Strasbourg, 23 May 2007

CDL(2007)052*
Engl. only

Opinion no. 392 / 2006

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT INTERIM OPINION ON THE DRAFT CONSTITUTION OF MONTENEGRO

On the basis of comments by

Mr Anthony BRADLEY (Substitute Member, United Kingdom)
Mr Asbjørn EIDE (Expert, Norway)
Mr Aivars ENDZINS (Member, Latvia)

This document has been classified restricted at 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.

This document will not be distributed at the meeting. Please bring this copy.
www.venice.coe.int

TABLE OF CONTENTS

I. Introduction 3
II. Introductory remarks 4
III. Part One, “Principal Provisions” (Articles 1-15) 4
IV. Part Two, Human Rights and Freedoms (Articles 16-76) 6
V. Part Three, Economic System (articles 77-86) 14
VI. Part four, System of powers (articles 87-132) 15
VI. Part Five - Constitutionality and legality (articles 133-136) 21
VII. Part Six - Constitutional Court of Montenegro 21
VIII. Part Seven - Change to the constitution (Articles 143-145) 23
VIII. Part Eight - Transitional and final provisions 24
IX. Conclusions 24

I. Introduction

1. The Republic of Montenegro became a member of the Council of Europe on 11 May 2007. In the process of accession to the Council of Europe, on 8 February the Montenegrin authorities committed themselves to ensuring that the new Constitution would incorporate the following minimum seven principles:

1) the Constitution must stress that the Republic of Montenegro is a civic state, based on civic principles by which all persons are equal and not on the equality between constituent peoples;

2) the Constitution must provide for the independence of the judiciary and recognise the imperative of avoiding any decisive role of political institutions in the procedure of appointment and dismissal of judges and prosecutors;

3) in order to avoid conflict of interests, the role and tasks of the Public Prosecutor should not include, both the application of legal remedies for the protection of constitutionality and legality and the representation of the Republic in property and legal matters;

4) the efficient constitutional protection of human rights must be ensured. The Constitution should provide for the direct applicability of the human and minority rights, as was recognised in the Charter on Human and Minority rights of Serbia and Montenegro. The constitutional reform therefore needs to provide for at least the same level of protection of human rights and fundamental freedoms as the one provided for in the Charter, including the rights of minorities[1];

5) the Constitution should state that capital punishment is prohibited at all times;

6) the Constitution should include transitional provisions for the retrospective applicability of human rights protection to past events. It should also include provisions on the retrospective applicability of the European Convention on the protection of Human Rights and Fundamental Freedoms and Protocols;

7) the Constitution should regulate the status of the armed forces, security forces and intelligence services of Montenegro and the means of parliamentary supervision. It should provide that the position of the commander-in-chief be held by a civilian.

2. On 16 April 2007, the parliament of Montenegro submitted the draft Constitution of Montenegro (CDL(2007)053) to the Venice Commission for assessment.

3. A delegation of the Venice Commission, composed of Messrs. Anthony Bradley and Aivars Endzins, accompanied by Mr Thomas Markert and Ms Simona Granata-Menghini, travelled to Podgorica on 25 and 26 April 2007. They met with representatives of the Montenegrin authorities, and participated in a public round table on constitutional reforms in Montenegro. Mr Asbjørn Eide was also appointed as rapporteur; he could not travel to Podgorica with the delegation but submitted his analysis of the draft constitution which was conveyed to the authorities and the public by the Secretariat.

[1] The Charter on Human and Minority Rights and Civil Freedoms formed an integral part of the Constitutional Charter of the State Union of Serbia and Montenegro and between 2003 and 3 June 2006 complemented the 1992 Constitution of Montenegro insofar as the protection of human rights and fundamental freedoms was concerned. This Charter had been assessed by the Venice Commission and recognised to be of excellent quality and to represent great progress in the constitutional protection of human and minority rights (see CDL(2003)010, Comments on the draft Charter on Human and Minority Rights and Fundamental Freedoms).

4. The present interim opinion was prepared by the Secretariat on the basis of the rapporteurs' comments and of the discussions which were held in Podgorica. It was forwarded to the Montenegrin authorities on …., and subsequently endorsed by the Venice Commission at its … Plenary Session (Venice, …).

II. Introductory remarks

5. It was explained to the Commission delegation which visited Montenegro at the end of April 2007 that the text of the draft constitution as finalised by the competent parliamentary committee is to be considered more a political than a legal document. The committee reached an agreement on the content of most provisions and reserved the technical drafting to a later stage. For those matters on which a consensus could not be found, alternatives were put in the text.

6. Indeed, the technical quality of the draft constitution needs to be significantly improved. In particular, as will be explained in detail below, the technical flaws in the part on Human Rights result, notwithstanding the attempt to ensure the implementation of the Council of Europe founding principles, in the draft constitution providing an insufficient level of human rights protection. The draft constitution will need to be reviewed in the light of the present opinion. A further visit of the Venice Commission to Montenegro will provide the opportunity of close co-operation.

7. The provisions on the manner of appointment, dismissal and the career of judges and the functions and composition of the Judicial Council remain at variance with European standards on the independence of the judiciary. In this respect, the Commission delegation engaged in detailed discussions with the authorities of Montenegro and considered that it appears possible to reach a solution which complies with European standards and meets the specific needs of Montenegro.

III. Part One, "Principal Provisions" (Articles 1-15)

General remark

8. In this chapter, an explicit reference to the need to abide by the rule of law would be desirable.

Articles 1 and 2

9. Paragraph 2 of Article 1 and paragraph 2 of Article 2 are identical.

Article 6

10. Article 6 contains, in its third paragraph, a general clause on non-discrimination. This could be put in a separate, specific provision on non-discrimination containing also the principle of equality before the law, currently set out in Article 16, and the principle of equal legal protection set out in Article 17. In any event, the explicit possibility of introducing positive measures in order to promote full and effective equality of persons or groups of persons in unequal position (corresponding, insofar as national minorities are concerned, to Article 4 § 2 of the Framework Convention for the Protection of National Minorities) must be added. A good example is Article 3 paragraphs 4 and 5 of the 2002 Charter on Human and Minority Rights of Serbia and Montenegro, ["the 2002 Charter of Human Rights"].

Article 7

11. Article 7 is the only provision of the draft constitution directly dealing with minority rights. The alternative Articles 70a, b, c, d, đ, e and ž would instead set out some minority rights. Whether or not to list the specific minority rights is, in principle, a choice which belongs to the Montenegrin parliament. Both options are possible, but if the rights are not listed the constitution must contain an explicit reference to the relevant (constitutional?) law: such reference should therefore be added in Article 7 (Article 15 of the Constitution only refers to a

law on the manner of exercise of minority rights"). It must be noted however that Montenegro has committed itself to providing "at least the same level of protection of human rights and fundamental freedoms as the one provided for in the Charter on Human and Minority Rights of Serbia and Montenegro, including with respect to the rights of minorities". The 2002 Charter of Human Rights did list the minority rights in a specific chapter. In addition, "special rights of National and Ethnic Groups" were provided in detail by the Constitution of the Republic of Montenegro of 1992. It would therefore appear more consistent to continue to provide minority rights with a constitutional entrenchment.

