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COMMISSION EUROPEENNE POUR LA DEMOCRATIE PAR LE DROIT

(COMMISSION DE VENISE)

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

76e SESSION PLENIERE
76th PLENARY SESSION
(Venise, Scuola Grande di San Giovanni Evangelista)
vendredi, 17 octobre 2008 (9h30) –
samedi, 18 octobre 2008 (13h00)
(Venice, Scuola Grande di San Giovanni Evangelista)
Friday, 17 October (9.30 a.m) –
Saturday, 18 October 2008 (1.00 p.m.)

RAPPORT DE SESSION
MEETING REPORT

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1. Adoption of the agenda

L'ordre du jour est adopté.

2. Communication du Secrétariat

La Commission observe une minute de silence à la mémoire de M. Gérard Batliner, ancien membre de la Commission au titre du Liechtenstein, récemment disparu.

M. Buquicchio indique que la procédure visant à l'adoption du projet de budget de la Commission pour 2009 est bien avancée et que, vraisemblablement, la Commission obtiendra la légère augmentation demandée, qui sera essentiellement destinée à couvrir les frais d'interprétation de la conférence mondiale de la justice constitutionnelle du Cap en janvier 2009.

3. Coopération avec le Comité des Ministres

Dans le cadre de sa coopération avec le Comité des Ministres, la Commission a un échange de vues avec l'Ambassadeur Jan Devadder, Représentant permanent de la Belgique auprès du Conseil de l'Europe, avec l'Ambassadeur Margaret Hennessey, Représentante permanente de l'Irlande auprès du Conseil de l'Europe, et avec l'Ambassadeur Paul Widmer, Représentant permanent de la Suisse auprès du Conseil de l'Europe.

L'Ambassadeur Jan Devadder remercie la Commission de l'avoir invité à cette session de la Commission et souligne combien il apprécie les travaux de la Commission, au cœur des priorités du Conseil de l'Europe. L'Ambassadeur souligne en outre qu'une nouvelle réforme des institutions a lieu actuellement en Belgique et que, par ailleurs, son pays a soumis pour avis à la Commission la question de l'usage du vote électronique.

L'Ambassadeur Margaret Hennessey souligne que les travaux de la Commission ont permis d'offrir une base solide aux institutions des Etats membres du Conseil de l'Europe. La Commission a pu ainsi montrer le rôle qu'elle peut exercer grâce à son expertise et fournir ainsi un service de valeur aux Etats de même qu'aux institutions du Conseil de l'Europe. L'Ambassadeur indique en outre que les travaux de la Commission doivent concerner l'ensemble des Etats membres, y compris les plus anciennes démocraties, ces dernières demandant moins d'avis à la Commission.

L'Ambassadeur Paul Widmer remercie la Commission de cette invitation et annonce qu'à l'occasion de la présidence suisse au Comité des Ministres, ses autorités souhaitent organiser en 2010 une conférence relative à la démocratie et à la décentralisation en coopération étroite avec la Commission de Venise. Concernant par ailleurs le Forum pour le futur de la démocratie, dont la prochaine réunion aura lieu en Arménie en 2009, l'Ambassadeur souligne l'importance des travaux de la Commission permettant d'alimenter fructueusement les débats du Forum.

4. Coopération avec l'Assemblée parlementaire

La Commission tient un échange de vues avec M. Christos Pourgourides, membre de la Commission des affaires juridiques et des droits de l'homme de l'Assemblée parlementaire du Conseil de l'Europe, sur la coopération avec l'Assemblée.

M. Pourgourides informe la Commission des derniers rapports réalisés par la Commission des affaires juridiques et des droits de l'homme de l'Assemblée parlementaire du Conseil de l'Europe portant notamment sur la situation de la démocratie en Europe (avec notamment la question de l'interdiction de partis politiques en Turquie) ; l'accès aux documents publics ; l'indépendance du pouvoir judiciaire ; la participation des Etats à la Cour pénale internationale.

M. Pourgourides remercie la Commission de son assistance dans la réalisation de tels rapports.

M. Van der Linden, ancien président de l'Assemblée parlementaire, intervient au nom de l'Assemblée et souligne notamment l'importance des travaux de la Commission de Venise concernant le règlement de conflits d'ordre juridique et se réjouit de représenter l'Assemblée à l'occasion de cette session.

5. Coopération avec le Congrès des pouvoirs locaux et régionaux du Conseil de l'Europe

La Commission tient un échange de vues avec M. Delcamp, Secrétaire général du Sénat français, représentant le Congrès des pouvoirs locaux et régionaux du Conseil de l'Europe à l'occasion de cette session, sur la coopération avec le Congrès.

M. Delcamp met l'accent sur des thèmes chers au Congrès, notamment la participation des citoyens et le suivi de la coopération avec l'ensemble des pays du Conseil de l'Europe et au-delà, à savoir la coopération décentralisée. Il rappelle également la coopération fructueuse récente entre la Commission de Venise et le Congrès à l'occasion d'un colloque qui avait été organisé au Sénat sur le rôle des secondes chambres en Europe le 21 février 2008.

