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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

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 THE STATE PROSECUTOR'S OFFICE AND THE LAW ON THE JUDICIAL COUNCIL

OF MONTENEGRO

Adopted by the Venice Commission
at its 87th Plenary Session
(Venice, 17-18 June 2011)

on the basis of comments by

Mr James HAMILTON (Substitute Member, Ireland)
Mr Guido NEPPI MODONA (Substitute Member, Italy)
Mr Kaarlo TUORI (Member, Finland)

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1 Introduction

1. By letter dated on 5 April 2011, the Minister of Justice of Montenegro, Mr Dusko Markovic, requested the Venice Commission an opinion on the draft amendments to three Laws: the Law on Courts, the Law on the High Judicial Council and the Law on the Public Prosecutor's office (CDL-REF(2011)024, 025 and 026).

2. By letter of 12 May 2011, Mr Markovic further requested the Venice Commission an opinion on the draft amendments to the Constitution of Montenegro in the field of the judiciary (CDL-REF(2011)033).

3. The Venice Commission invited Mr Hamilton, Mr Neppi Modona and Mr Tuori to act as rapporteurs for these texts submitted.

4. On 9 and 10 June 2011, a delegation of the Venice Commission travelled to Podgorica, where it held several meetings with the different stakeholders concerned, including the civil society. The present opinion is based on the comments of the rapporteurs as well as the results of those meetings.

5. The present opinion was adopted by the Venice Commission at its 87th plenary session (Venice, 17-18 June 2011).

2 General remarks

6. The background to these proposals is the application of Montenegro to join the European Union. The European Commission has adopted an opinion dated 9 November 2010. In this opinion, one of seven recommendations refers to strengthening the rule of law, in particular through depoliticized and merit based appointments of members of the Judicial and Prosecutorial Councils and of state prosecutors as well as through reinforcement of the independence, autonomy, efficiency and accountability of judges and prosecutors. The Analytical Report[1] accompanying the EC Opinion, inter alia, states:

> *"The independence of the judiciary, the autonomy of public prosecution and the principle of the natural judge are provided for in the Constitution. However, serious concerns exist over the independence of the judiciary, as the legal framework leaves room for disproportionate political influence. Although judges are appointed by the judicial Council, the majority of its members are appointed by Parliament and the Government. All Public Prosecutors are elected by Parliament. Legislation also provides for excessive accumulation of authority in the persons of the President of the Supreme Court and of the Supreme Public Prosecutor who are also appointed by simple majority in Parliament. The President of The Supreme Court combines the presidency of the Judicial Council and of the three-member Commission on Judicial Appointments with the authority to manage and schedule the work of the Conference of Judges. Appointment of the Supreme Public Prosecutor by Parliament raises additional concerns due to the hierarchical structure of the prosecution service."*

[1] Brussels, 9 November 2010, SEC(2010) 1334

7. The Venice Commission had already analysed the judiciary aspects of the Constitution of Montenegro in its Opinion on the Constitution in 2007 (CDL-AD(2007)047). There, the Commission noted that "the provisions on the judiciary in the newly-adopted constitution reflect in several respects the previous suggestions of the Venice Commission" and pinpointed in particular that "the appointment and dismissal of judges has been duly removed from the hands of the parliament". However, the Commission also stated that "the parliament has … retained some influence, notably through the appointment of the President of the Supreme Court and of the Public Prosecutors, and that "these solutions are problematic in the light of the European standards". The Commission expressed the hope that "in the near future the effectiveness and impartiality of the judiciary will improve so as to enable Montenegro to complete the reform fully guaranteeing its independence". (para 79-82).

3 The provisions concerning the judges in Montenegro

3.1 On the constitutional amendments

3.1.1 On the appointment and dismissal of judges

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, article 121 of the Constitution would read as follows:

> *"Judges shall be elected for life.*
>
> *Cessation of office and dismissal from office as judge shall take place in such cases and in such procedures as prescribed by law.*
>
> *A judge shall be dismissed from office if he/she has received a final decision finding him/her guilty of a crime committed with intent and through the misuse of judicial office"*

10. All the procedure of dismissal and cessation of office would now be contained in the law and would no longer be set out in the Constitution. It would have been preferable nevertheless to keep the basic elements of the dismissal of judges within the constitutional level, although the legislation should develop the detailed regulation in this respect. It would have also been preferable to say that judges shall be appointed on a permanent basis until retirement (and not "for life")[2].

