



Strasbourg, 22 November 2012

CDL(2012)051*
Engl. only

Opinion No. 677 / 2012

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT OPINION

**ON TWO SETS OF DRAFT AMENDMENTS
TO THE CONSTITUTIONAL PROVISIONS
RELATING TO THE JUDICIARY
OF MONTENEGRO**

on the basis of comments by

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I. Introduction

1. By letter dated on 13 June 2012, the Speaker of the Parliament of Montenegro, Mr Ranko Krivokapic, requested the Venice Commission to prepare an opinion on the draft amendments to the Constitution of Montenegro in the field of the judiciary adopted on 28 May 2012 by the Parliamentary Committee for Legal and Constitutional affairs of the Parliament of Montenegro (hereinafter referred to as the “first set of amendments”) as well as on the alternative draft amendments to the Constitution proposed by the Socialist People’s Party of Montenegro (SNP) (the second set of amendments). (CDL-REF(2012)023). Parliamentary elections were held on 14 October 2012, and the new parliament will start a new procedure for the preparation of amendments to the constitution in due course.

Mr Hamilton, Mr Neppi Modona and Mr Tuori acted as rapporteurs.

2. *The present opinion was adopted by the Venice Commission at its .. plenary session (Venice, **).*

II. Background

3. The Venice Commission had already analysed the judicial structure of Montenegro in its Opinion on the Constitution in 2007 (CDL-AD(2007)047); it also studied the issue on its opinion on the draft amendments to the Constitution of Montenegro, as well as on the draft amendments to the law on courts, the law on state prosecutor’s office and the law on the judicial council of Montenegro, adopted in 2011 (CDL-AD(2011)010). The Commission expressed the view that the constitutional guarantees for the independence of the judiciary needed to be improved. Mainly, the Venice Commission considered that the President of the Supreme Court should be elected by the Judicial Council alone and that the composition of the Judicial Council should change in order to avoid both politicisation and self-perpetuating government of judges. Moreover, the appointment and dismissal of the State prosecutors should be regulated at the constitutional level. The composition of the Constitutional Court should change as well.

4. The question of the amendment to the Constitution of Montenegro was also raised in the context of the process of accession of Montenegro to the European Union. In October 2011, the European Commission recommended the opening of negotiations with the country. It acknowledged that some progress had been made by the country, improving the legal framework. However it also expressed concern *inter alia* over the appointment of the President of the Supreme Court, the Supreme State Prosecutor and the judges of the Constitutional Court.

III. On the principle of legality

5. Both the first and the second sets of amendments propose to change articles 33 and 34 of the Constitution of Montenegro, which deal with the principles of legality, legal certainty, *nullum crimen sine lege*, as well as *nulla poena sine lege*. The new draft text introduces the possibility of regulating certain punishable acts or sanctions at an infra-legislative level (allowing therefore to adopt by-laws and rules instead of formal laws), although it makes a reservation concerning criminal laws and criminal sanctions, which may be regulated solely by law. The draft proposal does not specify what would be the punishable acts or sanctions to be regulated at the infra-legislative level and what would be the infra-legislative level acts.

6. As stated by the European Court of Human Rights in its case-law, Article 7 of the Convention “*goes beyond prohibition of the retrospective application of criminal law to the detriment of the accused. It also sets forth, more generally, the principle that only the law can*

define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) (see, among other authorities, *Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 145, ECHR 2000-VII). It follows that:

“an offence must be clearly defined in the law. (...) This requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts’ interpretation of it, what acts and omissions will make him criminally liable. The Court thus indicated that when speaking of “law” Article 7 (art. 7) alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises written as well as unwritten law and implies qualitative requirements, notably those of accessibility and foreseeability”¹.

7. The principle of legal certainty, including the requirement of accessibility and foreseeability should be respected. In a system of written law, the formal-law requirement is important, particularly in the field of criminal law. Therefore, the proposed draft amendment could be acceptable if it does not lower the respect for the principle of legality and the fact that only formal laws should regulate crimes and prescribe penalties.

