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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

**(VENICE COMMISSION)**

**COMMISSION EUROPEENNE POUR LA DEMOCRATIE PAR LE DROIT**

**(COMMISSION DE VENISE)**

**88th PLENARY SESSION**
**Venice, Scuola Grande di San Giovanni Evangelista**
**Friday, 14 October 2011 (9.00 a.m.) -**
**Saturday 15 October 2011 (1.00 p.m.)**

**88e SESSION PLÉNIÈRE**
**Venise, vendredi 14 octobre (9h00) -**
**samedi 15 octobre 2011 (13h00)**

# SESSION REPORT
# RAPPORT DE SESSION

**This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

**TABLE OF CONTENTS/TABLE DES MATIERES**

## 1. Adoption of the Agenda

The Agenda was adopted as it appears in document CDL-OJ(2011)002ann.

## 2. Communication du Président

M. Buquicchio informe la Commission de ses activités récentes qui sont listées dans le document CDL(2011)080.

## 3. Communication by the Secretariat

Mr Markert informed the Commission that, during a visit of the Secretary General to Kazakhstan, the country had submitted an official request for membership in the Venice Commission. The Committee of Ministers would soon decide on this request.

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

Within the framework of its co-operation with the Committee of Ministers, the Commission held an exchange of views with the Chair of the Ministers' Deputies Ambassador Mykola Tochytskyi, Permanent Representative of Ukraine to the Council of Europe, Ambassador Claus von Barnekow, Permanent Representative of Denmark to the Council of Europe and Ambassador Carl Henrik Ehrenkrona, Permanent Representative of Sweden to the Council of Europe.

Ambassador Tochytsky informed the Commission about the priority areas of co-operation between his country and the Council of Europe during the chairmanship. Ukraine was reforming its legislation in a number of areas, notably in the field of the judiciary and elections. Mr Tochitskyi underlined the importance of the assistance provided to Ukraine by the Venice Commission and reiterated the Ukrainian authorities' commitment to continuing this fruitful co-operation.

Ambassador Claus von Barnekow focussed on the role that the Venice Commission could play in working with non-European countries, notably with the Arab countries, and invited the Commission to co-operate more closely with the rapporteur groups of the Committee of Ministers.

Ambassador Carl Henrik Ehrenkrona was of the opinion that, together with the European Court of Human Rights, the Commission was one of the Council of Europe's most important and dynamic bodies. He pointed out that during the Swedish chairmanship of the Committee of Ministers of the Council of Europe one of the main priorities was the development of rule-of law-related activities. The Ambassador praised the Commission's work in this particular area and suggested that this component could be among the priority areas in different co-operation programmes with the countries of Northern Africa.

## 5. Co-operation with the Parliamentary Assembly

The Commission held an exchange of views with the representatives of the Parliamentary Assembly of the Council of Europe, on co-operation with the Assembly.

Mr Holovaty informed the Commission about the work of the Legal Affairs and Monitoring Committees from June to September 2011. He indicated in particular the Legal Affairs Committee's work on threats to the rule of law, political prisoners and access to nationality, and the Monitoring Committee's work on challenges to the parliamentary procedure.

## 6. Co-operation with the Congress of Local and Regional Authorities of the Council of Europe

The Commission held an exchange of views with Mr Lars O. Molin, Chair of the Monitoring Committee of the Congress. Mr Molin informed the Commission that the Congress would hold its next plenary session in the week of 17 October and would discuss, among other issues, the monitoring reports on Finland, Latvia, Serbia and Slovenia and a report on its recent election observation mission in Moldova. During this mission the Congress delegation had noted that there had been significant improvements in preparing the electoral lists and in the field of campaign financing.

## 7. Council of Europe Development Bank

Mr Raphaël Alomar, Governor of the Council of Europe Development Bank, informed the Commission about the projects recently funded by the Bank.

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

The Commission was informed on follow-up to:

*Opinion on the Draft Law on Languages in Ukraine* ***(***CDL-AD(2011)008***)***

The Commission was informed that, since the adoption of its Opinion on the Draft Law on Languages in Ukraine in March 2011, different sectors of the Ukrainian society have addressed the Commission expressing their views on the Opinion. While representatives of the Russian community of Ukraine and of local authorities from areas inhabited by a majority of Russian speaking population have expressed their dissatisfaction with the conclusions contained in the Opinion, representatives of the Ukrainian majority population welcomed the recommendations formulated therein. In its Opinion, the Commission had called upon the Ukrainian authorities to opt for a balanced linguistic policy, consolidating Ukrainian as the country's official language while providing adequate conditions for the preservation and development of its minority and regional languages.

The Commission was also informed that a new draft law relating to Ukraine's languages had been recently registered with the Parliament of Ukraine. While no request for Opinion had yet been received, it was stressed that the Venice Commission stands ready to assist the Ukrainian authorities, upon their request, in the process of development of language-related legislation.

*Opinion on the new Constitution of Hungary* ***(***CDL-AD(2011)016***):***

The Secretariat informed the Commission about the wide interest raised by the Opinion on the new Constitution of Hungary adopted during its 87th session. In particular, on 6 July 2011 detailed and constructive comments on the opinion had been submitted by the Hungarian authorities.

The Commission was also informed of the Resolution adopted by the European Parliament in July 2011 with regard to the new Hungarian Constitution, resolution which largely reflects the findings of the Venice Commission and calls for a close follow-up, by the European Parliament's relevant committees, in co-operation with the Venice Commission and the Council of Europe of the implementation of the recommendations addressed to the Hungarian authorities.

*Joint opinion by the Venice Commission and the OSCE/ODIHR on the draft law on amendments to the law on election of councillors and members of Parliament of Montenegro (CDL-AD(2011)011)*

The Secretariat informed the Commission that on 8 September 2011 the parliament of Montenegro had finally adopted the draft Law on the amendments to the law on election of councillors and members of Parliament of Montenegro. The three main controversial points had been settled as follows: a quantitative criterion of less than 15 % of the population had been introduced in the definition of minorities; the need to provide proof of Montenegrin citizenship before 31 December 2012 had been introduced; the maximum number of seats to which aggregate lists can aspire had been changed from 0,3 percent of the votes to 3 seats.

