' Deputies and Permanent Representative of Portugal to the Council of Europe, and with Ambassador Constantin Yerocostopoulos, Permanent Representative of Greece to the Council of Europe.

Ambassador Duarte said that the Venice Commission was one of the Council of Europe's most admired and respected bodies. The highest priority of the Portuguese Chairmanship of the Committee of Ministers had been the implementation of the Action Plan adopted by the Third Council of Europe Summit. In order to strengthen democracy, political freedoms and citizen participation, the Summit had decided to establish a Forum for the Future of Democracy within the existing Council of Europe framework. This would provide a means of exchanging ideas, information and examples of best practices in the field of democracy. The Forum would work in close co-operation with the Venice Commission and other relevant bodies to enhance the organisation's work in the area of democracy through its ideas and proposals. Under the Portuguese chairmanship, a seminar had been held by the Venice Commission in co-operation with Coimbra University on "The status of international treaties on human rights". The Committee of Ministers was very satisfied with its good working relationship with the Venice Commission on matters such as monitoring activities and requests for expert opinions; it had also expressed its political support for the Commission's Code of Good Practice in Electoral Matters in a declaration which had been adopted at ministerial level.

Ambassador Yerocostopoulos focused on the co-operation between the OSCE and the Council of Europe. At the first joint meeting of the Committee of Ministers and the Standing Committee of the OSCE in April 2005, it had been decided to intensify co-operation between the two organisations in four areas including the protection of national minorities and the promotion of tolerance and non-discrimination, for which Ambassador Yerocostopoulos had been appointed Council of Europe correspondent. The outstanding co-operation between the two organisations was especially noticeable in these two areas, largely through the agency of ECRI (the European Commission against Racism and Intolerance) and the ODIHR, which had set up joint action plans aimed at ensuring a degree of complementarity in the recommendations of the two bodies under the "tolerance and non-discrimination" programme. The Venice Commission had been active in these areas through its opinions, guidelines, conferences and training seminars, which enabled it to pass on its expertise and its values to those who needed them the most, such as lawyers, judges and mediators to name but a few. Lastly, while the Venice Commission's work most certainly helped to disseminate Council of Europe standards and values beyond Europe's geographical frontiers, the Commission's experience of working with non-member countries of the Council of Europe and other international organisations proved that productive co-operation arrangements could also be made.

5. Co-operation with the Parliamentary Assembly

The Commission exchanged views on co-operation with the Parliamentary Assembly with the Assembly members Mr Peter Schieder and Mr Erik Jurgens.

Mr Schieder focused on three issues.

The Sub-Committee on External Relations of the Parliamentary Assembly's Political Affairs Committee was currently drafting a report on the Council of Europe's external relations. The Venice Commission would be invited to make comments and specific proposals on external relations, which could be incorporated into the report.

At its last plenary session, the Assembly had adopted a recommendation on "The Council of Europe and the European Neighbourhood Policy of the European Union", paragraph 21 of which asked the Venice Commission " to provide assistance for legislative and constitutional

reforms with a view to developing self-sustained democratic institutions in countries covered by the ENP". This reference showed that the Commission's activities had the Assembly's full support.

Lastly, for some years the Assembly had had an excellent relationship with the Inter-Parliamentary Union. The Inter-Parliamentary Union often made use of experts and so Mr Schieder thought it would be particularly useful for the Commission to attend its next assembly, due to be held in Nairobi from 7 to 12 May 2006, to exchange views and establish contacts.

Mr Erik Jurgens talked about both the past work of the Commission and its growing role on the legal and political scene and the new situation brought about by the enlargement of the European Union but above all by the Charter of Fundamental Rights and the Human Rights Agency, which could lead to divides in Europe or even within the Venice Commission itself.

After 15 successful years, the Venice Commission should be thinking about its working methods, its future and its role in the institutional and political arena, all the more so as it had proved an efficient body and tool for solving political problems on account of its legal expertise. Consequently, in order to update the Commission's role, systematic exchanges of information arranged with the Parliamentary Assembly and the Committee of Ministers would enable the Commission to make an active contribution to matters addressed by these two institutions; it could also be considered whether the Commission might issue opinions of its own accord.

Mr Dutheillet de Lamothe underlined that these were interesting proposals. He also wished to point out that, where human rights were concerned, the principle of subsidiarity should apply in relations between the Council of Europe and the European Union. Regarding the necessary relationship within the Council of Europe between the Venice Commission and the recently-established Forum for the Future of Democracy, the same reasoning also applied as existing institutions should not be duplicated.

Mr Jowell agreed with Mr Dutheillet and said that he was surprised that the Council of Europe was setting up an institution which seemed at first sight to duplicate the Commission. It was absolutely crucial to establish very close co-operation between the Forum and the Commission forthwith, to foster positive interaction.

Several Commission members including the President agreed with these comments and hoped that mechanisms could be discovered to secure the most fruitful possible co-operation between the Forum for the Future of Democracy and the Venice Commission and respond fittingly to the priorities set at the Third Council of Europe Summit.

Ambassador Duarte pointed out that the Forum for the Future of Democracy had been set up to meet the political challenges of democracy and was intended to provide a forum for discussing ways to enhance both public participation in politics and the credibility of democratic institutions. Moreover, the Third Summit Action Plan specifically stated that the Forum for the Future of Democracy would have to work in conjunction with the Venice Commission.

6. Co-operation with the Council of Europe Development Bank

Mr Raphaël Alomar, Governor of the CEB, gave information on the policy of partnerships built up between the bank and other international organisations and the prospects for co-operation that could be developed between the bank and the Venice Commission.

