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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**73<sup>rd</sup> PLENARY SESSION**

**(Venice, Scuola Grande di San Giovanni Evangelista)**  
**Friday, 14 December (11.30 a.m) –**  
**Saturday, 15 December 2007 (1.00 p.m.)**

**RAPPORT DE SESSION**  
**MEETING REPORT**

**TABLE OF CONTENTS/TABLE DES MATIERES**

1. Adoption of the Agenda .....	3
2. Communication by the Secretariat .....	3
3. Election of the President .....	3
4. Co-operation with the Committee of Ministers .....	3
5. Co-operation with the Parliamentary Assembly .....	3
6. Rapport de la réunion du Conseil des élections démocratiques (13 décembre 2007) .....	4
7. Co-operation with the Congress of local and regional authorities of the Council of Europe	5
8. Follow-up to earlier Venice Commission opinions.....	5
- <i>comments on the draft opinion of the Consultative Council of European Judges on</i>	
<i>judicial councils (CDL-AD(2007)032);</i> .....	5
- <i>opinion on legislative provisions concerning early elections in Ukraine (CDL-</i>	
<i>AD(2007)021);</i> .....	6
- <i>amicus curiae opinion on the law on legalisation, urban planning and integration of</i>	
<i>unauthorised buildings of the Republic of Albania (CDL-AD(2007)029);</i> .....	6
- <i>amicus curiae comments on the conformity of certain provisions of the Statute of the</i>	
<i>International Criminal Court with the Constitution of Moldova (CDL-AD(2007)038).</i> .....	6
9. Albania.....	7
10. Armenia .....	7
11. Bulgaria .....	7
12. Kyrgyzstan.....	7
13. Moldova .....	8
14. Azerbaijan.....	8
15. Montenegro .....	9
- <i>New constitution</i> .....	9
- <i>Draft Law on the Judicial Council</i> .....	11
16. Serbie .....	11
17. Etude sur le contrôle démocratique des forces armées .....	12
18. Constitutional Justice in Latin America.....	13
19. Autres développements constitutionnels.....	14
- <i>Israël</i> .....	14
- <i>Mexique</i> .....	14
- <i>Corée du Sud</i> .....	14
20. Forum for the Future of Democracy .....	15
21. Date of the next sessions.....	15
LIST OF PARTICIPANTS/LISTE DES PARTICIPANTS.....	16
OBSERVERS/OBSERVATEURS.....	17
SECRETARIAT .....	19

## **1. Adoption of the Agenda**

The agenda was adopted as it appears in document CDL-OJ(2007)004ann.

## **2. Communication by the Secretariat**

The Commission paid tribute to the victims of the terrorist attack on Algeria of 11 December 2007.

Mr Buquicchio informed the Commission about Israel's request to become a Member of the Venice Commission. Colombia and Tunisia have expressed an interest to co-operate with the Commission and to become members.

The Commission was informed about the joint meeting between its Enlarged Bureau and the Committee of Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe on 14 December 2007.

## **3. Election of the President**

The Commission unanimously elected Mr Jan Helgesen as its President for a term of 2 years from the present session.

## **4. Co-operation with the Committee of Ministers**

The Commission held an exchange of views with Ambassador Christian Oldenburg, Permanent Representative of Denmark to the Council of Europe, with Ambassador Arif Mammadov, Permanent Representative of Azerbaijan to the Council of Europe and with Ambassador Eleanor Fuller, Permanent Representative of the United Kingdom to the Council of Europe.

Ambassador Oldenburg praised the role played by the Commission in helping different countries to reform their national constitutions and legislation. Since the Commission is an enlarged agreement its projects also cover a number of non-European countries which contributes to the promotion of democratic values of the Council of Europe in other parts of the world.

Ambassador Mammadov reminded the participants that his authorities had long-standing co-operation with the Commission and expressed the hope that substantial progress would be reached on a number of projects of co-operation between his country and the Venice Commission in 2008.

Ambassador Fuller pointed out a number of new challenges faced by European countries, notably the terrorist threat. Some States try to face this problem through measures that sometimes were incompatible with the Council of Europe human rights standards. She was of the opinion that it was important to strike the right balance between the growing security concerns and the necessity to protect fundamental rights and freedoms. Ambassador Fuller also congratulated the Commission for its role in sharing the Council of Europe's values and experience with non-European countries.

## **5. Co-operation with the Parliamentary Assembly**

Mr Erik Jurgens and Mr Abdülkadir Ateş, Members of the Parliamentary Assembly of the Council of Europe, referred to the first joint meeting between the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe and the enlarged bureau of the Venice Commission which took place on 14 December 2007. Mr Jurgens

stressed that the first joint meeting had been a success and that this form of exchange of views should be continued in the future. Mr Ateş proposed increasing the level of complementarity between the Commission and the different Committees of the Assembly. He also proposed considering the possibility of closer co-operation on such issues as distance voting, political parties, e-democracy and secrecy of vote procedures.

