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COMMISSION EUROPEENNE POUR LA DEMOCRATIE PAR LE DROIT
(COMMISSION DE VENISE)

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

80^e SESSION PLÉNIÈRE
80th PLENARY SESSION
Venise, Scuola Grande di San Giovanni Evangelista)
vendredi, 9 octobre (9h30) –
samedi, 10 octobre 2009 (13h00)
(Venice, Scuola Grande di San Giovanni Evangelista)
Friday, 9 October (9.30 a.m) –
Saturday, 10 October 2009 (1.00 p.m.)

RAPPORT DE SESSION

SESSION REPORT

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1. Adoption de l'ordre du jour

L'ordre du jour est adopté sans modification.

2. Communication du Secrétariat

La Commission de Venise observe une minute de silence à la mémoire de M. Luchaire, membre de la Commission de Venise au titre de l'Andorre (2000 à 2007).

M. Buquicchio informe la Commission que le projet de budget, y compris une augmentation financée par la contribution du Brésil et du Pérou suite à leur adhésion, a été approuvé par le Comité du Budget.

Le Bureau a discuté d'une reprise de la coopération avec le Belarus et a décidé que la Commission de Venise serait disposée à reprendre une coopération à condition que celle-ci soit réelle et porte sur des projets concrets et que le Belarus nomme un membre indépendant.

Le Comité des Régions de l'Union européenne participera à compter de la prochaine session aux réunions de la Commission et du Conseil des élections démocratiques (CED).

Le Bureau de la Conférence mondiale de justice constitutionnelle se réunira en marge de la session de la Commission de décembre et discutera de l'adoption du statut de ladite Conférence.

La Commission de Venise est engagée dans un vaste programme de coopération avec les pays d'Asie centrale. Ce programme a d'ores et déjà été financé par une contribution volontaire de l'Allemagne et le sera par un contrat qui est à conclure entre l'Union européenne et la Commission.

Une délégation de la Commission se rendra prochainement en Bolivie pour répondre à une demande de l'Union européenne d'aider à la mise en œuvre de la nouvelle constitution bolivienne. Cette activité est entièrement financée par l'Union européenne.

La célébration du 20^e anniversaire de la Commission aura lieu le 5 juin 2010. Une contribution volontaire de Monaco sera dévolue à cet événement. La Regione, pour sa part, envisage de mettre la Scuola di San Rocco à disposition de la Commission à cette occasion.

M. Helgesen informe la Commission de l'intention des autorités népalaises de demander l'assistance de la Commission dans la finalisation de leur projet de constitution. Cette activité sera financée par le gouvernement norvégien.

3. Coopération avec le Comité des Ministres

M. l'Ambassadeur Ronald Mayer, Représentant permanent du Luxembourg, rappelle combien le Comité des Ministres considère la Commission de Venise comme un des piliers du Conseil de l'Europe. Convaincu de la nécessité de la Commission de Venise, le Luxembourg a pour la troisième fois demandé un avis à celle-ci. En effet, le Luxembourg est convaincu que les anciennes démocraties ont aussi à apprendre de la Commission qui est à leur service. Enfin, M. l'Ambassadeur rend un hommage appuyé à M. Buquicchio qui aura été un avocat convaincant et toujours écouté par le Comité des Ministres. La Commission de Venise doit beaucoup à l'investissement personnel de M. Buquicchio dans son succès.

M. l'Ambassadeur Petter Wille, Représentant permanent de la Norvège, présent lors de la création de la Commission, il ya 20 ans, rappelle combien le succès impressionnant que la Commission a connu depuis n'était pas prévisible. Au-delà de l'assistance constitutionnelle qui

fut majeure, la Commission a su développer un nombre considérables d'activités et d'études sur des sujets cruciaux pour la démocratie véritable.

M. l'Ambassadeur Sergio Busetto, Représentant permanent de l'Italie remercie la commission pour la réédition du Liber Amicorum du président La Pergola. MM. La Pergola et Gianni Buquicchio ont été les deux artisans majeurs de la création mais également du succès de la Commission aujourd'hui. Le Ministère des Affaires étrangères, comme la Regione Veneto, se félicitent d'avoir soutenu et contribué à cette institution qui est devenue incontournable dans le paysage européen. Il est en effet rare de voir une institution aussi florissante après 20 ans, ceci est certainement dû à la qualité de ses membres et de son travail, à son indépendance partout reconnue, mais aussi aux qualités de diplomate et de négociateur de son Secrétaire depuis 20 ans. La Commission a su créer et partager une sagesse commune européenne qui aujourd'hui inspire d'autres continents.

4. Coopération avec l'Assemblée parlementaire

M. Drzemczewski, Chef du Secrétariat de la Commission des questions juridiques et des droits de l'homme de l'Assemblée parlementaire du Conseil de l'Europe, informe la Commission des derniers développements majeurs depuis la dernière session.

Lors de la session de l'Assemblée du 22 au 26 juin, l'Assemblée a adopté 21 textes parmi lesquels figure la Recommandation 1876 et les Résolutions 1675 et 1676 sur « la situation des droits de l'homme en Europe : la nécessité d'éradiquer l'impunité ». Un Comité d'experts a été constitué afin de réfléchir sur la faisabilité de lignes directrices contre l'impunité lors de violations des droits de l'Homme. Suite au refus des autorités ukrainiennes de fournir à l'Assemblée un troisième candidat pour l'élection de juge à la Cour européenne des Droits de l'Homme, le Comité des Ministres a demandé à la Cour européenne des Droits de l'homme un avis consultatif sur la procédure d'élection d'un juge.