These prospects were enhanced both by the general context and by the task assigned to the CEB by the 3rd Summit of Heads of State of the Council of Europe, which it expected: "while confirming its traditional role on behalf of populations in distress and of social cohesion, also to facilitate, through its own means of action, the implementation of policies which aim at the consolidation of democracy, the promotion of the rule of law and respect for human rights, notably in the field of training of magistrates, civil servants and other participants in public life, as well as in the organisation, operation and infrastructure of administrative and judicial public services" (point 1.5 of the Action Plan). This meant that in future emphasis would be placed on the importance of governance and suitable institutional capabilities for economic and social development.

The three main avenues of co-operation should be countries preparing for membership of the European Union, national and ethnic minorities, particularly the Roma, and projects in the field of training of magistrates, civil servants and other participants in public life, as referred to in point 1.5 of the Action Plan. The bank's proposals for follow-up to the 3rd Summit would be submitted to its collegiate bodies by the end of the year.

7. Follow-up to earlier Venice Commission opinions

- *Bosnia and Herzegovina: Opinion on the constitutional situation in Bosnia and Herzegovina and the powers of the High Representative (CDL-AD(2005)004)*

Mr Markert from the Secretariat informed the Commission that this opinion continued to be widely discussed both within the country and at the international level. Moreover, steps were now being taken to implement it. He had presented the opinion at a meeting in Mostar with Bosnian Croat politicians on 8 September 2005 and at a hearing of the Foreign Affairs Committee of the European Parliament in Brussels on 11 October 2005. Under the auspices of the former Deputy High Representative Donald Hays, now working at the US Institute for Peace, a group of representatives of the main political parties within Bosnia and Herzegovina had been set up. This group was considering concrete proposals for constitutional reform, taking as its point of departure the Venice Commission opinion. He had discussed the opinion with this Group on 7 September 2005. US Undersecretary of State Nicholas Burns had recently called for constitutional reform in the country, mentioning explicitly the issues considered most urgent in the Venice Commission opinion. In his key-note speech at the "Conference on Bosnia and Herzegovina: Ten years of Dayton and beyond" in Geneva on 20 October 2005 European Enlargement Commissioner Ollli Rehn quoted the Venice Commission opinion and urged the country to undertake constitutional reform. At a panel on constitutional reform at the same conference Mr Markert had outlined the main conclusions of the opinion before about 100 people.

- *Kosovo : opinion on Human Rights in Kosovo: Possible Establishment of Review Mechanisms (CDL-AD(2004)033)*

The Commission was informed that, following the Commission's opinion on Human Rights in Kosovo: Possible Establishment of Review Mechanisms (CDL-AD(2004)033), the UN Mission in Kosovo (UNMIK) had decided to proceed with the setting up of an advisory panel of independent experts, which would be competent to review UNMIK's decisions allegedly infringing human rights. A regulation to this effect was in preparation and had been submitted to the Commission's working group for comments. The issue of the nomination of the Panel's

members and the manner of involvement of the President of the European Court of Human Rights was still under discussion, but it was expected that the Panel would be set up shortly.

- *Serbia and Montenegro: Opinion on the Draft Law on the Ombudsman of Serbia (CDL-AD(2004)041)*

Mr. Dürr from the Secretariat informed the Commission that the English translation of the Serbian Law on the Public Protector had recently been received, a draft which had been the object of the Opinion on the Draft Law on the Ombudsman of Serbia (CDL-AD(2004)041), adopted in December 2004. He pointed out that a number of the Commission's recommendations had been taken into account, such as for example the competence of the protector to act on behalf of all persons and not only citizens, providing the protector with investigative powers and the right to inspect all places where persons are held against their will. Other recommendations required constitutional changes. However, the major problem in the Law remained the requirement for the public protector to be able to intervene only after all legal remedies have been exhausted. While an exception had been introduced for cases when the individual faced irreparable damage, this rule prevented the protector from being active during administrative procedures even before a case was referred to a court. In addition, once a final court decision had been handed down, the administration would be bound by this judgement and would be unable to follow the recommendations of the protector.

Mr. Stojkovic, Minister of Justice of Serbia, assured the Commission that the institution of the Citizens' Protector will be incorporated into the new Constitution. Concerning the question of why the Citizens' Protector acts only after the exhaustion of all other legal remedies, he pointed out the following:

- many other countries, including Croatia, whose law on the Citizens' Protector received a positive review from the Council of Europe, had opted for a similar solution;
- the ombudsman cannot be a substitute for or interfere in regular court procedures, which control the activity and acts of administrative organs;
- a different solution could lead to an absurd situation in which the ombudsman takes action or recommends certain measures to be taken, while, in parallel, the court reaches a totally different decision;
- in cases which involve only maladministration but no violation of rights, the ombudsman can intervene directly;
- the draft law allows the ombudsman to intervene in order to prevent an irreparable damage even before exhausting all legal remedies.

8. Armenia

- *Draft final opinion on constitutional reforms in Armenia*

Mr Tuori recalled that the Commission had assisted the Armenian authorities in this second process of constitutional reforms, after the one which had failed in spring 2003, since January 2004. In May 2005, the constitutional amendments had been adopted in first reading and the Commission had expressed deep dissatisfaction with them. As a consequence, the Armenian authorities had agreed to improve the text in respect of three main areas : the separation of powers, the independence of the judiciary and the election of the Mayor of Yerevan. A meeting in this respect had been held in Strasbourg on 24 June 2005, and on that occasion a detailed list of necessary amendments had been drawn up and agreed upon. In July 2005, the Armenian

authorities had submitted an amended text to the working group, which the reporting members had assessed positively: indeed, adequate checks and balances could now be found notably in respect of the formation and running of government; sufficient guarantees for the independence of the judiciary had been provided and the Mayor of Yerevan would be elected, although maybe only indirectly.