6. Follow-up to earlier Venice Commission opinions

The Commission was informed on the follow-up to the:

- *Opinion on the Draft Law on the Public Prosecutors Office and the Draft Law on the Council of Public Prosecutors of "the former Yugoslav Republic of Macedonia" (CDL-AD(2007)011*)

A number of the Venice Commission's recommendations had been taken up. The issues addressed were:

- The opinion (para. 10) pointed out that is was not clear from the draft how the dual answerability to a hierarchical superior and also to the Council of Public Prosecutors was intended to work. Article 20.6 and 21.3 of the adopted LPPO are now more specific on this point.
- The opinion (para. 13) asked to clarify the basis on which instructions should be given to prosecutors and prosecutions taken over. Article 25.1 and 25.2 LPPO now refer to "general" instructions only and Article 26.3 LPPO gives more detailed criteria when cases can be taken over by superior prosecutors.
- The opinion (para. 14) complained that it was not clear what the special investigative measures were or whether they might be ordered by the prosecutor without any reference to a court of law. Article 30.1 LPPO makes clear that these powers remain within the scope of competences of those of the Ministry of the Interior.
- Article 28(3) LPPO now provides that the monitoring by the Ministry of Justice which was deemed to endanger the independence of the Public Prosecutor's Office does not relate to individual cases (para. 18)
- Article 41(4) LPPO provides that only candidates for whom the Council of Public Prosecutors has given a positive opinion can be appointed by the Government (paras. 38, 39).
- The adopted Law entitles the Public Prosecutor of the Republic and other prosecutors to make a defence before Parliament or the Prosecutorial Council respectively.

However, there were some other recommendations which had not been followed:

- The recommendation to extend the *ex-officio* procedure for determining the justification of the use of firearms by police officials, which resulted with death or serious bodily injury, to any bodily injury (whether or not with firearms) was not followed (para. 20)
- The time limits for objections to the election of members of the Prosecutorial Council are still extraordinarily short (5 hours!) (para. 35).
- The Law still provides that only prison sentences of more than 6 months lead to the disqualification of a prosecutor (paras. 56, 57).
- The criticised criterion "achievement of unsatisfactory results" as a basis for dismissal has been changed for "unconscious and unprofessional performance", which is only slightly less ambiguous (para 59).

- *Opinion on the Draft Amendments to the Law on the State Prosecutor of Montenegro (CDL-AD2008)005)*

The Secretariat informed the Commission that the Law on the State Prosecutor as adopted in June 2008 implemented a number of recommendations made in the Commission's Opinion. In particular:

- The Commission had recommended that a prosecutor, who is being seconded against his or her will, should be allowed to file a non-suspensive protest to the Prosecutorial Council. The Law now provides for such a protest for deputy prosecutors, but not for prosecutors.
- While the Law did not maintain the competence of the Protector of Human Rights to appoint one member of the Prosecutorial Council, at least the President of Montenegro is obliged to consult with the Protector before making his or her proposal for a person with relevant human rights experience.
- In accordance with the Opinion, the provision on special reports to be provided upon the request by parliament and by government was deleted.

The major remaining problems stem, however, not from the Law but from the Constitution, which provides for the election of prosecutors and members of the Prosecutorial Council by Parliament without a qualified majority.

7. Albania

Mr Rusmajli, President of the Legal Affairs Committee of the Assembly of Albania, underlined that the constitutional amendments had been adopted by a majority of 115 of 140 members of parliament although usually majorities in Albania were quite narrow. The main aim of the amendments was to increase political stability in particular by introducing an electoral system which did not encourage an artificial dispersal of votes among a multitude of parties. It was true that the text of the amendments had not been widely discussed with civil society but the issues addressed had been known for quite some time. It would have been desirable to include also in the amendments new rules on the immunity of public officials but the required compromise could not be reached.

Mr Jowell as one of the rapporteurs, assessed the changes to the electoral system both regarding the Assembly and the President positively. By contrast he was critical about the possibility to re-elect the Prosecutor General and warned against abolishing the Central Election Commission.

Mr Bartole said that that the electoral system now was largely left to the ordinary law since the regional-proportional system chosen in the Constitution could have very different effects depending on the size of the constituencies. If the Assembly failed to elect the President, new elections could be called. This could lead to a strengthening of the President's position . He concurred with Mr Jowell's criticism of the possibility to re-elect the Prosecutor General.

Mr Rusmajli assured the Commission that the Central Election Commission would be provided for in the text of the electoral law. There was a need to ensure the accountability of the Prosecutor General to parliament.

The Commission agreed to adopt its Opinion on the amendments to the Constitution of Albania at its next session in December 2008.

8. Arménie

La Commission examine, en vue de son adoption, le projet d'avis conjoint de la Commission de Venise et de l'OSCE/BIDDH (CDL(2008)081) sur les amendements au Code électoral apportés jusqu'à fin 2007 (CDL(2008)083), établi sur la base des observations de M. Kåre Vollan (expert de la Commission de Venise) et de Mme Karen Gainer (experte de l'OSCE/BIDDH). Cet avis fait suite à l'avis sur les amendements du 26 février 2007 au Code électoral (CDL-AD(2007)023) et aux élections présidentielles de mai 2008 et parlementaires de février 2008.