Lors de la session de l'Assemblée du 28 septembre au 2 octobre 2009, celle-ci a élu le nouveau Secrétaire général du Conseil de l'Europe en la personne de M. Thorbjorn Jagland, de Norvège. L'Assemblée a également adopté, entre autres, la Résolution 1685 sur « Allégations d'utilisation abusive du système de justice pénale, motivée par des considérations politiques, dans les états membres du Conseil de l'Europe », dont le rapport prend en compte certains éléments du rapport de la Commission sur l'indépendance du système judiciaire ; la résolution 1683 (2009) sur « la guerre entre la Géorgie et la Russie : un an après » dans laquelle l'Assemblée réitère sa profonde préoccupation sur les conséquences humanitaires de « la Loi sur les territoires occupés de Géorgie » et de son application, bien qu'elle se félicite de la bonne volonté affichée par les autorités géorgiennes de résoudre les problèmes soulevés par la Commission de Venise.

S'agissant de la Commission des questions juridiques et des droits de l'homme, celle-ci a adopté un rapport sur la « protection des donneurs d'alerte » et sur la « corruption judiciaire ». Elle a déclassifié un nouveau rapport d'information sur la situation des droits de l'homme dans la région du Caucase du Nord ainsi qu'un document de travail sur la « spécificité et la valeur ajoutée des acquis des traités du Conseil de l'Europe ».

Enfin, la table ronde sur la « La lutte contre le terrorisme : les défis pour le judiciaire » qui s'est déroulée à Florence les 17-18 septembre 2009, a été organisée en coopération avec la Commission des questions juridiques et des droits de l'homme de l'APCE et l'Institut universitaire européen (Florence) et la Commission de Venise.

M. Helgesen informe la Commission des rapports très intéressants qui ont été présentés et longuement discutés lors de cette table ronde.

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

En l'absence d'un représentant du Congrès, la Commission n'a pu avoir un échange de vues.

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

The Commission was informed on follow-up to:

- *Opinion on the Draft Law on the Constitutional Court of Montenegro*
([CDL-AD\(2008\)030](#))

Mr. Dürr informed the Commission that the Law on the Constitutional Court of Montenegro has been adopted in October 2008 but the Venice Commission only received an English translation some time later.

A number of recommendations made in the opinion have been taken up, notably:

1. the law defines the court as an independent institution;
2. the judge concerned is excluded from the vote on lifting his or her immunity;
3. especially in the light of a possible high number of individual complaints, a written procedure is available;
4. the law makes clear who can be a party in the various types of proceedings;
5. individual acts attacked in individual complaints are directly annulled and not merely declared unconstitutional;
6. a quite general competence of the Court to monitor constitutionality and legality has been deleted;
7. it has been clarified the Human Rights Protector can bring cases on behalf of individuals with their consent;
8. very positively the *actio popularis* has been excluded and the possibility for the Court to initiate norm control proceedings seems to be limited to cases of incidental norm control, i.e. when the Court has to apply a law of which it doubts the constitutionality.

Other points have not been taken up however, notably:

1. A number of detailed points, which could be regulated in the rules of procedure remain in the law itself;
2. the procedure of the election of judges by Parliament has not been regulated;
3. the law does not allow for any exceptions from the requirement of exhaustion of remedies;
4. several time limits remain overly optimistic.

Unfortunately, a provision which allowed the President of the Court to defend the budget in parliament and which had been welcomed by the Commission has been deleted.

Other recommendations made in the Opinion would require a constitutional amendment. These concern, for example:

1. the election of the judges in Parliament by a qualified majority;
2. the possibility to establish chambers with the court;
3. ensuring that retiring judges stay in office until their successor is appointed.

Finally, a point linked to the law again, it seems that even if a criminal provision has been annulled persons who have been condemned on the basis of this provision will remain imprisoned if their condemnation dates back more than one year before the decision of the Constitutional Court.

To sum up, the Law has been improved substantially, but a few elements still ought to be reviewed, both on the level of the law and the Constitution itself.

- *Avis conjoint sur le code électoral de la République d'Arménie, tel qu'amendé jusqu'en décembre 2007 (CDL-AD(2008)023) :*

M. Garrone rappelle le Conseil des élections démocratiques et la Commission de Venise ont adopté en octobre 2008 un avis conjoint sur le code électoral de la République d'Arménie, qui avait été transmis officiellement au président de l'Assemblée nationale d'Arménie.

En l'absence de nouvelles sur les suites données, le secrétariat de la Commission a rencontré le président de la Délégation arménienne près l'Assemblée parlementaire du Conseil de l'Europe et président de la Commission des affaires juridiques de l'Assemblée nationale d'Arménie, M. Davit Harutyunyan. Celui-ci a indiqué qu'un groupe de travail, comprenant des représentants des différentes forces politiques, avait élaboré un document conceptuel sur différents points essentiels du code électoral en vue de sa révision et que l'avis conjoint et de la Commission de Venise et de l'OSCE/BIDDH avait été pris en considération dans les discussions. M. Harutyunyan va envoyer ce document au secrétariat ; il a en outre indiqué que la Commission de Venise sera sollicitée prochainement pour fournir un avis sur le projet d'amendements.

M. Buquicchio indique que, à l'occasion de la conférence organisée conjointement par la Commission de Venise, le Parlement et la Cour constitutionnelle d'Arménie du 1^{er} au 3 octobre 2009, il a parlé avec le Président du Parlement, M. Hovik Abrahamyan, qui lui a indiqué que la Commission de Venise serait bientôt saisie.