The opinion referred to the text of the constitutional amendments as adopted in second reading at the end of August 2005. The third reading had subsequently taken place in October 2005.

Mr Micaleff, representative of CLRAE, underlined that the Congress had been involved in the revision of the Armenian legislation on self-government and recalled that the possibility of legislative reforms was conditioned by the need for prior revision of the relevant constitutional provisions. In view of the foregoing, the constitutional reform was welcome. He underlined that the envisaged election of the Mayor of Yerevan was an undoubted move toward respect of the European standards.

The Commission adopted the final opinion on constitutional reform in Armenia (CDL-AD(2005)025).

- *Draft joint opinion with OSCE/ODIHR on the law on making amendments and addenda to the law on the procedure for conducting gatherings, meetings, rallies and demonstrations*

Ms Flanagan recalled that earlier opinions of the Venice Commission and OSCE/ODIHR had pointed to the need to permit the broadest exercise of the fundamental rights of freedom of assembly.

The law under consideration, which had undergone its second and final reading at the beginning of October 2005, met most of the recommendations previously made.

In particular, the previously contained blanket restrictions had been removed, although a certain discretion had been introduced even in cases when there should be none, such as in cases of incitation of racial hatred or possible overthrow of the constitutional order. Spontaneous assemblies and counter demonstrations were now allowed. Certain suggestions for improvement could still be made, although in general tribute needed to be paid to the Armenian authorities for their efforts and results.

Ms Flanagan underlined the need to monitor the due application of the law, in particular in view of the upcoming campaign for the constitutional referendum.

Mr Denis Petit, on behalf of OSCE/ODIHR, underlined that this law marked a significant improvement as compared to its previous versions; it was indeed one of the best of the whole CIS region.

He also underlined the crucial importance of the monitoring of the application of the law.

Finally he expressed satisfaction with the fruitful cooperation between ODIHR and the Venice Commission on this matter.

The Commission adopted the joint Venice Commission/OSCE-ODIHR opinion on the law making amendments and addenda to the law on conducting meetings, assemblies, rallies and demonstrations of the Republic of Armenia (CDL-AD(2005)035).

Mr Buquicchio informed the Commission about two international conferences which had been held in Yerevan on 30 September 2005 and on 15 October 2005 in connection with the constitutional reforms in Armenia. The opposition parties were dissatisfied with the process of reforms, while the international community was in favour of the text which would be submitted to referendum on 27 November 2005. These reforms were of crucial importance, and it was essential that the referendum campaign be conducted in a free and impartial manner. The Parliamentary Assembly of the Council of Europe and CLRAE had been invited to monitor the referendum. In this respect, Mr Buquicchio expressed his regret that OSCE/ODIHR had not been invited to do so by the Armenian authorities.

9. Azerbaijan

The Secretariat reported on the seminars and workshops held in anticipation of the parliamentary elections in Azerbaijan (seminar on media and elections, 12-13 July; electoral training workshop, 7-8 September; seminar on the role of judges in the settlement of electoral disputes, 28-29 September), and on co-operation with the Central Electoral Commission. These activities had been held as part of the Action Plan for the elections in Azerbaijan, adopted by the Committee of Ministers of the Council of Europe in 2005.

The Secretary General of the Council of Europe told the Commission of his concerns about the situation prior to the elections in Azerbaijan. The main objections of international organisations and national observers, he said, were the electoral lists, the unequal treatment of candidates during the campaign and the inadequate safeguards against fraud and multiple voting. The authorities should introduce a finger-marking system to prevent multiple voting.

The opinion on the amendments to the electoral code of the Republic of Azerbaijan is dealt with under item 18.

10. Bosnia and Herzegovina

Mr Cardoso da Costa presented the draft opinion (CDL(2005)057) on voting rules in the Constitutional Court of Bosnia and Herzegovina drawn up on the basis of comments by Mr. Scholsem and himself (CDL(2005)056). The request from the Head of the Department for Legal Affairs of the Office of High Representative in Bosnia and Herzegovina referred to a proposal to make decisions of the Constitutional Court of Bosnia and Herzegovina valid only if at least one judge from each constituent people supported the decision.

Mr Cardoso da Costa insisted that the proposal clearly runs counter to European standards for several reasons. While it is possible and even desirable to take into account the ethnic set up of a country in the composition of a constitutional court, the linking of the validity of judgements to the ethnic origin of judges would endanger their independence because the judge could not be seen to be unbiased but would implicitly act as a representative of a particular group. The proposal would also conflict with the principle of collegiality and the principle of majority vote emanating from it. A minority of the judges could thus prevent the Court from taking decisions.

Consequently, the proposed voting rules could lead to inadmissible situations of *non liquet* in which the Constitutional Court would be unable to fulfil its role of guaranteeing the functioning of state institutions.

Mr Scholsem pointed out that the example of the Constitutional Court of Belgium (former Court of Arbitration) to which the draft opinion referred clearly showed that situations in which the Court could not take a decision had to be avoided.

Mr Luchaire agreed and mentioned that in the case of a split vote in the Constitutional Court of Andorra the decisive vote remained with the reporting judge.

