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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

77th PLENARY SESSION

77e SESSION PLÉNIÈRE

(Venice, Scuola Grande di San Giovanni Evangelista)
Friday, 12 December (9.30 a.m.) –
Saturday, 13 December 2008 (12.30 p.m.)

(Venise, Scuola Grande di San Giovanni Evangelista)
vendredi, 12 décembre 2008 (9h30) –
samedi, 13 décembre 2008 (12h30)

SESSION REPORT

RAPPORT DE SESSION

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1. Adoption of the Agenda

The Agenda was adopted.

2. Communication by the Secretariat

Mr Buquicchio informed the Commission that its budget for 2009 had been adopted by the Committee of Ministers and that it obtained 50 000 Euros in addition to its usual budget to help finance the interpretation for the first World Conference on Constitutional Justice, which will take place in Cape Town on 23-24 January 2009.

He briefly outlined the Commission's activities since the last Plenary Session, which included a seminar on "Models of Constitutional Jurisdiction" organised in Ramallah in October with the Palestinian National Authority, for the establishment of a Constitutional Court. The Venice Commission was informed that although good progress had been made, the opinion on this matter will only be adopted in March, as the Minister of Justice could not attend this session. As regards the co-operation with the UACCC, the Commission was informed that a preparatory meeting for the World Conference on Constitutional Justice and an International Colloquy on Constitutional Interpretation had taken place in Algiers in October, during which the resolution for the World Conference was prepared. Further meetings included the fifth Plenary of the UACCC "Scientific Symposium on Fair Trial", which took place in Sana'a, Yemen in November; the VIth Meeting of Supreme Courts of Mercosul Member States and Associate Members, which took place in Brasilia in November, during which contacts had been made with the Ministry of Foreign Affairs, as Brazil would like to become a member of the Venice Commission. The Commission was further informed that Peru had already requested membership and that the Committee of Ministers will make its decision on this question in February 2009 and that Mexico was also interested in acceding to the Venice Commission.

The Commission was then informed that two meetings had taken place in Astana, Kazakhstan, in December. One on the financing of political parties and election campaigns and the other on the UN's Universal Declaration of Human Rights, financed by the European Commission and the German authorities. At the latter event, the Kazakh State Secretary said that Kazakhstan had the firm intention of progressing towards democracy and that the publication "Way to Europe" includes an action plan which, although it focuses on issues regarding the environment and transport, also deals with human rights.

3. Co-operation with the Committee of Ministers

Within the framework of its co-operation with the Committee of Ministers, the Commission held an exchange of views with Ambassador Stelian Stoian, Permanent Representative of Romania to the Council of Europe, with Ambassador Margarita Gega Permanent Representative of Albania to the Council of Europe, Ambassador Yevhen Perelygin, Permanent Representative of Ukraine to the Council of Europe and with Ambassador Zurab Tchiaberashvili, Permanent Representative of Georgia to the Council of Europe.

Ambassador Stoian spoke about the evolution of the relationship between Romania and the Venice Commission. He said that Romania had developed both internally and externally by becoming a member of the Council of Europe, NATO and the EU. He explained that Romania had progressed from a centralised communist system towards a democratic one also thanks to the Venice Commission's continuous guidance and assistance.

Ambassador Gega underlined the important role played by the Commission in the implementation and protection of human rights, democracy and the rule of law beyond the borders of Europe. She said that Albania had received crucial support from the Venice Commission in the area of constitutional reform since 1991 and that the Constitution of 1998 bears the Venice Commission's mark.

Ambassador Perelygin spoke about the Rapporteur Group on Democracy in the Committee of Ministers and the Action Plan for Ukraine, saying that important progress had been made in the co-operation between Ukraine and the Venice Commission. Its assistance in the current constitutional reforms was very much appreciated by the Ukrainian authorities. He said that this co-operation should increase in 2009, as Ukraine will host the Forum for the Future of Democracy, which will deal with questions relating to elections, and hopes to be able to rely on the expert support of the Venice Commission in this matter.

Ambassador Tchiaberashvili said that the Venice Commission played an important role in the drafting of the Georgian Constitution and explained the various projects that had been organised with the Venice Commission over the years, including in respect to the laws on property restitution and compensation on the territory of Georgia for the victims of conflict in the former South Ossetia district.

4. Co-operation with the Parliamentary Assembly

Mr van der Linden informed the Venice Commission that the Parliamentary Assembly highly appreciates the Commission's work. He informed the Commission about the follow-up to Resolution 1633 (2008) on **"**The consequences of the war between Georgia and Russia", saying that presidents and rapporteurs of various committees visited Georgia and will visit Russia in February 2009. Mr van der Linden underlined the important role played by Mr Hammarberg, the Council of Europe's Commissioner for Human Rights, in the Georgia-Russia crisis and that his handling of the situation was appreciated by both the Russians and the Georgians as well as by the EU.

