Strasbourg, 17 December 2007 CDL(2007)129*

Opinion no. 459/2007 Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS

ON THE DRAFT LAW ON THE JUDICIAL COUNCIL OF MONTENEGRO

by

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I. Introduction

1. On 21 November 2007 the Ministry of Justice of Montenegro asked for assistance in the drafting of the new Law on the Judicial Council, which has to be adopted as part of the implementation of the new Constitution. On 7-8 December 2007 I participated together with Mr Markert from the Secretariat in a meeting in Podgorica with the working group presided over by the Minister of Justice Mr Miras Radovic. The comments which follow therefore deal only with the main questions discussed.

II. Comments

A.

2. The draft Law on the Judicial Council of Montenegro merits a generally positive assessment. Nevertheless, some articles require comments and remarks in order to fully accomplish what is provided for in article 126 of the Constitution: "The Judicial Council shall be an autonomous and independent authority that secures autonomy and independence of the courts and the judges".

B.

3. With regard to the composition of the Judicial Council, art. 4 provides that, of the four members appointed by the Conference of Judges, one must be elected among the judges of the Supreme Court, one among the judges of the Court of Appeal and the Administrative Court, one among the judges of the Higher Courts, and only one among the judges of the Basic Courts and Commercial Courts.

4. This system does not secure a balanced representation of all judges, since the judges belonging to the Supreme Court are fourteen, those belonging to the Appeal Court and the Administrative Court are, respectively, nine and eight, judges belonging to the two Higher Courts and to the two Commercial Courts are, respectively, forty one and twenty eight. For the above mentioned courts we have a total of one hundred judges, while the judges belonging to the Basic Courts are one hundred fifty seven. The electoral system provided for in the draft law seems to be in contrast with the principle of equality among judges within the judiciary.

5. A right proportion between judges and their representation within the Judicial Council could be the following: two members elected by the Conference of Judges among four candidates

designated by the judges belonging to the courts different from the Basic Courts, and two members elected by the Conference of judges among judges belonging to all the judicial bodies, selected among those designated by at least thirty judges.

6. In this way, taking into account that the President of the Supreme Court is *ex officio* President of the Judicial Council, three out of the five judges members would belong to the higher levels of the Judiciary, that is to say a proportion which acknowledges the greater experience of judges performing judicial activity for a long period, and at the same time gives a reasonable representation to the lower levels of the judiciary.

C.

7. As for the functioning of the panels of the Judicial Council, art. 10, par. 2, provides that they consist of at least three members, and that judges must always be the majority of the panel. Similar rules are provided for in article. 11, par. 2 and 3, respectively, for the sessions of the Judicial Council and for the decisions in disciplinary cases: decisions of the Judicial Council must be supported by a minimum of six members, of which at least three must be judges; disciplinary decisions must be supported by a minimum of five members, of which at least three must be judges.

8. This system does not take into account that the Judicial Council is a unitary body, and that within the Council all the members are equal, it does not matter if they are judges or lay members. The provisions provided for in the draft law would favour an autocratic and corporatist management of the judiciary. As for the composition of the panels, it would be suitable to provide a turnover among all the members, so that in the panel judges sometimes will be two and sometimes one, and vice versa for the lay members. This does, however, not necessarily have to be regulated by law. As for the decisions of the plenary sessions of the Judicial Council and for disciplinary decisions, the law must not provide any prearranged majority of judges or lay members.

D.

9. Article 12, dealing with the competencies of the Judicial Council, is too detailed; from the point of view of legislative technique, this leads to the risk of neglecting some relevant competencies. In order to avoid this risk, after the letter (h) it should be advisable to add a new letter as follows: “Any other decision concerning the legal status of the judges”.

E.

10. As for the system of appointments, promotions, and transfers of judges (articles 19 to 32), it would be more appropriate to distinguish more clearly between them and to provide different procedures.

11. For the first appointment of judges the best system seems to be competitive written exams followed by interviews; the vacant positions should be announced and the appointments should be made not for a specific court, but for first instance positions in the Montenegrin judiciary, so that it should be possible subsequently to be promoted to an higher position within the judiciary or to be transferred to another court of the same level.

12. As for promotion from lower to higher position within the judiciary the evaluation should be based on oral interviews, together with the specific attitudes and qualifications which come out from the personal file of the candidates. It could be provided that also outside lawyers are given the possibility to apply for the vacant position in the higher level courts.