The Commission adopted the opinion on voting rules in the Constitutional Court of Bosnia and Herzegovina (CDL-AD(2005)039).

- *Decertification of police officers*

Mr Van Dijk recalled that this matter had already been discussed within the sub-Commission on international law in March 2004 and it had been decided to seek comments from the United Nations. Such comments had now been received and were reflected in the opinion. The issue of the fairness of the procedure which had led to the decertification of several Bosnian police officers by UNMBiH was an important one, which raised a question of principle : that of the immunity of the United Nations, while it was performing state-like functions. It was imperative that the vetting procedure comply with minimum international standards. Given that this had not been the case, it was suggested setting up a panel of international experts to review the 150 cases challenged before the Bosnian courts, which did not have any competence to rule on this matter.

Mr Dimitrijevic underlined the importance of the principle set out in this opinion, in the light of the growing number in recent years of internationally administered territories.

The Commission adopted the opinion on a possible solution to the issue of decertification of police officers in Bosnia and Herzegovina (CDL-AD(2005)024).

11. Georgia

Mr Markert informed the Commission that he had taken part in a Conference in Batumi launching a new initiative of the Georgian government for a peaceful resolution of the conflict in South Ossetia. The new initiative was based on the plan presented by President Saakashvili before the Parliamentary Assembly in January and co-operation with the Venice Commission on the issue of status continued to be a main element. However, more emphasis was put on confidence building measures, including economic projects and the re-launching of the draft law on restitution of property to victims of the Georgian-Ossetian conflict. An earlier draft had been commented on by the Commission and it would probably again be asked for its input.

12. Kyrgyzstan

Mr Lapinskas and Mr Fogelklou presented their draft opinion (CDL(2005)077) on the constitutional situation in Kyrgyzstan (CDL(2005)055rev). They said that some points of the draft constitutional reform could be improved, particularly the provisions on the role of the

prokuratura and the independence of the judiciary. Some articles would have to be amended to remedy inconsistencies between different sections. Mr Fogelklou also expressed concern about the discussions on the role of the Constitutional Court of Kyrgyzstan and said that the institution's powers should be preserved.

Mr Omurbek Tekebaev, the speaker of the Kyrgyz parliament, thanked the rapporteurs for their opinion and confirmed that the parliament would do everything possible to ensure that the recommendations in the document were taken into account during the proceedings of the Constitutional Assembly in charge of the reform. The aim of the reform in hand was to improve the system for the allocation of powers between the executive and the legislature and human rights safeguards in Kyrgyzstan. The reforms would also cover electoral legislation, the political party system and other matters.

Mr Marat Kaipov, Minister of Justice, and Mr Daniyar Narymbaev, Plenipotentiary of the President of the Kyrgyz Republic to the parliament, also thanked the Commission for its opinion on the draft constitutional reform. They proposed holding further meeting between the authorities and the Commission's experts immediately the revised version of the draft was ready, and said that they were against the idea of the Commission's adopting an opinion as things stood.

Mr Denis Petit said that the ODIHR agreed with Mr Lapinskas and Mr Fogelklou. The proposed amendments were a step forward, but he felt that certain provisions – for instance those on the independence of the judiciary and freedom of worship – should be reviewed.

Mr La Pergola thanked the representatives of Kyrgyzstan for their contributions and proposed that Mr Lapinskas's and Mr Fogelklou's comments should be adopted as an interim opinion.

The Commission adopted the interim opinion (CDL-AD(2005)022) on constitutional reform in the Kyrgyz Republic.

13. Romania

- *Draft opinion on the draft law on the status of national Minorities in Romania*

Mr Bartole informed the Commission that this opinion had been prepared following a visit to the Romanian authorities in early September. The draft law was in many respects a framework one but also contained some self-executing provisions; it contained numerous open references to existing and future other pieces of legislation. The provisions on cultural autonomy partly overlapped with those on representation of national minorities. The draft law also aimed at guaranteeing collective rights; certain issues could however be raised in this respect, notably as regards the judicial protection of individual rights in respect of decisions taken by representative bodies of minorities.

Mr Van Dijk pointed out that the adoption of a specific law on national minorities was to be welcomed. Equality of treatment and equal protection of all national minorities were however to be guaranteed. The citizenship requirement, an exhaustive list of protected minorities and fixed percentages of population in order for a minority to benefit from protection could be seen as problematic.

Mr Bela Marko, the Romanian Minister of State for the co-ordination of the activities in the fields of culture, education and European integration, underlined that the protection of national minorities had a long-standing tradition in Romania and had achieved a high level. A specific statute on this matter was nevertheless important in that it allowed all the aspects of the guaranteed rights to be listed and it aimed at providing national minorities with the possibility of deciding whether to participate in the decision-making processes, notably in respect of education in the mother tongue. The concept of cultural autonomy would indeed be introduced by this draft law and specific structures would be set up to apply it.

In respect of the citizenship requirement, Mr Marko underlined that, while its inclusion in the definition of national minorities was widespread in Europe, non-citizens benefited from adequate protection under other pieces of legislation, *in primis* the law on the prevention and the fight against discrimination.

The draft law was being examined by the Senate and would be submitted to the Chamber of Deputies shortly; Mr Marko assured the Commission that its opinion would be circulated and taken into account.

Mr Jurgens expressed his support for the position of the reporting members that the restriction of the scope of protection of the draft law under discussion to citizens only was unnecessary and entailed risks of discrimination.