La Commission attend une demande d'avis de l'Assemblée nationale d'Arménie concernant la réforme du code électoral.

- *Opinion on the constitutional situation in Bosnia and Herzegovina and the powers of the High Representative (CDL-AD(2005)004) and Opinion on the Draft Amendments to the Constitution of Bosnia and Herzegovina (CDL-AD(2006)019)*

Mr Markert informed the Commission that Swedish Foreign Minister Carl Bildt on behalf of the EU Presidency as well as US Assistant Secretary of State Steinberg, together with Enlargement Commissioner Olli Rehn, were currently in Bosnia to present a package of proposals to political leaders. The most important item in the package were proposals for constitutional reform. These proposals were based on the previous constitutional reform proposal, which had narrowly failed in the Parliamentary Assembly in April 2006 and which was inspired by the Venice Commission opinion on the constitutional situation in Bosnia and Herzegovina and the powers of the High Representative (CDL-AD(2005)004). This earlier proposal had been amended on the basis of the Commission's opinion on it (CDL-AD(2006)019).

7. Albania

The rapporteurs recalled that this opinion had been prepared at the request of the Constitutional Court of Albania. Prior to the lustration law of 2008 which was under consideration, Albania had enacted other similar laws, which had not been fully implemented on account of negative judgments of the constitutional court and of changes in the government. The previous law had expired in 2002. The 2008 law had been adopted by the new majority, but had been brought before the Constitutional Court, which had suspended it.

The law, which was an ordinary one, aimed at the termination of the mandate of the holders of important state offices such as the President, members of parliament, judges of the Supreme Court and of the Constitutional Court and ministers, as well as other civil servants. It foresees that the persons to be lustrated would be identified by an administrative authority ad hoc on the

basis of their formal involvement with the communist regime; lustration would entail the final and permanent loss of functions or the impossibility to accede to public functions. The law foresees the same procedure for all the different categories of persons to be lustrated, including the state institutions which were regulated at the level of the constitution and of organic laws.

The rapporteurs underlined that the lustration law, which had been adopted by an ordinary majority and not by three-fifths like the organic laws, could not change the Constitution. The mandate of the most important state institutions was protected by the Constitution, which foresaw a special procedure, more protective than the one foreseen in the lustration law. In addition, the termination of the mandate could only be the effect of an individualised examination of the actual co-operation of the person in question with the communist regime and ought not to have been permanent. The lustration law therefore appeared to be flawed.

The question of the possible conflict of interest of the judges of the Constitutional Court had arisen, as they are directly concerned by the law on the one hand, and have to decide on its constitutionality, on the other hand. In this respect, the Commission observed that if the judges refrained from deciding, the constitutional court would be paralysed, which could not be allowed to happen in a democratic society. In the Commission's opinion, the lustration law ought to have envisaged a mechanism of substitution of the abstaining judges: as it has not done so, the judges of the Constitutional Court had to rule on the constitutionality of the lustration law.

Mr Rasmajli, Head of the Legal Affairs Committee of the parliament of Albania, claimed that in Albania, despite the fact that almost twenty years have elapsed since the end of the communist regime, there was still need for a lustration process. The previous laws had not been implemented, and the process had never been completed.

Mr Svoboda drew the Commission's attention to the great importance of lustration proceedings in order for new democracies to be able to trust their administration and civil servants.

The rapporteurs stated in reply that they accepted that lustration had been a necessity in many new democracies including Albania, and were not opposed to it as such. It was not for the Commission to assess whether the need for lustration in Albania still existed today: this choice belonged to the Albanian authorities alone. Indeed, lustration could be legitimately carried out by Albania, even almost twenty years after the end of the communist regime. However, this could only be done on the condition that the constitution and the principle of the rule of law be respected.

Mr Rasmajli further claimed that the specific constitutional procedures would be followed according to the specific procedure foreseen by the lustration law. The rapporteurs however noted that, as was underlined in the opinion, even assuming that this interpretation was the correct one, the constitutional procedures would have been totally devoid of substance if they had to be seen as a mere implementation of a decision of removal taken by the administrative authority in charge of lustration.

The Commission concluded that the lustration law did not comply with the Constitution of Albania and, as a consequence, with the principle of the rule of law.

The Commission adopted the amicus curiae opinion on the "law on the cleanliness of the figure of high functionaries of the public administration and elected officials of Albania" (CDL-AD(2009)044).

8. Armenia

The draft amendments to the civil code under consideration relate to the question of compensation in cases of defamation by the press. They thus concern freedom of expression, and call for great attention. Following a first interim opinion adopted in June 2009, the

rapporteurs and the Armenian authorities had been in contact, and subsequent to a continuous and very fruitful co-operation, several improvements had been made to the draft amendments. The latest version of the amendments, which seemed to take into account the remainder of the rapporteurs' recommendations, had only just been received.

Mr Armen Harutyunyan, Ombudsman of Armenia, expressed and conveyed the authorities' thankfulness and satisfaction for the co-operation in this matter. He confirmed the authorities' intention to further improve the amendments before their adoption by parliament.

The Commission adopted the second interim opinion on draft amendments to the civil code of Armenia (CDL-AD(2009) 47).

9. Bulgarie

Le point sur le projet de loi sur les actes normatifs de Bulgarie a été reporté et sera discuté lors de la 81^e Session plénière.