Mr Buquicchio recalled that the Commission was putting together 'case law' on concrete subjects in the form of vademecums. He praised the co-operation between the Commission and the Parliamentary Assembly and also invited the Committee of Ministers of the Council of Europe to co-operate on a more regular basis.

## **6. Rapport de la réunion du Conseil des élections démocratiques (13 décembre 2007)**

M. van den Brande, président du Conseil des élections démocratiques, informe la Commission des résultats et des conclusions de la réunion du 13 décembre 2007. Il confirme l'importance de la coopération en matière électorale entre la Commission de Venise d'une part et les organes politiques du Conseil de l'Europe, tels que le Comité des Ministres et l'Assemblée parlementaire.

M. Kask présente le projet d'avis conjoint de la Commission de Venise et de l'OSCE/BIDDH sur le code électoral de la Moldova dans la version en vigueur le 27 mars 2007 (CDL-EL(2007)019). Si des améliorations considérables ont été apportées, un certain nombre de points méritent d'être revus, concernant notamment les quorums (y compris le quorum de participation), la possibilité de renvoyer les membres des commissions électorales, les listes électorales, la campagne électorale, le secret du vote. M. Esanu indique que les autorités moldaves voudraient modifier le code électoral d'ici à la fin de l'année et qu'il est urgent d'envoyer l'avis avant cette date.

**La Commission adopte l'avis conjoint de la Commission de Venise et de l'OSCE/BIDDH sur le code électoral de la Moldova dans la version en vigueur le 27 mars 2007 (CDL-AD(2007)040).**

M. Closa Montero présente le projet d'avis sur le droit électoral du Royaume-Uni, élaboré à la demande de l'Assemblée parlementaire. Il indique que l'Assemblée a posé trois questions, relatives à la conformité avec les normes du Conseil de l'Europe du système d'inscription des électeurs, des modalités du vote par correspondance et des particularités en la matière applicables en Irlande du Nord. Il signale qu'une délégation de la Commission a rencontré le 10 décembre la Commission électorale, le directeur général des élections d'Irlande du Nord, ainsi que la ministre B. Prentice, notamment. Même si le système fonctionne bien dans son ensemble, des améliorations sont souhaitables en ce qui concerne en particulier l'enregistrement personnel des électeurs plutôt que l'enregistrement par ménage et le contrôle de l'identité des électeurs s'enregistrant ou votant par correspondance. Le droit applicable en Irlande du Nord, loin de poser un problème, est davantage conforme aux normes européennes. M. Jowell considère que la démocratie est toujours perfectible, mais certaines particularités du Royaume-Uni s'expliquent par le contexte spécifique de ce pays.

**La Commission adopte l'avis sur le droit électoral du Royaume-Uni et charge les rapporteurs, en coopération avec le secrétariat, d'y apporter le cas échéant des amendements avant de le transmettre à l'Assemblée parlementaire (CDL-AD(2007)046).**

M. Kask présente le questionnaire sur l'annulation des résultats des élections, qui comprend trois parties relatives à la base légale pour l'annulation des résultats des élections, à la procédure et à la jurisprudence. Il servira notamment aux participants au séminaire UniDem sur ce thème, organisé à Skopje les 25-26 avril 2008 dans le cadre de la Présidence slovaque du Comité des Ministres.

**La Commission adopte le questionnaire sur l'annulation des résultats des élections (CDL-EL(2007)043rev).**

M. van den Brande résume les autres points traités par le Conseil des élections démocratiques. En particulier,

- le Conseil des élections démocratiques poursuit son activité relative au Code de bonne conduite en matière de partis politiques; un texte insistant notamment sur la démocratie interne des partis sera présenté à une prochaine session;
- concernant la situation des droits de l'homme et de la démocratie en Europe, le Conseil des élections démocratiques propose à la Commission de traiter du mandat impératif, de la bonne gouvernance, du vote à distance et des amendements à la Constitution.;
- l'Assemblée parlementaire a adopté le Code de bonne conduite en matière référendaire (CDL-AD(2007)008);
- la coopération avec l'OSCE/BIDDH est toujours fructueuse et se poursuivra de manière systématique dans la rédaction des avis.

**7. Co-operation with the Congress of local and regional authorities of the Council of Europe**

The Commission held an exchange of views with Mr Keith Whitmore, representative of the Congress of local and regional authorities of the Council of Europe. Mr Whitmore informed the Commission about the conference on second chambers which would be organised in co-operation with the French Senate in 2008, on the European local authorities' week planned for next year and on the study on powers of local authorities prepared by the Congress. He expressed his hope that the Commission would co-operate with the Congress on these issues.