On this point, Mr Aurescu recalled that the Commission was preparing a study on non-citizens and minority rights and recalled that non-citizens were covered by specific regimes, such as diplomatic protection, aliens' protection, protection of refugees and protection of kin-minorities.

Ms Dzenana Hadziomerovic, of the Office of the OSCE High Commissioner on National Minorities, informed the Commission that the High Commissioner had also been requested by the Romanian authorities to assess the draft law under consideration. The Commissioner's assessment coincided in substance with that of the Venice Commission.

The Commission adopted the opinion on the draft law on the statute of national minorities living in Romania (CDL-AD(2005)026).

- *Draft opinion on the draft law on religious freedom and the general regime of religions of Romania*

Mr Malinverni explained that the draft law regarding religious freedom and the general regime of religions in Romania was generally a good one, but nevertheless presented certain shortcomings. As regards the form, it contained certain repetitions and certain self-evident provisions, and also frequent references to other, undetermined legislation. As regards the substance, it seemed at times to interfere in an unnecessary manner with the autonomy of the cults. The provision reserving disputes on cults' possessions to friendly settlement risked infringing Articles 6 and 13 ECHR, although it appeared that the Romanian authorities had taken some measures in this respect.

Mr Vogel underlined that this draft law had been prepared in consultation with representatives of eighteen cults and with the assistance of international experts. He referred in particular to the

provision in the law of the numerical threshold for an association to qualify as a "religious" one. He underlined the risk that such a threshold would be too rigid.

Mr Adrian Lemeni, State Secretary, explained that freedom of religion and the regime of cults were of particular significance in Romania. This draft law, which would replace old legislation still in force, was being discussed within the Senate.

In respect of the eighteen cults which were already recognised, Mr Lemeni pointed out that 99% of the Romanian population appeared to belong to one of them. The simplified procedure for their recognition under the new law was designed to avoid the need to undergo a full procedure and the risk for them to be denied recognition. The Orthodox Church of Romania benefited from a special status in recognition of its historical role. As regards the disputes over the cults' property, Mr Lemeni informed the Commission that a provision in Law 182/2005 now expressly allowed access to court in respect of these disputes.

The Commission adopted the opinion on the draft law regarding the religious freedom and the general regime of religions in Romania (CDL-AD(2005)037).

14. Russian Federation

Mr Malinverni presented his observations (CDL(2005)086) on the law on the Chechen Parliament (CDL(2005)065).

The law instituted a bicameral parliament system, non-egalitarian in that the two chambers had different powers and responsibilities.

Firstly, a number of criticisms could be made of this bill from the viewpoint of legislative procedure as, generally speaking, there were too many references to other laws, certain points should have been dealt with in the law itself and the regulation of important issues such as parliamentary immunity had been omitted from the bill. Regrettably, some of the provisions were imprecise and the appropriateness of certain others was dubious.

There were two main problems of substance to be considered.

The first related to the separation of powers. Besides the fact that the draft replicated a number of problems which the Commission had already highlighted in its opinion on the draft Constitution of the Chechen Republic (CDL-AD-2003-2), the draft was problematic having regard to European democratic principles in the following respects: the provisions on the extent of the Supreme Court's power with regard to the ineligibility of members of parliament, the consideration by parliament of executive decrees, the possibility for the parliament to provide an official interpretation of the laws of the Chechen Republic, and the appointment by one of the chambers of parliament of the judges, President and Vice-President of the Constitutional Court and justices of the peace on the exclusive proposal of the President of the Chechen Republic.

Secondly, regarding apportionment of powers of federal authorities and federate entities, while the draft law and its sometimes ambiguously worded provisions could be construed, hopefully, to the effect that the constitutional distribution of powers had been respected, the possibility for the federal authorities to dissolve the Chechen Parliament had to be restrictively and

exhaustively defined if it was not to amount to serious interference contrary to the principles which governed such matters.

Mr Baglay pointed out that this law instituted the first ever parliament of the Chechen Republic to be able to engage in genuine legislative work. In the distribution of powers, the law had to comply with the divisions stipulated in federal law and, as to the separation of powers, it would have to be seen how the relations between parliament, the President and the executive were settled.

The Commission endorsed Mr Malinverni's comments on the draft law on the Parliament of the Chechen Republic (CDL-AD(2005)030).

15. Serbia and Montenegro

Messrs Jowell and Hamilton introduced the draft Opinion on the chapter on the judiciary in the draft Constitution of Serbia as approved by the Government of Serbia in June 2004 (CDL (2005)085). Mr Jowell underlined that the rule of law was one of the guiding principles of the draft Constitution and that judicial independence was a crucial element of the rule of law. While generally the draft - subject to some improvements - was a positive text, the systematic involvement of parliament in the appointment and dismissal of judges was problematic. According to the draft judges were first appointed for a probationary period of five years before being confirmed for an indefinite duration. Such an arrangement was acceptable only if there were sufficient safeguards to ensure that the decision on confirmation was based on merit only. A parliamentary procedure provided no such safeguards. Mr Hamilton added that there was no uniform model for the public prosecution service in Europe; states had the choice between an independent prosecution service and a prosecution service subordinate to the executive. However, the latter model was acceptable only if the requirements of Recommendation (2000)19 of the Committee of Ministers were met. He expressed a personal preference for an independent prosecution service as long as such a service was not excessively powerful as was the case under the Soviet *prokuratura* system

Mr Nolte and Ms Suchocka as co-reporting members, supported by other members, expressed their preference for a system in which the prosecution service was accountable to democratically elected institutions. Mr Nolte underlined that in some cases decisions by prosecutors could have foreign policy consequences.