La Commission adopte le projet d'avis conjoint de la Commission de Venise et de l'OSCE/BIDH sur les amendements au Code électoral apportés jusqu'à fin 2007 (CDL-AD(2008)023).

La Commission tient ensuite à tenir un échange de vues avec M. Armen Harutyunyan, Ombudsman de l'Arménie et examine, en vue de son adoption, le projet d'avis (CDL(2008)087) sur le projet d'amendements à la loi sur le Défenseur des droits de l'homme en Arménie (CDL(2008)118 – loi en vigueur) établi sur la base des observations de M. Tuori (CDL(2008)089) et de M. Nowicki (CDL(2008)088) ainsi que le projet d'avis (CDL(2008)093) sur la question des immunités de personnes impliquées dans le processus électoral, établi sur la base des observations de MM. Mifsud Bonnici (CDL(2008)111) et Tuori (CDL(2008)112).

La Commission adopte le projet d'avis sur le projet d'amendements à la loi sur le Défenseur des droits de l'homme en Arménie (CDL-AD(2008)028).

M. Armen Harutyunyan, Ombudsman de l'Arménie, rappelle le contexte arménien touchant à la question des immunités, notamment en ce qui concerne le projet de limiter les immunités de différents groupes de personnes. Des membres de la Commission interviennent également sur la question des immunités, soulevant notamment : l'intérêt que pourrait représenter une étude plus élargie dans le futur ; la nécessité que l'immunité soit définie par la loi ; l'importance de moduler l'immunité selon les fonctions ou mandats concernés ; ou encore l'importance de l'immunité de l'élu dans le contexte de son mandat et l'importance de cette immunité pour la liberté de participer aux travaux des chambres.

La Commission adopte le projet d'avis sur la question des immunités de personnes impliquées dans le processus électoral en Arménie (CDL-AD(2008)024).

9. Bosnia and Herzegovina

- *Amicus Curiae Brief in the cases of Sejdic and Finci against Bosnia and Herzegovina*

This opinion was in fact a third party intervention, which the Commission had been authorised to make in proceedings pending before the European Court of Human Rights.

Mr Scholsem underlined that the proceedings in question raised a fundamental problem in the constitutional structure of Bosnia and Herzegovina, directly stemming from the constitution: the

exclusion of the category of "the others" (those who do not belong to the three constituent peoples: Serbs, Croats, Bosniacs) from the elections to the Presidency and to the House of Peoples of BH. The issue was to be examined under Article 14 in conjunction with Article 3 of Protocol No.1 and under Article 1 of Protocol 12, which had entered into force in respect of Bosnia and Herzegovina.

In the Commission's opinion, Article 3 of Protocol 1 was not applicable to the collective Presidency of Bosnia and Herzegovina, which did not qualify as "legislature" within the meaning of the provision in question, while it could be considered applicable to the House of Peoples, despite the fact that it was a second chamber, in the light of its significant powers and impact on the legislative process. The Commission was also of the opinion that while there was certainly a legitimate aim for this exclusion at the time of the Dayton peace accords in December 1995, one could legitimately doubt as to its pertinence today. Bosnia and Herzegovina had not managed to achieve a functioning democratic state, and was at a stalemate. There was no indication that the continuing exclusion of the "others" would contribute towards finding a solution to the crisis. In the discussion, members of the Commission underlined that the categories of the constituent peoples and of the "others" was not determined by legal criteria, but only by sociological one. Those who did not accept to belong to one of the three constituent peoples, for whatever reason, "opted out" and became "others". It was precisely this change from "ethnical identity" to "identity through citizenship" which had to be encouraged, notably through the enhancement of the position of the "others" in the Constitution. The Commission further considered that these same reasons justified the conclusion that the exclusion of the "others" from elections to both the Presidency and the House of Peoples was in breach of Article 1 of Protocol No. 12.

Several members of the Commission expressed their eagerness to assist the European Court of Human Rights again, whenever possible in the future.

The Commission adopted the Amicus Curiae Brief in the cases of Sejdic and Finci against Bosnia and Herzegovina (CDL-AD(2008)027).

10. Kyrgyzstan

The draft amendments to the law on the right of citizens to assemble peacefully, without weapons, to freely hold rallies and demonstrations, had been assessed by the Venice Commission jointly with the OSCE/ODIHR Freedom of Assembly Expert Panel in June 2008. The Commission and the Panel found that the amendments contained problematic blanket restrictions (both in terms of the place and time of assemblies); that the time-frame for the notification procedure was excessively long and that the impossibility for the organizers to proceed in the absence of a reply by the authorities showed that the law required an authorisation as opposed to a notification, and this was at variance with the applicable standards. Assemblies could further be terminated on the ground of any breach of the law, irrespective of its gravity, by either the organiser or any participant, which was clearly arbitrary and excessive.

For these reasons, the opinion was very critical of the draft amendments and recommended several changes.

The representative of OSCE/ODIHR informed the Commission that the amendments had been passed in August 2008, without the recommendations being taken into account.

The Commission endorsed the joint Venice Commission - OSCE/ODIHR opinion on the draft amendments to the law on the right of citizens to assemble peacefully, without weapons, to freely hold rallies and demonstrations (CDL-AD(2008)025).