**8. Follow-up to earlier Venice Commission opinions**

The Commission was informed on follow-up to the:

- *comments on the draft opinion of the Consultative Council of European Judges on judicial councils (CDL-AD(2007)032);*

Mr Markert informed the Commission that the Consultative Council of European Judges (CCJE) in its Opinion No. 10 on the Council for the Judiciary at the service of society followed only partly the recommendations of the Venice Commission. As suggested by the Commission, the Opinion now accepts that in parliamentary systems the Head of State may chair the judicial council and that there should be an appeal to a court against decisions of the judicial council. The administrative role of the Council is also reduced. As regards its composition, according to the Opinion a substantial majority of the members should be judges (and such councils may even be composed exclusively of judges) while the Venice Commission considers a substantial element or a majority to be sufficient and insists on a pluralistic composition. The Opinion also does not accept the membership of the Minister of Justice. While the Venice Commission favours a non-judicial member as the chair, the CCJE requires in most cases a judge to be the chair.

In the ensuing discussion several members underlined the need for flexibility in this area and expressed reluctance to accept the stricter requirements advocated by the CCJE.

- *opinion on legislative provisions concerning early elections in Ukraine (CDL-AD(2007)021);*

The Secretariat recalled that the Commission had adopted during its June 2007 session an opinion on the provisions concerning early elections in Ukraine. The opinion provided that the existing legislation was sufficient for carrying out early elections if the Central Electoral Commission took measures for its implementation; that the implementation of the Law on the State register of voters had to follow the time frame provided in its provisions; that the judiciary should deal with electoral complaints and appeals in a timely way.

Unfortunately some of the recommendations of the opinion were not implemented by the authorities. The adoption of the amendments to the election law in June 2007 failed to remedy some of the existing problems and created some additional ones. The introduction of the new procedure for registration of citizens returning to Ukraine several days before the election day prevented some citizens from exercising their right to vote. This addition to the election law was strongly criticised by the report of the international observation mission.

Several members of the Commission expressed the view that the authorities of Ukraine should review the existing legislation in the light of the recommendations of the Venice Commission's opinions and its Code of good practice in electoral matters.

- *amicus curiae opinion on the law on legalisation, urban planning and integration of unauthorised buildings of the Republic of Albania (CDL-AD(2007)029);*

Mr Bianku informed the Commission that the Constitutional Court of Albania took its decision in October and accepted the constitutionality of the law. The arguments used were in line with the Venice Commission opinion although less developed. Moreover, the concern expressed by the Commission as to a lack of coordination between procedures for legalising unauthorised buildings and procedures for compensating former owners had been addressed by the decision of the two competent commissions to work together.

- *amicus curiae comments on the conformity of certain provisions of the Statute of the International Criminal Court with the Constitution of Moldova (CDL-AD(2007)038).*

The Secretariat recalled that in September 2007 the Chairman of the Constitutional Court of Moldova had sought the assistance of the Venice Commission concerning the compatibility of the Statute of the International Criminal Court with the Constitution of Moldova as concerned the immunity of elected state officials and the prohibition to extradite or expel Moldovan citizens. Moldova had signed the Rome Statute in September 2000; in July 2007 the Moldovan government had raised these questions before the Constitutional Court. The Commission had endorsed the comments of Messrs Bianku, Kress and Paczolay at its 72<sup>nd</sup> Session. They had concluded that it was possible to interpret the relevant provisions of the Rome Statute on the obligation to co-operate in a manner compatible with the Moldovan Constitution; as regarded immunity, this was also possible, although according to one of them it would have been preferable to amend the Constitution.

By an opinion of 2 October 2007, published in the Official Gazette on 12 October, the Moldovan Constitutional Court held that there was no need to amend the Constitution in order to be able to ratify the Rome Statute.

## 9. Albania

The Commission examined with a view to adoption the draft opinion ([CDL\(2007\)109](#)) on the draft law on “freedom of religion, religious organisations and mutual relations with the State” of Albania ([CDL\(2007\)106](#)) drawn up on the basis of comments by Ms Nussberger ([CDL\(2007\)108](#)) and Mr Christians ([CDL\(2007\)107](#)).

Ms Nussberger explained that the draft law aimed at regulating human rights matters linked to freedom of religion as well as questions relating to the status of religious organisations. The general aims were to be welcomed; the draft however required certain improvements. In particular, it would be necessary to guarantee explicitly the right to beliefs, including non-religious ones, and the rights of non-registered organisations. The legal remedies required clarifications, and the reasons for dissolving a religious organisation needed to be made dependent on the principle of proportionality. In addition, the law would need to include rules on the composition of the Committee on Cults, which had a crucial role in the implementation of the law.