10. Georgia

In March 2009 the Venice Commission had expressed a critical opinion on the law on the occupied territories of Georgia. Since then, draft amendments had been prepared, which contained certain important improvements which had to be welcomed, notably: the criminal liability for irregular entry into the occupied territories had been narrowed down, humanitarian aid was now possible, inheritance rights had been improved. The rapporteurs however noted that the exception for criminal liability was too narrow, to the extent that only "necessary" humanitarian aid "in emergency situations" was exempted from the need for an authorisation. The criminalisation of economic activities remained retroactive.

Ms Chiora Taktakishvili, Deputy Chairperson of the Legal Committee of the Parliament of Georgia stressed that while Georgia was committed to allowing humanitarian aid, it needed its national sovereignty to be respected. Georgia was open to co-operation on this matter.

Mr Zorkin found that the law was not a useful one, and was problematic. He contested the notion of "occupied territories".

Mr Hetsch conveyed the concern of the European Commission over the unnecessary additional conditions which the draft amendments put to the notion of humanitarian aid.

The rapporteurs underlined that this opinion, like the previous one, did not concern the question of the status of the "occupied territories" of Georgia. This was stressed in the text.

Given that the Georgian authorities intended to submit additional and revised amendments for assessment, the rapporteurs proposed adopting this opinion as an interim one.

The Commission adopted the interim opinion on draft amendments and annexes to the law on occupied territories of Georgia (CDL-AD(2009)046).

The rapporteurs informed the Venice Commission that in July 2009 the Georgian parliament had adopted amendments to the law on assembly and demonstrations after a lengthy occupation of one of the main streets of Tbilisi by demonstrators from the opposition. These amendments aimed at making it easily possible for the authorities to prevent these problems.

The rapporteurs found that the amendments were not in conformity with the applicable European standards (Article 11(2) of the European Convention on Human Rights) in several respects, mostly in relation to the principle of proportionality. In particular, they only recognised

the right to demonstrate to citizens; they set out prohibitions and obligations where there is public inconvenience (for instance the prohibition to hinder public transport deliberately, or to block a thoroughfare unless the blockage is caused by the number of people attending the assembly; the need for notification in all cases where an assembly is to take place on a public thoroughfare). They also prohibited assemblies within 20 meters of the entrance to many state buildings, with no possible exception.

Mr Akaki Minashvili, Chairman of the Foreign Relations Committee of the Parliament of Georgia explained that these amendments had been prepared after careful consideration of the shortcomings of the legislation which had appeared in connection with the demonstrations which took place in Spring. Disruption to traffic and blockage of streets by only a few persons were not considered acceptable. As for the blanket prohibition around state buildings, he stressed that the 20 meter distance only concerned the entrance to these buildings. He accepted that some articles required revision, and expressed the willingness of the authorities to follow the rapporteurs' recommendations. Draft amendments to the law would be prepared shortly and sent to the Commission for assessment. The competent authorities and the police would be trained to apply the legislation correctly.

The Commission took note of the comments of the rapporteurs. An opinion on the draft amendments to be submitted by the Georgian authorities would be submitted to the Commission in December.

11. Kirghizistan

Mr Tanchev presented the text of joint opinion with OSCE-ODIHR (CDL(2009)105) on the draft Law on political parties in Kyrgyzstan (CDL(2009)099) drawn up on the basis of comments by himself and Mr Jessie Pilgrim, OSCE-ODIHR expert. The Commission was reminded that it had discussed the opinion during its session in June and authorised the Secretariat to transmit the draft opinion to the authorities.

Mrs Sydykova informed the Commission that on the basis of the draft opinion transmitted to the authorities in June, the draft law had been amended in order to include the recommendations of the Venice Commission and OSCE/ODIHR. However, some of the proposals could not be included because they were not in conformity with the provisions of the Constitution of the Kyrgyz Republic. Mrs Sydykova proposed changing paragraphs 24 (restrictions on membership in political parties) and 46 (Possibility of review of decisions on political parties by the Constitutional court) taking into account her comments.

The Commission adopted the Joint Venice Commission and OSCE/ODIHR opinion (CDL-AD(2009)041) with changes to paragraphs 24 and 46 as suggested by Mrs Sydykova.

12. Latvia

Mr. Hoffmann-Riem presented the draft opinion (CDL(2009)148) on draft amendments (CDL(2009)144) to the Law on the Constitutional Court of Latvia (CDL(2009)144). The draft amendments provided for new requirements for the appointment of judges, which were in compliance with international standards. The introduction of a non-renewable term of office was welcome. The possibility to publish dissenting opinions earlier but still after the judgement was welcomed but they should be published concurrently. The new remuneration system seemed complex but did not raise any problem of constitutionality. It was not possible to assess whether the remuneration system was also appropriate. The attribution of additional holidays only for judges of the constitutional court who had served as ordinary judges created a problem of equality between the judges. The taking of holidays should not affect the Court's work. Bonuses, especially when there was an element of discretion in their attribution, were likely to endanger independence. The relationship between the new head of the administration and the

President of the Court needed to be clarified. The judges and not the head of administration should be the hierarchical superior of legal assistants in the preparation of the cases.