Mr Vogel informed the Commission that he had worked in co-operation with the OSCE/ODIHR Panel of Experts on Freedom of Assembly on the assessment of the draft law on freedom of religion of the Kyrgyz Republic. This assessment had been largely based on the OSCE/ODIHR - Venice Commission Guidelines on freedom of religion. The draft law was at times excessively detailed, and at times rather vague. The registration requirements were extremely strict but presented in an unclear manner, and the consequence of lack of registration (a ban on all operation and activity) appeared disproportionate. The draft law failed to require that the reasons for refusal of registration of a religious organisation and association be spelled out in detail and in writing and for the explicit possibility to appeal against refusal in court. In conclusion, the draft law did not appear to meet the applicable international standards. The influence of the State over the exercise of freedom of religion was excessive.

Several members discussed the question of to what extent it was legitimate to regulate in the field of freedom of religion. A preference for de-regulation as opposed to over-regulation emerged, although it was conceded that regulation may indeed appear necessary.

The Commission adopted the joint Venice Commission – OSCE/ODIHR Opinion on the draft law on Freedom of Religion of Kyrgyzstan (CDL-AD(2008)032).

Mr Paczolay presented the draft opinion (CDL(2008)114) on the draft Law amending and supplementing the Law on constitutional proceedings in Kyrgyzstan (CDL(2008)064) and the draft Law amending and supplementing the Law on the Constitutional Court of Kyrgyzstan (CDL(2008)065) drawn up on the basis of comments by Mr Gstöhl (CDL(2008)070) and himself (CDL(2008)068). He pointed out that a key problem of the draft amendments was that they tried to assimilate the Constitutional Court and its judges to the ordinary judiciary. The whole Chapter III of the Law on the Court was to be deleted and the corresponding issues were to be regulated in the Law on the Status of (ordinary) Judges. The same was true for the procedure of adoption of the budget of the Court. The present law provided that the Constitutional Court budget be presented by its Chairman to Parliament whereas the amendments foresaw that the budget of the whole judiciary including the Constitutional Court should be presented by the Council of the Judiciary to Parliament. The new competence for “interpretation of the constitution” was not to be recommended.

In the discussion it was pointed out that the competence of the Court to protect human rights was too narrow. A requirement of a qualified majority for the election of a judge could result in a deadlock. Abstract proceedings should be possible before the Court, but there should be a conflict. The law was an implementation of the Constitution and should not be criticised for that.

Ms Sydokova informed the Commission that the draft amendments, and particularly the limitation of the jurisdiction of the Constitutional Court, were required because of the entry into force of the new Constitution. The Constitution was rigid and difficult to amend. Amendments had to be reviewed by the Constitutional Court. The procedure for the proposal of the budget did provide for an active participation of the chairman of the Constitutional Court. The distinction between the judges of the Constitutional Court and judges of ordinary courts remained. The former were appointed by Parliament and the latter by the Judicial Council. The mandate of judges of the Constitutional Court could only be suspended or terminated by the President of the Republic if the judge had violated criminal law.

The Commission adopted the Opinion on the draft Law amending and supplementing the Law on constitutional proceedings and the draft Law amending and supplementing the Law on the Constitutional Court of Kyrgyzstan and invited the rapporteurs to finalise it in the light of the discussions (CDL-AD(2008)029).

11. Moldova

La Commission examine, en vue de son adoption, le projet d'avis commun de la Commission de Venise et de l'OSCE/BIDDH (CDL(2008)094) sur le code électoral de la Moldova tel qu'amendé par la loi n°76-XVI du 10 avril 2008 (CDL(2008)082) établi sur la base des observations de MM. Darmanovic, Vollan (expert de la Commission de Venise) et Karapetyan (expert de l'OSCE/BIDDH).

M. Darmanovic présente le projet d'avis et indique que, malgré quelques améliorations apportées au code électoral par le législateur depuis le dernier avis conjoint de l'OSCE/BIDDH et de la Commission de Venise (notamment la publication des résultats préliminaires sur le site web de la CEC), beaucoup de recommandations n'ont pas encore été prises en compte au regard des précédents avis conjoints.

M. Darmanovic note même des reculs dans certains domaines, notamment la possibilité de révoquer les membres de la commission électorale centrale. Le rapporteur note qu'il est important de préciser le pouvoir décisionnel des membres des commissions. Il soulève également le problème du seuil de participation. En particulier, contrairement aux recommandations du précédent avis commun, le seuil électoral permettant l'accès au Parlement, a été augmenté de 4 à 6% ; le rapporteur souligne donc qu'il serait bon de réduire le seuil à nouveau. En outre, il reste des efforts à faire pour améliorer la fiabilité des listes électorales. De plus, il demeure encore des limitations aux droits de faire campagne. Enfin, M. Darmanovic rappelle le problème récurrent concernant les procédures de recours. En résumé, les amendements ne tiennent pas compte des recommandations de la Commission de Venise et de l'OSCE/BIDDH.

M. Esanu intervient en indiquant la nécessité d'apporter quelques précisions.

La Commission adopte le projet d'avis commun de la Commission de Venise et de l'OSCE/BIDDH sur le code électoral de la Moldova tel qu'amendé par la loi n°76-XVI du 10 avril 2008, avec quelques amendements (CDL-AD(2008)022).