**The Commission adopted the opinion on the draft law on freedom of religion, religious organisations and mutual relations with the State of Albania (CDL-AD(2007)41).**

## 10. Armenia

**The Commission endorsed the comments on the compatibility of Article 301 of the Armenian Criminal Code with European standards (CDL-AD(2007)43) drawn up by Mr Hamilton.**

## 11. Bulgaria

Mr Hamilton informed the Commission that he had visited Bulgaria on 11 to 12 November together with Mr Neppi Modona and Mr Dürr to exchange views with the Bulgarian authorities in order to prepare the draft Opinion on the Constitution. All interlocutors in Bulgaria had expressed surprise that at this late stage, after accession to the Council of Europe and the European Union, the full text of the Constitution and not only the latest amendments was the subject of the scrutiny of the Commission. The delegation replied that this was the mandate received from the Parliamentary Assembly. The visit had enabled a number of misunderstandings due to the translation of the Constitution to be clarified and the interpretation of the Constitution by the Constitutional Court to be taken into account. The draft Opinion would be submitted for adoption at the March session.

Mr Neppi Modona added that all interlocutors affirmed that at present the judicial system worked in perfect harmony without political interference. The constitutional rules had, however, to ensure the independent functioning of the judiciary including during less favourable periods.

## 12. Kyrgyzstan

Introducing the draft Opinion on behalf of the rapporteurs, Ms Nussberger recalled the unusual constitutional situation in the country. In September 2007, the Constitutional Court had declared two versions of the Constitution, adopted in November and December 2006 respectively, to be invalid due to procedural violations. Thereupon, the President had submitted a new draft Constitution to referendum and this draft was indeed approved by the people in October. The Speaker of Parliament requested the Commission’s opinion on the situation in his country. The new Constitution had some positive features in the area of human rights, including an implicit

abolition of the death penalty. However, there was a striking concentration of powers in the hands of the President and there were no effective checks and balances to his power. It was practically impossible to impeach the President and even the ban on re-electing him or her more than once could easily be circumvented by a constitutional amendment.

Messrs Fogelklou and Tanchev added that the new Constitution was a real step backwards to a more authoritarian system.

In the ensuing discussion it was underlined that it was highly unusual for a constitutional court to declare a Constitution invalid on the basis of a previous constitution and that, while a presidential system of government was compatible with European standards, there had to be checks and balances.

**The Commission adopted the Opinion on the constitutional situation in Kyrgyzstan with some amendments (CDL-AD(2007)045).**

### 13. Moldova

Mr Tuori informed the Commission about the request by the Moldovan parliament to assess the draft law on conflict of interest. He underlined that the subject was a complex one, for which very few standards had been developed. The draft under consideration presented several shortcomings, in that it did not contain sufficient distinctions in the substantive, personal-related and temporal dimensions. Yet, specific rules were needed for general incompatibilities as opposed to case-by-case ones; for different categories of persons, for example elected officials as opposed to civil servants; for preventive measures, as opposed to specific incompatibilities in a case under consideration, or to possible sanctions. Mr Kask added that the general provision of nullity of any act taken in violation of the law would undermine legal certainty.

In its conclusions, the opinion contained several suggestions for improving the draft law.

**The Commission adopted the opinion on the draft law on conflict of interests in Moldova (CDL-AD(2007)44).**

### 14. Azerbaijan

The Commission held an exchange of views with Messrs Fuad Alesgerov and Chingiz Askarov, Administration of the President of Azerbaijan, and examined with a view to adoption the draft opinion ([CDL\(2007\)112](#)) on the draft amendments to the law on freedom of assembly of Azerbaijan ([CDL\(2007\)113](#)), drawn up on the basis of comments by Ms Flanagan and Mr Aurescu.

Mr Aurescu and Ms Flanagan recalled that the co-operation between the Azeri Presidential Administration and the Venice Commission on the amendments to the law on freedom of assembly of 1998 had started two years previously; an opinion on the law of 1998 had been adopted in October 2006, and three meetings had subsequently been held in December 2006, June 2007 and November 2007. OSCE and ODIHR had participated in these meetings. Thanks to a very fruitful co-operation, the amendments which were now under consideration represented a very significant improvement in respect to the law currently in force. The system of notification had gained flexibility; spontaneous assemblies and counter-assemblies were expressly possible; there was no longer blanket prohibition as to places or times for demonstrating. The principles of legality and proportionality were guaranteed. Only a few amendments were still regarded as necessary: street processions had to be excluded from the



list in Article 9; only “central” bodies of executive power were concerned by that same provision; an exhaustive list was also necessary in respect of the places for conducting state events.