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

3.1.2 On the appointment and dismissal of the President of the Supreme Court

11. 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 found this solution, which excludes the judiciary from the appointment procedure, problematic, 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 have been appointment by the Judicial Council with a two-third majority. (para 88).

12. According to the proposed amendment (new Art. 124a), "*the President of the Supreme Court shall be appointed and dismissed from office by the Parliament at the proposal of the Judicial Council and after it has previously obtained the opinion of the General Meeting of the Supreme Court*". The appointment would be for a term of five years.

13. With regard to the present procedure, the proposal is a step in the right direction. However, through granting the final decision on both appointment and dismissal to the Parliament and restricting the term to five years, the proposal still conveys the impression of political control, and the risk of undermining the public confidence in the independence and autonomy of the judiciary remains. Should appointment by parliament nevertheless be maintained in the Constitution, in the Venice Commission's opinion this should **at the very least be done with a two-third majority**.

14. The Venice Commission however reiterates its previous suggestion, also taking into account the complexities of achieving a qualified majority in Parliament in Montenegro and the subsequent risks of deadlock, that the **President of the Supreme Court should be appointed by the Judicial Council with a two-third majority,** avoiding therefore the political intervention of the Parliament. **This proposal is connected to the important modifications introduced in the composition and competences of the Judicial Council**. The Venice Commission considers that a composition in which there is a parity of members coming from the judiciary and from the rest of society and in which the President of the Judicial Council will be elected from among the lay members would ensure a better balance between the autonomy and independence and the accountability of the judicial power.

3.1.3 On the Judicial Council

15. 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;*
> *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 form 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.*

16. According to the proposed amendment, the Judicial Council shall have the following members:

> *"1) six judges who are elected and dismissed by their peers at the Conference of Judges;*
> *2) Two legal experts who are appointed and dismissed by the Parliament of Montenegro;*
> *3) Two renowned members of the legal profession who are elected and dismissed by the President of Montenegro, and*
> *5) The Minister of Justice.*
>
> *The President of the Judicial Council shall be elected from among the Supreme Court judges who are members of Judicial Councils.*
>
> *The composition of the Judicial Council shall be proclaimed by the President of Montenegro*
>
> .
> *The Judicial Council shall serve a term of four years."*

17. With the proposed new composition of the Judicial Council, the element of judicial self-government would be strengthened through increasing the number of the judges elected by the Conference of Judges and ensuring that they constitute the majority in the Council. In addition, the two members appointed by the Parliament would not necessarily be parliamentarians since the key qualification is to be a "legal expert" (a provision which does not, however, exclude legally qualified parliamentarians). This element corresponds to the view expressed by the Venice Commission in its Opinion CDL-AD(2007)047 (para 94). The President of the Supreme Court should no longer be *ex officio* the President of the Council, but the President would be elected from among the Supreme Court judges who are members of the Council. (Art. 127)

18. While the proposed amendment would strengthen the independence of the judiciary, in practice it could lead to maintaining the present arrangement and to the risk of "autocratic management" of the judiciary, which the Venice Commission evoked in its Opinion CDL-AD(2007)047 (para 96). The Venice Commission expressed already at that moment that "it would have been preferable, instead of entrusting *ex officio* the President of the Supreme Court with the chairmanship of the Judicial Council, to provide that the President be elected by the Judicial Council among the lay members, in order to ensure the necessary links between the judiciary and the society, and to avoid the risk of an "autocratic management" of the judiciary (paragraph 96). The Venice Commission also pointed out that it would have been preferable that the two members elected by the Parliament be appointed among lawyers and law professors."

19. The Commission takes into account the peculiarities of the situation of the judiciary in Montenegro and the necessary balance between the independence of the judiciary and the need to avoid an autocratic management of judges. Following the *Report of the Venice Commission on the independence of judicial system Part I: Independence of judges* (CDL-AD(2010)004), in which it is stated that the "*council should have a pluralistic composition with a substantial part, if not the majority, of members being judges. With the exception of ex-officio members these judges should be elected or appointed by their peers"* and the recommendation of the Committee of Ministers of the Council of Europe CM/Rec(2010)12, of 17 November 2010, which requires that "*not less than half of such members of (judicial) councils should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary*", the Commission suggests a composition with a parity of members coming from the judiciary and from the rest of the society. If the Council is to have 10 members, the composition could be of 5 judges elected by the conference of judges and, among them, the President of the Supreme Court would be an *ex officio*

member; among the other 5 members, 2 could be renowned lawyers elected by Parliament - one elected by the majority, one by the opposition-; 1 renowned member of the legal profession could be appointed by the President; one renowned member of the legal profession could be proposed by the civil society (which would require a mechanism in which NGOs, academia and bar association could participate); and the Minister of justice, who is an *ex officio* member with no voting rights in disciplinary and removal proceedings.