IV. On the appointment and dismissal of judges in Montenegro

8. According to current Article 121 of the Constitution:

“The judicial duty shall be permanent.

The duty of a judge shall cease at his/her own request, when he/she fulfills the requirements for age pension and if the judge has been sentenced to an unconditional imprisonment sentence.

The judge shall be released from duty if he/she has been convicted for an act that makes him unworthy for the position of a judge; performs the judicial duty in an unprofessional or negligent manner or loses permanently the ability to perform the judicial duty.

The judge shall not be transferred or sent to another court against his/her will, except by the decision of the Judicial Council in case of reorganization of courts.”

9. According to the proposed amendment VII of the first set of amendments, article 121 of the Constitution would read as follows:

“The judicial duty shall be permanent.

Judicial duty of a judge shall cease and he/she shall be released from judicial duty in the cases and according to the procedure prescribed by the law.

A judge must be released from duty if he/she has been convicted by a legal and binding decision for a criminal act committed by abusing the judicial duty”

10. The second set of amendments explicitly states that Article 121 of the Constitution should not be changed.

11. The procedure of dismissal and cessation of office for judges, according to the amendment proposed, would now be contained in the law and would no longer be set out in the Constitution (except for the criminal conviction based on abuse of office). In the opinion of the Venice Commission, the basic conditions for the dismissal of judges should be kept at the constitutional level, although the legislation should develop a detailed regulation in this respect. It is also appropriate to maintain the constitutional provision that judges should stay in their permanent posts until retirement².

¹ ECtHR, *Kokkinakis v. Greece*, judgment of 25 May 1993, para. 52; *S.W. v. UK*, judgment of 22 November 1995, para. 35.

² See *Report on the independence of the Judicial system: part I The independence of judges*, CDL-AD(2010)004, paras 33-38.

V. On the appointment and dismissal of the President of the Supreme Court

12. According to Article 124 of the present Constitution, the President of the Supreme Court is elected “by the Parliament at the joint proposal of the President of Montenegro, the Speaker of the Parliament and the Prime Minister”. In its Opinion CDL-AD(2007)047, the Commission criticised this solution which excludes the judiciary from the appointment procedure, because “it gives the impression that the whole judiciary is under the control of the majority of the Parliament, and that the President of Montenegro, the Speaker of the Parliament, and the Prime Minister take part in the political control of the judges”. It “therefore risks undermining the public confidence in the independence and autonomy of the whole judiciary, no matter if all the other judges are appointed by an independent Judicial Council”. The Commission considered that a more appropriate solution would be appointment by the Judicial Council with a two-third majority (para 88).

13. According to point VIII of the first set of amendments³, “the President of the Supreme Court shall be elected and released from duty by two-third majority of the Judicial Council, at the proposal of the Supreme Court general bench”. The appointment would be for a term of five years.

14. Under points IV and VII of the second set of amendments, the President of the Supreme Court would be elected by the Parliament by a two-third majority.

16. The Venice Commission finds the proposal contained in the first set of amendments to be very positive. Indeed, the Commission had indicated in former opinions that granting the final decision on both the appointment and the dismissal of the President of the Supreme Court to the Parliament conveyed the impression of political control. This proposed amendment fully takes such criticism into account, and eliminates any political intervention in the choice of the President of the Supreme Court. In this respect, the transparency of the procedure for appointment and dismissal of the President of the Supreme Court by the two-third majority of the Judicial Council, at the proposal of the Supreme Court’s judges, should be ensured.

17. As concerns the proposal set out in the second set of amendments, the requirement of a two-third majority represents an improvement compared to the present situation; however, the Venice Commission considers that the first proposal – election and release from duty by the Judicial Council - is more appropriate and should be retained.⁴

VI. On the Judicial Council

A. On the composition of the Judicial Council

18. Article 127 of the present Constitution states that:

The Judicial Council shall have a President and nine members.

The President of the Judicial Council shall be the President of the Supreme Court.

Members of the Judicial Council shall be as follows:

1) *Four judges elected and dismissed from duty by the Conference of Judges;*

³ This amendment fits with amendments III and IV , which would change articles 82 and 91 of the Constitution in order to eliminate the competence of the Parliament to elect and release from duty the President of the Supreme Court.