Mr Drzemczewski, Head of Secretariat, Committee on Legal Affairs and Human Rights, informed the Commission that the Parliamentary Assembly had established an annual award called the "Human Rights Prize" for outstanding civil society action in the defence of human rights. He explained that a selection panel composed of the President of the Assembly, the Chairperson of the Committee on Legal Affairs and Human Rights, the Chairperson of the Monitoring Committee and four independent persons (one of whom is, at present, a member of the Venice Commission: Mr van Dijk) examine the nominations and make a recommendation to the Bureau. The decision on the prize-winner is then made by the Bureau.

Mr Holovaty, in his capacity of Chair of the Monitoring Committee, informed the Commission that visits to "the Former Yugoslav Republic of Macedonia", Bulgaria and Turkey had taken place in November 2008. He explained that all three countries are in the post monitoring dialogue with the Council of Europe. He said that a fact finding mission to "the Former Yugoslav Republic of Macedonia" took place three months prior to presidential elections and municipal elections there and that the intention was to recompose the electoral commission. Since concerns were raised on this issue, he believed that an opinion by the Venice Commission on this matter would be welcome. He went on to inform the Venice Commission that its opinion regarding Bulgaria on constitutional amendments made clear that the Venice Commission regretted that these changes were made without its prior consultation. The Ministry of Justice of Bulgaria and the Speaker of Parliament promised to be more active in seeking the Venice Commission's assistance in the future. He then said that urgent debates had taken place on Turkey last June on the ban of one of the political parties and that another case was pending in court for the ban of yet another political party. The opinion by the Venice Commission, which should be adopted at the March Plenary Session, will be very valuable in this matter. He said that the Parliamentary Assembly believes that it is important for Turkey to redraft its Constitution with the assistance of the Venice Commission.

5. Interaction with the Council of Europe Development Bank

Mr Raphaël Alomar, Governor of the Council of Europe Development Bank, explained that the Bank (CEB) is now 52 years old and the oldest financial institution in Europe. It is seen as an important tool in the reforms carried out in Central and Eastern Europe and an Action Plan for the CEB will be put in place by June 2009, taking into account its broader role as set out during the Third Summit of Heads of State and Government. He said that the CEB's mandate to assist in the training of judges provides a complementarity between itself and the Venice Commission that should be developed in the years to come.

6. Follow-up to earlier Venice Commission opinions

The Secretariat observed that over the last years, the European Court of Human Rights increasingly referred to the opinions and reports of the Venice Commission in its judgments. The Secretariat informed the Commission about several such judgments recently delivered. Amongst these, *Tanase and Chirtoaca v. Moldova* contained a reference to the Commission's Opinion on the Electoral Code of Moldova; *Yumak and Sadak v. Turkey* referred to the Report on electoral law and electoral administrations in Europe and to the Report on electoral rules and affirmative action for national minorities' participation in the decision-making process in European countries, and the *Georgian Labour Party against Georgia* referred *inter alia* to the Code of Good Practice in Electoral Matters.

7. Albania

Mr Bartole presented the draft Opinion (CDL(2008)142) on the amendments to the Constitution on behalf of the reporting members. The Opinion had been requested by the Monitoring Committee of the Parliamentary Assembly and a first discussion had taken place at the last session in the presence of Mr Rusmaili, chair of the legal affairs committee of the Albanian Parliament. The amendments to the Constitution concerned mainly the rules for electing the Parliament and the President. For the Assembly elections, a regional-proportional system was introduced which was less favourable to the smaller parties. The President continued to be elected by the Assembly, but as from the fourth round an absolute majority was sufficient. The approach of calling new general elections if the Assembly was unable to elect the President created a potential risk for the parliamentary character of the Albanian constitutional system, since a President elected in such circumstances had a much stronger mandate. The Central Electoral Commission no longer appeared in the text of the Constitution, but it was essential to maintain it in the law. The new rule on appointing the prosecutor general was a step back.

Mr Gumi recalled that ODIHR and the Venice Commission had asked for changes in the electoral system since the previous rules opened the door to abuse. The issue of an open or closed lists system had now been resolved by the electoral code in favour of closed lists. Following the adoption of the amendments, the Assembly had amended its rules of procedure to ensure that such decisions could no longer be made so quickly. This should be reflected in the Opinion.

The Commission adopted the Opinion on the amendments to the Constitution of the Republic of Albania as it appears in document CDL-AD(2008)033.

