
Strasbourg, 11 June 2008 **CDL(2008)076***

Opinion 479/2008 Engl. only

**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

**(VENICE COMMISSION)**

# COMMENTS

# ON THE DRAFT LAW ON THE CONSTITUTIONAL COURT OF MONTENEGRO

**by**

**Mr Christoph GRABENWARTER (Member, Austria)**

---

*****_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.._

## 1. Introduction and General Remarks

The draft Law on the Constitutional Court is composed of 116 articles divided into five chapters. It addresses almost all relevant questions of a modern law of this type.
Chapter one ("general provisions") is followed by a chapter on the organisation of the Court. Chapter III on the various proceedings before the Constitutional Court and on legal effect of Constitutional Court decisions is by far the most voluminous chapter of the law. The only article of Chapter IV, Article 111, deals with "penal provisions". Transitional and final provisions can be found in Chapter V.
At the outset it has to be mentioned, that the text obviously suffers some language problems so it may be that some of the critical remarks are due to a problem of translation.
A second general point is the systematic structure of the law. A proposal for improvement concerns the principle of public proceedings which is dealt with in Article 3 under general provisions and in Article 33 in the main chapter with reference to public hearings.
A new systematic approach may also contribute to reduction of the length of the law.

## 2. Remarks on provisions in Chapter I (Introductory Provisions)

According to Article 3 the work of the Constitutional Court is public. This wording may lead to misunderstandings although paras. 2 to 5 explain the programmatic para. 1. However, it might be requested that deliberations must also be public, which is the case in proceedings before the Swiss Federal Court, for the other Councils of Europe member states, however, this is unusual. Moreover the provision should be harmonised with Articles 33 to 36 (if not merged). Para. 3 could be adapted to the wording of Article 6 para. 1 of the European Convention on Human Rights (ECHR), although only a part of the proceedings will be subject to this provision.

According to Article 6 the method of work and of decision-making of the Constitutional Court shall be regulated by this Law, and it shall be regulated in more details by the Rules of Procedures. This technique is common and usually works well in practice. The way those Rules are adopted (see Art. 114) and published should be made clear unless there are general rules in domestic law.

In addition the law could provide for an *analogous* application of the code of civil procedure in general and for an analogous application of the code of criminal procedure in certain specific proceedings. This solution is followed in the Austrian system and 80 years of practice show that *analogous* application leaves enough space for the Constitutional Court to adapt the provisions of the Codes of procedure to Constitutional Court proceedings.

## 3. Remarks on provisions in Chapter II (ORGANISATION OF THE CONSTITUTIONAL COURT)

With respect to election and dismissal of judges Article 7 refers to the Constitution. This technique is common practice in European constitutions. It provides for sufficient independence from simple majorities in parliament. Article 82 of the Constitution guarantees election of judges by the Parliament. In order to ensure a broader consensus about constitutional justices a two-thirds-majority would be advisable.
The term of office of nine years is not as long as it is in other countries like in Germany (12 years, maximum age 65) or Austria (until the age of 70). There are, however, countries with shorter terms (e.g. Liechtenstein). It corresponds to the term of office in the European Court of Human Rights according to Protocol No. 14. It is therefore sufficient regarding the requirement of independence. The other guarantees of independence are duly respected bearing in mind that a number of provisions are already included in the Constitution (Article 86 para. 4, Article 153 para. 2 and 5, Article 154).

The Court shall consist of seven judges (Art 153 para. 1). This is a relatively small size of a Constitutional Court (Germany: 16, Austria: 14). Bearing in mind the size of the country the size seems adequate (the Liechtenstein Staatsgerichtshof has only 5 judges). Moreover, it corresponds with the size of the chambers of the European Court of Human Rights, where this size has proven to be adequate for efficient work.

Pursuant to Article 12 of the draft law the Court shall designate a judge who shall substitute the President of the Constitutional Court in instances when he is absent or prevented from performing his duties. Yet the draft law lacks a provision as to the event that the vice president is prevented as well. The Austrian law subsidiarily institutes the eldest judge to deputise the president so that the representation of the Constitutional Court is assured at any rate.

Another point concerns the number of attendant judges required to have a quorum. Neither the draft law nor the Constitution lay down explicitly if a valid ballot requires the attendance of all seven judges or if a still smaller, minimum number is sufficient. A provision setting up a minimum number for decision-making secures the autonomy and independence of the Court since otherwise every single judge is capable of paralysing the Court or at least delaying the session by simply not attending the sessions.