Mr. Kutris thanked the Commission for the opinion and welcomed the fact that after a two year wait, Parliament had started work on the draft amendments when they learned that the Venice Commission were to provide an opinion. However, due to the difficult economic situation all provisions requiring additional funds (remuneration and administration) had been removed from the draft. President Kutris was of the opinion that a later re-election of judges would not threaten the independence of the judges. He found that also a later publication of dissenting opinions would allow for scientific debate and would avoid their political exploitation. The tight time-limit for the publication of the judgment after the hearing (30 days) would make it impossible for the dissenting opinions to be published with the judgement. The regulation on additional holidays for former ordinary judges was not a new one but only transferred a provision from the Law on Judicial Power into the Law on the Constitutional Court. The bonuses were attributed according to objective criteria. The bonus for taking over the work of a justice on leave in practice concerned the replacement of a judge working at an international court for up to three years.

Mr. Dutheillet de Lamothe, insisted that bonuses should not be ruled out in general. At the French Conseil d'Etat (supreme administrative court), one-third of the remuneration consisted of bonuses attributed on the basis of the quantity and quality of the work of the judges by their president. Mr. Hoffman-Riem replied that the discretionary attribution of bonuses would be incompatible with judicial independence.

The Commission adopted the opinion on draft amendments to the Law on the Constitutional Court of Latvia with amendments (CDL-AD(2009)042).

13. Luxembourg

M. Garrone indique que, par lettre du 2 juin 2009, M. Paul-Henri Meyers, Président de la Commission des Institutions et de la Révision constitutionnelle du Luxembourg, a demandé, au nom de ladite Commission et par l'intermédiaire de M. Lucien Weiler, Président de la Chambre des députés, à la Commission de Venise de rendre un avis sur la proposition de révision portant modification et nouvel ordonnancement de la Constitution (CDL(2009)131).

La Commission de Venise a chargé un groupe de travail composé de MM. Chagnollaud, Colliard, van Dijk, Jowell, Trocsanyi et Velaers de préparer un avis sur la question. Le 14 octobre 2009, le groupe de travail rencontrera la Commission des Institutions et de la Révision constitutionnelle à Luxembourg, en présence de M. François Biltgen, Ministre de la Justice, ainsi que M. Marc Colas, Administrateur général au Ministère d'Etat et Secrétaire général du Conseil de Gouvernement.

Mme Err indique que le projet de révision constitutionnelle résulte d'une initiative parlementaire. Seuls ont été retenus les éléments qui ont obtenu la majorité des deux tiers dans la Commission. Depuis une vingtaine d'années, la Constitution a été amendée environ vingt fois, en général sur un seul article.

Le texte qui est soumis à l'avis de la Commission n'est pas une véritable révision totale de la Constitution, c'est pourquoi elle est qualifiée de modification et nouvel ordonnancement. Un facteur important de cette proposition d'amendement est l'incident constitutionnel de 2008, lorsque le Grand-Duc a refusé de signer un texte de loi sur l'euthanasie. La Commission a dès lors examiné tous les articles relatifs aux pouvoirs du Grand-Duc pour voir s'il conviendrait de les réviser. Par contre, il n'a pas été possible d'étendre davantage le chapitre sur les libertés publiques et les droits fondamentaux.

14. Monténégro

M Huseynov présente le le projet d'avis (CDL(2009)122) sur le projet de loi sur la prohibition de la discrimination au Monténégro (CDL(2009)119) établi sur la base des observations de MM. van Dijk et Huseynov (CDL(2009)120 et 121).

À la demande de l'ancien Ministre de la protection de droits de l'homme et des minorités du Monténégro, M. Fuad Nimani, les rapporteurs ont évalué le projet de loi sur l'interdiction de la discrimination. Afin d'avoir une meilleure compréhension de la situation locale, une mission fut organisée à Podgorica. M. Huseynov et Mme Martin du Secrétariat se sont rendus à Podgorica les 2 et 3 Septembre 2009. Ils ont pu rencontrer le Ministre pour la protection des droits de l'homme et des minorités, le Vice-président du Parlement et d'autres parlementaires, le Groupe de travail sur le projet de loi et plusieurs organisations non gouvernementales.

Indiscutablement, l'intention des autorités du Monténégro à adopter une loi unique et globale sur la discrimination doit être saluée et encouragée. L'acte est, en effet, susceptible de constituer une étape importante dans la lutte contre la discrimination dans le pays.

Le projet de loi comporte un certain nombre d'aspects positifs. Le projet de loi interdit la discrimination directe et indirecte, ainsi qu'un large éventail d'actes discriminatoires. Il introduit la notion d'action positive. Les associations de droits de l'homme et autres entités compétentes peuvent, sous réserve de certaines limitations, engager des procédures au nom ou en soutien de victimes de discrimination. Le projet de loi prévoit un partage de la charge de la preuve dans les affaires relatives à la discrimination.

Cependant, sous plusieurs aspects le projet de loi n'est pas conforme aux normes internationales et européennes. À cet égard, neuf recommandations clefs ont été faites, parmi lesquelles : Prévoir la création d'un organisme spécialisé dans la lutte contre la discrimination ou en cas d'attribution à l'ombudsman de pouvoirs d'exécution de veiller à ce que: a) l'ombudsman détienne les pleins pouvoirs pour la mise en œuvre de la loi, et b) l'institution du Médiateur dispose des ressources humaines et financières nécessaires pour remplir ses nouvelles tâches, et qu'une formation spécialisée dans la discrimination soit prévue pour son personnel; prévoir des sanctions "effectives, proportionnées et dissuasives» en cas de violation des dispositions de la loi, et de régler cette question de manière plus complète et détaillée; définir clairement le champ d'application de la loi à la sphère publique et privée.

M. Huseynov rencontrera à nouveau le groupe de travail afin d'aider à la mise en œuvre des recommandations, à Podgorica du 12 au 14 Octobre 2009.