## 9. Bosnia and Herzegovina

Mr Scholsem presented the draft *amicus curiae* brief on the Law of the Republika Srpska (Bosnia and Herzegovina) on the Status of State Property located on the Territory of the Republika Srpska and under the disposal Ban (CDL-REF(2011)042), which had previously been examined by the Sub-Commission on Fundamental Rights at its meeting on 13 October.

Mr Scholsem indicated at the outset that, in the absence of explicit constitutional provisions, the issue was the competence to decide about the distribution of state property between the State of Bosnia and Herzegovina and the two Entities (Republika Srpska and the Federation of Bosnia and Herzegovina). After summing up the complex domestic context of this law, Mr Scholsem explained that the issue of allocation of state property had to be seen in the context of primary and accessory or instrumental powers in a federal state. Instrumental powers are those which derive from the primary ones and are necessary to carry out the latter; they are normally explicitly set out in the constitution, but when they are not – as is the case, for historical reasons, in Bosnia and Herzegovina – they may be implied from the primary ones. Accordingly, instrumental powers are not necessarily residual powers.

This meant, in the Bosnian context, that instrumental powers do not automatically fall under the competence of the entities.

In addition, Mr Scholsem explained that the distribution of powers is essentially a federal competence, and cannot be carried out by the federated entities. In Bosnia, which in the Commission's opinion was clearly a federal state, it was therefore up to the State to proceed with such distribution of powers pursuant to the basic principle that property must be allocated to each level so as to enable every component of the State to carry out its constitutional functions. In a subsidiary manner, territorial and historical criteria may also be used in the allocation of state property.

Mr Tuori underlined that the findings of this *amicus curiae* brief had a potentially broad interest for Bosnia and Herzegovina. In particular, the conclusion that instrumental powers are not necessarily residual powers was an important one, which was being spelt out explicitly perhaps for the first time. This principle entailed that not only the State, but also the Entities could invoke the use of the functional criterion in the distribution of state powers.

Mr Sadikovic disagreed with the assumption that Bosnia and Herzegovina is a federal state and challenged the possible implication that it was based on a voluntary, hence revocable decision of the federated entities.

**The Commission adopted the *Amicus curiae* brief on the Law of the Republika Srpska (Bosnia and Herzegovina) on the Status of State Property located on the Territory of the Republika Srpska and under the disposal Ban (CDL-AD(2011)030) with amendments.**

## 10. Turkey

Mr Grabenwarter presented the draft opinion on the Law on the establishment and rules of procedure of the Constitutional Court of Turkey (CDL-REF(2011)047). He pointed out that in February the rapporteurs had already provided preliminary comments on the then draft Law, which was adopted on 30 March 2011. On the basis of information received from the Ministry of Justice, which showed that a number of issues raised in the opinion related to translation problems, the rapporteurs proposed amendments to the draft opinion. The main purpose of the draft law was to introduce an individual complaint procedure to the Constitutional Court in order reduce the number of Turkish cases before the European Court of Human Rights. Rapporteur judges would have an essential role in dealing with the heavy case-load expected. The draft opinion addressed the issues of their independence and case-assignment. The opinion also recommended referring cases back to the highest ordinary courts rather than to first instance courts in order to ensure the effectiveness of the individual complaint.

Mr Ali Bilen, Judge, Director General for EU Affairs of the Ministry of Justice of Turkey, thanked the Venice Commission for the present and previous opinions and explained that it would be useful also in the context of the on-going constitutional reform process. Mr Ali Rıza Çoban, Reporter Judge at the Constitutional Court of Turkey, pointed out that while some of the opinion's recommendations would even require amendments to the Constitution, others would be taken into account in the drafting of the internal rules of procedure. The Court was preparing intensely for the individual complaint though the recruitment of rapporteur judges, a new IT-system and ECHR training in co-operation with the Council of Europe. Article 90 of the Constitution, providing for direct application of the Constitution, needed to be fully applied in the country.

Mr van den Brande pointed to a backlog in criminal cases in Turkey and a lack of transparency in those.

**The Commission adopted the Opinion on the Law on the establishment and rules of procedure of the Constitutional Court of Turkey with amendments (CDL-AD(2011)040).**

## 11. Ukraine

*Draft law on the election of people's deputies*

The Commission held an exchange of views with Mr Vladyslav Zabarskyi, Member of Parliament of Ukraine and examined the draft joint opinion by the Venice Commission and the OSCE/ODIHR on the draft law on the election of people's deputies of Ukraine (CDL-REF(2011)034) drawn up on the basis of comments by Mr Darmanovic, Mr Endzins and Mr Donald Bisson (OSCE/ODIHR expert). The Commission was informed that the opinion had been adopted by the Council for Democratic Elections at its meeting on 13 October 2011.

Mr Endzins presented the opinion and informed the Commission about the visit of a Venice Commission delegation to Ukraine in September. The critical remarks in the opinion focussed notably on the lack of dialogue between different parts of the society as to the choice of the electoral system, the prohibition of election blocs combined with an increased threshold, the procedure for registration of candidates in single mandate constituencies, some aspects of the electoral campaign and complaints and appeals procedures.

Mr Vladislav Zabarski, Member of Parliament, thanked the Commission for the invitation to attend the plenary session of the Commission. The draft law on the election of people's deputies of Ukraine examined by the Commission had been prepared by the Working Group on electoral legislation created by the President of Ukraine. The group had met eight times and held a serious and constructive discussion on different aspects of the electoral process. The

Working group was composed of representatives of different political parties, the civil society and academia. Such a broad participation of politicians, electoral experts and the civil society had resulted in a draft which took into account a number of proposals and which had reached a compromise on several problematic issues. The draft prepared by the Working group proposed introducing a mixed system. Such a choice was made in order to reduce the gap existing between the electors and the elected MPs. According to Mr Zabarskyi this system was in accordance with the wishes of a considerable number of voters.