Mr Stojkovic, Minister of Justice of Serbia, thanked the Commission for its work and broadly agreed with the conclusions in the draft opinion. He argued in favour of a concise Constitution since the Serbian Constitution was rigid and difficult to amend. Prosecutors should have autonomy but not full independence.

The Commission adopted the Opinion on the Provisions on the Judiciary in the Draft Constitution of the Republic of Serbia as it appears in document CDL-AD(2005)023.

16. "The former Yugoslav Republic of Macedonia"

Mr Hamilton presented the draft opinion (CDL(2005)066) on constitutional amendments (CDL(2005)087) drawn up on the basis of comments by Mr Mazak, Ms Suchocka and himself

(CDL(2005)082, 083 and 084). In general, the reporting members found the draft amendments to be very positive and likely to strengthen the independence of the judiciary. In particular, Mr Hamilton highlighted that the appointment of judges by the State Judicial Council, in which judges had the majority, rather than their current election by Parliament was a very positive element, which would help to depoliticise judicial appointments. Changes relating to the election of the President of the Republic and the lifting of immunity were deemed useful as well. Nevertheless, some points of the amendments could be further improved. In particular, the provision on fair trial should more closely follow the text of Article 6 ECHR. Mr. Hamilton also insisted that there was a need to differentiate between judges and prosecutors as concerns the issue of independence. While the Prosecutors' Council as such was certainly useful, its functions should be regulated on the level of ordinary law. As concerns the desirability of probationary periods for judges, the rapporteurs had found a position of compromise: if such a system was deemed indispensable by the authorities, a refusal to confirm a judge in office should be made only according to objective criteria and with safeguards as apply for the removal from office. Against a decision of non-confirmation but also against disciplinary decisions by the State Judicial Council in general, an appeal to a court should be available. On the other hand, the suggestion that the Minister of Justice should have no voting rights in the Judicial Council was not a fundamental point of the opinion.

Ms Mladenovska-Gorgievska, Minister of Justice of "the former Yugoslav Republic of Macedonia", explained that the amendments were part of a national strategy for judicial reform, which had been adopted in order to remedy certain weaknesses of the judicial system. As part of a major effort for public consultation, several seminars on the reform had been organised during one of which Mr. Dürr from the Commission's Secretariat had presented a preliminary version of the opinion. Since then, the Ministry had taken up most of the reporting members' recommendations. In particular, probationary periods for judges were no longer provided for. On the other hand, an active participation of the Minister of Justice in the Judicial Council was deemed indispensable.

The Commission adopted the Opinion on Constitutional Amendments relating to the Reform of the Judiciary in "The Former Yugoslav Republic of Macedonia" (CDL-AD(2005)038).

17. Southern Africa

Mr Buquicchio informed the Commission about the results of a meeting of the Southern African Judges Commission (SAJC), which had taken place in Windhoek, Namibia on 12-13 August in the framework of the co-operation with constitutional and supreme courts from the Southern African region, which had been funded successively by the Swiss, Norwegian and Irish Governments. The Windhoek meting had focused on the courts' relations with the media and judicial accountability but also dealt with practical questions such as the training for judges and the staff of the courts. During the meeting, the situation of the judiciary in Zimbabwe had been addressed. In order to strengthen the links between the SAJC and the Venice Commission, it was suggested to hold a common session in Venice either in March or June 2006.

The Commission approved the proposal to invite the Southern African Judges Commission to its plenary session in March or June 2006.

18. Report of the Meeting of the Council for Democratic Elections (20 October 2005)

Mr Erik Jurgens, Chair of the Council for Democratic Elections, reported on the outcome and conclusions of the meeting.

At their last session, the Council for Democratic Elections and the Venice Commission had endorsed the joint interim opinion of the Venice Commission and the OSCE/ODIHR on the draft amendments to the electoral code of Azerbaijan (CDL-AD(2005)018). The final version of the amendments (CDL-EL(2005)030; cf. CDL(2003)047) had subsequently been adopted and discussed in a joint opinion (CDL-EL(2005)029rev) based on the observations of Mr Nolte, Mr Paczolay and Mr Maleev. They regretted that the authorities had failed to rectify a whole series of problems with certain provisions highlighted in the interim opinion, particularly those relating to the membership of electoral commissions.

The Commission adopted the joint final opinion of the Venice Commission and the OSCE/ODIHR on amendments to the electoral code of Azerbaijan (CDL-AD(2005)029).

Following the adoption of two reports on the abolition of restrictions on the right to vote in legislative elections by the Council for Democratic Elections and the Venice Commission (CDL-AD(2005)011 and 012), the Parliamentary Assembly had adopted Recommendation 1714 (2005) on the abolition of restrictions on the right to vote. The Committee of Ministers had asked the Venice Commission to deliver its comments by 31 October 2005. The Commission's Rapporteurs on this subject, Ms Lazarova Trajkovska and Mr Matscher, had prepared comments, which the Council for Democratic Elections had adopted.

The Commission adopted the opinion on the Recommendation of the Parliamentary Assembly on the abolition of restrictions on the right to vote (CDL-AD(2005)031).

The Council had adopted the following without discussion:

- the joint final opinion with the OSCE/ODIHR on the amendments to the electoral code of the Republic of Armenia (CDL-EL(2005)028; see CDL(2003)052 and CDL-EL(2005)024);
- the joint OSCE/ODIHR - European Commission - Council of Europe guidelines for media monitoring during election observation missions (CDL-EL(2005)043);
- the draft opinion on Recommendation 1704 (2005) of the Parliamentary Assembly on referendums: towards good practices in Europe (CDL-EL(2005)032);
- the Declaration of Principles for International Election Observation (CDL-EL(2005)042; see CDL-EL(2004)025 and 026).