8. Bulgaria

In the absence of the rapporteurs, Mr Kouznetsov informed the Commission that, in mid-November, it had received a request to examine the draft amendments to the Law on political parties of Bulgaria (CDL(2008)126).

The rapporteurs, Messrs Vogel and Closa Montero, had examined the draft amendments in the light of the previous documents of the Venice Commission on political parties. The overall

assessment of the Law was positive, however, certain provisions of the text might be reconsidered, notably, the limitations on the participation in political parties imposed on non-citizens, high thresholds for establishing parties as well as requirements concerning the territorial branches of parties. The Opinion also noted that certain articles of the Law that related to the financing of parties or to complaints and appeals procedures might be reviewed and made clearer in order to avoid problems of their interpretation.

The Commission adopted the Opinion on the amendments to the Law on political parties of Bulgaria (CDL-AD(2008)034).

9. Georgia

- *Constitutional amendments*

Mr Dutheillet de Lamothe and Mr Bartole informed the Commission about the request made by the Georgian authorities for an assessment of four constitutional laws amending the Constitution recently passed. The amendments entailed: the reduction in the number of members of Parliament required to form a parliamentary faction; the automatic removal of the Government following the inauguration by the President or the election of a new Parliament; the strengthening of the guarantees for private property; and the transfer of the responsibility for prosecution to the Minister of Justice.

The English version of these laws was of very poor quality, which had caused significant problems in understanding the extent of the amendments. The amendment on the prosecuting function raised several issues in respect of the degree of independence of prosecutors and the guarantees for such independence. The question of whether it would be sufficient to provide for such guarantees in statutory law or whether they should instead be put in the Constitution would also need to be addressed. The rapporteurs learned that a law "on the structure activity and authority of the Government of Georgia" and a law on "Prosecution Service of Georgia" had been adopted in October 2008. The rapporteurs wished to examine these laws before forming their final opinion on the degree of independence of the prosecution under the new system.

Mr Minashvili, Deputy Chairman, Legal Affairs Committee, Parliament of Georgia, explained that the amendments in respect of the prosecutor were dictated by the wish of the Georgian authorities to move further away from the old *prokuratura* system, by increasing the prosecutors' parliamentary accountability. In his view, several features of the new system provided sufficient guarantees of independence: in particular, Parliament would not be able to intervene in individual cases; neither the President nor the Prime Minister could give instructions on prosecuting activities; the Minister of Justice (the new head of the prosecuting services) would not have full control of the Chief Prosecutor (appointed by the President). In Mr Minashvili's view, the reform would bring about satisfactory checks and balances by increasing, on the one hand, parliamentary control of the prosecution services and, on the other hand, judicial control by the Supreme Court of Georgia.

Mr Papuashvili recalled that Georgia had already started dismantling the old *prokuratura* system a few years ago. He drew attention to the need for more background and complementary information on the aims and manners of carrying out this reform, in addition to a good translation of the texts.

Mr Dzagnidze, Deputy Minister of Justice, pointed out several inaccuracies in the translation, which had given rise to misunderstandings by the rapporteurs. He underlined that the status of the prosecutors was determined by the Law which had recently been adopted; it was common not to have this kind of issues regulated at the level of the Constitution.

Mr Machavariani invited the rapporteurs to Georgia in order to discuss and clarify these important issues.

The rapporteurs agreed that it would be useful to meet with the authorities in Georgia before finalising an opinion on these four constitutional laws amending the Georgian Constitution and submitting it to the Plenary Session in March 2009.

The Commission decided to adopt the Opinion at its next Plenary Session and to transmit any additional draft elements to the Constitutional Court of Georgia as soon as they were available.

- *Amicus Curiae brief requested by the Constitutional Court*

In the absence of Mr Grabenwarter, Mr Dürr presented the draft *amicus curiae* Opinion for the Constitutional Court of Georgia on the right of access to court against the decision of an independent broadcasting authority. The request originated in a case before the Court in which parents complained to the independent broadcasting authority about the airing of a sexually explicit broadcast by a private TV company at hours during which children were also likely to be watching television. This complaint was rejected and the applicable legislation did not allow for an appeal to the court against this decision.

The draft Opinion first made a comparative presentation of the Austrian and Swiss systems, where appeals to a court in such cases were allowed (in Switzerland only since 2007), followed by an examination of Article 13 ECHR (effective remedy) in combination with Article 2 Protocol 1 ECHR (right to education) and Article 10 ECHR (freedom of expression). The draft Opinion concluded that there was no obligation under the Convention to provide for an appeal to a court. Such an obligation could result from the Constitution. In line with the Commission's practice in *amicus curiae* opinions, the draft Opinion, however, refrained from examining the question of whether the applicable law was in conformity with the Georgian Constitution, which falls within the jurisdiction of the Constitutional Court.