M. van Dijk rejoint parfaitement la présentation faite par M. Huseynov et relève pour sa part que le projet de loi révèle également une faiblesse dans la technique législative. Aussi propose-t-il à la Commission, et plus particulièrement au Bureau, que des lignes directrices de technique législatives soient préparées. Celles-ci permettraient aux rédacteurs de projets d'améliorer la qualité législative et le contenu normatif de leurs projets de lois.

Mme Err soutient la proposition de M. van Dijk.

La Commission adopte le projet d'avis sur le projet de loi sur l'interdiction de la discrimination du Monténégro (CDL-AD(2009)045).

Mr. Tuori presented the draft opinion (CDL(2009)109) on draft amendments (CDL(2009)114) to the Law on the Protector of Human Rights and Freedoms of Montenegro (CDL(2009)). This opinion had been prepared jointly with the Directorate of Co-operation of the Directorate General of Human Rights and Legal Affairs.

While Mr. Tuori gave an overall positive assessment of the draft amendments, which brought a number of improvements for the Office of the Human Rights Protector, he also pointed out that some parts of the Law should be further improved. The major positive elements were the specialisation of the deputy ombudspersons, taking into consideration national minorities in their appointment and the right of the Protector to make a direct budget proposal to Parliament without interference from Government. One element which was not welcome was that the amendments would remove references to the principles of autonomy and independence of the Protector. Full transparency had to be ensured for any external financing of the Office. The amendments provided that the ombudsman be nominated by the President of the Republic. However, the present system of direct election by Parliament was to be preferred. Another important recommendation, the election of the Protector by a qualified majority required a constitutional amendment. The ombudsman, the deputies and the staff should also benefit from functional immunity.

Mr. Huseynov made proposals for amendments to the draft opinion, emphasising the need to provide the Protector with the necessary powers and means to enable him or her (a) to fulfil the role as national preventative mechanism according to the Optional Protocol of to the Convention on the Prevention of Torture and Inhuman and Degrading Treatment and (b) as a national body for the prevention of discrimination according to General Policy Recommendation No. 7 of the European Commission against Racism and Intolerance

The Commission adopted the draft opinion on amendments to the Law on the Human Rights Protector of Montenegro with amendments (CDL-AD(2009)043).

15. Serbia

The Commission examined, with a view to adoption, the draft joint opinion (CDL-EL(2009)013) with OSCE-ODIHR on the draft Law on the State Election Commission of Serbia (CDL-EL(2009)010), the draft Law on the Unified Register of Voters of Serbia (CDL-EL(2009)011) and the draft Law on the Election of Councillors of Serbia (CDL-EL(2009)012) drawn up on the basis of comments by Mr Hjörtur Torfason and Mr Jessie Pilgrim, OSCE-ODIHR expert and following adoption by the Council for Democratic Elections.

Mr Torfason presented the opinion on the three draft laws noting that the overall assessment of the texts by the rapporteurs of the Commission and of OSCE/ODIHR was positive. He pointed out that the Commission had already adopted an opinion on the previous law on Councillors several years ago and that there were a number of improvements in the draft submitted in 2009 compared to the previous text. The other two laws could be considered as an important step significantly improving the electoral system in Serbia.

However, Mr Torfason pointed out that there were some articles in the draft Law on the Election of Councillors of Serbia and in the draft Law on the State Election Commission that could be revised. Among other issues the proposed system of allocation of mandates should be clarified.

The Commission adopted the joint Venice Commission and OSCE/ODIHR opinion (CDL-AD(2009)039) on the draft Laws on the State Election Commission of Serbia, the Unified Register of Voters of Serbia (CDL-EL(2009)011) and the Election of Councillors of Serbia (CDL-EL(2009)012) drawn up on the basis of comments by Mr Hjörtur Torfason and OSCE-ODIHR expert, Mr Jessie Pilgrim.

16. Ukraine

The Commission held an exchange of views with Messrs Portnov and Pisarenko, Members of the Verkhovna Rada of Ukraine and examined with a view to adoption the draft joint opinion (CDL-EL(2009)016) with OSCE-ODIHR on the Law amending certain legislative acts on

elections of the President of Ukraine (CDL-EL(2009)14; see CDL-EL(2009)023) drawn up on the basis of comments by Ms Nussberger and Mr Jessie Pilgrim, OSCE-ODIHR expert following its adoption by the Council for Democratic Elections.

Ms Nussberger presented the text of the opinion. She regretted that the Verkhovna Rada had not adopted these amendments earlier - the proposed changes to the electoral system of Ukraine concerned a number of important laws and it would seem that there was no public discussion of these important changes. Among the main features one could note that the law abolished the absentee voting and the collection of signatures – measures that could simplify the voting procedures. However, the law presented quite a number of problems. According to the opinion the text established unreasonable restrictions on the right of candidacy, re-introduced the possibility to add voters to the election lists on the election day and limited the possibilities of the Central Election Commission to correct mistakes of lower level election commissions. It also drastically curtailed the possibilities for court control of the electoral process.

Mr Portnov thanked the Commission for the possibility to attend the session and to participate in the exchange of views on the Law amending certain legislative acts on elections of the President of Ukraine. He informed the Commission that based on the critical remarks of the opinion some changes might be introduced to the law, notably on domestic observers and on the composition of electoral commissions. However, he disagreed with the critical remarks on the complaints and appeals system. Mr Portnov insisted that there were no limitations on appeals to courts on election-related issues.