12. Montenegro

Mr Endzins presented the draft opinion (CDL(2008)080) on the draft Law on the Constitutional Court of Montenegro (CDL(2008)073), drawn up on the basis of comments by Messrs Gstöhl (CDL(2008)075, Grabenwarter (CDL(2008)076) and himself (CDL(2008)074). The draft Law was now in Parliament but the exact state of its discussion was not known. The draft opinion recommended that the judges should be elected by Parliament without a qualified majority. The Law should expressly designate the Constitutional Court as an independent body and should provide for budgetary independence and social guarantees for judges and the staff of the Court. An *actio popularis* should be avoided. Ordinary courts should not only make preliminary requests when they are asked to do so by the parties, but also when they themselves have doubts about the constitutionality of a law they have to apply. These proposals had been discussed at a meeting in Podgorica in June. Mr Grabenwarter insisted that a number of problems did not originate in the draft Law, but in the Constitution.

In the discussion the point was raised whether the Law should repeat the provisions of the Constitution to make the Law more easily understandable.

The Commission adopted the Opinion on the draft Law on the Constitutional Court of Montenegro (CDL-AD(2008)030).

- *Amicus curiae brief in the case of Bjelic against Montenegro and Serbia*

The Secretariat informed the Commission that this brief had been prepared as a third party intervention in a case against both Montenegro and Serbia, pending before the European Court of Human Rights. The case related to the non-enforcement of decisions rendered by the tribunals of the Republic of Montenegro in the period between 3 March 2004 (date of the entry into force of the European Convention on Human Rights in respect of the State Union of Serbia and Montenegro) and 6 June 2006 (date as of which the independent State of Montenegro is a party to the ECHR).

The opinion dealt with two main issues: the succession of Serbia and Montenegro to the treaty obligations of the former State Union of Serbia and Montenegro, and the liability of a successor state for the wrongful acts of its predecessor.

As concerns the first issue, Serbia succeeded to the State Union as of 14 June 2006, by operation of a specific provision of the Constitutional Charter of the State Union itself. Montenegro was accepted by the Committee of Ministers as a successor to the treaty obligations of the State Union as of 14 June 2006 in respect of "open" conventions (which are open to non Council of Europe member States). The Committee of Ministers decided in May 2007 that Montenegro was to be considered a party to the ECHR, which is a "closed" convention, retrospectively as of 6 June 2006 (date on which Montenegro declared in a letter to be willing to succeed to the treaty obligations of the State Union).

As concerns the second issue, the opinion stressed that there were few settled rules on state succession and considered that the correct approach in deciding this kind of issue was to judge in each specific case by reference to all the factors to determine how reasonable it was to impose continuity in responsibility. Indeed, the International Law Commission in its Articles on State Responsibility, provided for a general rule that responsibility devolved to a successful independence movement, unless the successor could prove that it would be unreasonable to do so. In the case under consideration, the acts or inaction complained of were attributable to authorities which were under the complete control of an entity (the Republic of Montenegro) which later became the government of the new State (Montenegro). It would therefore have been unreasonable to hold Serbia responsible for human rights violations allegedly committed by the courts of the Republic of Montenegro. This interpretation, which seemed to be in line with the intentions of Montenegro itself, was in conformity with the principles of a European public order brought about by the ECHR. This conclusion did not affect the possibility, under different circumstances, of holding Serbia responsible for breaches possibly committed during the material time by the authorities of the State Union.

The Commission adopted the amicus curiae brief in the case of Bjelic against Montenegro and Serbia (CDL-AD(2008)021).

13. Serbia

See under item 12 above.

14. Turkey

Mr Van Dijk informed the Commission of the request by the Parliamentary Assembly to review the legal and constitutional rules relevant for the prohibition of political parties in Turkey. This request had bee made following the decision of the Constitutional Court in the AKP case. 6 of 11 judges, less than the required majority of 7, had voted in favour of prohibiting AKP and 10 of 11 had voted to deprive it of part of its public funding. Both the 1998 guidelines of the Commission and the recent case law of the European Court of Human Rights would be relevant for the Opinion.

Mr Erdogan, Judge Rapporteur at the Ministry of Justice of Turkey, explained that in the Turkish system political parties could be prohibited at the request of the Chief Public Prosecutor on a number of grounds defined by the Constitution. The constitutional provisions were completed by the Law on Political Parties, a law which until recently was not subject to any amendments due to a specific constitutional provision. The Constitution was enacted in 1982, which was another era in Turkey, and its rigid interpretation by the Constitutional Court had led to difficulties. The Constitution was therefore amended several times, in 1995, 2001 and 2004, making the prohibition of parties more difficult. In addition, the prohibition on amending certain laws such as the law on political parties was removed and the human rights provisions contained in international treaties now prevailed with respect to contrary provisions of Turkish law. Thanks to these reforms Turkey now had a workable system.

In reply to questions from members Mr Esener, Head of the Department for Human Rights in the Ministry for Foreign Affairs, said that the written reasoning in the AKP case should be available soon but that he could not indicate any date. It was also not clear, and this was confirmed by Mr Özbudun, what would happen with respect to the constitutional reform.