After the visit of the delegation of the Commission and the OSCE/ODIHR to Ukraine, the initial text had been amended in order to meet most of the recommendations made by the experts. At the beginning of October, the President of Ukraine had decided not to introduce the draft himself but rather to send it to the Rada so that different factions in the parliament could discuss it. The draft law had been registered under number 9265-1 by a group of MPs.

Mr Nemyria took the floor as a representative of the opposition parties in the Rada. He thanked the Commission for its objective an unbiased analysis of the draft law and, notably, of the conditions under which it had been prepared. He underlined that the decision on the electoral system, the prohibition of blocs and on thresholds had been taken by the majority unilaterally. These issues were not put on the agenda of the Working group. Mr Nemyria informed the participants that the opposition was unanimous in rejecting this draft law and that it preferred to keep the proportional system with open lists. He also underlined the importance of adopting an Election Code in Ukraine.

Mr Kivalov said that the draft had been improved following the visit of the Venice Commission delegation. The text had been transmitted to the Rada and the corresponding Committee would work on the final version of the draft law. Some recommendations of the Venice Commission and the OSCE/ODIHR could not be taken into account because the criticised articles were based on the text of the current Constitution.

Ms Stavnychuk agreed with the rapporteurs of the Commission that the text of the draft law on elections of the MPs should be improved. She said that it was a positive development that the President of Ukraine, instead of introducing it to the Rada, had sent it for discussion. This positive decision could be reflected in the conclusions of the opinion. She hoped that the parliament would have a broad discussion of the examined draft and other projects and work on the basis of recommendations of the Venice Commission and the OSCE/ODIHR.

In the discussion that followed several Commission members suggested some minor changes to the text of the opinion.

**The Venice Commission adopted the joint opinion by the Venice Commission and the OSCE/ODIHR on the draft law on the election of people's deputies of Ukraine with some changes (CDL-AD(2011)037).**

*Draft Law on the bar*

In presenting the draft joint opinion by the Venice Commission and the Directorate of Co-operation on the draft Law on the Bar of Ukraine (CDL-REF(2011)040), Mr Mihai, Mr Mullerat and Mr Jakobauskas pointed out that in Ukraine two groups of lawyers existed: entrepreneurial lawyers who had finished law studies and could represent clients at civil courts and licensed advocates who had the exclusive right to plead in criminal cases. Only advocates were bound by rules of ethics. The draft Law attempted to merge these two groups by bringing both under rules of ethics. The draft was a good basis for regulating the work of the legal profession in Ukraine and in most parts in conformity with European standards. There was no uniform model concerning a monopoly of advocates for legal representation. Ukraine was free to make its own choice in this field. However, the draft Law had several flaws: The Draft was far too detailed and

casuistic, leaving no room for self-regulation by the Bar. The terminology used led to confusion. The principles of loyalty and avoidance of conflicts of interests were not regulated sufficiently. The powers of the advocates to seek information from public bodies but also individuals were too wide. This problem seemed to be based on the fact that judges would not provide assistance to parties in enforcing justified requests. The high number of Ukrainian cases before the European Court of Human Rights was an indication of the problems in the Ukrainian judiciary.

Ms Stavnychuk thanked the rapporteurs for the useful opinion. She pointed out that several reforms were on-going in parallel in the judiciary. In particular the revision of the Code of Criminal Procedure would also be relevant in respect of the issues raised.

**The Commission adopted the Joint Opinion on the draft Law on the Bar of Ukraine (CDL-AD(2011)039).**

*Draft amendments to the law on the judiciary and the status of judges and to other legal acts of Ukraine*

Mr Hamilton presented the draft opinion on the draft amendments to the law on the judiciary and the status of judges and to other legal acts (CDL-REF(2011)043) relating to the judiciary and the prosecution service. He pointed out that this draft Law was a revised version of the Law on the Judiciary and the Status of Judges of Ukraine adopted on 7 July 2010 by the *Verkhovna Rada* and signed by President Yanukovych on 27July 2010. The Law was already the subject of two joint opinions of the Venice Commission and the Joint Project between the European Union and the Council of Europe entitled "Transparency and Efficiency of the Judicial System of Ukraine" (TEJSU Project) adopted in March and October 2010.

Mr Hamilton explained that new draft Law represented an improvement over previous proposals in this area and addressed many of the recommendations previously made by the Venice Commission. The recommendations which had not been addressed in the new text principally related to provisions which appear in the Constitution and which therefore cannot be changed without an amendment to the Constitution. These included the role of the *Verkhovna Rada* (parliament) in the appointment and dismissal of judges which the Commission criticised as politicising the judges, the judges' immunity from prosecution which the Commission had previously criticised and the role of the President in appointing and dismissing judges. The new draft appeared to have at least partially reversed the earlier decision to effectively deprive the Supreme Court of much of its jurisdiction and would appear to restore it to its position as the highest judicial body in the system of courts..

Mr Gass noted that, despite the improvements, fundamental problems in the system envisaged for the appointment and removal of judges persisted. In particular, the role of the *Verkhovna Rada* was deeply problematical, as well as the existence of temporarily appointed judges and the role of the President in the creation and abolition of courts. Therefore, he pointed out the importance of modifying the constitutional provision in this respect.

Mr Kivalov expressed his disagreement with the criticism contained in the opinion regarding the restriction of powers by the Supreme Court and stated that the system of High Specialised Courts adopted in the latest reform on the judiciary in Ukraine had been issued to redress the situation of double cassation.

Mr Markert informed the Commission of the dissatisfaction of the Supreme Court for the lost of competences and on the letter sent by the President of the High Specialised Court. on Civil and

Criminal matters of Ukraine to the Commission supporting the restriction of competences of the Supreme Court in order to reduce the backlog of cases.

**The Commission adopted the joint opinion on draft amendments *to* the law on the judiciary and the status of judges and to other legal acts of Ukraine (CDL-AD(2011)033).**

*Draft law on freedom of peaceful assembly*

The Commission examined the draft joint opinion by the Venice Commission and the OSCE/ODIHR on the draft Law on freedom of peaceful assembly of Ukraine (CDL-REF(2011)037), adopted by the 'Ukrainian Commission for Strengthening Democracy and the Rule of Law' (a body constituted under the President of Ukraine).