Mr Papuashvili thanked the Commission for the useful draft Opinion and pointed out that the Court extended its original request regarding access to courts not only to the rescheduling of programmes, but also to decisions rejecting defamation complaints. It was also suggested that a discussion on Articles 6 and 10 ECHR be added.

10. Kyrgyzstan

- *Draft Opinion on the draft amendments to the Constitutional Law on the Supreme Court and Local Courts of Kyrgyzstan*

Ms Nussberger presented the draft Opinion on the draft amendments to the Constitutional Law on the Supreme Court and Local Courts of Kyrgyzstan (CDL(2008)130). She explained that this Law was a part of a package of laws that had been drafted as a result of the judicial reform in Kyrgyzstan to bring legislation in line with the new Constitution. She gave a brief overview of the draft Opinion, pointing to a number of issues that will need to be clarified, for instance the provision dealing with the supervision of the implementation of judgments by judges, which was unusual as it should not be the judge's task to do so; the discretion of the president of the court to allocate cases, which can be easily abused, should be revised; the powers of the plenum of the Supreme Court to hand down clarifications on questions concerning judicial practice, which could be at odds with the principle of the separation of powers, and the possibility for the Minister of Justice and the Prosecutor General to be present at the meeting of the plenum during the adoption of decisions, which could influence the voting procedure, should also be revised.

Mr Torfason added that it is important for future purposes and especially from the point of view of judicial independence that the number of local judges be clearly set out in the draft Law itself.

- *Draft Opinion on the Constitutional Law on Bodies of Judicial Self-Regulation*

Mr Hamilton presented the draft Opinion on the Constitutional Law on Bodies of Judicial Self-Regulation (CDL(2008)129). He explained that the draft Law was a framework law and therefore did not provide many details. It establishes two bodies, the Congress and the Council of Judges, however there was not enough detail in this draft Law to understand how these bodies are going to work. Mr Hamilton went on to say that a number of provisions would need to be revised, notably the provision that allows the President of the Republic to convene the Congress, which is not in line with self-regulation, or the provision that sets out that the resources for the Council are to be provided by the Ministry of Justice, which creates a strong dependency by the Council on the Ministry, which is incompatible with the idea of self-regulation. He said that the draft Law in itself was welcomed, but that it will be important to follow how subsidiary legislation will put it into operation.

- *Draft Opinion on the Constitutional Law on Court Juries*

Ms Nussberger presented the draft Opinion on the Constitutional Law on Court Juries (CDL(2008)131) and explained that the purpose of this draft Law was "to bridge the gap between the judicial system, courts and society" and was very welcome. She proceeded to point out provisions which needed further attention, for instance the Law should clarify whether it is a duty or a right for citizens to participate in the "dispensing of justice"; the provision setting out that persons with an interest in the case should be excluded, should be further explained and the procedure allowing anyone to contest the appointment of a juror might be reconsidered.

- *Draft Opinion on the draft amendments to the Constitutional Law on the Status of Judges*

Mr Hamilton presented the draft Opinion on the draft amendments to the Constitutional Law on the Status of Judges (CDL(2008)145) and said that these amendments were welcomed as they aim to strengthen judicial independence in Kyrgyzstan. However, there were a number of provisions that needed to be revised, for instance the distinctions that exist in the status of judges and justifications for such distinctions should be provided; the prohibition for members of the judiciary to be members of political parties and its compatibility with the International Covenant on Civil and Political Rights deserves further reflection, as does the extent of the immunity of judges.

Ms Sydykova replied to some of the queries raised by the rapporteurs in the above-mentioned draft opinions.

The Commission adopted the four opinions :

- **Opinion on the draft amendments to the Constitutional Law on the Supreme Court and Local Courts of Kyrgyzstan as it appears in document CDL-AD(2008)041;**
- **Opinion on the Constitutional Law on Bodies of Judicial Self-Regulation as it appears in document CDL-AD(2008)040;**
- **Opinion on the Constitutional Law on Court Juries as it appears in document CDL-AD(2008)038;**
- **Opinion on the draft amendments to the Constitutional Law on the Status of Judges as it appears in document CDL-AD(2008)039.**

11. "The former Yugoslav Republic of Macedonia"

Mr Sejersted pointed out that the draft Law on prohibition of discrimination in "the former Yugoslav Republic of Macedonia" had been assessed in the light of the applicable European standards, which were in particular the ECHR and, as concerned soft law, the recommendations by the European Commission against Racism and Intolerance (ECRI). A delegation of the Venice Commission and representatives of ODIHR had carried out a joint fact finding mission to Skopje in late November, which had proved very useful. In the course of this mission, they learned that a new draft Law had recently been produced, which was to replace the one under consideration, but which had not yet been submitted to Parliament; the Venice Commission was to assess the previous draft, while ODIHR would subsequently assess whether the Venice Commission's recommendations would be taken on board before submitting the new draft to Parliament.