In the discussion it was underlined that the Parliamentary Assembly had asked Turkey to revise its Constitution and that the opinion should deal with the legal rules applicable in Turkey and should not be an evaluation of the decision of the Constitutional Court.

The Commission requested Messrs Closa Montero, van Dijk, Grabenwarter, Hoffmann-Riem, Sejersted, Tuori and Vogel to prepare an opinion for adoption at one of its forthcoming sessions.

15. Report on European national legislation on blasphemy, religious insults and incitement to religious hatred

Mr van Dijk presented the Report on “the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred”, which was the follow-up to a preliminary report adopted in March 2007 at the request of the Parliamentary Assembly. These matters had then been the object of the international Round Table on “Art and Sacred beliefs: from collision to co-existence” which the Commission had organised in January 2008 in Athens in co-operation with the Hellenic League of Human Rights.

This report was a pioneer one, and as such it did not purport to provide all the answers to the difficult questions raise in the field of the intersection of freedom of expression and freedom of religion. In the Rapporteurs’ opinion, incitement to hatred had to be criminalised and prosecuted, with no unjustified difference being made between different groups. By contrast, neither blasphemy nor insult to religious feelings ought to be criminalised. The report underlined that democratic societies must not become hostage to the excessive sensitivities of certain individuals: it must be possible to criticise religious ideas even if such criticism may be perceived by some as hurting their religious feelings. Fear of violent reactions should not dictate self-censorship. But reasonable self-restraint should be used if constructive debate is to replace dialogues of the deaf. The report concluded by proposing a new ethic of responsible intercultural relations, in Europe and in the world.

Mr Christians stressed that the analysis of the pertinent European domestic laws showed the pan-European penalisation of incitement to hatred, a clear tendency not to prosecute blasphemy and a tendency not to criminalise religious insult. This appeared to him to be the correct approach for the future. He also underlined that it was essential that the provisions against incitement to hatred be applied in a non-discriminatory manner.

Several members expressed their appreciation of the balanced nature of the report. Certain amendments were proposed.

The Commission adopted the Report on "the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred" (CDL-AD(2008)026).

16. Constitutional issues raised by the ratification of the Statute of the International Criminal Court

Mr Paczolay explained that this report was meant to supplement the Commission's Report on the constitutional issues raised by the ratification of the Rome Statute of the International Criminal Court, which the Commission had prepared in 2001 at a time when practically no State had yet ratified the Statute. This second report examined the constitutional case-law since 2001, and confirmed that several states had indeed been confronted with the problems foreseen by the Commission; some of these States had adopted the solutions indicated in the 2001 report. Practice showed that several of the States, which had been unable to interpret the statute in a manner compatible with the constitution and instead had to modify the latter, had not yet ratified the statute.

Ms Palma indicated that Portugal had amended its Constitution in 2001 in order to be able to ratify the Rome Statute despite the prohibition contained in the Portuguese constitution of imposing life-time imprisonment.

The Commission adopted the Second Report on the constitutional issues raised by the ratification of the Rome Statute of the International Criminal Court (CDL-AD(2008)31).

17. Other constitutional developments

- *Afghanistan*

Le Professeur Musa Marofi, Ambassadeur de l'Afghanistan à Rome rappelle à la Commission que malgré la guerre contre le terrorisme le processus démocratique commencé par l'adoption d'une constitution continue et se renforce. La constitution prévoit une séparation des pouvoirs, une participation des citoyens dans la vie politique, la création de partis politiques et de médias libres, et le respect des droits de l'homme. Cet ordre juridique qui fonctionne dans la réalité a néanmoins besoin de nouvelles lois et réglementations. Il invite instamment la Commission à intervenir dans ce domaine et se réjouit de l'élargissement des activités de la Commission au-delà de l'Europe.

- *Belarus*

Mr Vahkevich presented a UNDP project for the improvement of the efficiency of justice in Belarus. The intention was to collect material and to identify best practices. He invited the members and the staff of the Commission to participate as experts in the programme. He also informed the Commission that the competence of the Constitutional Court had been significantly broadened recently. Now, every law had to be submitted to preliminary control by the Court. The Court had five days to carry out this control.

Mr Buquicchio informed the Commission that in April, the Commission had organised a Conference with the Constitutional Court in Minsk. He had then stressed to the authorities that a change of the status of Belarus within the Commission was possible if the authorities there showed a concrete will to co-operate with the Commission by submitting requests for opinion to the Commission.

- *Brazil*

Minister Gilmar Mendes, President of the Federal Supreme Court of Brazil emphasised that each constitution was the product of the history and culture of a nation. This diversity resulted in experiences which should be shared. The supremacy of the constitution resulted in a need for constitutional justice. He highlighted the keen interest of his Court in international judicial co-operation on a regional basis and with the Venice Commission. He pointed out that it was not sufficient to make foreign case-law available, but it also had to be presented together with information on the institutional context of the court, which had adopted these decisions. President Mendes expressed his view that the CODICES database of the Venice Commission was an important effort, which should be further encouraged.

Mr Helgesen welcomed the interest of the Supreme Court of Brazil in the Venice Commission's work and expressed the hope that Brazil would become a member of the Commission.