Ms Banic indicated that the Venice Commission and the OSCE/ODIHR had already examined other drafts pertaining to the exercise of freedom of assembly in Ukraine. She stressed that the aim of all recommendations made, regardless of which version or which draft has been reviewed, is to assist the authorities of Ukraine to meet, when adopting legislation on the matter, the applicable international standards and the country's commitments on freedom of peaceful assembly.

The Venice Commission and the OSCE/ODIHR were of the view that, in many respects, the Draft Law drew upon and reflected the principles enunciated in international standards and the ODIHR-Venice Commission Guidelines on Freedom of Peaceful Assembly. Its structure was relatively clear and it provided for the amendment of other related legal acts - such as the Codes on Administrative Offences and Administrative Proceedings - which would enable its application.

Nevertheless, further improvements were needed to ensure the coherence and the clarity of the Draft Law and to limit the potential for misinterpretation. The main concerns related to the following: definitions, such as that of spontaneous assembly, issues concerning the prior notification of an assembly and related court's procedure, the extent of possible limitations on freedom of assembly and the need to put the relevant provision of the draft in full conformity with criteria established by the applicable international standards (in particular the ECHR), the responsibility of assembly organisers and their co-operation with the competent authorities, obligations of competent authorities when deciding on restrictions, the possibility for anyone to freely record the actions of law enforcement officials during assemblies.

The Opinion also stressed the importance of awareness-raising measures and training of relevant regulatory and enforcement authorities so as to ensure a full understanding of their responsibilities - in particular, the obligation to protect and facilitate the enjoyment of the right to freedom of peaceful assembly. More generally, the Opinion underlined that the right to peaceful assembly should not be interpreted restrictively and any restrictions should be construed narrowly, and that in general, rights must be "practical and effective" not "theoretical or illusory".

**The Commission adopted the opinion the draft Law on freedom of peaceful assembly of Ukraine (CDL-AD(2011)031).**

## 12. Armenia

*Draft Law on freedom of religion of Armenia and draft law on making a supplement to the Law of the Republic of Armenia on the relations between the Republic of Armenia and the Armenian Holy Apostolic Church, the draft law on making amendments and a supplement to the Administrative Offences Code and the draft law on making an amendment and a supplement to the Criminal Code of the Republic of Armenia*

Ms Marta Achler, representative of the OSCE/ODIHR, introduced the draft joint Opinion by the Venice Commission and the OSCE/ODIHR on the draft Law on freedom of religion of Armenia (CDL-REF(2011)045) and on the draft law on making a supplement to the Law of the Republic of Armenia on the relations between the Republic of Armenia and the Armenian Holy Apostolic Church, the draft law on making amendments and a supplement to the Administrative Offences Code and the draft law on making an amendment and a supplement to the Criminal Code of the Republic of Armenia (CDL-REF(2011)046). The Venice Commission and the OSCE/ODIHR had already examined, in 2009 and 2010, previous drafts relating to the issue of freedom of religion, which were never adopted. In 2011, the Armenian authorities had drafted an entirely new Draft Law, which was the subject of the present Joint Opinion.

The 2011 Draft Law represented a marked improvement compared to both the Law currently in force and previous draft laws. Fundamental aspects of freedom of religion or belief which were missing from the text of the current Law and previous draft laws were addressed by the current Draft, which followed in this respect many of the key OSCE/ODIHR-Venice Commission past recommendations: the Draft Law expressly guaranteed to every person in the Republic of Armenia, and not only to Armenian citizens, freedom of religion or belief; the right to change one's religion or belief; the freedom to manifest religion or belief in public or private; the right to act according to one's religion in daily life; and the liberty of parents and guardians to ensure the religious education of their children in conformity with their own convictions. The Draft Law also made the liquidation of religious organisations a measure of last resort.

At the same time, in order for the Draft Law to be fully in line with the applicable international standards, additional changes were necessary, including some of a fundamental nature which had already been raised in the previous Joint Opinions. This concerned in particular issues related to the requirements to be fulfilled for introducing limitations to the freedom to manifest religion or belief, the definition of proselytism and religious associations, the specific conditions provided by the draft for the registration and operation of religious organisations, religious associations and religious groups, the liquidation of religious organisations, would need further improvement and should be carefully considered. Also, the 'exclusive missions' of the Holy Armenian Apostolic Church had to be opened to other religious communities as well.

The Commission held an exchange of views with Mr Grigor Muradyan, First Deputy Minister of Justice of Armenia. Mr Muradyan thanked the Commission and the OSCE/ODIHR for their co-operation during the legislative process which had led to the current draft law. While expressing his satisfaction for the globally positive assessment of the draft, Mr Muradyan provided clarifications on a number of specific issues raised in the Opinion, stressing that those which had not been settled in the current draft would be carefully addressed by the Armenian authorities. In addition, he made a number of amendment proposals and indicated that certain terms used in the Draft Law, such as "proselytism", had specific connotations in Armenia.

The Commission also endorsed a number of amendments proposed by the Rapporteurs.

**The Commission adopted the Joint opinion on the on the draft Law on freedom of religion of Armenia, on the draft law on making a supplement to the Law on the relations between the Republic of Armenia and the Armenian Holy Apostolic Church, on the draft law on making amendments and a supplement to the Administrative Offences Code and the draft law on making an amendment and a supplement to the Criminal Code of the Republic of Armenia (CDL-AD(2011)028), with amendments.**

*New electoral code of Armenia*

The secretariat introduced the draft final joint opinion on the new electoral code of Armenia which had been endorsed by the Council for Democratic Elections at its meeting on 13 October 2011. The Commission had endorsed the interim joint opinion on the draft version of this electoral code (CDL-AD(2011)021) at its Plenary Session of June 2011. The code had been adopted in May 2011, but its English version had only recently become available.