12. It is true that article 133 provides that the law shall be in conformity not only with the constitution but also with international agreements, and article 137 provides that the Constitutional Court shall decide on conformity not only with the laws but also with international agreements; in addition, the international agreements take precedence over national law in case of conflict, as set out in Article 8. It might therefore be argued that, in the absence of explicit formulation of minority rights in the constitution, the international conventions would be directly applicable.

13. The problem however is that some rights are not formulated as self-executing in the Framework Convention, and they therefore require a national implementation. This is partly done by the Montenegrin Law on national minorities of 2006, but it would be desirable that a stronger incorporation of the minority rights be contained in the Constitution itself, and the present Article 7 is insufficient for that purpose.

14. At any rate, the current draft article 7 should provide for the rights of persons belonging to national minorities not only to express, preserve and openly manifest, but also to "develop" their national and religious, but also "cultural, ethnic and linguistic" identity.

15. Paragraph 2 of Article 7 should state that not only "these rights", but "minority rights in general" are to be exercised in accordance with the generally accepted international treaties and rules for the protection of human and minority rights. It should also explicitly state that "the protection of the rights of persons belonging to national and ethnic minorities forms an integral part of human rights".

Article 8

16. The meaning of the term "single" is the English translation is unclear.

17. Paragraph 2 of Article 8 provides that international treaties and agreements shall form an integral part of the internal legal order, have supremacy in case of conflict with domestic law, and be directly applicable in case of conflict with domestic law. This provision, which is line with one of the relevant commitments which Montenegro undertook vis-à-vis PACE, is to be welcome. It is of importance also for minority protection and for the status of the Framework Convention for the Protection of National Minorities. This could be further strengthened with a reference to the need to implement human rights treaties in the light of the practice of the respective monitoring bodies. The use of the last 9 words of Article 8 is questionable.

Article 9

18. The use of this article is doubtful.

Article 10

19. The term "State power" would be clearer than "the power".

20. In Article 10 § 4, the reference to checks and balances is vague and possibly meaningless; checks and balances only come into play when specific checks or balances are stipulated by the Constitution. It is difficult to imagine what 'implied checks or balances' would be.

Article 12
21. The guarantees in Article 12 for "official use" of languages of national minorities could be usefully supplemented by a more limited and specific right to use a minority language "in contacts with administrative authorities."

Article 14
22. There is no need to maintain paragraph 4, which may be seen as putting into question EU accession and further integration.

Article 15
23. If Article 15 § 1 is meant to govern the extent of legislation affecting the protected rights and freedoms, it does not do so in a satisfactory manner. Any such restrictions should follow the model set out in the European Convention on Human Rights ("the ECHR") of being prescribed by law, for a legitimate purpose and should not exceed what is necessary in a democratic society. Article 15 § 4 is unclear.

24. It might be more appropriate that the gist of Article 15 be placed in Article 87 (legislative powers of Parliament), but possibly this provision is not needed at all, given Article 21, if improved in accordance with the comments made below.

IV. Part Two, Human Rights and Freedoms (Articles 16-76)

General observations
25. This part of the draft constitution is worded and structured in rather different terms than the ECHR. This will, of itself, raise issues of interpretation. The ECHR is to become directly applicable in Montenegro, and the Montenegrin courts will have to apply it and the case-law of the European Court of Human Rights: significant differences between the ECHR and the Constitution will lead to possibly conflicting interpretations of the substantive guarantee, a situation which would not ensure the effective protection of human rights.

26. In addition, the differences between the current draft Constitution and the ECHR are not merely textual. Certain fundamental guarantees have been omitted, in part or totally.

27. It is recalled that the Montenegrin authorities have committed themselves to providing in the new Constitution at least the same level of human rights protection which was guaranteed by the 2002 Charter of Human Rights, which the Venice Commission had found to provide for an excellent level of human and minority rights protection.

28. For these reasons, it is strongly recommended that this part of the draft Constitution be amended so that it corresponds fully to the ECHR. This will ensure that there is no gap in the substantive guarantees. On the other hand, the draft Constitution may of course make provision for the protection of rights that go beyond those found in the ECHR.

Article 16
29. It would be appropriate to add that the rights and freedoms shall be exercised on the basis of the Constitution "and of the generally accepted principles of international law and the applicable international treaties", similarly to what is rightly stated in Article 7 in respect of minority rights. As concerns the overlap of this provision with Article 6 of the draft constitution, see above, re. Article 6.

Article 18
30. Article 18 provides for the right to a remedy. In order for this provision to correspond fully to Article 13 ECHR and comply with the opinion of the Parliamentary Assembly on Accession of the Republic of Montenegro to the Council of Europe (No. 261(2007)) ("PACE opinion"), 19.2.2.2., the term "effective" must be added prior to "legal redress", and specify that this applies in respect of alleged breaches of the rights and freedoms set forth in Part 2 of the Constitution.

Article 19
31. The right to legal aid should be subjected to the conditions foreseen by the law, notably in respect of income and the interests of justice, as foreseen in Article 6 § 3 c) ECHR. (See para. 41 below)

Article 20
32. In order to avoid that the Constitution contain merely programmatic rules, the right to a sound environment should not be formulated as an individual right, but rather as a state objective. A good example of this kind is Section 20 of the Finnish Constitution, which provides: "Section 20 - Responsibility for the environment. Nature and its biodiversity, the environment and the national heritage are the responsibility of everyone. The public authorities shall endeavour to guarantee for everyone the right to a healthy environment and for everyone the possibility to influence the decisions that concern their own living environment."

Article 21
33. Limitations to the exercise of individual rights should not only be imposed "in accordance with the law", as stated in Article 21, but also "in pursuit of legitimate aims" and "in a proportional manner", that is to say to the extent required in a democratic society for achieving a legitimate aim. These further guarantees must be added in Article 21.

34. This provision appears to overlap with paragraph 1 of Article 15: a cross-reference should therefore be added.

Article 22
35. This provision should specify that derogations from human rights and freedoms may only be made upon "the official proclamation" (see articles 121 and 122 of the draft constitution) of the state of war or other public emergency "threatening the life of the nation". They are only possible "to the extent required by the exigencies of the situation" (the expression "within the limits required" is not sufficiently clear).

36. This provision should also specify the articles in the Constitution that are not affected during war or emergency.

Article 23
37. While human life is inviolable, Article 2 ECHR authorises deprivation of life resulting from the use of force when absolutely necessary and in three situations: in defence of any person from unlawful violence; in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; in action lawfully taken for the purpose of quelling a riot or insurrection. It is suggested that Article 23 of the draft Constitution contain a similar clause.