Moreover, profane reasons such as diseases, deaths and so on might also give rise to adjournments of decisions especially since the draft law does not mention any provision as to substitute judges who are destined to represent regular judges in whatever case of prevention. Most notably – apart from above mentioned diseases – preventions may arise from bias. The legislator could add such provisions regardingsubstitute judges to grant efficiency of the Constitutional Court. A system of substitute judges seems advisable for cases of diseases, deaths or bias. Such systems exist in Austria or Liechtenstein and with the ECHR (“ad-hoc-judges”).

Again, bias is tackled only indirectly, namely by means of Article 20 of the draft law which refers to provisions of relevant procedural laws to apply *mutatis mutandis* if a matter of procedure before the Constitutional Court is not regulated by the draft law. Nonetheless it might be preferable to lay down the regulations concerning bias more prominently in the draft law given the specific competences of the Court.

Also the reference to the *relevant procedural laws* is not exactly a wording which excludes different interpretations from the outset, instead the legislator could specify the procedural law in such a way that it applies to not regulated matters of procedure before the Constitutional Court.

## 4. Remarks on provisions in Chapter III (PROCEEDINGS BEFORE THE CONSTITUTIONAL COURT AND LEGAL EFFECT OF ITS DECISIONS)

A first remark concerns a merely formal aspect. The first part of the chapter (Common Provisions) is subdivided by alphabetic characters that are mixed up: a and b are followed by v, g, and finally d.

Articles 21 to 24 deal with the participants in proceedings. Article 21 contains a very detailed list of participants (sometimes only with reference to a specific type of proceedings (e.g. No 7 - “political party or non-governmental organization ....”). The value of this list - quite unusual from a comparative perspective - appears questionable for two reasons. Firstly, the term “participant” is not limiting rights in the proceedings unlike the term ""parties of proceedings” the term “participant” is not limiting rights in the proceedings)” Secondly, No 10 contains a general clause concerning the capacity of “participant” for “other persons, in accordance with the law”. It is suggested to draft a more consistent, shorter and more general provision on parties in

proceedings, which may very well leave some discretion to the Constitutional Court. In general, the term “participant” should be replaced by the more technical term “parties”.

The time limit of 15 days (Article 30) is very short. The usual time limit in comparable proceedings e.g. in Austria is eight weeks, to be reduced in case of the need of speedy proceedings. However, the words “at least” make it clear that this is only a minimum time limit that may be exceeded.

Under the head of “public hearing” Article 33 provides for (compulsory) public hearings in certain proceedings (para. 1), possible restrictions in proceedings for review of constitutionality or legality (para. 2) and a general clause within the discretion of the Constitutional Court (para. 3). Given the workload of modern Constitutional Court it is not realistic that it holds more than 30 hearings per year, especially where there is no chamber system. The law should reflect this reality.

The provisions on the initiation and conduct of proceedings break new ground, at least from the perspective of the German-Austrian tradition which is followed in Spain, Hungary and Poland. It is quite unusual that a Constitutional Court initiates proceedings *ex offo*: According to Article 43 procedures for assessing the constitutionality or legality of general acts may be initiated by the Constitutional Court itself (“on its own by an order”). According to Article 47 the Constitutional Court shall not be limited by the petition or initiative. This gives some additional discretion to the Court (the Austrian Constitutional Court is bound by the allegations in the application to the Court).

Furthermore, the technique of intertwining Constitutional Court proceedings with the legislative procedure established in Articles 44 and 46 seems interesting. However, it is difficult to see the advantages of such proceedings.

The rule on suspense effect in Article 48 enables the Court to suspend the enforcement of an individual act or action taken on the basis of the general act whose constitutionality or legality is being assessed, where that enforcement could cause “irreversible detrimental consequences”. This last element seems rather strict in comparison with other Constitutional Court systems. Article 32 para. 1 of the German Law on the Constitutional Court and Article 85 para. 2 of the Austrian Law on the Constitutional Court provide for interim measures or suspense effect also in cases of weighty disadvantages or other important grounds in the public interest guided by the principle of proportionality.

The system in Montenegro provides for “Proceedings upon constitutional complaint” which has to be welcomed in the interest of a high level of human rights protection. Some suggestions concern technical details: According to Article 59 para. 1 constitutional complaints “may be lodged by anyone who believes that his human right and freedom guaranteed by the Constitution was delivered”. [The wording “delivered” seems to be problem of translation]. Usually the precondition of a complaint of this type is the “allegation” of a violation of a right (cf. Germany, Austria). The competence of “state authority or organization in charge of the monitoring and realization of human rights and freedoms” to introduce constitutional complaints may be seen as a step forward. For the sake of equality this competence should be restricted in situations where two individuals have conflicting human rights. In this case it seems more adequate if the state remains neutral. Moreover the quality of those organs must be precisely defined in law.