⁴ There is an inconsistency between this amendment and the proposed amendment X of the SNP, which establishes that the President of the Supreme Court shall be elected and released from duty by the Judicial Council.

- 2) *Two Members of the Parliament elected and dismissed from duty by the Parliament amongst the parliamentary majority and opposition;*
- 3) *Two renowned lawyers elected and dismissed from duty by the President of Montenegro;*
- 4) *The Minister of Justice.*

The President of Montenegro shall proclaim the composition of the Judicial Council.

The mandate of the Judicial Council shall be four years.

19. According to both point IX of the first set of amendments and point VIII of the second set of amendments, the Judicial Council should have a President and nine members, as follows:

- 1) *The President of the Supreme Court;*
- 2) *Four judges to be elected and released from duty by the Conference of Judges;*
- 3) *Two renowned lawyers that are elected and released from duty by the Parliament of Montenegro at proposal of Parliamentary majority and the opposition;*
- 4) *Two renowned lawyers that are appointed and released from duty by the President of Montenegro;*
- 5) *The Minister in charge of Judicial affairs.*

The President of the Judicial Council shall be elected by the Judicial Council from among its members who do not perform judicial functions, by the two-thirds majority vote of the members of the Judicial Council.

The Minister in charge of judicial affairs may not be elected by the president of the Judicial Council.

The vote of the President of the Judicial Council shall be decisive in case of equal number of votes.⁵

The composition of the Judicial Council shall be proclaimed by the President of Montenegro.

The term of office of the Judicial Council shall be four years.

20. With the proposed new composition of the Judicial Council, a parity between judicial and lay members is sought to be achieved. The Venice Commission welcomes this new composition, which would avoid both the risk of politicisation and the risk of self-perpetuating government of judges.

21. However, the parity of judicial and lay members would not pertain in disciplinary proceedings, as the Minister of Justice could not sit and vote in such cases and, as a consequence, the judges would have a majority (see point X of the first set of amendments and IX of the second set of amendments). Therefore, as previously stated (CDL-AD(2011)010, para. 22), a crucial additional element of this balance would be to add a provision in Article 127 of the Constitution on a smaller disciplinary panel within the Judicial Council with a parity of judicial and lay members (with the exclusion of the Minister of Justice). The details concerning this disciplinary panel could be regulated by the Law, taking into account the importance of reconciling the independence of the judiciary and at the same time ensuring accountability.

22. It is very positive, as part of the balance sought, that the President of the Judicial Council will be elected by the Judicial Council itself by a two-third majority among its lay members.

⁵ The SPN proposes not to give the casting vote to the President of the Judicial Council "to avoid outvoting the judicial members of the Judicial Council". However, the casting vote of the President, mainly in disciplinary proceedings, is an important part of the balance between independence and accountability of judges.

23. Finally, among the judicial members of the Judicial Council there should be a balanced representation of judges from different levels and courts, and this principle should be explicitly added.

B. On the competences of the Judicial Council

24. Concerning the competences of the Judicial Council, Article 128 of the present Constitution reads as follows:

The Judicial Council shall:

- 1) *elect and dismiss from duty a judge, a president of a court and a lay judge;*
- 2) *establish the cessation of the judicial duty;*
- 3) *determine number of judges and lay judges in a court;*
- 4) *deliberate on the activity report of the court, applications and complaints regarding the work of court and take a standpoint with regard to them;*
- 5) *decide on the immunity of a judge;*
- 6) *propose to the Government the amount of funds for the work of courts;*
- 7) *perform other duties stipulated by the law.*

The Judicial Council shall decide by majority vote of all its members.

In the procedures related to disciplinary responsibility of the judges, the Minister of Justice shall not vote.