In the interim joint opinion, the Commission and the OSCE/ODIHR had found that several positive amendments had been made following previous joint opinions by the Venice Commission and the OSCE/ODIHR, which was commendable. In particular, quotas aimed at gender balance had been introduced, together with the clarification of the grounds for invalidating the results of elections and the provision of a judicial remedy for all electoral disputes. The new composition of election commissions, which shifted from a partisan to a non-partisan model at the level of the CEC and the CSECs, was a step towards a fully independent and impartial election administration. It was also positive that the Electoral Code had been amended almost a year before the next election, scheduled for May 2012. Political will would however be crucial for the good implementation of the code.

The code had been further improved on the basis of the recommendations contained in the interim opinion. In particular, the President of the Republic had been deprived of any discretion in the appointment of the members of the Central Electoral Commission, which was commendable. Quotas for women had been improved as well as the conditions of eligibility for President of the Republic (in respect of dual citizenship). Certain shortcomings in the electoral code stemmed directly from constitutional provisions. The electoral code as adopted had therefore the potential to ensure the conduct of democratic elections. Nevertheless, legislation alone cannot guarantee that members of election commissions will act professionally, honestly and impartially: full and proper implementation of the existing and possible new provisions on electoral commission formation and administration remained therefore crucial.

Certain amendments were proposed to the draft opinion so as to reflect more accurately the original Armenian text of the electoral code in the light of the explanations received from the authorities.

Mr Davit Harutyunyan, Chairman of the Standing Committee on State and legal affairs of Armenia, thanked the Commission for the good co-operation and expressed his satisfaction at the positive assessment of the electoral code. He expressed his conviction that his country would apply the new electoral code so as to conduct fully free and fair elections.

**The Commission adopted the final Joint opinion by the Venice Commission and the OSCE/ODIHR on the new electoral code of Armenia (CDL-AD(2011)032), with amendments,**

## 13. "The former Yugoslav Republic of Macedonia"

The Venice Commission examined the draft joint opinion by the Venice Commission and the OSCE/ODIHR on the revised Electoral Code of "the former Yugoslav Republic of Macedonia", as amended on 5 and 13 April 2011 (CDL-REF(2011)039), previously adopted by the Council for Democratic Elections at its meeting on 13 October 2011.

Mr Kask presented the opinion and the discussions held by the Council for Democratic Elections on 13 October. The examined revised Electoral Code of "the former Yugoslav Republic of Macedonia" included an important number of the previous recommendations of the Venice Commission and the OSCE/ODIHR. As a result the overall assessment of the Code was very positive. However, some of the articles of the Code could be further improved, notably, the provisions on the registration of candidates, the issue of donations during the electoral campaign and the voting of persons residing abroad.

**The Venice Commission adopted the joint opinion by the Venice Commission and the OSCE/ODIHR (CDL-AD(2011)027) on the revised Electoral Code of "the former Yugoslav Republic of Macedonia", as amended on 5 and 13 April 2011.**

## 14. Peru

Ms Peters presented the draft amicus curiae brief requested by the Constitutional Court of Peru on the case *Santiago Brysón de la Barra et al.* concerning the definition and punishment of crimes against humanity. The Constitutional Court submitted three questions to the Commission: 1*. What case-law has been issued on crimes against humanity by other courts and constitutional equivalent bodies? 2. How have crimes against humanity been defined and established? 3. On the basis of this case-law, what types of facts have been considered as constituting crimes against humanity?* The background to this request is the lodging at the Constitutional Court of Peru of several complaints (and amongst them, the one introduced by Mr Bryson and others) against the criminal proceedings and the sentencing relating to the events which happened in "El Frontón" prison in June 1986.

Ms Peters noted that the brief dealt first of all with the element of the definition of crimes against humanity; secondly, with the principle of legality and non-retroactivity and the statute of limitations of crimes against humanity and finally with the issue of the sentencing of these crimes. The experience of many European and non European countries, as well as the case-law of several international courts, including the European and the Inter-American Court of Human Rights have been presented in the opinion. It shows that a progressive inclusion of a definition of crimes against humanity has been developed by domestic laws, a practice which has increased mainly after the end of the cold war. Quite a general consensus exists that the category of crimes against humanity emerged in international law (at the latest) by the mid-20$^{th}$ century and the prosecution of past crimes is not considered retroactive or in violation of the principle of legality if it is proved that at the time of their commission, those crimes could have been qualified as crimes against humanity under applicable rules of international law.

Mr Gonzalez Oropeza commented the Mexican case-law on this issue and the possible evolution introduced by the constitutional reform introduced in 2011. He also noted the clear link between the rich case-law of the Inter-American Court of Human Rights in this field and the case-law of the European Court of Human Rights, often cited by the Inter-American Court, as well as some landmark cases of the International Criminal Tribunal for the Ex-Yugoslavia. Ms Palma suggested taking into account also the Portuguese experience in the prosecution on these crimes and the reluctance of national courts towards the non applicability of statutory limitations, mainly because of the importance of the principle of legal certainty *and nullum crime sine lege*. Ms Cleveland suggested including also some references to the United States case-law.

**The Commission adopted the *amicus curiae* opinion on the case *Santiago Brysón de la Barra et al.* (on crimes against humanity) for the Constitutional Court of Peru, with the addition of the case-law suggested by the members (CDL-AD(2011)041).**

## 15. Bolivia

Ms Flanagan presented the draft opinion on the Draft Code on Constitutional procedure of Bolivia (CDL-REF(2011)053), submitted by the European Union Delegation in La Paz in the framework of the Joint programme with the European Union to co-operate on the development of constitutional reforms in Bolivia. She explained that the draft Code dealt with a wide range of matters and established complex and very detailed rules. Some of them should be covered by the rules of procedure of the Court instead of appearing with such great detail in the draft Code. Moreover, according to the Final Provisions of the Draft Code on Constitutional Procedure, Part II of the Law on the Constitutional Court would be repealed. This raised some concerns on the relationship between the two pieces of legislation and on the scope of the draft Code on Constitutional Procedure.