In "the former Yugoslav Republic of Macedonia" there was no general anti-discrimination law; the draft Law under consideration was thus to be welcomed, as it would improve the normative protection of the principle of non discrimination. The Law was nevertheless excessively broad, and therefore failed to provide the necessary consistency and to prove applicable in practice. An explanatory memorandum or other authoritative interpretative guide was necessary in this respect.

As concerned enforcement of the Law, ECRI recommended, in principle, entrusting the supervision of non discrimination legislation to a specialised body. The Venice Commission shared this view. However, taking into account in particular the concerns expressed by the Council of Europe's Commissioner for Human Rights on the excessive complexity of the legal system of that country, the Commission accepted that for an initial period, the supervision of the implementation of the Law could be entrusted to the Ombudsman, on condition however that this institution be adequately strengthened in terms of both financial resources and human resources and competences.

Ms Siljanovska-Davkova underlined that in order to entrust the Ombudsman with this new task, it would be necessary to amend both the Constitution and the Law on the Ombudsman. She also stressed the need for simplifying the Law, which was far too broad and overlapped with several already existing pieces of legislation.

The Commission adopted the Opinion on the draft Law on protection against discrimination of "The former Yugoslav Republic of Macedonia" (CDL-AD(2008) 042).

Suite à la demande de la Commission de suivi de l'Assemblée parlementaire, la Commission examine, en vue de son adoption, le projet d'avis sur la question du renouvellement de la nomination des membres de la Commission électorale d'Etat de «l'ex-République yougoslave de Macédoine» (CDL(2008)133), établi sur la base des observations de M. Kask.

En l'absence de M. Kask, M. Garrone indique qu'il s'agit d'une première étape suite à la demande de la Commission de suivi de l'Assemblée parlementaire relative au code électoral révisé de cet Etat. D'urgence, il a fallu se prononcer sur le renouvellement total de la Commission électorale d'Etat peu avant les élections. L'avis met en particulier l'accent sur la stabilité du droit électoral. Il faut éviter les apparences de manipulations et d'avoir uniquement des membres inexpérimentés. Vu l'urgence, le projet d'avis a déjà été transmis à l'Assemblée parlementaire du Conseil de l'Europe.

Mme Siljanovska-Davkova indique qu'heureusement, seuls deux membres sont nouveaux dans la Commission électorale d'Etat et que l'ancien vice-président est devenu président. La composition de cette Commission est maintenant plus politique. Mme Siljanovska regrette que son mandat ait été réduit à quatre ans, ce qui correspond à une législature. Par ailleurs, la

Commission de Venise organise à Skopje, les 16 et 17 décembre, un séminaire relatif à l'administration des élections.

La Commission adopte l'avis sur la question du renouvellement de la nomination des membres de la Commission électorale d'Etat de «l'ex-République yougoslave de Macédoine» (CDL-AD(2008)036).

12. Turkey

Mr Sejersted informed the Commission that the reporting members would prepare a draft Opinion on the constitutional and legal provisions relevant for the prohibition of political parties for the next session. The draft Opinion would take up the existing standards, including the Venice Commission's guidelines and the case-law of the European Court of Human Rights as well as current practice in European states. The draft Opinion would not focus on the AKP decision of the Turkish Constitutional Court, but this decision, like other decisions such as the one on parties regarded as a threat to territorial integrity, would be mentioned as evidence on how the Constitution was applied in practice. The Opinion would deal both with substantive and procedural aspects. In his view, Turkish practice fell short of European standards.

In the discussion, it was underlined that Turkey was still subject to a post-monitoring dialogue and that the Monitoring Committee was eagerly awaiting the Opinion. Regrettably, the efforts to adopt a new Constitution were at present no longer actively being pursued.

The Commission agreed to adopt its Opinion at its next session in March 2009.