20. **In the Venice Commission's view, this composition of an equal number of judges and lay members would ensure inclusiveness of the society and would avoid both politicisation and autocratic government.**

21. A crucial additional element of this balance would be that the President of the Judicial Council should be elected by the Judicial Council from among its lay members (with the exception of the Minister of Justice) by a majority of two thirds, and should have a casting vote. Moreover, a new paragraph could be included in Article 127 of the Constitution to provide that the composition of the Judicial Council must secure a balanced representation of judges of all Courts.

22. This constitutional provision should be further accompanied by a provision included in Article 127 of the Constitution dealing with the composition of a panel within the Judicial Council for disciplinary proceedings with a partity of judicial and lay members. Like for the Plenary, among the judicial members of the disciplinary panel there should be a balanced representation of judges from all different levels and courts (see *infra* the comments on the amendments to the laws).

23. Concerning the competences of the Judicial Council, Article 128 would be amended as follows:

> *The Judicial Council shall have the competence to:*
> 1. *elect and dismiss judges, presidents of courts, and lay judges,*
> 2. *issue decisions on the cessation of judicial office,*
> 3. *make decisions on immunity of judges,*
> 4. *propose to the Government a budget for the work of courts, and*
> 5. *perform such other functions as may be laid down by law.*
>
> *The Minister of Justice shall not vote in proceedings co0ncerning disciplinary responsibility and dismissal*

The amendment to Article 128 is to be welcomed, although the Judicial Council should have the responsibility concerning the administration and allocation of financial resources for the judiciary[3].

3.1.4 On the Constitutional Court

24. Another amendment deals with the Constitutional Court. The amendment concerns article 151 and provides that the Court, under specific conditions, can decide constitutional complaints also in a panel of three judges. The proposed amendment adds the following paragraph:

> *"Notwithstanding paragraph 1 of this Article, the Constitutional Court shall decide constitutional complaints in a panel of three judges. The panel may only decide by an unanimous vote and in full composition. Where no unanimity is reached within the panel, the constitutional complaint shall be decided by the Constitutional Court in accordance with paragraph 1 of this Article".*

[3] See the *Report on the Independence of the Judicial System: part I, the independence of Judges*, CDL-AD(2010)004, paras. 52-55.

25. 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*"[4]. It is therefore an amendment in conformity with European standards.

26. However, the reform of the Constitutional Court should have been given more attention, in particular with regard to its independence. In fact, the Constitutional Court plays a fundamental role of guarantee in a democratic system, and should enjoy full independence from the political power. Article 153, together with article 82.13 and 95.5, provides that the seven judges of the Constitutional Court, and among them the President, are elected and dismissed by the Parliament, without any qualified majority, on the proposal of the President of the Republic.

27. In its Opinion, the Venice Commission (paragraph 122) 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 particular, "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". The Venice Commission has also pointed out that it would be preferable to leave the election of the President to the Court itself (paragraph 123).

28. The appointment of the judges of the Montenegro Constitutional Court does not fully comply with European standards and risks that at some point the Court might have difficulty to accomplish the role of an independent, impartial and neutral guarantor in respect to political power and other State institutions. **The Venice Commission therefore strongly recommends to address this issue on the occasion of this process of constitutional reform.**

3.2 On the legislative amendments

29. The draft amendments to the Laws on the High Judicial Council and on Courts have been drafted on the same lines as the proposed amendments to the Constitution, and they could even stand alone in the event that these constitutional amendments were rejected. It would, of course, be desirable that both the Constitution and the laws be amended if this were possible and therefore the laws should be made consistent with the amended Constitution.

3.2.1 On the Law on Courts

30. The proposed draft amendments on the Law on Courts provide better accountability through disciplinary measures, regulating this issue in a clearer and more transparent way. It is indeed necessary to be able to make disciplinary proceedings effective and objective.

31. However, in order to achieve this goal, some of the provisions should be clarified. The relationship between the terms used in articles 33a, 33b and 33~~d~~ is confusing: the terms "unduly", "violation of duty" and "unprofessional and negligent" should be clearly defined. If Article 33b establishes what is to be considered a more important violation, then articles 33a and 33~~d~~ should at least merge the terms used. Besides, the quality of judgments should not be a criterion as such in order to establish a negligent performance of the judicial duty (Article 33~~d.~~1).