Article 24
38. Concerning cloning, it could be appropriate to use the formula of Article 1 of the Council of Europe Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, on the Prohibition of Cloning Human Beings, according to which "Any intervention seeking to create a human being genetically identical to another human being, whether living or dead, is prohibited."

39. In paragraph 2, instead of “medical or other testing, it would be preferable to use the term “medical intervention”, which is broader than testing and is used in the relevant international instruments, notably the Oviedo Convention on Human Rights and Biomedicine. The latter (which Montenegro has however not ratified) provides as a general rule that “an intervention in the health field may only be carried out after the person concerned has given free and informed consent to it”, which is a stronger guarantee than that provided in Article 24 of the draft Constitution, setting out that such intervention must not be done against the will of the person.

Article 25

40. This provision mixes several rights protected by different articles of the European Convention on Human Rights. The right to dignity and the inviolability of physical and mental integrity are protected by Article 3 ECHR (see below, re. Article 28). The right to security of person is protected by Article 5 ECHR (which in the draft constitution is reflected in articles 26 and 27). The right to privacy is protected by Article 8 ECHR. It is unclear what the expression “individual rights” means in this context, as the principle of protection of human rights is already set out in article 6.

41. For reasons already elaborated (see para 25-25 above) and in order to avoid any possible confusion or misunderstanding as to the interpretation of these rights, the Constitution should adopt the same structure as the European Convention.

Article 26

42. This provision should state the only permissible grounds for deprivation of liberty, as stated in article 5 ECHR paragraph 1, and the need for any deprivation of liberty to be “in accordance with a procedure prescribed by law”.

43. This will make it necessary to re-draft later provisions of the Article in that they mostly assume that the individual has been detained in connection with a criminal charge e g Article 26/5

44. Article 26 § 6 states that “Unlawful deprivation of liberty is punishable”. It is unclear whether it is intended to make all breaches of article 26 a criminal offence. If it is so, would it have that effect without further legislation? The immediate consequence of unlawful deprivation of liberty must be release, and this should be stated explicitly.

Article 27

45. This article makes provision for a prompt decision by a court on pre-trial detention, and for the possibility for a superior court to order further detention for three months. Provision should be made for the possibility of seeking more frequent review of the detaining decisions.

46. Article 27 should also contain an express reference to the right of detainees to be released on bail (this is only implicit in the first paragraph).

Article 28

47. This title of this provision is respect for person. Paragraph 1, however, only refers to obligation to respect the dignity of *persons who are deprived of their liberty or whose liberty is restricted*. This right in fact flows directly from Article 25 of the draft constitution, which protects “the *dignity* and security of person”.

48. Paragraph 2 prohibits and renders punishable *any form of violence against a person deprived of his/her liberty, whose liberty has been restricted and any extortion of confession and statement*. This provision is insufficient to comply with Article 3 ECHR, in particular and in that it refers only to persons *deprived of their liberty*, and in addition in a context which suggests that it refers to detainees only, so that the question of whether a prisoner or immigrant or other irregularly detained persons qualify as a detainee might arise.

49. Article 28 should therefore rather prohibit in absolute terms torture and inhuman or degrading treatment or punishment.

Article 29
50. This provision sets out the general principle of the right to a fair and public trial within a reasonable time, equivalent to the guarantee of due process in article 6 § 1 ECHR, as well as one of its specific aspects, the right to a public pronouncement of the judgment, albeit without the explicit possibility to exclude the press and the public from all or part of the trial for the reasons set out in the ECHR provision; this is partly provided in Article 125 of the constitution on the publicity of trial, but it would be appropriate to state it in the section on human rights as it is not a merely organisational or procedural matter.

51. As it stands, this provision fails to identify when it is that an individual is entitled to fair and public trial; the opening words of Article 6/1 ECHR are needed : "In the determination of his civil rights and obligations or of any criminal charge against him".

52. The requirement of an "independent and impartial tribunal established by law" needs to be added.

Articles 30 and 31
53. These provisions rightly mirror Article 7 ECHR.

Article 32
54. This provision sets out the principle of presumption of innocence, which in the ECHR is spelled out in paragraph 2 of Article 6. In paragraph 3, it would be preferable to state "any *reasonable* doubt" .

Article 33
55. The right not to be *tried* (in addition to convicted) twice for the same offence should be added, as foreseen in Article 4 of Protocol 7 to the ECHR.

Article 34
56. This provision sets out other specific aspects of the general right to due process. The defence attorney must be of his own choosing", as set forth in Article 6 § 3 c) ECHR. Legal aid is foreseen in Article 19, although it would be logical that the two provisions be grouped.

57. While certain other aspects of Article 6 ECHR are covered by other provisions of the draft constitutions, some of the minimum rights belonging to everyone charged with a criminal offence are not contained in the current draft: the right to be informed promptly, in a language which one understands and in detail, of the nature and cause of the accusation (Article 6 § 3 (a) ECHR); the right to have adequate time and facilities for the preparation of the defence (Article 6 § 3 (b)); the right to examine or have examined witnesses against and to obtain attendance and examination of witnesses on one's behalf under the same conditions as witnesses against oneself (equality of arms) (article 6 § 3 (d)); the right to have the free assistance of an interpreter if one cannot understand or speak the language used in court (article 6 § 3 (f)). These rights must be added in the draft constitution.

Article 35
58. This provision rightly secures the rights stated in paragraph 5 of Article 5 ECHR and in Article 3 of Protocol no. 7. Article 22 of the 2002 Charter of Human Rights also foresaw the right to rehabilitation.

Article 36
59. The first paragraph should set out the right of *every citizen* to freedom of movement and residence. Otherwise, it would prevent any control of immigration by foreign citizens into Montenegro.

60. The right for everyone to leave freely Montenegro, set out in paragraph 2 of Article 2 of Protocol 4 to the ECHR as well as in Article 37 § 1 of the 2002 Charter of Human Rights, should be added.

61. The restrictions to the right to freedom of movement and residence should correspond to those listed in paragraph 3 of Article 2 of Protocol 4 to the ECHR, and the need for these restrictions to be in accordance with the law and necessary in a democratic society must be added.

62. The principle that citizens cannot be extradited save in application of international treaties should be added.

Article 37

63. This provision sets out the right to respect for one's home, which is protected by Article 8 ECHR (but unlike Article 8 ECHR, this does not protect "private and family life", as to which see para. 95 below). The need for any interference with the right to respect for one's home to be in accordance with the law, in pursuit of a legitimate aim and proportional to that aim must be added in Article 37. As it stands, this provision seems to give very wide powers to a court to authorise "a person in an official capacity" (it is unclear whether this refers to police officers only) to enter homes and other premises, without any reference to the need for a basis in national law for the issuing of search warrants by the court, which is incompatible with Article 8 ECHR. The need for two witnesses to assist should rather be spelled out in the relevant law, and not at the constitutional level.

Article 38

64. Article 38 omits to state the essential principle that any interference with the right to respect for one's correspondence must be in accordance with the law, in pursuit of a legitimate aim and proportional to that aim.