- *Bulgarie*

La Commission est informée de la demande d'assistance sur le concept de la nouvelle loi sur les instruments statutaires qui vise à définir la répartition des compétences entre le Parlement et l'administration dans la rédaction de projets de lois.

- *France*

M. Jean-Claude Colliard informe la Commission de la réforme constitutionnelle du mois de juillet dernier en France. Les textes d'application de cette réforme sont en cours de rédaction que ce soit au niveau des lois organiques ou des règlements de procédure de l'Assemblée nationale. Outre la possibilité pour le Président de s'adresser au parlement et l'introduction d'un referendum d'initiative aux conditions très strictes, la réforme a abouti a deux modifications importantes : l'introduction de l'exception d'inconstitutionnalité et le renforcement de la procédure parlementaire et du rôle du parlement dans l'élaboration de la loi.

M. Chagnolleau, ancien membre du Comité Balladur ajoute pour information que le mandat du Président de la République a été limité à deux mandats successifs et que le Conseil de la magistrature n'est plus présidé par le Président de la République.

- *Mexique*

Mme Carmen Alanis Figueroa, Présidente du Tribunal électoral fédéral informe la Commission de développements constitutionnels récents au Mexique qui touchent au contrôle constitutionnel mis en œuvre par le Tribunal électoral fédéral. Le Tribunal a ainsi statué sur l'enregistrement d'un parti politique, sur l'organisation statutaire d'un parti politique, l'élection interne au sein d'un parti, les droits des citoyens de participer en tant que candidat au sein de leur parti, le droit des candidats élus d'exercer leur mandat. Le tribunal a également créé un observatoire électoral qui constitue un forum de discussions publiques. Les membres de la Commission sont cordialement invités à participer à ce projet.

M. Francisco Guerrero, Conseiller à l'Institut fédéral électoral, présente à la Commission les grandes lignes du système électoral et de la réforme électorale de 2007 qui touche l'organisation et le fonctionnement des partis politiques, le financement et le contrôle des partis et campagnes, la réglementation des recours électoraux, l'organisation et les compétences de l'Institut fédéral électoral.

18. Liber Amicorum Antonio La Pergola

In the presence of Mrs Anna Rosa La Pergola and her daughter Serena, Mr van Dijk presented the Liber Amicorum Antonio La Pergola, which contained contributions by members and friends

of Mr La Pergola. Mr van Dijk thanked Mr Murri, President of the Istituto Poligrafico e Zecca dello Stato, which had designed the cover page and taken care of the publication of the volume.

19. Co-operation with the Union of Arab Constitutional Courts and Councils

Mr Helgesen informed the Commission that he had signed a co-operation agreement with the Union in June in Cairo, which provided for contributions to the CODICES database and the organisation of joint seminars. In the Committee of Ministers he had once been asked how the Venice Commission would expand in the future. His reply had been that the Commission did not 'expand' but acted as a bridge to countries outside Europe. The Commission had to respond to the strong interest from Arab countries in the activities of the Commission.

Mr Buquicchio pointed out that the co-operation with the Union of Arab Constitutional Courts and Councils had been made possible by a financial contribution from Norway. The next activities in this fruitful programme were a seminar on Models of Constitutional Justice in Ramallah in view of the establishment of a Constitutional Court by the Palestinian National Authority (25-26 October 2008) and a Colloquy on constitutional interpretation in co-operation with the Constitutional Council of Algeria (Algiers, 30-31 October 2008).

Mr Buquicchio also called on the member states to support the co-operation of the Venice Commission with the Southern African Judges Commission.

20. Co-operation with the Ibero-American Conference on Constitutional Justice (CJIC)

Mr Guillermo Ortiz Mayagoitia, President, Supreme Court of Mexico holding the *pro-tempore* secretariat of the CIJC, informed the Commission about the co-operation agreement between the Ibero-American Conference on Constitutional Justice and the Commission, which was signed in Vilnius on 3 June 2008. This agreement provided for contributions of the CIJC Courts to the CODICES database and the Venice Forum and an exchange of publications. In view of the preparation of the VII Ibero-American Conference in early 2009, the Supreme Court was compiling a selection of the leading case-law of CICJ member courts and hopes thus to contribute to an exchange between the courts.

Mexico has profoundly evolved. In parallel to democratisation, constitutional justice has developed. Constitutional reform had reduced the number of judges of the Supreme Court from 26 to 11. The Court's strongest tool to protect human rights was an *amparo*, which was similar to the *certiorari* procedure. In order to make constitutional justice more widely known, the Supreme Court even had its own TV channel, which broadcasts the proceedings at the Court.

Mr Buquicchio welcomed the co-operation with the Ibero-American Conference and pointed out that the agreement provided for the inclusion of the Systematic Thesaurus in CODICES in Portuguese and Spanish.

21. Report on the notion of good governance

Mr Kask presented the draft report on the notion of good governance, which contained at the outset a review of the existing definitions of "good governance", both at the international and at the national level (constitution, law, case-law). This overview showed that there was little consistency in the use of this concept, which covered both "good administration" and less legal concepts. The report also contained some proposals for a human-rights based approach to the definition of "good governance". The report concluded with the suggestion that the Council of Europe should work on a definition of "good governance", to be used in a consistent manner in the future.

