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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

COMMENTS

**ON THE DRAFT LAW
ON THE CONSTITUTIONAL COURT
OF MONTENEGRO**

by

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**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..*

The Venice Commission made comments on the Constitution of Montenegro and wherever criticisms were not taken into consideration, they will continue to affect further legislative acts.

As a general remark, it would be advisable to repeat in the Law the provisions of the Constitution rather than just to complete them. This would ease the reading and understanding and make it unnecessary to work with two texts.

Article 2

Article 149 of the Constitution of Montenegro enumerates a wide list of competences and Article 2 of the draft Law on the Constitutional Court refers to these competences. As a technical remark it would be easier for consultation of the Law, if it would re-enumerate the competences from the constitutional text and, in order not to oblige the interested reader to consult the Constitution on this matter. In Article 39 of the draft Law an enumeration is clearly made (even if for procedural purposes) and such an enumeration (taken from the Constitution) would be welcome also for the competences.

Article 3

It is not clear whether the publication of decisions of the court concerns all decisions or not; it would not be a bad idea to leave to the Court to decide which decisions shall be published.

Article 7

This Article is based on Articles 153 and 154 of the Constitution. In Opinion CDL(2007)104, the Commission already criticised the fact that the election of the Judges by Parliament without a qualified majority presented a series of risks of political dependence of majority and political exposure of the Court. The Constitution itself does not guarantee a balanced composition of the Court.

Due to the importance of the matter, the comment of the Venice Commission in CDL(2007)104 is quoted:

“ Article 153 (Composition and election).

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This Article, together with Article 82.13 and Article 95.5, does not ensure a balanced composition of the Court. All judges of the Court are elected by parliament on the proposal of the President. If the President is coming from one of the majority parties, it is therefore likely that all judges of the Court will be favourable to the majority. An election of all judges of the Court by parliament would at least require a qualified majority. Even so, however, it would not ensure the independence of the Constitutional Court from the political power, which is at variance with the role of guarantor which this Court must have in respect of the political majority. As the Venice Commission had previously stressed, the guarantees of neutrality and independence of the Constitutional Court would have been duly ensured only through a system of appointment whereby this responsibility is shared between different and autonomous powers and institutions of the State.

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It would also have been preferable to leave the election of the President to the Court itself

Article 154 (Cessation of duty)

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It seems excessive to remove a judge from office if he or she publicly expresses his or her political convictions. “

Furthermore, it is suggested to retake the wording of the Constitution on the terms of office of Judges, the minimum requirements for Judges, the composition of the Court etc. as per Article 153 of the Constitution.

Article 9

In the last paragraph it is referred to a majority which shall be the majority of "all judges". This wording is in conformity with the Constitution. However, in the context of Article 9 of the draft Law it is a vote on the suspension of a judge or the President of the Court in relation to a criminal investigation. It is not at all clear whether the person under investigation votes or not and if the wording "all judges" includes this person or not.

It might be preferable to clearly quote that in those cases the person concerned has to refrain from voting.

Article 13

The meaning of this Article is not clear, which might be due to the translation. If the intention is to ensure a judge the possibility to return to his or her working place with a public or private employer, other laws should be consulted (e.g. working law).

Article 16

It might be found only in the translation but the wording concerning the Secretary General "... *appointed and dismissed by the Constitutional Court for the period of five years with the ...*" should be checked as for the term "*dismissal for a period of 5 years*".

Article 19

The wording of par. 3 should read "*Without prejudice to paragraph 1 and two above ...*". There is no obvious reason to leave out par. 1, as there is also an exception made thereto.

Article 20

It is not clear, what is meant in par. 2. Are there rules which shall be applied without the parties knowing them beforehand?

Article 22

It should be clarified who is meant by "*other persons*". It might well be a reference to Article 21 last paragraph [*"other persons, in accordance with the law"*].

Articles 27 and 28

A judge-rapporteur examines whether the procedural preconditions and other conditions for conduct of the proceedings and determination of the request have been fulfilled. [Art. 27].

Art. 28 refers to incomprehensible or incomplete submissions.

The minimum requirements are fixed in Article 61 for a constitutional complaint.

Article 42

See also remarks to Article 3. It would be a good idea to leave some freedom of decision for publication to the Court itself.

Article 51

Under number 1) the court shall discontinue proceedings if, during the proceedings, the Law was harmonised with the Constitution etc. There may be situations where the determination that a law violates the Constitution has to be issued as a court's decision, even if – during the proceedings – the law has been changed as to become in conformity with the Constitution. It is understandable that the Court has this liberty of appreciation but it should be made sure that this is the case.

Article 67

This Article proposes an “alternative wording”.

It is not clear whether the alternative wording is an alternative in the sense that the other text is substituted or if it is a text which is to be added after the last paragraph of the other text, which would make sense. In fact the two texts seem to be complementary and not contradictory. It would not be a bad idea to combine both versions into one text using them just one after the other.

[See also Article 70 where the decision is expressly mentioned to be a legal basis for the claim of damages.]

Article 111

Paragraph 1 states that authorities can also be fined and, according to paragraph 3, so can the responsible person of the authority. It is the question to know whether it makes sense to fine an authority submitted to the State Budget which would basically mean to take money from one budget position and let it enter into another position. It might make more sense (probably) just to fine the responsible person in that authority.

Article 112

The fact of applying the new procedure, as in the draft Law for the proceedings, which have started under the old Law (instead of terminating those procedures under the old Law) is surely worth discussing.