Ms Flanagan noted that the draft Code had some shortcomings, mainly concerning the risk for the Constitutional Court of being overburdened by the existence of multiple and complex actions and remedies, which could endanger its effectiveness. However, the multiplicity of remedies and actions stemmed from the Constitution and the Law on the Constitutional Court of Bolivia. Therefore it was not possible to limit these sometimes overlapping procedures within the current legal and constitutional framework. The draft Code should also ensure that the Constitutional Court should be effectively able to supervise all jurisdictions and, in particular, the indigenous peasant original jurisdiction, which had to respect the right to a fair trial and the prohibition of cruel and unusual punishments.

Mr Israel Campero Méndez, Director General of Legal Affairs of the Parliament of Bolivia, expressed his satisfaction for the fruitful co-operation between the Venice Commission and the Bolivian authorities. Bolivia was in an important historic moment, as many new laws were being adopted to implement the 2009 Constitution. In October 2011 the judicial authorities would be elected by the population in an unprecedented process in the country and in the region. Mr Campero stressed the importance of the considerations and advice of the Venice Commission for the country and wished to continue this co-operation further in the future.

**The Commission adopted the opinion on the draft Code on Constitutional procedure of Bolivia (CDL-AD(2011)038).**

## 16. Azerbaijan

Ms Herdis Thorgeirsdottir presented the draft opinion, requested by the Chairperson of the Committee on Legal Affairs of the Parliamentary Assembly, on the compatibility with Human Rights standards of the legislation of Azerbaijan on Non-Governmental Organisations (see documents CDL-REF(2011)048 and 049).

The opinion focused on some problematic aspects of the 2009 Amended Law on NGOs and the 2011 Decree such as the registration of NGOs generally; the registration of branches and representatives of international NGOs specifically; the requirements relating to the content of the charters of NGOs and the liability and dissolution of NGOs.

With regard to the registration, which in many countries was a rather formal procedure, the opinion considered that the 2009 amended version of the Law on NGOs and the 2011 Decree had added further complications to an already complicated and lengthy procedure. Moreover,

the requirement for international NGOs to create branches and representatives and have them registered was in itself problematic.

As far as the liability and dissolutions of NGOs were concerned, the Law on NGOs posed problems of compatibility with Article 11 of the ECHR. There needed to be convincing and compelling reasons justifying the dissolution and/or temporary forfeiture of the right to freedom of association. Such interference must meet a pressing social need and be proportionate to the aims pursued.

The opinion indicated that the way in which the national legislation enshrines freedom of association and its practical application by the authorities reveals the state of the democracy of the country concerned. The opinion reiterated that the Republic of Azerbaijan, as Party to the ECHR and the ICCPR, was required to take steps to give effect to the civil and political rights it has undertaken and to ensure these rights to all individuals within the territory of Azerbaijan.

The opinion's conclusions coincided with the Recommendations adopted by the INGO Conference and the Venice Commission invited the authorities to take due account of this text as well.

Mr Shahin Aliyev, Head of the Department of Legislation and Legal Expertise of the Office of the President of Azerbaijan, stated that the Republic of Azerbaijan was a new democracy, with a new established civil society which comprises thousands of NGOs. With regard to the registration process of foreign NGOs he reminded the Commission that other countries had also set up a special registration procedure for foreign NGOs.

The Commission took note and endorsed the amendments discussed by the Sub-Commission on Fundamental rights at its meeting on 13 October 2011.

**The Commission adopted the Opinion on the compatibility with Human Rights standards of the legislation of Azerbaijan on Non-Governmental Organisations (CDL-AD(2011)035).**

## 17. Belarus

Ms Herdis Thorgeirsdottir presented the draft opinion on the compatibility with universal human rights standards of article 193-1 of the Criminal Code of Belarus on the rights of non registered associations in this country (CDL-REF(2011)051).

The opinion analysed Article 193.1 in the light of the right to join or not to join an association, in the light of the rights of non-registered association and in the light of freedom of expression and or association. The opinion concluded that penalising actions connected with the organization or management of an association on the sole grounds that the association concerned has not passed the state registration, as Article 193-1 of the Criminal Code does, did not meet the strict criteria provided for under Articles 22.2 I and 19.2 CCPR and 11.2 and 10.2 ECHR. This would make the activities of a non-registered association in fact impossible and, consequently, restrict the right to freedom of association in its essence.

Moreover, criminalising the legitimate social mobilisation of freedom of association, activities of human rights defenders albeit members of unregistered associations and social protest or criticism of political authorities with fines or imprisonment, as foreseen by Article 193-1 of the Criminal Code, was incompatible with a democratic society in which persons have the right to express their opinion as individuals and in association with others.

Finally, taking into account the deteriorating situation of human rights defenders in Belarus, particularly in recent months, along with the evolution of the legal framework in Belarus with regard to NGOs in the last decade, the adoption of Article 193-1 appeared to serve the purpose of criminalising social protest and legalising the government response to social unrest. The opinion reiterated that the Republic of Belarus, as a Party to the ICCPR, was obliged to take steps to give effect to the fundamental rights it had undertaken and to ensure these rights to all individuals within its territory.

Mr Maryskin thanked the Venice Commission for the comprehensive and detailed analysis of article 193.1 of the Criminal Code. He reminded the Commission that Article 193.1 aimed to ensure public order and not to prevent the work of human rights defenders. In this regard, he invited the Venice Commission to revise the conclusions of the opinion which were too severe and focused on the issue of human rights defenders.

The Commission took note and endorsed the amendments discussed by the Sub-Commission on Fundamental rights at its meeting on 13 October 2011.

**The Commission adopted the Opinion on the compatibility with universal human rights standards of article 193-1 of the Criminal Code on the rights of non registered associations in Belarus (CDL-AD(2011)036).**

## 18. Montenegro

Mr Hüseynov presented the joint opinion on the Law on the protector of human rights and freedoms of Montenegro (CDL-REF(2011)041), prepared in cooperation with the OSCE/ODIHR. The Law had been adopted by the Parliament of Montenegro on 29 July 2011, however the rapporteurs' comments had been sent to the Montenegrin authorities prior to the adoption.