One important type of proceedings is missing: There should also be a type of **summary proceedings** before committees of a few judges dealing with complaints that have not enough prospects to succeed. There are two solutions which have proved their efficacy for three decades now: first, in the German way not to accept a complaint and second the Austrian way to decline jurisdiction. In any event such an instrument is necessary in order to uphold the efficient functioning of a Constitutional Court.

Article 60 paras. 2 and 3 allow restitution to a person who on justified grounds missed the time-limit for submitting a constitutional complaint if within 15 days (relative time limit) from the disappearance of reasons which caused him to miss the deadline that person submits an application for *restitutio in integrum* and simultaneously lodges a constitutional complaint. Restitution cannot be requested after the expiry of a period of three months from the date of missing the deadline (absolute time limit). The latter absolute time limit seems rather short. In Germany it amounts to one year.

The alternatives proposed for the wording of Article 67 invite for remarks in both directions. Under the first alternative when the Constitutional Court establishes a violation, it shall after granting the complaint and repealing the act remand the case for repeat procedure to the authority which enacted the repealed act while reparation is conferred irrespectively of the repeated procedure. The second alternative, for its part, seems to turn these consequences alternative. Either reparation is conferred or procedure is repeated. As regards the second alternative of the Article, it is not comprehensible why the mentioned consequences are provided in a way that they exclude one another. After all, their goals differ considerably: reparation makes good financial losses whereas the repeat of procedure pursues the respective end of the proceedings in question. From this point of view the first alternative deserves preference; a system with both alternatives might enable the Court to take account of specific situations (cf. the practice of the ECHR with regard to Articles 41 and 46 of the Convention).

Article 68 is interesting and has to be welcomed from a European point of view. However, it leaves room for doubts on the meaning and effect of that provision. Bearing in mind Article 46 of the Convention and its significance for the case law before domestic courts wording "take into account **the principles" of the ECHR** may be seen as a restriction of legal effects of the Convention. Perhaps a more precise wording not limited to "principles" would help.

The provisions on **proceedings resolving conflicts of jurisdiction** (Articles 80 to 87) do not make an explicit difference between positive conflicts (two or more authorities act in the same issue, only one is competent) and negative conflicts of competence (two or more authorities deny there competence, but one of them is competent). Therefore the wording in Article 80 remains general: "The petition to resolve a conflict of jurisdiction shall be submitted by one or both of the conflicting authorities, as well as the person who is unable to exercise his rights due to acceptance or rejection of jurisdiction." The Austrian Law on the Constitutional Court dedicates 11 Articles to this type of proceedings. It is suggested to include a provision enabling the Court to quash decisions of authorities having acted without competence.

In the part concerning the procedure of deciding on electoral disputes there could also be a need for more provisions bearing in mind the importance and high political significance of such proceedings (Articles 92 seq.). A specific point concerns Article 98 para. 2: In the case of a decision annulling the entire electoral procedure or parts thereof, the entire electoral procedure or parts thereof shall be repeated within ten days of the serving of the decision of the Constitutional Court to the competent authority. This time limit does not seem realistic at all.

With regard to the **legal effect of decisions** Article 152 of the Constitution provides that a law which the Court established to be not in conformity with the Constitution shall cease to be valid on the date of publication of the decision of the Constitutional Court. In the first place it is remarkable that there is no provision in pursuance with which the Court may postpone cessation of validity if appropriate. Admittedly, this consideration has not as much to do with the draft law but with the insofar clear-cut Constitution. Yet in certain instances it might be impossible for the legislator to amend the unconstitutional act at once so that terms postponing cessation of validity could be highly desirable. The Austrian Constitution provides for the possibility that the Constitutional Court may postpone the effect of an annulment of a law for 18 months.

**5. Remarks on provisions in Chapter IV**

Article 111 provides for “penal provisions” for certain cases of misconduct of parties in the Constitutional Court proceedings. Such disciplinary measures form a common feature of procedural law. However, one should bear in mind that such sanctions may - following the case law of the ECHR - be qualified as criminal charges within the meaning of Article 6 of the ECHR. In this case the procedural guarantees must be respected.