[4] *Study on individual access to constitutional justice*, CDL-AD(2010)39rev.

32. The proposed amendment in Article 90 in order to introduce the automatic allocation of cases is to be welcomed. If the specialisation of the judges is to be taken into account when assigning the cases, it should be done following transparent and established criteria[5].

33. The meaning and consequences of the term "legal attitude" used in Article 98.1 should be further clarified.

34. The proposed increase of salary in article 99.3 for a judge acting upon a case on the criminal offence of organized crime or corruption or terrorism or war crimes, as well as in cases of "difficult work conditions" could be problematic, creating the danger that judges categorize ordinary cases as organized crime cases in order to keep their salaries higher.

3.2.2 On the Law on the Judicial Council

35. The proposed draft amendments on the Law on the Judicial Council are from a general point of view positive amendments, providing for an improvement in the legislation. However, several provisions need to be considered further.

36. Concerning Article 8.a.1 establishing the composition of the Commission for the Code of Ethics for Judges, the Commission is a key element and therefore would need special legitimacy. Therefore, the Commission should have a mixed composition from among the members of the Judicial Council rather than the Supreme Court making proposals from among its members.

37. For the same reasons, the Judicial Appointments Commission established in Article 10.a.2 should be elected by the Judicial Council based on the same principles rather than by the Supreme Court. A staggered renewal could be envisaged in Article 10.a.3. Furthermore, the election procedure is very detailed and such issues could be settled in the rules of procedure or in a byelaw adopted by the Judicial Council.

38. Article 13, concerning the election of members to the Judicial Council by the President, should be amended in order to be consistent with the constitutional amendments adopted, as well as article 23 and article 28a on the election of the President of the Supreme Court (see *supra* the comments in this respect).

39. Concerning the election of the judicial members of the Judicial Council, which provides for seven candidates, seems to contradict Article 11.(2), which envisages the existence of eight candidates. It is important to consider that there should be a guarantee for a fair balance among judges who are members of the Judicial Council. As the President of the Supreme Court would be an *ex officio* member of the Judicial Council, the representation of the Supreme Court is ensured. However, members from the basic courts and members from higher courts should also be ensured a fair representation within the judicial members of the Judicial Council.

40. In Article 15, at least concerning the translation of the amendment into English, the term "even" should be replaced by "in the event that". It seems also that the sanction imposed does not make any distinction between minor and more important measures imposed. It could be provided that minor measures should not entail the dismissal from the Judicial Council. In relation to this, concerning new Article 17(2), the term "temporarily dismissed" should be replaced by suspended.

[5] See the Venice Commission's *Report on the independence of the judicial system: Part I, The independence of judges*, CDL-AD(2010)004, paras. 73-81.

41. Concerning the complaints procedure about the judges performance (Article 23.2), it can be indeed be regulated in the rules of procedure. However, the law should require clearly the **publication of the decisions taken in this respect in order to ensure transparency and accountability**.

42. In this respect, the amendments proposed in this Law do not deal with the panel and commission in charge of dealing with the **disciplinary proceedings** against judges and the issue of removal. In order to reconcile the requirement of independence of the judiciary and at the same time to ensure accountability, a panel composed on the basis of **parity** among judicial members and lay members of the Judicial Council should be created. **The Minister of Justice and the President of the Supreme Court, who are both members ex officio of the Judicial Council, should have power to initiate disciplinary proceedings.** As the Minister of Justice does not sit in disciplinary and removal proceedings, a member of the judiciary should also not sit on the commission in order to respect the parity. If the initiative has been exercised by the President of the Supreme Court, he/she should be the one not sitting in the panel or commission. Out of the 10 members proposed to be part of the Judicial Council, only 8 could sit but there should also be certain mobility among the members in case there is an incompatibility.

43. Therefore, **the Commission could then be composed, if the Council has 10 members, of a panel of 6 members, 3 judges and 3 lay members, one of them being the President of the Judicial Council (which should be, as suggested *supra*, elected among the lay members of the judicial council, with the exception of the Minister of Justice). The President of the Council should have a casting vote. By creating a smaller panel or commission inside the Judicial Council, a margin of manoeuvre is left in case one of the members can not sit for incompatibility in a specific case. Members of this panel or disciplinary commission should rotate on a periodic basis**. Its decisions on disciplinary proceedings should be able to be challenged in an appeal before an administrative court, following the requirements of the due process of law, and the appeal procedures should also be clearly regulated in the law.
44. Finally, Article 52.5, which provides that the record of the disciplinary proceedings taken will be deleted after 2 years seems to establish a period too short to allow the appropriate information to be available when considering promotion procedures or future disciplinary cases.