25. Under both sets of amendments (point X and IX respectively), Article 128 of the Constitution would be amended as follows:

The Judicial Council shall:

1. *elect and release from duty the President of the Supreme Court;*
2. *elect and release from duty the President of the Judicial Council*
3. *elect and release from duty the judge, the presidents of the court and the lay judge,*
4. *deliberate on the report on the court activity, applications and complaints regarding the work of the court and take a standpoint with regard to them;*
5. *establish the cessation of the judicial duty,*
6. *decide on the immunity of the judge,*
7. *propose to the Government the amount of funds required for the work courts;*
8. *perform other duties as stipulated by the law.*

The Judicial Council shall make decisions by majority vote of all its members.

The Minister in charge of judicial affairs shall not vote in disciplinary proceedings related to accountability of judges.

26. The amendments to Article 128 reflect the proposed competences of the Judicial Council to elect and release from duty the President of the Judicial Council and of the Supreme Court, and are therefore to be welcomed. Among its competences, it would be better to mention expressly that the Judicial Council issues decisions concerning transfers, promotions, judiciary functions and other aspects concerning the legal status of judges. Concerning immunities, it should be recalled that the Venice Commission has argued that 'it is undisputable that judges have to be protected against external influence and, to this end, they should enjoy functional – but only functional – immunity'⁶.

⁶ CDL-AD(2010)004-e, paras. 60-61.

VII. On the Constitutional Court

A. On the creation of panels and the number of judges of the Constitutional Court

27. Both sets of amendments in relation to Article 151 of the Constitution provide that the Constitutional Court may decide constitutional complaints also in a panel of three judges. The proposed amendment adds that the panel may only decide by an unanimous vote and where no unanimity is reached, the constitutional complaint shall be decided by the plenary session of the Constitutional Court. The Commission has previously stated that it is a common and useful method for alleviating the Constitutional Court's case-load to create "*smaller panels of judges deciding matters initiated by one of the types of individual access, where the plenary only acts if new or important questions need to be decided*".⁷ It is therefore an amendment in conformity with European standards.

28. It is further proposed (first set of amendments, point XIII) to increase the number of judges of the Constitutional Court from seven to nine. The ensuing additional costs could be justified only because of the need to work in panels in order to deal with the backlog of cases of the Constitutional Court.

B. On the judges of the Constitutional Court

29. According to the present Constitution, there are seven judges of the Constitutional Court, elected and dismissed by the Parliament, without any qualified majority, on the proposal of the President of the Republic.

30. The first set of amendments (point XIII) leaves the election and dismissal of the nine judges in the hands of the Parliament, with no special qualified majority (according to amendment V, the Parliament shall take this decision "*with majority vote of all its Members*"), at the proposal of the President. The proposed amendment XIII establishes that the judges of the Constitutional Court "*shall be elected for the period of 12 years*", with no indication that the mandate is not renewable.

31. The second set of amendments (point XV) proposes a different solution, in which judges of the Constitutional Court are elected and dismissed by different institutional actors: three by the President, three by the Judicial Council and three by the Parliament. This is coupled with amendment IV, in which it is required that the Parliament elect and release the Constitutional Court judges by a two-third majority.

32. The Venice Commission has formerly stated that:

*"In Europe, constitutional courts are often entirely elected by a qualified majority in Parliament (e.g. Germany) or various bodies and institutions have the power to appoint part of the judges of the Constitutional Court, for instance in Italy where one third of the members are appointed by the President of the Republic, one third are appointed by the judges of the higher ordinary and administrative Courts, and the last third is elected by the Parliament with a qualified majority. While the 'Parliament-only' model provides high democratic legitimacy, a mixed composition has the advantage of shielding the appointment of a part of the members from political actors."*⁸

33. In particular, in its former opinions on Montenegro, the Venice Commission had stressed that a system in which all judges of the Court are elected by Parliament on the proposal of the President "*does not secure a balanced composition of the Court*". In the opinion on the Constitution of Montenegro, the Commission considered that, if the President is coming from

⁷ Study on individual access to constitutional justice, CDL-AD(2010)39rev.

⁸ CDL-AD(2012)009, para. 8.

one of the majority parties, there is therefore a danger 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 majority⁹.