Article 41

65. Article 41 should state that the exercise of the right to vote can only be restricted in the cases indicated by the law (for example in cases of conviction or bankruptcy). The meaning of the expression 'with residence in Montenegro' should be clarified, and possibly refer to a law regulating the modalities of exercise of the right to vote.

66. Article 41 should also take into account the multicultural composition of the Montenegrin society. International standards require that appropriate electoral arrangements are made to ensure effective participation of minorities in public life. Several options exist, and the necessary details should be set out in ordinary law, but it is essential that the constitution provides in general terms the necessary guarantees, for example by introducing the following formula in Article 41: "The electoral arrangements shall be set out in law which shall contain regulations ensuring that persons belonging to minorities can participate effectively in public life."

Article 42

67. It has been suggested before (see above, re. Article 6) to add a specific provision on the permissibility of positive discrimination in respect of minorities. A similar clause should be added in this article.

Articles 43 and 44

68. These provisions protecting the right to freedom of thought and belief guaranteed by Article 9 ECHR should be merged. In addition, certain important aspects of this protected right should be added, such as the freedom to change one's religion or belief, the freedom to manifest them "alone or in community with others" and "in public and in private", and to manifest them "in worship, in teaching, practice and observance". Provision for permissible restrictions in pursuit of the legitimate aims stated in Article 9 ECHR and in a proportional manner must be made. The alternative proposed by the Serbian List constitutes an acceptable text, with the exception of the term "citizen" in the first paragraph: this right must be guaranteed to everyone, not just

citizens; in addition, the expression “prevent the threat to the identity and rights of another religious community” does not correspond as such to any legitimate aim set out in Article 9 ECHR.

Article 45
69. Restrictions on freedom of expression must be required to be prescribed by law and necessary in a democratic society for the pursuit of a legitimate aim, as guaranteed by Article 10 ECHR.

Article 46
70. In paragraph 1, the phrase “in accordance with the law” should be added. It should further be clarified whether the right to conscientious objection relates to any matter or only to military service.

Article 47
71. It is unusual to protect the right to claim damages for inaccurate reporting in the media at the constitutional level. This could be done in the law. Does “register” mean “a licensing system” ? Article 10 ECHR explicitly permits the licensing of broadcasting, television or cinema enterprises.

Article 48
72. Among the legitimate aims justifying the prevention of dissemination or distribution of ideas through the media, the following should be added: prevention of disorder or crime, protection of health and morals, protection of the reputation and rights of others and the other aims listed in Article 10 ECHR. The specific aim of preventing racial, national and religious hatred and discrimination is to be welcomed.

Article 49
73. This provision should be removed, as it is absorbed by Article 45.

Article 50
74. The necessity for any restriction to the right to freedom of peaceful assembly to be prescribed by the law and to be necessary in a democratic society for the pursuit of the legitimate aims listed in Article 11 ECHR should be added.

75. The need for prior *notification to the authorities* as opposed to *authorisation by the authorities* is compatible with the European standards. However, it should apply depending on the size of the assembly and on its taking place in the open air and should be provided in the law, not in the constitution: it should therefore be removed from this provision.

Article 51
76. The right to form and to join trade unions should be added. The need for any restriction to the right to freedom of association to be prescribed by the law and to be necessary in a democratic society for the pursuit of the legitimate aims listed in Article 11 ECHR should be added.

77. Does Article 50/3 authorise the state to pick and choose the political and other associations that it wishes to support?

Article 52
78. The blanket ban on participation of civil servants in political association is unacceptable. The general prohibition for the categories of persons listed in paragraph 2 to “publicly express own political beliefs” appears excessive.

79. Particularly problematic is the third paragraph. The prohibition of any forms of "political association" by "foreign nationals" (including those who do not hold Montenegrin citizenship) is formulated so broadly that it could give rise to undue restrictions. While the provision, at its core, pursues a legitimate aim, it requires more specific and detailed formulation in order to avoid unacceptable restrictions. Such details are difficult to include in a constitutional text.

80. "Political parties" are generally understood to refer to those who participate in parliamentary and other public elections. While it is legitimate to limit such voting rights to non-citizens, it should not exclude individuals who do not (yet) hold citizenship from membership in such parties even if they cannot vote.

Article 53
81. The meaning of "secret organisations" is unclear.

Article 54
82. The title of this provision is misleading in that it refers to citizens while the right to recourse to international organisations belongs to everyone. It must also be noted that the international organisations will have jurisdiction over an application only if it raises questions as to freedoms and rights guaranteed by the international convention, and they will not in general be concerned with questions of conformity with a national constitution.

Article 55
83. This provision corresponds to the "right to petition" which was guaranteed by Article 34 of the 2002 Charter of Human Rights. It should be specified that the right to petition may be exercised "individually or in community with others". However, by contrast with Article 34 of the 2002 Charter on Human Rights, Article 55 § 1 has added the menacing words "unless having committed a crime in doing so".

Article 56
84. The right to work seems a purely programmatic right – are the practical consequences of this to be declared by law?

Article 57
85. Does "appropriate salary" mean anything, unless defined by law?

Article 58
86. Paragraph 2 should rather refer to a law regulating the exercise of the right to strike.

87. The blanket prohibition for public employees to strike appears excessive; what needs to be guaranteed, either in the constitution or in the law, is the maintenance of a minimum service in key sectors of the public service.

Article 62
88. This provision appears to be merely programmatic and should be removed.

Article 63
89. The principle of equality between spouses, foreseen in Article 5 of Protocol 7 to the ECHR and by Article 25 of the 2002 Charter of Human Rights, should be added.

Article 64
90. The meaning of "children" should be better defined. Possibly Article 64/2 applies to 'children who are minors' and Article 64/3 applies to 'children who are adults'.

Article 65
91. The obligation for the State to create conditions to stimulate childbirth is very vague and should be removed.

Article 66
92. This provision should better correspond to Article 32 of the 1989 Convention on the Rights of the Child which sets out “the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.”

Article 70
93. Surprisingly, this article deals only with the protection of national and cultural heritage. It appears to have replaced the far more detailed provisions in Articles 81-82 and 83 of the expert draft which was the subject of the consultation held in November 2006. See above, with reference to Article 7.

Lacking provisions on human rights protection
94. As mentioned above, the draft constitution should contain the absolute prohibition of torture and inhuman and degrading treatment or punishment.

95. The draft constitution should contain a provision prohibiting in absolute terms slavery and forced labour as provided in Article 4 ECHR.

96. The rights set out in Article 6 § 3 (a), (b), (d) and (e) ECHR must be added (see above, para. 37).

97. A provision setting out the right to respect for family life should be added, possibly in conjunction with the right to respect for private life as is done in Article 8 ECHR (see above, paras. 21 and 22). This right is not covered by current article 64 of the draft constitution.