13. Ukraine

Mr Paczolay presented his comments (CDL-EL(2008)028) and the comments by Mr Sanchez Navarro (CDL-EL(2008)010 and 023) on the draft laws on referendums in Ukraine (CDL-EL(2008)009 and 025). The rapporteurs shared the opinion that both draft laws addressed the main and necessary issues in an appropriate way that could serve as a legal basis for organising a referendum, however, both texts were too detailed and sometimes with unnecessary repetitions and even contradictions. In his comments, Mr Sanchez Navarro pointed out that there were differences in terminology used in different parts of the texts which could lead to ambiguous interpretation of certain parts of both drafts.

Mr Kliuchkovskiy thanked the rapporteurs for their comments on both drafts. He explained that the Constitution of Ukraine was not specific as to the procedure to follow for the organisation of referendums. In his opinion, laws had to be detailed in order to make clear not only the rights of citizens participating in or initiating a referendum, but also the responsibilities and powers of different state bodies. Mr Kliuchkovskiy pointed out that the current Law on referendums had been drafted more than fifteen years ago, even before the adoption of the Constitution of Ukraine. Since the issue of amending the text of the latter was on the agenda, new legislation on referendums had to be adopted as soon as possible.

Mr Holovaty expressed his concern that the examined drafts were introducing provisions that were not foreseen by the Constitution of Ukraine and proposed to amend the comments with additional paragraphs that would address this issue. Mr Paczolay agreed with this remark and suggested that the comments be completed with cross-references to the Venice Commission's Opinion on the Constitutional reform.

The Commission endorsed the individual comments of Messrs Paczolay and Sanchez Navarro (CDL-EL(2008)010, 023 and 028) and requested the Secretariat to make the necessary modifications to the text as suggested during the discussion.

14. Other constitutional developments

- *France*

Following up to Mr Colliard's presentation during the last Plenary Session on other aspects of the recent constitutional reform in France, Mr Dutheillet de Lamothe informed the Commission about the reform of France's Constitutional Council. Prior to the reform, the Constitutional Council only had *a priori* and abstract jurisdiction. On the basis of an appeal by State bodies and a parliamentary minority, it decided on the constitutionality of draft laws after their adoption by Parliament, but prior to their enactment by the President of the Republic. The major power of the opposition was the appeal to the Council by 60 members of Parliament. The reform added an *a posteriori* and concrete control by which ordinary courts can now appeal to the Council to request the annulment of a law already in force, which they have to apply in a given case. This appeal is similar to the Italian system's constitutional review. However, safeguards were built in to avoid overloading the Constitutional Council. Lower courts may bring a case only if (a) the constitutional question is relevant to the case before them, (b) the issue has not already been decided by the Council, and (c) the issue is not manifestly ill-founded. In addition, lower courts have to send their request via their respective highest court, i.e. the Court of Cassation in civil and penal matters and the State Council for administrative cases. These courts have to decide again whether the constitutional issue was 'serious' and only pass it on to the Constitutional Council if it is. The filtering process provided by the two highest courts is an expression of the delicate balance between the Council and these courts, which *de facto* also became constitutional courts, since they evaluate the cases' seriousness. The success of the reform will very much depend on an effective dialogue between the Constitutional Council and the ordinary courts.

This reform did away with the 'myth' of the sovereignty of the law. In the past, ordinary courts – first the Court of Cassation, later the State Council – already exercised a control of the conformity of the law with the ECHR, but now the Constitutional Council may annul unconstitutional laws with general effect.

The Council will have to ensure a public and adversarial procedure in the concrete review cases in order to take Article 6 ECHR into account. To that end, an organic law that will transpose the reform will be adopted in the first half of 2009. In addition, since the Council's workload will increase, it will recruit more lawyers.

Mr Dutheillet de Lamothe explained that the Plenary of Parliament would now hold discussions based on the Law as amended by the parliamentary committee and not on the basis of the original governmental proposal, as was the case before the reform.

- *"L'ex-République yougoslave de Macédoine"*

Mme Siljanovska-Davkova soulève le problème lié à l'exigence d'une participation de 50 % du corps électoral lors des élections présidentielles, qu'il conviendrait pour le moins de réduire, voire de préférence d'abroger, selon les recommandations des organisations internationales. Vu la proximité des élections présidentielles (mars 2009), la question d'un amendement constitutionnel sur cette question n'est pas à l'ordre du jour.

15. Constitutional developments in observer States

No comments were made.

16. Legislative initiative

Mr Bartole recalled that this report had already been submitted to the Plenary Session in October. It was a descriptive report of a comparative nature on the subjects and modalities of exercise of the right to initiate legislation. It also contained some analysis of recurrent features and recent trends in this area.