Mr Hüseynov noted that the Law contained several positive steps in order to ensure the independence of the Human Rights Protector of Montenegro, such as in the field of financial independence concerning the possibility for the Protector to submit a proposal on his/her own budget and to participate in the debate at the Parliament. However, the need for constitutional amendments in order to strengthen the independence of the Human Rights Protector remained important, mainly as concerns the issue of the appointment of the Protector. Moreover, the dismissal of the Human Rights Protector should also be regulated at the constitutional level and in a detailed manner by the Law on the Protector.

The OSCE/ODIHR upheld the recommendations contained in the joint opinion and expressed its satisfaction for the work and co-operation with the Commission in the field of ombudsmen.

Mr Holovaty, as rapporteur on Montenegro for the Monitoring Committee of the PACE, stated that the request was part of the process of requiring the Montenegrin Parliament to improve the provisions on the appointing and dismissal of the ombudsman and on improving its role as an anti-discrimination body.

**The Commission adopted the opinion on the Law on the Protector on Human Rights and Freedoms of Montenegro (CDL-AD(2011)034).**

## 19. Georgia

Mr Aurescu presented the draft opinion on the law on amendments and supplements to the law on assembly and manifestations of Georgia, adopted on 1 July 2011 (CDL-REF(2011)054).

The text of this law reflected several recommendations made by the Commission in its interim opinion on the Draft Amendments to the Law on Assembly and Manifestations of Georgia (CDL-AD(2010)009 ). In particular and importantly, the principles of proportionality, legality and necessity in a democratic society were now set out in the law. The provisions on dispersal of assemblies and simultaneous and counter assemblies had been improved. In this context, it was worth reiterating that the Constitutional Court of Georgia in its judgment of 18 April 2011 had struck down certain provisions in the law in force which the Venice Commission had previously criticised.

Certain problems persisted, notably as concerned blanket restrictions, blocking of traffic and spontaneous assemblies, although in part they stemmed directly from the constitution. In all, the new law represented a significant improvement. Due implementation would however be crucial and the Commission was ready to assist the Georgian authorities in this respect.

**The Commission adopted the final opinion on the on the law on amendments and supplements to the law on assembly and manifestations of Georgia (CDL-AD(2011)029).**

## 20. Other constitutional developments

*Egypt*

Dr Yahia El Gamal, former Deputy Prime Minister of Egypt, presented to the Commission the most recent developments relating to the reform process taking place in his country since the fall of the previous regime.

Mr El Gamal briefly summarised the succession of events in Egypt since 27 January 2011, including the formation of the first government in February 2011. The Commission was in particular informed of the process having led to the proclamation, in March 2011, of a Constitutional Declaration containing the main constitutional principles underlying - for the transitional period - the functioning of the Egyptian state. As indicated by Mr El Gamal, as a result of a lively debate, it was agreed that the election of the Parliament would precede the adoption of a new Constitution. Once elected, the Parliament will designate the members of a Constitutional Commission entrusted with the drafting of the new Constitution, to be submitted to popular referendum before its adoption. Mr El Gamal also provided an overview of the Egyptian political scene, marked by a variety of new political parties with very different views emerging in addition to the old established parties, and the difficulty to formulate unified political programmes for the implementation of democratic reforms.

While stressing the various challenges facing Egypt during this difficult transition period, Mr El Gamal assured the Commission of the country's firm commitment to building a genuine democratic system, accepted by the population, respectful both of the domestic traditions and of the international standards. Mr Buquicchio thanked Mr El Gamal for sharing with the Commission information, the concerns and prospects relating to the democratic process which is on-going in his country, and assured him that the Venice Commission stands ready to assist Egypt, with its experience and technical help, in the forthcoming constitutional reforms. Mr Buquicchio indicated in this context that a Conference organised in cooperation with the Supreme Constitutional Court of Egypt will bring together in January 2012, just after the parliamentary elections, experts, lawyers as well as members of the new parliament to discuss the constitution drafting process.

*Romania*

Mr Thomas Markert informed the Commission on the Conference "Constitutional Reshuffle and Guarantee for the Independence of the Judiciary", organised on 28 September in Bucharest by the Konrad Adenauer Foundation and the Romanian Superior Council of Magistracy. The

Conference was organised in the framework of the recent initiative of the President of Romania for the revision of the current Romanian Constitution. Its aim was to provide a forum for an expert discussion of the amendments proposed in the draft revised Constitution with regard to the judiciary, in the light of the relevant international standards.

Among the issues discussed during the conference, Mr Markert mentioned the role of civil society representatives within the Superior Council of Magistracy, which should be strengthened through the constitutional amendments, as well as further changes proposed, in the draft revised Constitution (including the issue of judges' liability for judicial errors), as a way to improve the functioning of the Romanian judiciary and to address the high level of dissatisfaction, within the Romanian society, towards the Romanian judicial system.

*Maroc*

M. Lamghari informe la Commission de la récente réforme constitutionnelle au Maroc. Cette réforme peut se résumer à trois séries d'éléments : une véritable charte des libertés et droits fondamentaux, de nouveaux espaces et un nouvel équilibre des pouvoirs.

S'agissant de la charte des droits fondamentaux on peut noter la consécration de la parité et le bannissement de toute forme de discrimination et plus largement une référence aux droits de l'homme universellement reconnus.

Les nouveaux espaces concernent la transformation et l'élargissement de la régionalisation, l'institutionnalisation de la démocratie citoyenne et participative, l'affirmation de la bonne gouvernance.

Enfin le nouvel équilibre des pouvoirs se révèle à travers un nouveau partage de pouvoirs entre le Roi et le chef du gouvernement : ce dernier est le véritable chef de l'exécutif responsable devant le Parlement, le Roi n'étant qu'un arbitre. Un parlement à compétences renforcées. Une justice dont le statut est devenue celui d'un pouvoir indépendant avec des garanties explicites pour l'indépendance des juges et les droits des justiciables. Un conseil constitutionnel transformé en cour constitutionnelle dont la moitié de membres sont élus par les deux chambres du parlement, avec des compétences et une saisine plus larges.

*Tunisie*

M Ben Achour informe la Commission de l'état d'avancement de la préparation des élections pour l'assemblée constituante, prévues pour le 23 octobre. Il explique en détail le système électoral adopté par décret-loi et le rôle de l'Instance Supérieure Indépendante pour les Elections (ISIE).