98. A provision setting out the right to Free access to information held by public authorities should also be added; it was foreseen in Article 29 § 2 of the Charter. This matter is of high importance to the Council of Europe; indeed, one of the requests of PACE concerns the implementation of the law on access to public information (see PACE opinion, 19.3.17).

99. Transitional provisions on the retroactive applicability of human rights protection to past events and on the retroactive applicability of the ECHR and its Protocols and other international treaties need also to be added (see PACE opinion, 19.2.6). Unless clear provision is made for this, it is probable that past infringements of human rights, however serious, will remain without a remedy under the new Constitution.

General remarks on Local Self-Government (Articles 74-75)
100. It is surprising that local self-government is regulated within the Part on Human Rights and Freedoms.

Article 74
101. The first paragraph of this Article does not give to municipalities the full position of owner of their assets. It was explained that municipalities should have all the rights of an owner but that, in order to prevent abuses which happened with respect to the alienation of land in coastal areas, the State should have the right to block sales of land by municipalities. It would be more respectful of the principle of local self-government to provide that the alienation of real property by municipalities may be made subject to an authorisation by the State (if it goes beyond a certain value threshold fixed by law).

Article 75
102. The term “autonomy” in this Article would require further clarification. Art. 8.2 of the European Charter of Local Self-Government distinguishes between supervision of legality in the area of a municipality’s own competencies and supervision also with regard to expediency which is permissible in the area of delegated competencies.

103. The second paragraph limits the cases of possible dismissal of the Municipal Assembly. What about dismissal of the Municipal President?

The Ombudsman (Article 76)

104. Article 76 is insufficient. The constitution must also provide for the need for a qualified majority in the appointment of the ombudsman by parliament; the need for appropriate qualifications and high moral standards etc); the term of office (ideally, nine years, non renewable); and the guarantees of inamovibility of the ombudsman (the permissible grounds for removal must be indicated exhaustively) and its independence, including budgetary (See PACE opinion, 19.2.2.3). The main function of the Ombudsman, in particular, his power to investigate allegations of breaches of human rights and liberties and other wrongs, and to recommend (or to provide?) remedies for such breaches or wrongs that are found to have been committed, should also be indicated.

V. Part Three, Economic System (articles 77-86)

General remarks

105. This part of the Constitution appears too long. Many provisions have little normative content or should properly be elsewhere. Generally it seems preferable not to provide much detail on the economic order in the Constitution but to leave this to the legislature and the political process.

Article 78

106. The need for this Article may be questioned, possibly apart from the first paragraph which states an unobjectionable principle (which seems however obvious even without mentioning it). The second paragraph seems redundant. The third paragraph might unduly constrain the legislature in the future. The principle of the “open” market economy already implies the principle of acceptance of foreign investment and details should be left to laws and international agreements. The direct prohibition of acts by private parties is problematic as part of the Constitution, not least since its scope remains unclear. It would be preferable to give to the legislature the task to adopt appropriate legislation against restraints of trade or the creation and abuse of dominant positions or to provide for the establishment of an antitrust agency.

Article 79

107. The principle of freedom of entrepreneurship appears already in Art. 77. There seems no need to repeat it . This Article would better be included in Part II among the economic rights. The permitted restrictions seem too narrow having regard to the potentially extremely wide scope of entrepreneurship. At least the rights of others should be added.

Article 80

108. The right to property is a human right which should appear in Part II.

109. It is imperative to provide for the possibility of limitations of the right to property and not only of expropriations. Often it is necessary or sufficient to regulate property rights without proceeding to an expropriation.

110. Requiring compensation for expropriations at market value may pose problems for the state budget, especially when this value is inflated due to speculation motivated by the perspective of expropriation. To provide for fair compensation would appear more prudent.

111. The third paragraph raises many issues of interpretation and seems to go too far. As an example, many churches will be assets of specific historical significance but should presumably be owned by the church and not by the state. It would seem preferable to state in the Constitution that parliament may adopt laws regulating property and the exercise of property with respect to such assets.

Article 81

112. This article seems meaningless unless it is to be understood as a complement to Article 74 excluding municipal ownership.

Article 82
113. The right to succession could be regulated together with the right to property. If it is regulated separately, the right of the state to introduce an inheritance tax should be mentioned.

Article 83
114. As worded, this Article seems to state the obvious. Is the intention to guarantee to foreigners the right to acquire real property, including in sensitive areas?

Article 84
115. In the first paragraph "as provided for by law" should be added.

116. The purpose of the second paragraph is not clear. Will there not be other State revenue such as proceeds from privatisation?

117. As regards the third paragraph, the principle that municipalities will have their own budget already appears in Article 74. The State budget would merit a separate Article with more detail.

Article 85
118. It is welcome that the National Bank is to be an independent institution. Such independence will however be meaningful only if it is reflected in safeguards for the position of the Governor and the members of the Council such as a fixed term of office. The unqualified provision in Art. 87.13 that parliament shall appoint and dismiss the Governor of the Central Bank is therefore problematic. There is a need for a law on the National Bank to govern these matters in detail and the Constitution should make reference to such a law.

119. The currency of Montenegro is currently the euro, over whose stability Montenegro does not obviously have any influence. Montenegro obviously has no intention of abandoning the Euro.

Article 86
120. The same considerations apply to the National Audit Institution and the terms of office of the members of the Senate of this Institution. It would seem useful to provide for an Annual Report of this Institution to be submitted to the Government and the Parliament.

VI. Part four, System of powers (articles 87-132)

General remarks
121. The draft Constitution provides for a parliamentary form of government. This is a welcome choice. Generally the main concern seems to be to make the institutions accountable and less emphasis is placed on the stability of the institutions.

Parliament of Montenegro (articles 87-99)

Article 87
122. As is usual in many new democracies, this Article provides for a list of parliamentary competencies. It is very detailed and several provisions require comment.

123. Concerning point 1, while it is a usual to give to parliament the power to amend the Constitution, it is unusual to give to it the power to adopt the Constitution. The drafting is plainly defective on this point. The Constitution will have to be in force to make this power effective but then it is normally no longer needed. In the draft Art. 143, however, also addresses the adoption of a new Constitution. In this case the power to amend should be added, preferably before the (exceptional) power to adopt..

124. With regard to point 2, unless this is clear in the original language the difference between the "regulations and general acts" to be adopted by parliament and the decrees to be adopted by government under Art. 105.3 should be defined. It would seem useful to have a more explicit provision in the Constitution on normative acts and their hierarchy (cf. Art. 116 et seq. of the Albanian Constitution) in the Chapter on constitutionality and legality.

125. The provision in point 9 on supervision over the army and the security forces runs the risk of remaining meaningless if the means of this supervision by parliament are not defined (cf. Art. 45.a) and b) of the German Basic Law).

126. Point 10 is a remnant of the previous system and should be deleted. Interpretation of the law is the task of the courts. If parliament does not agree with the interpretation provided by the courts, it has to change the law.