The right of legislative initiative was linked to the principle of separation of powers. While Parliament was the primary holder of this right, the executive also held it in several countries. In particular, the report addressed the case in which the right to initiate legislation was vested at the same time in the Government and in the President. This was more frequent in presidential systems, but it was only appropriate in systems where the President was not meant to be a neutral, *super partes* institution. As regards the judiciary, it was rarely granted the right to initiate legislation, and, in the Venice Commission's opinion, rightly so.

These issues, as well as the extent of limitation of the right of legislative initiative on account of membership in the EU, were discussed by the members of the Venice Commission, and as a result certain amendments to the text of the draft report were agreed upon.

The Commission adopted the report on legislative initiative (CDL-AD(2008)035).

17. Code of good practice for Political Parties

Mr Van den Brande informed the Commission that the draft Code of Good Practice for Political Parties (CDL-EL(2008)020 rev.) had been discussed and adopted during the October meeting of the Council for Democratic Elections. The initial text proposed by the rapporteurs Messrs Colliard and Closa Montero had been completed on the basis of contributions from the members of the Council. In his opinion, the text was very useful and he invited the Commission to adopt it during the current Plenary Session and to consider the explanatory memorandum to this text in March 2009.

Mr Closa Montero presented the Code of Good Practice for Political Parties. He underlined that the text was addressed to political parties and did not contain recommendations to the national authorities. The Code was an open document, which established a list of best practices to follow; in the future the Commission might consider it to be useful in its work on different opinions and studies. Mr Closa pointed out that the Code had already been used during the work on the draft Opinion on amendments to the Law on political parties of Bulgaria and for the preparation of a study on the imperative mandate.

During the discussion that followed the presentation of the Opinion, it was suggested that some additional references to the previous documents of the Venice Commission on political parties be included, notably, the 1999 text on prohibition of political parties and analogous measures. The Commission decided that detailed proposals made by some members to elaborate in a more detailed way paragraphs on gender equality, on responsibilities of party members elected to representative bodies and membership of non-nationals will be taken into account during the work on documents of the Commission which will be more focussed on these concrete issues.

The Commission adopted the Code of Good Practice for Political Parties (CDL-AD(2009)002).

18. Quorums et autres aspects des systèmes électoraux restreignant l'accès au Parlement

La Commission est invitée à examiner, en vue de son adoption, le projet de rapport sur les quorums et autres aspects des systèmes électoraux restreignant l'accès au Parlement préparé par M. Jaklic (CDL-EL(2008)018rev).

Cette question est traitée à la demande du Comité consultatif du Forum pour l'avenir de la démocratie, qui, suite aux conclusions du Forum de 2007, a souhaité un examen plus approfondi de la question. M. Jaklic a préparé un rapport, qui ne concerne pas seulement les quorums, mais aussi les autres aspects des systèmes électoraux qui restreignent l'accès au Parlement (taille des circonscriptions et systèmes majoritaires, notamment).

La Commission adopte le rapport sur les quorums et autres aspects des systèmes électoraux restreignant l'accès au Parlement (CDL-AD(2008)037).

Le Conseil des élections démocratiques traitera l'après-midi du 13 décembre des suites possibles à ce rapport. Cela pourrait consister en deux étapes : un examen plus détaillé des législations nationales, quant à leur caractère exclusif ou inclusif, puis des recommandations.

19. Rapport de la réunion du Conseil des élections démocratiques (16 octobre 2008)

M. van den Brande, président du Conseil des élections démocratiques, présente le rapport. Le Conseil, lors de sa dernière réunion, a en particulier travaillé sur les développements du droit électoral en Arménie, en Géorgie et en Moldova. Il a eu un échange de vues avec les représentants de l'Institut fédéral électoral mexicain sur le mandat impératif et sur le statut international des observateurs d'élections. Des projets de rapports sur ces thèmes pourraient être présentés à la session de mars.

En l'absence des rapporteurs, M. Garrone présente le projet d'avis conjoint de la Commission de Venise et de l'OSCE/BIDDH sur le Code électoral de la Géorgie, révisé jusqu'au 10 juillet 2008 (CDL(2008)119; cf. CDL-EL(2008)016). Le projet d'avis, élaboré sur la base des commentaires de M. Jaklic (membre de la Commission, Slovénie), de Mme Maria Teresa Mauro (experte de la Commission) et de Mme Marla Morry (experte de l'OSCE/BIDDH) fait suite à l'avis sur le Code tel qu'amendé au 24 juillet 2006 (CDL-AD(2006)037) et aux élections présidentielles et parlementaires de janvier et mai 2008. Plusieurs améliorations ont été apportées au code électoral mais un certain nombre de recommandations passées n'ont pas été prises en compte dans la dernière révision du code. Certaines dispositions du code sont en outre imprécises, notamment concernant le nombre d'électeurs par bureaux de vote. De plus, les fonctionnaires impliqués en politique tendent à confondre leurs activités professionnelles avec leurs activités électorales ; les ressources administratives tendent à être utilisées à des fins électorales ; l'accès aux médias est également un point problématique. Plus généralement, il faut globalement améliorer la confiance du public dans ce texte.