Il explique également qu'un débat qui a eu lieu en Tunisie sur le rôle de la future assemblée constituante (uniquement constituante ou également législative) et la durée de son mandat. Dans une déclaration sur le processus transitionnel, les 12 partis politiques les plus influents se sont engagés politiquement à respecter les principes suivants : lors de sa première séance, l'assemblée constituante élira un président intérimaire, qui nommera un Premier ministre. La durée des travaux de l'Assemblée n'excédera pas une année. En revanche, la question de la compétence n'a pas été tranchée.

M Ben Achour explique ensuite qu'environ 1600 listes électorales ont été déposées pour les 27 circonscriptions électorales (27 en Tunisie et 6 à l'étranger), dont 40% par les 115 partis politiques et 60% par des candidats indépendants. L'ISIE s'occupe de la préparation et de la sécurité des 9 000 bureaux de vote, ainsi que de la supervision de la campagne électorale.

Finalement, M Ben Achour informe la Commission que la situation à la frontière tuniso-libyenne s'est beaucoup améliorée.

## 21. Report of the meeting of the Council for Democratic Elections (13 October 2011)

Mr J-C Colliard, Vice-President of the Council informed the Commission on the results and conclusions of the meeting held on 13 October 2011.

The Council considered and adopted the opinions on the electoral legislation in Armenia, "The former Yugoslav Republic of Macedonia" and Ukraine. These opinions were discussed and adopted by the Commission under specific items of the agenda of the plenary session.

The Council decided to hold its next meeting on 15 December 2011 in Venice.

## 22. Report of the meeting of the Scientific Council (13 October 2011)

Mr Helgesen informed the Commission that the work of the Scientific Council on the compilations was continuing. Four had already been submitted to the Commission, and one more was in the pipeline. They would be available on the Commission's website and continuously updated. As concerned the conferences and seminars planned for 2012, the planned conference on the linguistic rights of minorities would take place in Oslo in the autumn, on the occasion of the 25th anniversary of the Centre for Human Rights. The conference on the rule of law to take place in London in March 2012 had also been discussed at length.

## 23. Report of the meeting of the Sub-Commission on Working Methods (13 October 2011)

Mr Paczolay informed the Commission that at the meeting of 13 October the sub-commission had examined the measures which had been taken by the Secretariat on the basis of the revised guidelines on the Commission's working methods, adopted by the Commission in October 2010. The following were underlined: the sending of regular members' updates (five so far); the information sheets which were now sent to the rapporteurs for the preparation of the opinions; the preparation of a quick guide for new members; the distribution of the commission's documents by e-mail with an intelligible title; the preparation of compilations of the Commission's opinions and studies on selected topics. The deadline for distribution of session documents had been brought forward. These measures had increased the transparency, the effectiveness and the quality of the Commission's work. The Sub-Commission had therefore expressed its satisfaction.

The Sub-Commission decided that the individual comments of the rapporteurs should not, as a rule, be published unless, in specific cases and exceptionally, this is deemed useful.

The Sub-Commission had also discussed the method of the election of the President, vice-Presidents and chairs of the sub-commissions, in view of the upcoming elections of December 2011. Ms Haller and Ms Siljanovska expressed their preference for a system of open elections instead of the system currently foreseen in the working methods (preparation of the elections by a committee of wise persons elected by the Plenary upon proposal of the Bureau).

The Sub-Commission had considered that the system currently foreseen in the working methods was the most appropriate to accommodate the need to meet all the different criteria in a democratic manner and had decided to maintain it.

## 24. Report of the meeting of the Sub-Commission on Fundamental Rights (13 October 2011)

Mr Kaarlo Tuori, Chair of the Sub-Commission, indicated that the Sub-Commission, during its meeting held on 13 October 2011, had discussed the draft *amicus curiae* brief on the Law of the Republika Srpska (Bosnia and Herzegovina) on the Status of State Property located on the Territory of the Republika Srpska and under the disposal Ban, the draft opinion on the

compatibility of the legislation of Azerbaijan on Non-Governmental Organisations with Human Rights standards and the draft opinion on the compatibility with universal human rights standards of article 193-1 of the Criminal Code of Belarus vis-à-vis the rights of non registered associations in this country, in view of their submission for adoption by the plenary. In addition to discussing specific issues addressed by the above-mentioned drafts, further issues were raised by some members of the Sub-Commission, such as the need to anticipate the implications of the Commission's reasoning in other areas potentially concerned by a specific topic and, more generally, the need for a coherent approach of the Commission when addressing similar issues in different countries. The three drafts, and related amendments proposed by the rapporteurs, were approved by the Sub-Commission and recommended for adoption by the plenary.

## 25. Other business

*Co-operation with the OSCE/ODIHR Group of experts on political parties*

The Commission was informed about the creation of the OSCE/ODIHR Group of experts on political parties. Several members of the Commission had participated in the meetings organised by the OSCE/ODIHR from 2008 to 2010. In 2010 the Commission had adopted the Guidelines on the regulation on political parties prepared by the OSCE/ODIHR working group on political parties in co-operation with the Venice Commission members.

The Commission decided to nominate Mr J. Hamilton as its representative in the OSCE/ODIHR Group of experts on political parties and invited all members interested in co-operating with the Group to inform the Secretariat of the Commission. A meeting of members interested in working on political parties' issues could be organised if needed in the near future.

*Conference on the rule of law (London, 2 March 2012)*

Mr Jowell informed the Commission on progress in the preparation of the Conference on the rule of law. This Conference would be held in London on 2 March 2012 within the framework of the UK Chairmanship of the Committee of Ministers and would be co-organised by the UK, the Bingham Centre for the Rule of Law and the Venice Commission.

## 26. Dates of the next sessions

The final session of 2011 was confirmed as follows:

89th Plenary Session 16-17 December 2011

The schedule of sessions for 2012 was confirmed as follows:

90th Plenary Session 16-17 March 2012
91st Plenary Session 15-16 June 2012
92nd Plenary Session 12-13 October 2012
93rd Plenary Session 14-15 December 2012

Link to the list of participants