34. The Commission has also previously expressed the view that the mandate of the judges of the constitutional court should be non renewable. According to the study on the composition of Constitutional Courts, "*The possibility of re-election may well be such as to undermine the independence of a judge. In order to avoid this risk, it appears advisable to provide for long terms of office or for appointment until retirement*"¹⁰. Indeed, in the former opinion on the law on the Constitutional Court of Montenegro, the Commission stated that "*the lack of the prohibition of re-election may undermine the independence of a judge*" (CDL-AD(2008)30, para. 20).

35. Against this background, the Commission finds that the proposal of the first set of amendments (election of all constitutional judges by Parliament without a two-thirds qualified majority for a renewable term of 12 years) would seriously undermine the independence of the Constitutional Court. It is therefore not in line with European standards. The election of constitutional court judges should be made by a two-third qualified majority. In addition and in any case, it is strongly recommended that Article 153 of the Constitution state clearly that judges may only have a single mandate, with no further extension.

36. The second set of amendments, which proposes the intervention of different actors in the appointment of the Constitutional Court's judges, establishes that one third of the constitutional judges should be appointed by the Judicial Council. A preferable solution could be that one third of the constitutional judges could be appointed by the judges of higher ordinary and administrative courts, rather than by the Judicial Council. Stronger safeguards are needed for the dismissal of the judges.

C. On the President of the Constitutional Court

37. According to the proposed amendment (in the first as well as in the second set of amendments) of Article 153 of the Constitution and of Article 82, the President of the Constitutional Court is no longer elected and dismissed by the Parliament. This choice is left to the Constitutional Court itself, who will elect and dismiss its own president.

38. The Venice Commission welcomes this positive change.

VIII. On the State Prosecutorial service

A. On the appointment and dismissal of the Supreme State prosecutor

39. Under the first set of amendments, the institution in charge of the appointment and dismissal of the Supreme State Prosecutor remains unclear: while in Article 82 of the Constitution the words "Supreme State Prosecutor" would be deleted from the list of persons who are appointed and removed by the Parliament, Article 135 of the Constitution remains unchanged, and it states that the Supreme State Prosecutor (and state prosecutors) shall be appointed by the Parliament of Montenegro. These provisions are clearly inconsistent. At any rate, the Commission considers that the appointment and removal of the Supreme State Prosecutor should remain in the hands of Parliament but with a qualified majority and with a mechanism against possible deadlocks¹¹.

⁹ CDL-AD(2007)047, paras. 122 and 123.

¹⁰ CDL-STD(1997)020, 1997.

¹¹ CDL-AD(2011)10, para. 54.

40. Under the second set of amendments, the Supreme State Prosecutor would be elected and released from duty by the Parliament by a two-third majority.

41. The Venice Commission welcomes this proposal. Provision should be made in addition for an anti-deadlock mechanism. The grounds for dismissing the Supreme State Prosecutor should also be regulated in the Constitution.

B. On the Prosecutorial Council

42. Article 136 of the current Constitution states that:

The Council of Prosecutors shall secure the independence of the state prosecution and the state prosecutors.

The Council of Prosecutors shall be elected and dismissed from duty by the Parliament.

The election, mandate, responsibilities, organization and manner of work of the Council of Prosecutors shall be regulated by the law.

43. The first set of amendments does not address the Prosecutorial Council.

44. The second set of amendments would amend Article 136 of the Constitution to provide that the composition of the Prosecutorial Council would be as follows:

- a. the Supreme State Prosecutor;
- b. four state prosecutors elected by the extended session of the Supreme State prosecutors;
- c. two lawyers elected and released from duty by the Parliament on the proposal of the majority and the opposition;
- d. Two distinguished jurists appointed and released from duty by the President of Montenegro;
- e. One representative of the Ministry responsible for Justice, appointed and released by the Minister of Justice

45. The President of the Prosecutorial Council would not be *ex officio* the Supreme State Prosecutor, but would be chosen among the lay members of the Council by a two-third majority.

46. As concerns the competencies of the Prosecutorial Council, under the second set of amendments the Prosecutorial Council would have the competence to appoint and dismiss state prosecutors and heads of state prosecution services, issue decisions on the cessation of office of state prosecutors and heads of state prosecution services, make decisions on immunity, propose to the government a budget for the work of the state prosecution services, and perform such other functions as may be laid down by law.