Mr Tuori and Mr Jowell stated that the difference between “good administration” and “good governance” needed to be underlined more clearly.

Mr Tuori did not consider it appropriate nor useful to try and determine a legal definition of “good governance”. In substance, it was not a legal concept. Other members considered instead that a legally-constructed concept of good governance could be useful.

The Commission decided to continue its reflection on this matter, and postponed the adoption of the report.

22. Initiative législative

M. Bartole présente le projet de rapport sur l’initiative législative (CDL-DEM(2008)003), établi sur la base des contributions de M. Bartole (CDL(2008)103), Mme Nussberger (CDL(2008)102), et Mme Muriel Helgeson (CDL(2008)104.

Le rapport a pour objectif d’offrir une description du droit d’initiative législative en Europe.

L’initiative législative est traitée sous l’angle du droit de soumettre au pouvoir législatif des projets de lois en vue de leur adoption par le parlement.

Le premier chapitre énumère les détenteurs de l’initiative législative que l’on peut trouver dans les constitutions européennes. Le deuxième chapitre décrit les principales caractéristiques et procédures de l’exercice du droit d’initiative législatif comme les conditions de rédaction qui peuvent exister en Europe.

M. Jowell informe la Commission des discussions qui ont eu lieu lors de la Sous-Commission sur les institutions démocratiques et qui ont donné lieu à quelques amendements au rapport figurant sur un document séparé et distribué en plénière.

Les ajouts portent notamment sur l’impact sur le droit d’initiative législative de l’appartenance à l’Union européenne et de la ratification du Traité de Lisbonne, de l’initiative populaire par rapport à la démocratie représentative et du rôle du Président de la République dans le droit d’initiative législative.

Plusieurs orateurs interviennent afin de proposer des amendements au texte.

Le Président reporte l’adoption du rapport à la prochaine session et invite les membres désireux d’apporter des amendements au texte d’envoyer leurs commentaires au Secrétariat (caroline.martin@coe.int) avant la mi-novembre.

23. Report of the meeting of the Sub-Commission on the Judiciary (16 October 2008)

Mr Endzins informed the Commission that the Parliamentary Assembly requested an opinion on the independence of the judicial system, which included both existing standards and the identification of areas where new standards should be developed. The opinion would also be used as an input for the revision of Recommendation 94(12) of the Committee of Ministers of the Council of Europe. New standards could be required in the following fields:

- Internal independence of judges and the right to the lawful judge, i.e. a predetermined assignment of cases to individual judges, which existed in a number of countries.
- Non-monetary benefits for judges (e.g. apartments), the attribution of which could be abused.
- independence or non-interference in the work of prosecutors

Mr Neppi Modona, Ms Suchocka, Mr Torfason and Mr Zorkin had agreed to act as rapporteurs. Discussion had evolved around the issue of the independence of prosecutors and whether the report should deal with the prosecution system at all. The Secretariat pointed out that like in previous opinions, reference could be made to substantial guarantees of non-interference rather then discussing the issue whether prosecution should be independent. A starting point for the report could be the Commission's Report on Judicial Appointments (CDL-AD(2007)028) and the Vademecum on the Judiciary (CDL-JD(2008)001), which also made references to the non-interference in the work of prosecutors.

In agreement with the Parliamentary Assembly, the report should be adopted in March 2009. The rapporteurs should submit their contribution by 30 November 2008 at the latest in order in order for there to be discussion of a draft report at the December session.

24. Report of the meeting of the Sub-Commission on Democratic Institutions (16 October 2008)

Mr Jowell informed the Commission that the Sub-Commission had examined the preliminary draft report on constitutional provisions for amending the constitution. It had been decided to proceed with an analysis of the issues raised by constitutional amendments, notably in relation to excessive rigidity or "unamendable" provisions, or adoption of entirely new constitutions. A report would be produced in due time.

The Commission decided to continue its reflection on this matter, and postponed the adoption of the report.

25. Other business

Mr Aurescu informed the Commission that he had participated in the 8th meeting of the DH-MIN concerning a possible follow-up to Parliamentary Assembly Recommendation 1796, notably the possible preparation of guidelines on the protection of national minorities by their kin-State. Mr Aurescu had presented the Venice Commission's work in this field. The DH-MIN had concluded, in the light of the Venice Commission's work and of the recent Bolzano Recommendations by the OSCE High Commissioner on National Minorities, not to proceed with the preparation of such guidelines at this stage.

Mr Dürr informed the members that their passwords expire once access to the restricted site of the Venice Commission has not been used for three months. In such a case, the password has to be reset using the link at the bottom of the menu on the left side of the site. The Secretariat will send a note to members describing the password reset procedure.

26. Date of the next sessions

The Commission confirms the date of its 77th Plenary Sessions: 12-13 December 2008.

The schedule of sessions for 2009 is confirmed as follows:

78th Plenary Session	13-14 March
79th Plenary Session	12-13 June
80th Plenary Session	9-10 October
81st Plenary Session	11-12 December

Sub-Commission meetings will take place on the day before the Plenary Sessions. The meeting of the Council for Democratic Elections should take place on 13 December in the afternoon.

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