Mr Pisarenko assured the Commission that its recommendations would be carefully examined by the lawmakers and that he hoped that some changes to the law were still possible. He proposed modifying some of the conclusions of the opinion.

Mrs Stavniychuk disagreed with the remarks of Messrs Portnov and Pisarenko and supported the opinion. She said that the rapporteurs' analysis was a very good one and that the opinion should not be modified. This opinion was shared by a number of other members of the Venice Commission.

Mr Van den Brande welcomed the opinion of the Venice Commission and invited the authorities to accept its recommendations. He agreed with the rapporteurs that a number of the provisions of the adopted law could be considered as a step backwards. The Assembly intended to observe the forthcoming Presidential elections in Ukraine and Mr Van den Brande expressed his hope that the problematic provisions of the law would be reviewed in the nearest future.

The Commission adopted the joint Venice Commission and OSCE/ODIHR opinion on the Law amending certain legislative acts on elections of the President of Ukraine (CDL-AD(2009)040).

17. Other constitutional developments

- *Kazakhstan*

Chairman Rogov explained that the constitutional amendments of May 2008 had transformed the system in Kazakhstan from a presidential to a semi-presidential one and strengthened democracy and human rights. These amendments were currently being implemented through legislation in various areas. A new body, the Assembly of the Peoples had been established to maintain intercultural peace. In August 2009, a new concept for the reform of the judiciary had established the main axis for reform in conformity with international standards until the year 2020.

Mr. Rogov thanked the Venice Commission for the assistance provided so far and suggested that parliamentarians and a representative of the presidential administration also come to Venice to benefit from the Commission. Presently, the Constitutional Council had to evaluate the constitutionality of a customs union agreement, which raised issues of sovereignty because it created supranational institutions. He requested an urgent *amicus curiae* opinion on this topic.

- *Norway*

Mr Sejersted informed the Commission about the appointment by the Norwegian Parliament of a Commission mandated to study whether to include a Human Rights Catalogue into the Constitution on the occasion of the 200th anniversary of the Constitution (2014). Mr Sejersted also congratulated the President of the Venice Commission Mr Jan Helgesen on his appointment as a member of the above-mentioned Commission.

The Commission had been created on the proposal of the former President of the parliament, Mr Thorbjorn Jagland before his appointment as a Secretary General of the Council of Europe.

- *Slovakia*

The Secretariat informed the Commission that on 25 September the Slovak authorities had requested the assessment of the Act on State language of the Slovak Republic. Work was in progress, and an opinion was likely to be submitted to the Plenary in March 2010.

18. Mechanisms to review the compatibility of acts of UNMIK and EULEX in Kosovo¹ with human rights standard

The secretariat informed the Commission that in June 2009 the Political Affairs Committee of the Parliamentary Assembly had requested a follow-up opinion on mechanisms to review the compatibility with human rights standards of acts by UNMIK and EULEX in Kosovo. Indeed the Commission had adopted, in October 2004, an opinion on "Human Rights in Kosovo: possible establishment of review mechanisms". Work was already in progress, and a visit to Pristina was scheduled for the month of November. The opinion was likely to be submitted to the Plenary in March 2010.

19. European standards as regards the independence of the judicial system – Part I Judges

Mr. Neppi Modona presented his reaction to the remarks made by various members in document CDL(2009)055rev3. He underlined that the present report was truly a collective piece of work given that not only the rapporteurs but also a number of other members had actively participated in its preparation. The main elements should remain external and internal independence and the right to a judge pre-established by law.

Mr. Hoffmann-Riem feared that the "soft" selection criterion of having a sense of justice could easily be abused to exclude some candidates (para. 23). Mr. Mifsud-Bonnici replied that it was possible to assess whether a judge would be "just". At least in countries where judges were appointed only after another career, this could be assessed on the basis of their previous work.

Mr. Mifsud Bonnici was of the opinion that the sentence that independence had to prevail over accountability (para. 29) could not remain in the text in such general terms. Judges had to be accountable, to a judicial council or another body. Mr. Torfason insisted that the Minister of Justice was politically accountable for the judiciary and could not be released from this responsibility by attributing all powers to a judicial council.

¹ All reference to Kosovo shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.

Mr. Dutheillet de Lamothe was opposed to the general exclusion of bonuses for judges (para. 43). The European Convention on Human Rights imposed a fair trial within reasonable time and the court presidents had to be able to influence judges to attain this objective. At the French Conseil d'Etat (supreme administrative court) One-third of judges salaries consisted of bonuses attributed on the basis of the quantity and quality of their work. This objective and transparent system was only used within the judiciary itself.

While Mr. Hoffmann-Riem said that in Germany the possibility for judges to become a member of a political party was an essential element of democracy (para. 58), Mr Baranyi insisted that in Europe various systems existed and it was not possible to build a single system. While political party membership was normal in Germany it would not be acceptable for society in Slovakia.

Mr. Torfason insisted that higher level judges must not influence lower level judges. The exception should be deleted for general directives, where this is foreseen by the Constitution, introduced as a reply to the Hungarian situation (para. 67). Mr. Paczolay insisted that the general exclusion of the influence of lower courts by higher courts did not correspond to the situation in a number of European countries.

Mr. Mifsud Bonnici was of the opinion that a random assignment of cases to the judges was not efficient (paras. 72-74). In Malta cases were assigned by judges' commissions. Mr. Dutheillet de Lamothe insisted that in the interest of the efficiency of justice, the court presidents needed to survey the work of the judges. Mr. van Dijk proposed that the workload of a judge should be taken into account in the attribution of cases.