47. The Venice Commission has previously expressed the opinion and reiterates that fixing in the Constitution the composition and competences of the Prosecutorial Council is to be welcomed¹². Removal from Parliament of the power to elect ordinary prosecutors is also to be welcomed.

48. . The amendments in question approach Prosecutors in the same manner as judges and propose in substance to apply to the Prosecutorial Council the same template as for the Judicial Council. The Venice Commission however stresses that, unlike the judiciary where each judge is independent, the prosecution service in Montenegro follows a hierarchical model. In a hierarchical system, the superior prosecutor must be able to exercise appropriate control over

¹² (CDL-AD(2011)10, para. 53

the decisions of the office, subject to proper safeguards for the rights of the individual prosecutor. But those rights do not include any right of the junior prosecutor to substitute his or her opinion or direction for the lawful decision of the senior prosecutor and ultimately the Chief Prosecutor, who is, in the final analysis, responsible for all decisions of his or her office. This is in contrast to the position of a court president who has no control over or responsibility for the decisions of the individual judge. The Supreme State Prosecutor must also have responsibility for the management of the prosecutor's office and the necessary powers to do so. Where the Prosecutorial Council has, as is the case in this proposal, a substantial component of members elected by the prosecutors, any risks of paralysis should be avoided. On the other hand, under the Constitution of Montenegro the Prosecutorial Council is responsible for ensuring the independence of the prosecutor's office.

49. An appropriate balance has therefore to be found between empowering the Supreme State Prosecutor (who is accountable before parliament) to achieve an efficient functioning and managing of the prosecutor's office on the one hand and avoiding excessive powers in his or her hands on the other hand. Account should also be taken in this context of the very limited number of prosecutors in Montenegro.

50. In the opinion of the Venice Commission, the Supreme State Prosecutor should chair ex officio the Prosecutorial Council, except in disciplinary proceedings. Prosecutorial immunity should be strictly limited to a functional immunity.

51. An efficient judicial remedy should exist to challenge decisions in disciplinary proceedings.

IX. Conclusions

52. The Venice Commission has stressed in its former opinions the need to achieve full independence of the judiciary and the Constitutional Court and the importance to avoid both self-perpetuating and a politicised government of judges.

53. The proposed amendments to the Constitution under consideration are steps in the right direction and attempt to improve the existing situation. Both the first set and the second set of amendments limit the role of the Parliament and seek to establish a balanced composition between judges and lay members within the Judicial Council.

54. The first set of amendments fully takes into account former criticism expressed by the Venice Commission and establishes that the appointment and dismissal of the President of the Supreme Court shall not be left in the hands of the Parliament, but in the hands of the Judicial Council. The composition of the Judicial Council is also improved in the proposals, although further guarantees should be included to ensure a parity in disciplinary proceedings.

55. The Venice Commission considers that the second set of amendments makes a proposal concerning the appointment of the judges of the Constitutional Court which should be taken into consideration in order to improve the independence and legitimacy of the Court, provided that the power to appoint one third of the constitutional judges is removed from the Judicial Council. The second set of amendments also contains a positive proposal concerning the appointment and dismissal of the Supreme State Prosecutor by Parliament by a two-thirds majority, which takes up previous recommendations of the Venice Commission. An anti-deadlock mechanism should be added in the Constitution. The Venice Commission considers however that the Supreme State Prosecutor should chair the Prosecutorial Council except in disciplinary proceedings.

56. The Venice Commission encourages Montenegro to proceed with the reform of the constitution. Nevertheless, as stressed in the past, a change in the Constitution of Montenegro

will not be sufficient in order to redress the situation of the judiciary. The legislation should also be changed to guarantee the transparency and effectiveness of disciplinary proceedings against judges and prosecutors, the parity in the composition of the disciplinary panel inside the Judicial Council and the prosecutorial Council and the improvement of the processes of appointment of judges and prosecutors.

57. The Venice Commission expresses its readiness to further assist the Montenegrin authorities further in this respect.