If the amendments under consideration, including the above-mentioned outstanding improvements, were adopted by parliament, Azerbaijan would have a good law on freedom of assembly, in line with European standards. The rapporteurs commended the excellent co-operation with the Azeri authorities and with OSCE and ODIHR in this matter.

Implementation remained however a key factor for guaranteeing the right to freedom of assembly in Azerbaijan. The Council of Europe, OSCE and ODIHR would continue to pay attention to this matter.

Mr Alesgerov, Head of Department of Legislation and Legal Expertise of the Presidential Administration, thanked the Venice Commission for its assistance and underlined that the co-operation in this matter had been excellent. The amendments which were under consideration were the result of a dynamic process driven by the accession of Azerbaijan to the Council of Europe and by the case-law of the European Court of Human Rights. Several amendments were proposed; some were fundamental, and aimed at ensuring compatibility with European standards, while other were merely technical and clarified certain provisions. The new law would respect the principles of necessity and proportionality, allow for assemblies on private property, spontaneous assemblies and counter assemblies. Restrictions to the right to assembly in emergency situations would respect the procedure set forth in Article 15 of the European Convention on Human Rights. In his opinion, the proposals for amendments fully met European standards.

Mr Huseynov proposed certain amendments to the text of the opinion with a view to clarifying certain matters.

**The Commission adopted the opinion on the draft amendments to the law on freedom of assembly in Azerbaijan (CDL-AD(2007)042).**

## **15. Montenegro**

### *- New constitution*

Mr Tuori recalled that in June 2007 the Commission had adopted an interim opinion on a draft version of the constitution which had been received in April. In the meantime, the rapporteurs had received a new draft and had co-operated with the Montenegrin authorities through meetings and contacts. The new Constitution had been adopted on 19 October 2007. It reflected most of the recommendations which the Commission had previously made. Some issues, however, remained. This opinion related to the text of the constitution as adopted.

As regarded the first chapter, an important provision, Article 9, set out the supremacy and direct applicability of human rights treaties. This provision had special importance for the chapter on human rights. Indeed, the human rights provisions of the new constitution did not directly reflect the wording of the ECHR, which might cause problems of interpretation: the provision on international treaties would help to avoid such problems. In addition, a new general provision, article 24, set out that limitations of human rights needed to respect the principles of legality, legitimate aims and proportionality: this provision would help overcome certain discrepancies between the wording of the constitutional provisions and that of the ECHR.

The provisions on minority rights were very far-reaching. Mr Tuori recalled that, unlike the Constitution, the law on minority rights of Montenegro contained a citizen-based definition of "minority", which it would be appropriate to amend.

Concerning the state powers, the new constitution reflected the choice of a clearly parliamentary system, which was to be welcomed. Unnecessary conflicts of power between the President and the Prime Minister would be avoided. The definition of the powers of parliament, however, raised certain problems, notably in connection with the power of parliament to dismiss persons elected by it.

Civilian command over the Armed Forces, one of the accession commitments, was now guaranteed; regulation on ending the state of emergency was however lacking.

The constitutional law on implementation of the constitution raised two problems; first, it referred to laws and regulations of the State Union of Serbia and Montenegro remaining in force if the interests of Montenegro so required, which impinged on legal certainty. Secondly, the provision on retroactive application of human rights treaties was worded in an obscure manner. This provision, in the Commission's view, was to be interpreted in a manner consistent with the relevant commitment of Montenegro, that is to say that human rights treaties to which Montenegro had been a party as a federated republic of the State Union of Serbia and Montenegro, were considered to be applicable in Montenegro between the end of the State Union and 3 June 2006.

As concerned more specifically the provisions on the judiciary, Mr Neppi Modona explained that they reflected for the most part the Venice Commission's recommendations. In particular, it was to be commended that the appointment, career and dismissal of the judges were no more in the hands of the parliament, which had previously been a major issue of concern for the Council of Europe. The composition of the Judicial Council was now balanced.

Under the new Constitution, however, parliament had retained some control over the judiciary, notably through the election of the President of the Supreme Court, who also chaired the Judicial Council, and through the election and dismissal of all state prosecutors. These solutions were problematic. The rapporteurs understood that these solutions reflected the strong will of the Montenegrin authorities to ensure the accountability of the judiciary. It was hoped that the situation of the judiciary would improve in the coming years thanks to the new constitution, after which further reform towards full independence would be necessary. In the meantime, attention needed to be paid in the preparation of the law on the judicial council in order to avoid conflicts between state powers.

The provisions on the constitutional court did not reflect the Commission's earlier recommendations and were unsatisfactory.