Mr. Hoffmann-Riem pointed out that European law now pervaded all spheres of law. There should no longer be any specialisation in European law (para. 73). Mr. van Dijk found that drawing on special expertise within the Court could only be useful. Mr. Torfason insisted that European law should not be described as "complex".

Mr. Hoffmann-Riem was of the opinion that it was not necessary to indicate why judicial independence was necessary (para. 75). This was a dogmatic rather than practical issue. Mr. Bartole replied that the issue of the purpose of judicial independence is not only a dogmatic one. The separation of powers had to be instrumental in the protection of human rights and should not benefit the judges as such. Corporatism and clan structures within the judicial council had to be avoided.

While Mr. Hoffmann-Riem pointed out that the attribution to the judiciary of a high level in state protocol did not relate to the independence of the judges (para. 76.15), Mr. Nicolatos insisted that this was an important issue.

Several speakers were of the opinion that in the light of its importance the report it should be re-discussed within the sub-Commission on the Judiciary.

The Commission referred the draft report on the independence of the judiciary to its Sub-Commission on the Judiciary for further discussion.

20. Report of the meeting of the Sub-Commission on Democratic Institutions (8 October 2009)

Mr Jowell informed the Commission that three interesting reports had been discussed within the sub-commission: good governance, constitutional amendments and, in a preliminary form, the rule of law. Despite the excellent work already carried out, the sub-commission had decided to pursue reflection and to postpone their submission to the Plenary. All interested members were welcome to submit their proposals or comments.

21. Rapport de la réunion du Conseil des élections démocratiques (8 octobre 2009)

M. Mifsud Bonnici fait rapport sur la réunion.

Le Conseil des élections démocratiques a demandé les lignes directrices sur un statut internationalement reconnu des observateurs d'élections (CDL-EL(2009)022), sur la base des contributions de MM. Masters, Musin, Pohler et Sanchez Navarro. Le Conseil a souhaité une formulation plus précise de qui sont les destinataires des lignes directrices. L'objectif final est de parvenir à un texte international (recommandation, convention). Le rapport sera révisé en ce sens en vue de la prochaine session.

M. Kask a préparé un rapport sur l'annulation des résultats des élections (CDL-EL(2009)020) ; les membres sont invités à vérifier les données relatives à leur pays. M. Kask préparera un rapport révisé en vue de son adoption lors de la prochaine session, qui comprendra un chapitre relatif à la jurisprudence ; les membres seront également invités à compléter les données sur ce point.

Les avis conjoints de la Commission de Venise et de l'OSCE/BIDDH concernant la Serbie et l'Ukraine ont été traités sous les points 15 et 16.

Le Conseil a pris note des commentaires de M. Masters (CDL-EL(2009)021) sur le projet de manuel de l'OSCE/BIDDH sur le suivi de l'enregistrement des électeurs (CDL-EL(2009)015).

La Commission prend note des commentaires de M. Masters (CDL-EL(2009)021) sur le projet de manuel de l'OSCE/BIDDH sur le suivi de l'enregistrement des électeurs (CDL-EL(2009)015).

22. Autres questions

M. Tuori informe la Commission que lors de la prochaine session, la Présidence et les Vice-Présidences de la Commission ainsi que les membres du Bureau élargi devront être élues.

Pour reprendre une ancienne pratique, un Groupe de Sages a été constitué afin de préparer ces élections. La composition du Groupe des Sages est proposée comme suit : Mme Suchocka, MM. Colliard, van Dijk, Jowell et Tuori.

La Commission approuve la composition du Groupe des Sages.

S'agissant du poste de Secrétaire de la Commission, le Bureau de la Commission aura très probablement l'opportunité de donner un avis sur les candidatures à cette fonction. Le règlement intérieur de la Commission de Venise prévoit en effet une telle consultation.

23. Dates des prochaines sessions et propositions de dates pour les sessions de 2010

La date de la session de décembre est confirmée comme suit :

81^e session plénière 11-12 décembre

Les réunions des sous-commissions ainsi que la réunion du Conseil des élections démocratiques auront lieu la veille des sessions plénières.

En outre, la Commission est invitée à approuver les dates des sessions en 2010 :

82^e session plénière 11-13 mars

83 ^e session plénière	3-5 juin
84 ^e session plénière	14-16 octobre
85 ^e session plénière	16-18 décembre

24. Liber Amicorum Antonio La Pergola

M. Vogel présente une nouvelle édition du Liber Amicorum consacré à la mémoire d'Antonio La Pergola, qui a été publiée par l'Université de Lund.

M. van Dijk remercie chaleureusement M. Vogel pour avoir pris l'initiative et la conduite de cette nouvelle édition, bien plus prestigieuse et plus complète que la précédente. Cette nouvelle édition fait ainsi honneur à la mémoire de M. La Pergola. La Commission réitère sa reconnaissance à M. Vogel pour avoir permis un tel hommage.

A l'occasion de la fin du mandat du Secrétaire de la Commission, l'Ambassadeur Thomas Hajnoczi, Représentant permanent de l'Autriche, a remis à M. Buquicchio une décoration de la part du gouvernement autrichien.

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ARMENIA/ARMENIE	Mr Gaguik HARUTUNYAN Mr Armen HARUTUNYAN
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BELGIUM/BELGIQUE	Mr Jan VELAERS M. Jean-Claude SCHOLSEM M. Cazim SADIKOVIC
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