127. The "calling for public loans" in point 12 is not very clear in the English translation but there seems a risk in the wording of encroaching upon executive responsibilities.

128. Point 13 contains, without further qualification, a list of positions to which parliament elects or appoints and dismisses. It would be better to separate the political positions in government from the other positions whose holders (should) enjoy independence. As regards elections and appointments, the list seems misleading since Art. 100.5 makes it clear that for some positions a proposal by the President is required while for other this is not the case. The list of positions for which a presidential proposal is required could be extended and/ or a qualified majority introduced for appointments to at least some independent positions. In particular as regards the Constitutional Court, not all judges should be close to the majority in parliament. The parallelism between appointments and dismissals seems inappropriate. Most of these positions are independent positions, the holders of which should be elected for a fixed term of office, and dismissal should only be possible upon specific grounds and in accordance with a court decision. Article 142 recognises this state of affairs for the judges of the Constitutional Court but leaves nevertheless the final decision to parliament.

129. Concerning point 14, while it is not unusual to require the consent of parliament for waiving the immunity of a member of parliament, the rational for parliamentary involvement in other immunities is not clear.

130. It would be prudent to add "or the law" in point 18.

Article 88

131. This article seems not sufficient as the only article on parliamentary elections. It would be desirable to have rules in the Constitution on the proclamation of election results and on the Central Election Commission.

Article 90

132. Insofar as this Article protects the free expression by deputies of opinions expressed as members of parliament, it is desirable and necessary. The broader immunity of Deputies for any act committed is traditional in many democracies and has been regarded by the Venice Commission as still pertinent for new democracies where there may still be a risk of unwarranted prosecution of opposition members. In Montenegro this risk seems at present remote. The recent case law of the European Court of Human Rights tends to consider such wide immunity as an obstacle to the right of access to the courts; and could victims of a crime committed by a deputy complain that they are being denied the equal protection of the law?

133. It seems not justified to regulate immunity for the President, members of government and especially judges in the same manner as immunity of members of parliament. Immunity of the Head of State should be regulated separately having regard to the impeachment procedure. Judges should not enjoy general immunity and there is no justification for involving parliament in waiving their immunity.

Article 91

Paragraph 2 is not very clear in the English translation.

Article 92

134. The third alternative is unclear at least in the English translation.

Article 93

135. It would be prudent to provide an alternative in case that the previous Speaker does not act.

136. Convocation is made dependent on the publication of the election results. The Constitution does, however, fail to regulate the procedure for this publication. Surprisingly, it does not even mention the Central Election Commission.

Article 95

The last clause should be "or minimum".

Article 96

137. The majority proposal requiring an absolute and not a two-thirds majority of votes for certain decisions seems preferable. Otherwise decision-making becomes too cumbersome. The list of laws for which the special majority is required could be reduced.

Article 97

138. Paragraph 2 of this Article, together with Article 89 on auto-dissolution, makes it very easy to dissolve parliament. This is a risk for political stability. It was explained that its purpose is to enable a government having lost its majority due to some parliamentarians changing their political affiliation to call new elections. Whether this purpose can be always or in most cases reached is doubtful since in accordance with paragraph 4 the opposition will often be able to pre-empt dissolution by a motion of no confidence.

With respect to paragraph 6, it seems strange for a Parliament that is dissolved to be able to continue working even while a general election is being held – and even after the voting has taken place?

Article 98

139. Is parliament obliged to call a referendum if one of the authorised bodies under paragraph 3 makes the proposal or is it free to reject the proposal? The first alternative would entail the risk of an excessive number of referendums since often more than 25 MPs will oppose a decision of parliament..

140. What can be the subject matter of a referendum? Only a proposed law ? Any law?

Article 99

141. It could be envisaged to require the majority of the total number of members of parliament for re-adoption following a presidential veto.

President of Montenegro (articles 100-104)

Article 100

142. Foreign policy (point 1) is the responsibility of the government. It is unclear which would be the international agreements within the scope of responsibility of the President.

In Point 3 – the power to proclaim laws by Ordinance presumably refers back to Art 99 and is not an independent power to make laws without Parliament

143. As regards the candidate for Prime Minister (point 5), the wording seems appropriate for the first attempt(s). It could be considered to give to parliament the right to elect a Prime

Minister proposed from within parliament if the first or first two candidates proposed by the President are not elected.

Article 103
144. While the text is not extremely clear, it would seem that parliament is under an obligation to start an impeachment procedure and submit the issue of violation of the Constitution to the Constitutional Court if 25 MPs request this. This threshold seems quite low. There is the risk of the Court deciding that the President has violated the Constitution and Parliament voting against dismissal. The authority of the President would be greatly weakened in such cases.

Government of Montenegro (articles 105-117)

Article 105
145. This Article contains a list of governmental tasks. The following require some comments:

- As regards the various normative acts listed in point 3, cf. the comment on Article 87.2. Point 3 should not confer a general power on the government to legislate which would raise a problem of compatibility with the separation of powers. An example of a clearly limited power of the government to issue normative texts is provided by Article 80.(1) of the German Basic Law: "The Federal Government, a Federal Minister … may be empowered by law to issue statutory orders. The content, purpose and scope of that power shall be specified in the law. Statutory orders shall contain a reference to their legal basis…."
- Point 8 might be considered covered by managing foreign policy in point 1. Is it useful for Montenegro to decide on the recognition of foreign governments?
- It would be prudent to add "or the law" in point 11.

Article 107
146. Paragraph 2 is not very clear on the distribution of tasks between Prime Minister and Ministers. An interesting comparison can be made with Art. 65 of the German Basic Law:

"The Federal Chancellor shall determine and be responsible for the general guidelines of policy. Within these limits each Federal Minister shall conduct the affairs of his department independently and on his own responsibility. The Federal Government shall resolve differences of opinion between Federal Ministers. The Federal Chancellor shall conduct the proceedings of the Federal Government in accordance with rules of procedure adopted by the Government and approved by the Federal President."

147. Or Art. 114 of the Slovenian Constitution:

"The Prime Minister shall be responsible for the political unity, direction and administrative programme of the Government and for the coordination of the work of the various Ministers of State. The Ministers are collectively responsible for the work of the Government and each Minister is responsible for his own Ministry.
The composition and functioning of the Government and the number, jurisdiction and organization of Ministries of State shall be regulated by statute."

Article 109
What happens to the position of a Deputy who is appointed a Minister?

Article 112
148. The threshold of 15 MPs to introduce a motion of no confidence is quite low.

149. In general, the Constitution makes it easy to shorten the term of office of parliament and government. This is a legitimate choice which may, however, be prejudicial to stability. As a stabilising measure to prevent the emergence of purely negative majorities the constructive vote of no confidence (the Prime Minister can only be replaced if a new Prime Minister is elected at the same time) could be considered.

Article 114

150. The threshold for the setting up of investigatory committees is quite low. It would be useful to define their powers

Article 115

151. Is it useful that the mandate of the government ceases if the Budget is not adopted?

Article 116

152. The establishment of a professional civil service is a key challenge for all post-socialist countries. The draft Constitution does not contain any indication as to the status of civil servants.