13. A simplified proceeding, based only on the personal file of the candidates and on personal or family reasons, could be provided for the transfer from a court to another of the same level.

14. For all the proceedings, the Judicial Council shall set up general and objective criteria to be followed, in order to guarantee impartial evaluation of the candidates.

15. The Administrative Court could be entrusted with the power to perform judicial review about the decisions of the Judicial Council on appointments, promotions, and transfers.

F.

16. For removal and other disciplinary measures (articles 38 and 39), it would be suitable to unify the proceedings as to the rights of defence which must be guaranteed to the accused (the right to be assisted by a defence lawyer, the right of self defence, the right to be cross-examined and to be confronted with the accusing party, etc.).

17. That said for the rights of defence, it should be better distinguished between the disciplinary proceeding for removal and the proceeding for other less serious disciplinary measures.

18. The proceeding for removal should be given to the plenary session of the Judicial Council, without the participation of the President of the Supreme Court in the case he has taken the disciplinary initiative. In order to allow the functioning of the plenary session, other members of the Judicial Council should not be given the faculty of taking disciplinary initiative, because of the incompatibility between the functions of accusation and judgement. In any case, other members should have the possibility to request the Supreme Court President to take the initiative. The Administrative Court should be entrusted with judicial review of the Judicial Council decisions.

19. As for disciplinary measures other than removal, it could be provided that a panel of the Judicial Council is competent, composed of five members (with a rotation system between judges and lay members). The competence of a panel would make it possible to give the power to initiate disciplinary proceeding also to the President of the Supreme Court and to three members of the Judicial Council: they, together with the Minister of Justice, could take the disciplinary initiative without affecting the functioning of the Judicial Council because of the incompatibility between the functions of accusation and judgement.

G.

20. The articles 24, par. 3 and 37 provide, respectively, the involvement of the Judicial Council in the appointing and removal proceedings of the President of the Supreme Court, even though article 124, par. 3, of the Constitution gives to the Parliament the exclusive power to elect and dismiss the President of the Supreme Court, at the joint proposal of the President of Montenegro, the Speaker of the Parliament, and the Prime Minister, without mentioning any role of the Judicial Council. It is also worth mentioning that the rules for appointment and dismissal of other judges and the duration of the mandate of the presidents of other courts are separately provided for in article 125 of the Constitution, so that it seems that the Judicial Council has nothing to do with the position of the Supreme Court president. From this point of view, article 24 seems to be in contrast with the Constitution. This applies, in particular, in so far as art. 24, par. 3, refers for the appointment proceeding to articles 19 (public announcement for the vacant position), 22 (interviews with the applicants to the position, conducted by a panel of at least three members of the Judicial Council), 23 (that is to say, recommendation on the appointment to be sent to the President of the Republic, the Speaker of the Parliament, and the Prime Minister).

21. Since the appointment of the President of the Supreme Court is given to the Parliament, as a political body, which elects the President without a qualified majority, and involves other

political bodies, it would be better if the Judicial Council is not involved in a proceeding which is clearly based only on political reasons.

22. Moreover, the involvement of Judicial Council could create severe and critical conflicts between the judiciary and the three highest political bodies of the State (legislative power, executive power, President of the Republic) in the case that the recommendation of the Judicial Council for appointment is not followed by the other state powers.

23. The best solution would be to delete par. 3 of article 24. If it is deemed suitable that the Judicial Council does not wholly give up its function of appointing judges in this respect, the law should restrict itself to enabling it to establish the general criteria for the appointment of the Supreme Court President (juridical qualification of the candidates, previous experiences as lawyer, minimum and maximum age, etc), without interfering at any level in the political proceeding of the appointment.

24. As for the removal of the Supreme Court President, any involvement of the Judicial Council seems inappropriate, both from an institutional and constitutional point of view. The political responsibility for the removal of the President is only up to the Parliament which appoints him or her through a political proceeding; any initiative of the Judicial Council, any discussion before a special disciplinary commission, as provided for in art. 37 of the draft law, would have the meaning of an open political conflict between the judiciary and the three highest state powers; it would be wholly out of the constitutional functions of the Judicial Council.

25. The only solution appears to wholly delete art. 37 of the draft law.

H.

26. As regards Article 30, it does not seem necessary to limit the putting of judges at the disposal of another court with their consent to a period of 6 months.