In conclusion, the overall assessment of the new constitution of Montenegro was a positive one, but more attention was required by the Council of Europe as concerned the President of the Supreme Court, the State prosecution and the constitutional court. The rapporteurs commended the fruitful co-operation with the Montenegrin authorities.

The representative of the OSCE High Commissioner on National Minorities expressed the view that the provisions on minority rights of the new constitution deserved a generally positive assessment. The Commissioner was ready to assist the Montenegrin authorities in the preparation of the laws of implementation of the constitution, notably on minority rights and on citizenship.

The representative of OSCE/ODIHR also expressed her generally positive overall assessment of the new constitution and confirmed the availability of her office to assist the Montenegrin authorities in the implementation.

Mr Ranko Krivokapic, Speaker of the Parliament of Montenegro, expressed his gratitude to the Commission for the fruitful co-operation.

He considered that the adoption of the new constitution in parliament with a two-thirds majority had been a real political success, bearing in mind that there were 15 parties and 7 political clubs in Montenegro. It was important to avoid a too long interregnum between independence and the new constitution.

Montenegro had prepared this constitution in consultation with the civil society, notably as concerned minority rights, and in co-operation with international organisations; Montenegro would pursue this co-operation in relation to the due implementation of the Constitution.

As concerned the judiciary, Mr Krivokapic underlined that there existed no single model in Europe, and that it was essential in this field to take into account the specific national context. In Montenegro, all judges had been reappointed in 1992 by Milosevic, and the Montenegrin parliament had to be accountable for their work towards the Council of Europe and the Montenegrin society. Indeed, it was extremely important that the Montenegrin judiciary should gain public confidence.

The model proposed by the new constitution was not perfect, but it was felt to respond to the current needs of the country. Hopefully, it would enable the situation to be improved.

Mr Krivokapic reiterated the willingness of the Montenegrin authorities to pursue their co-operation with the international community.

**The Commission adopted the opinion on the new Constitution of Montenegro, subject to certain amendments (CDL-AD(2007)047).**

- *Draft Law on the Judicial Council*

Mr Neppi Modona informed the Commission that last week he had taken part together with Mr Markert in a meeting with the working group preparing the new law on the judicial council. The meeting, chaired by the Minister of Justice, had been very productive and the working group had accepted the main proposals of the delegation as regards amendments to the text. In particular, the articles on appointment and dismissal of the President of the Supreme Court, which were not in line with the Constitution and risked involving the council in political conflicts, would be deleted and the composition of the council modified to avoid under-representation of the lower level judges. Following a request by the Minister of Justice, he would send his written comments to the authorities before the end of the year.

**16. Serbia**

Mme Err informe la Commission qu'au cours de la Journée Internationale des Droits de l'homme en Serbie, le 3 décembre, de nombreuses ONG ont réclamé l'adoption d'une loi contre la discrimination en Serbie. L'intérêt sur le texte présenté à la Commission pour expertise est donc très actuel.

Mme Err présente à la Commission ses commentaires sur le projet de loi sur la prohibition de la discrimination. De manière générale le projet semble bien structuré, très détaillé et correspond a priori aux prescriptions internationales en la matière.

Parmi les points positifs on peut citer les causes de discriminations envisagées par la loi qui dépassent de loin la Directive de l'Union européenne en la matière, l'établissement d'une Commission pour la protection de l'égalité aux compétences très étendues ainsi que le principe du partage de la preuve.

Le projet contient cependant des points négatifs qui mériteraient d'être modifiés. Parmi les points négatifs on peut citer le champ d'application de la loi qui n'est pas bien précisé, la concomitance de procédures judiciaires et de procédures devant la Commission pour la protection de l'égalité, le nombre restreint des membres de la Commission au vu des compétences élargies de cette dernière, la procédure de nomination comme de remplacement des membres de la Commission qui ne garantit pas l'indispensable caractère indépendant d'une telle Commission dont par ailleurs l'indépendance financière n'est pas envisagée ni garantie par le texte. L'impossibilité d'octroyer des dommages et intérêts aux associations se portant partie civile est une disposition qui devrait être retirée.

M. Bianku rejoint pleinement les commentaires positifs et négatifs de Mme Err en y ajoutant quelques points relevés dans son analyse du texte. En premier lieu il appartiendra aux autorités serbes de s'assurer de la complémentarité et de la compatibilité du projet de loi avec les dispositions du code pénal et du code administratif. Le principe très important de proportionnalité dans le domaine de la discrimination devrait davantage être précisé. S'agissant de la Commission pour la protection de l'égalité, M. Bianku ajoute aux commentaires précédents que les délais prévus par la loi pour traiter des affaires semblent trop courts. Enfin s'agissant des discriminations graves, les sanctions prévues par la loi ne semblent pas assez lourdes et dissuasives.