Article 117

153. The difference between delegating under paragraph 1 and entrusting under paragraph 2 may be clear to a Montenegrin lawyer. No provision is made that such delegation has to be accompanied by the required financial resources.

Army of Montenegro (articles 118-122)

Article 118

154. It would be welcome to reflect in this Article the principle from the Constitutional Charter of the State Union that defence has to be carried out in accordance with the provisions of international law on the use of force.

Courts (articles 123-132)

Article 125

155. As mentioned above in respect of Article 29, the exceptions to the principle of the publicity of trial are enumerated exhaustively in Article 6 ECHR, and should be added here. “Exceptionally” is too vague.

Article 126

156. The transfer of a judge against his or her will should be possible by decision of the Judicial Council in case of restructuring of the courts. The law should state that the decision on release from duty of a judge under paragraph 3 must be taken by the Judicial Council.

Article 127

157. It is common in other European countries to allow judges to perform certain activities such as teaching.

Article 128

158. The relationship which is intended to exist between (a) the ordinary civil and criminal courts, including the Supreme Court and (b) the Constitutional Court is unclear. It is also unclear whether matters of administrative law (where, say, a local council is alleged to have exceeded its legal powers) are intended to fall within the term “constitutionality and legality”. While a law regulating this in detail will be needed, it is important for the relevant constitutional provisions to be clear. This matter will be further discussed below, in respect of the mandate of the Constitutional Court in human rights matters.

Appointment, dismissal and career of judges, Composition of the Judicial Council (Articles 129-130), General observations

159. The manner of appointment and dismissal, and the career of judges, as well as the composition of the Judicial Council are an extremely controversial and debated matter in Montenegro.

160. Under the current constitution, they are appointed by parliament upon the non-binding proposal of the Judicial Council. The Montenegrin parliament is reluctant to abandon this system, which is at variance with the principle of independence of the judiciary. The Montenegrin authorities, however, in their negotiations on accession to the Council of Europe (see PACE opinion, 19.2.1.2) explicitly committed themselves to "avoiding any decisive role of political influence" in the appointment of judges.

161. The draft constitution contains two alternative methods. The first one is clearly incompatible with European standards. The second is marred by a flawed composition of the Judicial Council. Significant amendments are therefore essential.

Article 129

162. Judges should be appointed by the Head of State upon the proposal of the Judicial Council or directly by the Judicial Council. Election by parliament (moreover with no qualified majority), albeit upon the proposal of the Judicial Council, is a political act which is inappropriate to ensure the independence of the judiciary, and does not comply with European standards. Dismissal of judges by parliament, which is currently foreseen in Article 129, is even more problematic.

163. Election of the president of the Supreme Court by parliament, as foreseen in paragraph 2 of the alternative article 129, could be accepted once all other judges are appointed by the Judicial Council, but it should be specified that he is to be chosen "among sitting judges".

164. The mandate of the presidents of courts (four years) appears to be too short.

165. The Judicial Council should be competent to decide upon the appointment, the advancement and the removal of judges and to carry out disciplinary proceedings. There should be the possibility for affected judges to appeal against decisions of the Judicial Council on dismissal to the Constitutional Court or the Supreme Court. The criteria for professional advancement of judges need to be defined clearly and in detail in the law.

Article 130

166. The composition of the Judicial Council should be balanced; at least half of the members should be judges, elected by their peers. In this respect, it would be preferable that they be elected by a general assembly of all judges, including the most junior ones, than by senior judges only.

167. The other members should all possess appropriate legal qualifications. Some of them could be elected by parliament either with a qualified majority or in another manner which would allow the opposition to participate duly in the process (for example, one member could be elected by the majority and one by the opposition). The Minister of Justice could be a member ex officio, but it should not have the right to vote in disciplinary matters. The President of the Republic could also be an ex officio member, or could be entitled to appoint a member. The President of the Supreme Court could also be an ex officio member.

168. The Venice Commission delegation discussed with the Montenegrin authorities a possible composition of the Judicial Council, which is as follows: Out of ten members, five would be judges elected by the general assembly of judges. The President of the Supreme Court and the Minister of Justice would be ex officio members (the MoJ would not have the right to vote in disciplinary matters). One law professor would be appointed by the President of the Republic. Of the remaining two lay members, one would be chosen by the parliamentary majority and the other one by the parliamentary opposition. The Judicial Council would be competent to appoint, promote and dismiss all judges, with the exception of the President of the Supreme Court, who would be elected by parliament with a 2/3 majority.

169. The Venice Commission considers that such system would be acceptable and compatible with the relevant European standards.

170. In order to avoid that the majority of judges may take decisions with no possibility of oversight by the lay members, all decisions by the Judicial Council should be taken by a qualified majority.

171. As regards the president of the Judicial Council, two options appear preferable to granting this role ex officio to the President of the Supreme Court. It could either be elected by the members of the Judicial Council. Or it could be the President of the Republic (if he or she is a member of the Judicial Council) , with the vice-president being a lay member; given that the President of the Republic would rarely attend the sessions, the presidency would in fact be exercised by a lay member.

Article 132

172. The protection of the state interests has duly been removed from the tasks of the prosecutor (see PACE opinion, 19.2.1.3). The law will have to foresee the manner in which these interests will be protected otherwise, normally through public defence attorneys. It might be appropriate to state in paragraph 2 of Article 132 that among the "other duties stipulated by the law" there cannot be any duties on behalf of the Government or any public authority that would involve an actual or potential conflict with his duties as State Prosecutor.

173. The current draft constitution, unlike the previous expert text, is silent about the appointment of the state prosecutor, and about the composition and functions of the prosecutorial council. This issue should be regulated in the law.

VI. Part Five - Constitutionality and legality (articles 133-136)

Article 133

174. As set forth above in the remark on Art. 87.(2), it would be welcome to define the various normative acts below the level of a law in the formal sense (regulations, general acts, decrees) as well as their hierarchy.

VII. Part Six - Constitutional Court of Montenegro

Article 137

175. This provision sets out the competencies of the Constitutional Court. As concerns the constitutional appeal (paragraph 3), the formula "unless other court protection is prescribed" reproduces the formula contained in Article 113 para. 4 of the 1992 Constitution. This formula has proved to be problematic and has indeed let to the rejection of 95% of all applications under this paragraph on account of the formal existence of domestic remedies, as ineffective as they may be. It is suggested to replace this formula with "after all effective internal remedies have been exhausted".

176. To the extent that paragraph 6 seems to refer to Article 53 of the draft Constitution, this provision is acceptable.

177. The provision for the need to exhaust effective domestic remedies prior to applying to the Constitutional Court for the protection of fundamental rights will clarify at least in part the division of competences between this Court and the Supreme Court. Appeals to the former against decisions of the latter will indeed be possible, but the Constitutional Court will have to avoid turning into a court of "fourth instance". The case-law of the Strasbourg Court will be able to assist it, as this problem has occurred as concerns the relations between that Court and national courts.