The Commission adopted:

- **the joint final opinion with the OSCE/ODIHR on the amendments to the electoral code of the Republic of Armenia (CDL-AD(2005)027);**
- **the opinion on Recommendation 1704 (2005) of the Parliamentary Assembly on referendums: towards good practices in Europe (CDL-EL(2005)028);**
- **the joint OSCE/ODIHR – European Commission – Council of Europe guidelines for media monitoring during election observation missions (CDL-EL(2005)032).**

The Commission endorsed the Declaration of Principles for International Election Observation (CDL-EL(2005)036).

19. Study on referendum

Mr Luchaire presented the report and summary tables on referendums (CDL-EL(2005)020, 020add and add2) prepared by the Secretariat, and praised the high standard of the work done.

Preliminary versions of these documents had been sent to the members of the Council for Democratic Elections and the Venice Commission for their comments, which had been taken into consideration. The comments received from members just before the session would be included in the final version of the report and the tables.

The Commission adopted the report and summary tables of the comparative study on referendums in Europe (CDL-AD(2005)028). It instructed the rapporteurs (Mr van Dijk, Mr Luchaire and Mr Malinverni) to prepare guidelines on referendums in co-operation with the Secretariat.

20. Democratic oversight of the security sector in member states

Mr Constas informed the Commission that the Committee of Ministers of the Council of Europe had sought the assistance of the Commission with a view to replying to Recommendation 1713(2005) of the Parliamentary Assembly "on democratic oversight of the security sector in member states". Two areas addressed by PACE were of particular relevance for the Commission's work : intelligence services and defence. In respect of the first, the Commission had carried out a comparative study in 1995. After the tragic events of 11 September 2001 and the bombings inter alia in Madrid, Bali, London and Sharm el Sheikh, the perception of the needs and the importance of security had significantly changed. National legislations in this field had become increasingly trans-national. It was suggested that the Commission could carry out a new study focussing on the roles of parliaments, the judiciary and the trans-national bodies to which substantial powers are more and more often delegated.

In respect of the defence sector, Mr Constas pointed out that the distinction between the police and the armed forces was blurred. Several defence organisations were engaged in policing actions, and democratic oversight of international forces was difficult. It was suggested to pursue reflection on this matter.

The Commission adopted the opinion on PACE Recommendation 1713(2005) on Democratic oversight of the security sector in member states (CDL-AD(2005)033).

21. OSCE/ODIHR guidelines on freedom of assembly

Mr Malinverni welcomed the OSCE/ODIHR's initiative in preparing guidelines for states drafting laws on freedom of assembly. The principles laid down therein were undoubtedly very useful but under no circumstances should these guidelines be interpreted as an encouragement to excessively far-reaching regulation of freedom of assembly. Indeed, it could be questioned whether such legislation was at all advisable. If states opted for it, it should be restricted to establishing basic procedural rules and specifying under what circumstances and conditions freedom of assembly could be limited. The guidelines were very comprehensive, albeit a little too detailed. The rapporteurs had proposed certain improvements.

The Commission adopted the opinion on the OSCE/ODIHR guidelines for drafting laws pertaining to the freedom of assembly (CDL-AD(2005)040).

22. Election of a member of the Bureau

On the Bureau's proposal, Mr Paczolay was elected member of the Bureau following Mr Solyom's resignation from the Commission.

23. Other constitutional developments

- *Albania*

The legislative elections of 3 July 2005 had seen a victory for the right, which had centred its manifesto priorities on institutional, social and economic reform and the fight against corruption.

The national assembly was currently discussing the possibility of adopting a resolution lifting the immunity of members of parliament in the event of corruption or abuses of power. Whether this was constitutional was the subject of animated debate as the opposition felt that such a measure would be contrary to Article 73 of the Constitution, under which parliamentary immunity could only be lifted by a majority of two-thirds of the members of parliament in a secret ballot.

Should the measure be adopted, the Socialist group intended to refer the matter to the Venice Commission.

Mr Buquicchio pointed out that a matter could only be referred to the Commission by an institution such as the parliament and it was not possible under the Commission's statutes for a political party to do so.

- *Bahrain*

Mr Fathi Kemicha, Secretary General of the Constitutional Court of Bahrain, said he was particularly honoured to address the Venice Commission, whose activities were followed very

closely by his Court and were a source of inspiration to it. The Constitutional Court of Bahrain had been set up on 14 February 2002 following the adoption by referendum, in 2001, of the National Charter establishing a constitutional monarchy and setting up democratic institutions such as a bicameral parliament. The Constitutional Court comprised seven members with a non-renewable 9-year term of office. It carried out preliminary and *ex post facto* reviews of laws, and applications could be made to it by individuals – through the intermediary of a court – by judges or by the king, who could refer a bill to it for a preliminary constitutional review. Further information could be found on the Constitutional Court's website at http://www.constitutional-court.org.bh.