<p><b>Le Secrétariat est chargé de rédiger en coopération avec les Rapporteurs un avis consolidé sur la base des commentaires individuels.</b></p>
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- *Développements constitutionnels au Kosovo*

M. Markert informe la Commission qu'il a participé, à l'invitation de l'Union européenne, à une conférence sur la préparation d'une Constitution pour le Kosovo qui s'est tenue à Mitrovica les 1 à 3 novembre. Le but de la Conférence était d'assurer que le Kosovo devrait être en mesure de se doter d'une nouvelle Constitution dans le délai très court prévu par la proposition de M. Ahtisaari (4 mois après la décision sur le statut). La Conférence était très positive. Les participants kosovars semblaient prêts à pleinement intégrer les éléments requis par la proposition de M. Ahtisaari afin d'assurer la protection de toutes les communautés au Kosovo et d'assurer leur participation aux décisions les concernant. Lors de la rédaction du chapitre sur les droits de l'homme, on s'inspirait des avis de la Commission de Venise relatifs à ce chapitre dans d'autres constitutions.

## **17. Etude sur le contrôle démocratique des forces armées**

M. Closa Montero présente à la Commission l'avancement des travaux sur le projet de rapport sur le contrôle démocratique des forces armées. L'approche et l'objectif de cette étude sont de faire un bilan des différentes formes de contrôle auquel peuvent être soumises en Europe les forces armées. Le titre « contrôle démocratique des forces armées » a été préféré au titre initial « contrôle civil des forces armées », le contrôle démocratique étant une notion plus large qui se réfère aux organes de l'état et aux valeurs

qui forment un état démocratique. Quelque soit les fonctions des forces armées envisagées, le contrôle démocratique de leurs actions est une pré-condition de toute démocratie véritable. L'étude se concentre sur trois domaines spécifiques du contrôle : elle énumère et décrit les organes qui contrôlent les forces armées, les actes des forces armées qui sont contrôlés et comment ce contrôle s'exerce et ce au niveau national et international. L'étude a permis notamment de constater l'importance du contexte historique de chaque Etat européen dans le traitement de cette question, des différents degrés de contrôle qui peuvent s'exercer au niveau national et du rôle des organisations internationales dans la fixation des normes de contrôle.

Dans ses conclusions l'étude recommandera que les règles constitutionnelles identifient les organes qui exercent le contrôle des forces armées. L'étude conclura également que l'organe de contrôle le plus important est le Parlement, et à cet égard accueille favorablement le rôle des Commissions parlementaires dans ce domaine. La dimension internationale de la question apparaîtra clairement dans les conclusions du rapport.

**Le Secrétariat fera circuler au sein des membres de la Commission le projet de rapport dans le courant du mois janvier. Les membres seront invités à vérifier les exactitudes des informations relatives à leur pays et à faire parvenir au Secrétariat leurs éventuelles rectifications au plus vite.**

## **18. Constitutional Justice in Latin America**

Mr Cea Egana paid tribute to the late Mr La Pergola for his role in promoting co-operation between the Commission and countries of Latin America and congratulated Mr Helgesen on his election as President of the Venice Commission. He informed the Commission about the project to study the situation of constitutional justice in Latin America. A number of countries on the continent were facing instability and their political institutions were not always ready to come up with acceptable solutions to the crisis. There was a strong tendency to change constitutional provisions often for achieving immediate political results, however in the long run such an attitude brought new problems and challenges and threatened democracy and human rights. Mr Cea Egana was of the opinion that the Commission should give its support and share its knowledge and experience in the framework of the proposed study on the operation of constitutional justice in times of political crisis. He proposed to examine the first draft of the report during the June session of the Commission.

M. Maus shared the opinion of Mr Cea Egaña and informed the Commission that the International Association of constitutional law was ready to participate in this initiative.

Mr Buquicchio assured Mr Cea Egaña that the project would get the Commission's full support. He reminded the participants that the role of constitutional justice was on the agenda of the Warsaw summit of the Council of Europe. He informed the Commission of the imminent co-operation agreement with the Conference of the Ibero-American courts. These closer ties with Latin America were to be welcomed as an additional tool of co-operation in the field of constitutional justice. Mr Buquicchio made reference to similar agreements with ACCPUF, the Southern African Chief Justices Commission and the Union of Arab Constitutional Courts and Councils. The world conference of constitutional courts which will take place in Cape Town in January 2009 will also deal with the issue of the efficiency of constitutional justice.