Le projet d'avis a déjà été transmis aux autorités.

La Commission adopte l'avis conjoint de la Commission de Venise et de l'OSCE/BIDDH sur le Code électoral de la Géorgie, révisé jusqu'au 10 juillet 2008 (CDL-AD(2009)001).

M. Machavariani, vice-président du Parlement de la Géorgie, indique qu'un groupe de travail spécial, dirigé par l'OSCE et le Conseil de l'Europe, travaillera à la préparation d'un nouveau code électoral. Ce groupe de travail comprendra notamment des représentants de partis

politiques et d'ONG. Il devrait terminer ses travaux d'ici juin 2009. Le projet sera alors soumis pour avis à la Commission de Venise.

20. Report of the meeting of the Sub-Commission on the Judiciary (11 December 2008)

Ms Flanagan informed the participants that the Sub-Commission had examined comments on the two aspects of the study, judges (Nussberger, Zorkin) and prosecutors (Hamilton, Sorensen, Suchocka). The issues discussed in the field of judges were the right to a lawful judge and whether there should be a predetermined system for the attribution of cases to judges. In such a system, the specialisation of judges in specific areas would have to be taken into account. It is important that the reasons for any exceptions are provided for by law and announced publicly for individual cases.

Other issues discussed included non-monetary elements of the remuneration of judges, which bore the danger of abuse, the reduction of the judges' salaries, the independence of the budget of the courts and the evaluation of judges.

Ms Laffranque, President of the Consultative Council of European Judges (CCJE), had informed the Sub-Commission that the CCJE and the Consultative Council of European Prosecutors (CCPE) will adopt a joint opinion on the relations between judges and prosecutors. Mr Desch, representing the European Committee on Legal Co-operation (CDCJ), pointed out that his Committee had been mandated by the Committee of Ministers of the Council of Europe to revise Recommendation (1994) 12 on the Independence of the Judiciary, which was deemed to be outdated.

In the presentation of his comments on prosecutors, Mr Sorensen favoured the identification of guarantees against undue influence in individual matters rather than the outright independence of prosecutors. Mr Hamilton pointed out that there was a general tendency to endow the prosecution service with independence. It was, however, necessary to distinguish systems applying the legality from those using the opportunity principle. In countries applying the legality principle, the question of independence was less crucial. In Eastern Europe, the problem often was that there were too wide powers unrelated to the prosecution of criminal cases, inherited from the Soviet system.

The Sub-Commission decided to prepare a draft report on the independence of judges with a view of adopting the report at the March Plenary Session. The section dealing with prosecutors will be dealt with at a later session on the basis of the input from the CCJE and the CCPE.

21. Other business

Mr Helgesen said that the Venice Commission had consolidated its position even further during the course of this year and that he was informed that the Commission was mentioned on a regular basis in national discussions in governments and parliaments. He reminded the Venice Commission that the principle of the rule of law was threatened in the "war on terror". For this reason, the Venice Commission will be dealing with the question of the conformity between, on the one hand, European legislation dealing with acts and the threat of terrorism and, on the other hand, human rights. He reminded everyone that times of crisis are not an excuse to not apply human rights, on the contrary, they need to be reinforced and he referred to the US case of Boumediene et al. v. Bush, President of the United States, et al. (12 June 2008), where the Supreme Court held "*Our opinion does not undermine the Executive's powers as Commander in Chief. On the contrary, the exercise of those powers is vindicated, not eroded, when confirmed by the Judicial Branch. Within the Constitution's separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person. …. Liberty and security can*

be reconciled; and in our system they are reconciled within the framework of the law." (see p.69 of the judgment, 553 U.S._(228)).

22. Dates of the next sessions

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 Council for Democratic Elections will meet on Saturday 14 March in the afternoon.

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AUSTRIA/AUTRICHE	M. Christoph GRABENWARTER
AZERBAIJAN/AZERBAIDJAN	Mr Lätif HUSEYNOV
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CHILE	Mr José Luis CEA EGANA
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ESTONIA/ESTONIE	Mr Oliver KASK
FINLAND/FINLANDE	Mr Kaarlo TUORI
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GREECE/GRECE	Ms Kalliopi KOUFA
HUNGARY/HONGRIE	Mr Peter PACZOLAY Mr Laszlo TROCSANYI
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