- *European Union*

Mr Hubert Haenel, Chair of the European Union delegation of the French Senate, reported on the outlook for the European Constitution after the French referendum. Since the negative results in the French and Dutch referendums on the ratification of the European Constitutional Treaty, the legal future of the treaty seemed in jeopardy. A renegotiation of the terms of treaty seemed unlikely and unfeasible, and holding new referendums in the countries which had rejected it would apparently be difficult for want of new arguments. The current deadlock and irresolution were especially regrettable in view of the real need to renovate the European institutions. There was definitely a need for clarification among the public, for the subsidiarity principle to be explained again and for the European Union to complement the member states and not appear to be competing with them, but the fact remained that the situation mainly reflected a more general mood of discontent resulting from a deep-seated breakdown of public confidence in Europe.

Mr Jurgens felt that the attempt to draft a single constitutional treaty rather than pursuing a policy of step-by-step European construction was also one of the reasons for the current European crisis.

Mr Mazak announced that the Slovakian Constitutional Court had recently declared admissible a constitutional appeal demanding that the European Constitution be approved by referendum.

- *Iraq*

The Commission heard reports by members who had attended seminars on the Iraqi Constitution, held in co-operation with Germany's Friedrich Naumann Foundation.

Mr Closa Montero reported on the seminar he had attended on the Commission's behalf on the subject of various models of federalism. The Spanish system of autonomous regions had been regarded as a highly pertinent example. Discussions had also centred on the control of national resources and the possibility of decentralising the army. The fourth and fifth parts of the Iraqi Constitution now resembled the Spanish model.

The second seminar, held in Amman on 8 and 9 October, had looked at the provisions of the draft Constitution as they stood and the question of the transition period.

Five main points had been discussed: the underlying principles of the Constitution including, in particular, the question of the Muslim religion as a source of law, human rights issues in relation to European standards, the question of federalism, some of the shortcomings of the draft Constitution and, lastly, the constitutional reform in itself. Mr Closa Montero was very satisfied

with what had been achieved in view of the particular circumstances in which this constitutional process was taking place.

Mr Dimitrijevic had attended a meeting in July 2005 during which human rights, federalism, the protection of minorities and the position of women had been discussed on a theoretical level. Discussion had also centred on the question of the incorporation of Koranic teaching into the Constitution.

Mr Jowell emphasised that the draft Iraqi Constitution contained very promising constitutional guarantees on human rights.

Mr Mifsud Bonnici expressed the view that there was no incompatibility between human rights and Islamic law, or between the Koran and modern democratic principles. He was supported in this by Mr Kallis and Mr Kemicha, who also agreed on the need to avoid sweeping generalisations and pointed out, for example, that in Bahrain, men and women were equal under the Constitution.

- *Portugal*

Mr Cardoso da Costa reported on the recent amendment made to the Portuguese Constitution in order to submit the Treaty on the European Union to referendum, making it possible to hold a referendum to be on the Constitutional Treaty itself and not just on the question of ratification.

- *United Kingdom*

Mr Jowell said that the institution of the Lord Chancellor (Minister of Justice) had been strongly criticised by the Parliamentary Assembly because the Lord Chancellor's functions combined those of member of the government, including the power to appoint judges, Speaker of the House of Lords, head of the judiciary and active judge within the House of Lords and the Judicial Committee of the Privy Council – all of which was incompatible with the principle of the separation of powers.

As a result, a number of accommodations had been made to ensure the independence of the judiciary: the Lord Chancellor would no longer be entitled to sit as a judge or to appoint judges directly. Judges would now be selected by an independent committee on the basis of objective merit-related criteria and the Lord Chancellor would now have to give reasons for any refusal to appoint the persons it recommended.

The fact of explicitly setting down in the law that the Lord Chancellor had the same duty as all other ministers to ensure the independence of the judiciary and not seek to influence was undoubtedly a new departure, which was inspired to a great extent by the work of the Parliamentary Assembly and the Venice Commission.

The Anti-Terrorism Bill had also been a widely debated issue in the United Kingdom. Under the Anti-Terrorist Act of 2001, it was possible to detain non-residents and aliens without trial. In the case of Chahal v. the United Kingdom in the European Court of Human Rights, the Court had held that a person could not be sent back to a country in which he or she would be at risk of treatment contrary to Article 3 of the European Convention on Human Rights. The House of Lords as supreme court had declared therefore that this practice infringed treaty law, but as British law did not allow a court to set aside a law, it would be necessary to wait for the

government to remove this law from the statute book. The new anti-terror legislation had created a new offence of preparing or planning acts of terrorism. The possibility of holding terrorist suspects without charge for up to 90 days had been heavily criticised by the opposition. These matters would most certainly come before the UK courts.

24. Other business

The Secretariat announced that, in response to a request by the Monitoring Committee of the Parliamentary Assembly relating to the secrecy of voting in elections by parliament, the Bureau had offered to organise a general comparative study on secrecy of voting in parliamentary procedure.

The Commission decided to conduct a study on secret voting in parliamentary procedure and appointed Mr Chagnollaud as rapporteur.

25. Dates of the next sessions

The Commission confirmed the date of its 65th plenary session: 16-17 December 2005. Sub-commission meetings and a meeting of the Council for Democratic Elections would take place as usual on the day before the plenary session.

The schedule of sessions for 2006 wass confirmed as follows:

66th plenary session	17-18 March
67th plenary session	9-10 June
68th plenary session	13-14 October
69th plenary session	15-16 December

Sub-commission meetings and meetings of the Council for Democratic Elections would take place as usual on the day before the plenary session.

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AZERBAIJAN/AZERBAIDJAN	Mr Lätif HUSEYNOV
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BULGARIA/BULGARIE :	Mr Anton STANKOV
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CYPRUS/CHYPRE :	Mr Panayotis KALLIS
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