178. Paragraph 9 of Article 137 entrusts the Constitutional Court with the monitoring of the exercise of constitutionality and legality. The Venice Commission delegation was explained that this means that the Constitutional Court should bring general issues of concern in these areas to the attention of the parliament. This function does not seem problematic.

Article 138

179. While Article 137 enumerates a number of procedures before the Constitutional Court, Article 138 defines who has standing before the Court, without differentiating between the various procedures but as having the right to ask “for the assessment of constitutionality and legality”. This approach raises numerous problems of interpretation, e.g. the first paragraph of Article 138 could be interpreted- and on its own, would have to be interpreted- as the basis for an *actio popularis*. The persons or bodies enumerated should not have the right to launch all these procedures. It would be preferable to define with respect to each procedure who has the right to initiate it and under which conditions.

180. As examples,
o Constitutional complaints may only be introduced by the person(s) whose rights have been violated following the exhaustion of ordinary remedies;
o Courts may submit the constitutionality of a legal provision to the Constitutional Court if the decision in a dispute before the respective court depends on this provision (concrete norm control);
o Requests to examine the constitutionality of a law can be initiated by a group of MPs or a state authority (which one?, what is the definition of a state authority? – better enumerate these authorities) within a period of x days following the proclamation of the law (abstract norm control);
o Municipalities can presumably only go to the Constitutional Court if their right to local self-government has been violated;
o In case of conflicts between state organs as to the scope of their responsibilities, only the state organ concerned can introduce the claim.

181. Article 93 of the German Basic Law is an example of clear definition of the respective procedures in the Constitution. It reads as follows:
“Article 93
(1) The Federal Constitutional Court shall rule:
1. on the interpretation of this Basic Law in the event of disputes concerning the extent of the rights and duties of a supreme federal body or of other parties vested with rights of their own by this Basic Law or by the rules of procedure of a supreme federal body;
2. in the event of disagreements or doubts respecting the formal or substantive compatibility of federal law or Land law with this Basic Law, or the compatibility of Land law with other federal law, on application of the Federal Government, of a Land government, or of one third of the Members of the Bundestag;
2a. in the event of disagreements whether a law meets the requirements of paragraph (2) of Article 72, on application of the Bundesrat or of the government or legislature of a Land;
3. in the event of disagreements respecting the rights and duties of the Federation and the Länder, especially in the execution of federal law by the Länder and in the exercise of federal oversight;
4. on other disputes involving public law between the Federation and the Länder, between different Länder, or within a Land, unless there is recourse to another court;
4.a on constitutional complaints, which may be filed by any person alleging that one of his basic rights or one of his rights under paragraph (4) of Article 20 or under Article 33, 38, 101, 103, or 104 has been infringed by public authority;
4b. on constitutional complaints filed by municipalities or associations of municipalities on the ground that their right to self-government under Article 28 has been infringed by a law; in the case of infringement by a Land law, however, only if the law cannot be challenged in the constitutional court of the Land;
5. in the other instances provided for in this Basic Law.

(2) The Federal Constitutional Court shall also rule on such other matters as may be assigned to it by a federal law."

182. It would seem advisable to add a provision that the details of the procedure before the Constitutional Court shall be regulated by law. It is also recommended to mention in the Constitution the possibility for the Constitutional Court to take interlocutory decisions in appropriate cases.

183. The possibility for the Constitutional Court to initiate *proprio motu* the assessment of the legality and constitutionality of laws, foreseen in para. 3, appears inappropriate in that it would unduly drag the Constitutional Court into the political arena.

Article 140

184. As concerns the cessation of validity of laws or regulations found to be unconstitutional, it is only foreseen to be *ex nunc*, while there could be cases in which the cessation applies *ex tunc*.

Article 141

185. The appointment of the seven justices is given to parliament upon a proposal of the President of the Republic, with no requirement of a qualified majority for the election. Such requirement would instead appear essential. It would also seem important that parliament would choose between several candidates.

186. It might be appropriate however to ensure a more balanced composition of the Constitutional Court, for example by giving the power to nominate the justices to three organs: the President of the Republic, the Judicial Council and the Parliament.

187. The President of the Constitutional Court should be elected by the other justices.

188. Justices could be allowed to exercise academic activities.

Article 142

189. Paragraph 2 of this provision foresees the removal from duty of the President and the Justices of the Constitutional Court, should they *inter alia* "express publicly their opinion regarding an issue which is the matter *or may become"* the matter for decision-making in the Constitutional Court". While justices should of course abstain from commenting upon pending cases, it would seem difficult to foresee that a matter will be brought eventually to the Constitutional Court.

190. At any rate, it would seem that the sanction of removal from office in cases where a judge expresses political opinions or comments upon a case is excessive.

191. The decision on the removal from office should be taken by the Constitutional Court without the participation of the concerned judge.

VIII. Part Seven - Change to the constitution (Articles 143-145)

Articles 143-144

192. The relationship between Articles 143 and 144 is not very clear. Is the adoption of the Act on the Change of the Constitution in Article 143.4 the final step or has it to be followed by the public hearing provided for in Art. 144? The procedure looks cumbersome and complicated.

VIII. Part Eight - Transitional and final provisions

193. The adoption of the constitutional law on implementation of the constitution is foreseen to be made with a simple majority. Should the implementing law be merely technical, this would not seem to pose problems. Should it instead contain substantive matters, it would need to be adopted with a qualified majority.

194. It is extremely important that a transitional provision be added, whereby existing laws continue to be in force, unless and until amended through the normal democratic process, in compliance with the principle of legality. This was a specific commitment undertaken by the Montenegrin authorities (see PACE Opinion, 19.2.2.4).

IX. Conclusions

195. The draft Constitution as was submitted to the Venice Commission for assessment does not raise issues of compatibility with the Council of Europe standards, with the exception of (1) the provisions on the appointment, career and dismissal of judges and on the functions and composition of the Judicial Council and (2) the numerous defects in the structure and content of Part 2, Human Rights and Freedoms, that have been identified in the above comments.

196. It is essential that both these problems be addressed in a further text of the Constitution. So far as point (1) is concerned, the Montenegrin authorities have engaged in constructive discussions with the Venice Commission: these discussions must be pursued until an acceptable solution is found. So far as point (2) is concerned, the Montenegrin authorities should be asked to renew their efforts to achieve an acceptable draft.

197. The draft Constitution requires significant technical amendments; the present opinions contains very detailed indications which will hopefully assist the Montenegrin authorities in improving the text.

198. The adoption of the new Constitution should not be rushed, and should only be envisaged once the two issues stated above are settled in a manner compatible with the European standards, and once the text reaches a good level of drafting technique.

199. The Venice Commission remains at the disposal of the authorities of Montenegro and is ready to assist in this process.