## 19. Autres développements constitutionnels

### - *Israël*

Mme Dorit Beinisch, Présidente de la Cour Suprême d'Israël présente à la Commission le système juridique dans l'Etat d'Israël, et plus particulièrement le rôle de la Cour suprême dans l'établissement d'un Etat fondé sur les valeurs démocratiques, l'état de droit et la protection des droits de l'Homme.

Le régime juridique de l'Etat Israël s'est inspiré du modèle britannique, il n'y a donc pas de constitution écrite mais un «common law» qui résulte non pas de textes mais de la pratique des juridictions. La Cour Suprême est une cour d'appel, elle fait office de juridiction à compétence constitutionnelle. A cet égard la Cour Suprême pourra contrôler la validité d'actes du gouvernement, de la Knesset (parlement) comme les actes des forces armées. Les citoyens peuvent également saisir directement la Cour Suprême. Les compétences de la Cour suprême sont très larges et la majeure partie de ses décisions ont trait à la vérification du respect des droits fondamentaux dans les mesures de sécurité prises dans la lutte contre le terrorisme. Dans l'évaluation de la proportionnalité des atteintes aux droits fondamentaux aux nécessités de sécurité la Cour s'appuie largement sur le droit comparé et sur les conventions et jurisprudence internationales.

M. Jowell salue le travail remarquable de la Cour suprême d'Israël dans l'identification et la défense des principes fondamentaux; il souligne que la jurisprudence de la Cour a engendré une culture d'obligation de justification du gouvernement, qui doit de ce fait systématiquement faire la preuve du caractère proportionné de ses actions. Selon ses dernières informations, la Cour suprême serait face à une menace de limitation de son indépendance par le biais de la désignation des juges.

Mme Beinisch à cet égard informe la Commission du projet du Premier ministre de modifier la composition de la Commission qui désigne les juges et de contester la jurisprudence du « tout est justiciable » élaborée par la Cour suprême.

Le Président assure Mme Beinisch du soutien de la Commission de Venise dont la position vis-à-vis de l'indépendance de la juridiction est très claire.

### - *Mexique*

M. Gonzalez Oropeza Justice du Tribunal électoral de la Fédération informe la Commission qu'au Mexique, la question du contentieux électoral a pris une importance équivalente à celle de l'administration des élections. Le Tribunal électoral exerce aussi les attributions d'une Cour constitutionnelle dans ce domaine, et une réforme constitutionnelle a justement accru ses compétences.

M. Nguyen, du programme des Nations Unies pour le développement (PNUD), indique que depuis une quinzaine d'années, le PNUD et le secrétariat des Nations Unies à New York ont coopéré en matière électorale au Mexique. Le PNUD projette de créer un centre international de formation des administrateurs d'élections au Mexique. Les normes établies par la Commission de Venise, tels que les codes de bonne conduite en matière électorale et référendaire, lui sont très utiles.

### - *Corée du Sud*

M. Lee informe la Commission de la Conférence des juridictions constitutionnelles qui s'est tenue en Octobre 2007 à Séoul. Dix pays asiatiques ont été représentés et ont discuté de l'établissement d'une Association des Cour constitutions asiatiques qui constituerait un

organe permanent en Asie à l'image de la Conférence européenne des Cours constitutionnelles. Un Mémoire d'accord a été élaboré afin de créer un Comité préparatoire qui bénéficiera du soutien de la Fondation Adenauer. La Cour constitutionnelle a d'ores et déjà nommé un membre pour la première réunion du Comité préparatoire qui aura lieu en mars 2009.

## **20. Forum for the Future of Democracy**

Mr Paczolay informed the Commission that the third Forum for the Future of Democracy on "Power and Empowerment, the interdependence of democracy and human rights" had taken place in Stockholm and Sigtuna (Sweden) on 13-15 June 2007. He and four other members of the Commission (Ms Err, Mr Nick, Mr Vogel and Mr Cameron) had participated in this Forum. The conclusions were formulated by the General Rapporteurs; several of them calling for follow-up action by the Venice Commission, notably for establishing guidelines on the elimination of democratic deficits in the functioning of democratic institutions. This recommendation corresponds to that made by the Parliamentary Assembly in its Recommendation 1791(2007) on the "State of Human Rights and Democracy in Europe", which is currently the object of reflection by the Commission (see item 6).

## **21. Date of the next sessions**

The Commission confirms the date of its 74<sup>th</sup> Plenary Session: 14-15 March 2008.

In addition, the Commission took note of the schedule of sessions for 2008 as follows:

75 <sup>th</sup> Plenary Session	13-14 June
76 <sup>th</sup> Plenary Session	17-18 October
77 <sup>th</sup> Plenary Session	12-13 December

Sub-Commission meetings as well as meetings of the Council for Democratic Elections will take place as usual on the day before the Plenary Sessions.

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