45. The amendments intended to provide for more objective criteria concerning the appointment of judges are welcome. **Written examinations should be conducted in all cases and the computer literacy and languages skills are very positive criteria to take into account**. Concerning the "work performance" criterion (Article 32.a.2.1), it should take into account only an excessive number of cases not dealt with, as otherwise this could encourage judges to simply follow higher instance decisions without taking into account the specific elements of the case, as well as the Constitution and the fundamental rights provisions.

46. Finally, further amendments would be needed to give victims of judicial misbehaviour more rights. **In cases of excessive length of proceedings, the parties should have a right to initiate acceleratory procedures with a higher court** (Constitutional Court or Supreme Court), which – in justified cases - would order judges to speed up the deliberation of cases within a given deadline; otherwise, disciplinary proceedings should follow automatically.

4 On the State Prosecutorial service

4.1 On the constitutional amendments concerning the prosecutorial service

47. **The proposed amendments to the Constitution would take away from the Parliament the power to appoint state prosecutors**. In Article 82 the words "and state prosecutors" would be deleted from the list of persons who are appointed and removed by the Parliament. **Appointment and removal from office of the Supreme State Prosecutor would, however, remain with the Parliament**. As a purely technical matter, when the amendments go through the power of the Parliament to appoint the Supreme State Prosecutor will be mentioned in a number of different places in the Constitution. Article 82 will continue to refer to the appointment and removal from office of the Supreme State Prosecutor, but Article 91 will now also contain a provision to the effect that the Parliament shall decide by majority vote of the members of Parliament in a session attended by over one half of the total number of members the appointment and dismissal of the Supreme State Prosecutor. In addition, Article 135 of the Constitution will state that the Supreme State Prosecutor shall be appointed by the Parliament of Montenegro at the proposal of the Prosecutorial Council. While there is not any difficulty with the substance of this proposal, as a matter of drafting technique it is somewhat undesirable to find a relatively straightforward proposal concerning the appointment and dismissal of the Supreme State Prosecutor contained in three separate articles of the Constitution.

48. The proposed amendments will make changes in the term of office of prosecutors. **The Supreme State Prosecutor will continue to have a term of office of five years, as will the heads of State Prosecution Services (proposed amendments to Article 135). Under the proposed amendment to Article 135, other state prosecutors will now be elected for life.**

49. Article 136 of the Constitution provides for the election and dismissal of the Prosecutorial Council. The existing text simply provides that the Prosecutorial Council shall be elected and dismissed by the Parliament. The election itself is to be regulated by law. Under Article 84 of the Law on the State Prosecutors' Office, the Prosecutorial Council has a chairman and ten members. The Supreme State Prosecutor is to be chairman of the Prosecutorial Council by virtue of holding his office. The other ten members consist of six from amongst the state prosecutors and their deputies, one from amongst the professors of the law faculty in Podgorica, two from amongst renowned lawyers in Montenegro, and finally one representative of the Ministry of Justice. All of these members are elected by the Parliament. However, the method of nomination varies. The six state prosecutors and deputies are to be elected from amongst that group on the proposal of the extended session of the Supreme State Prosecutor's Office. The professors of the law faculty are to be elected on a proposal of that faculty. The two legal experts are to be elected on the proposal of the President who is first however to obtain a prior opinion of the Protector of Human Rights and Freedoms. Finally, the representative of the Ministry of Justice is to be elected on the proposal of the Minister of Justice. It is not very clear what is to happen in the event that the Parliament declines to elect the persons who are proposed. **There would seem to be some scope for potential deadlock in this situation.** However, the proposed amendment to the Constitution would resolve any such problem.

50. The **amended Constitution would contain detailed provisions for the composition of the Prosecutorial Council which are different from the current ones found in the law.** The council would still consist of a president and ten members. However, instead of the Supreme State Prosecutor being *ex-officio* the chairman, the Prosecutorial Council will elect its own chairman from among the elected state prosecutors. The Supreme State Prosecutor will be *ex-officio* a member of the council. In addition the council will consist of five state prosecutors elected by their peers at the extended meeting of the Supreme State Prosecution

Service, two legal experts who are appointed and dismissed by the Parliament of Montenegro, one attorney at law who is appointed and dismissed by the bar, and one representative of the Ministry of Justice who is appointed and dismissed by the Minister of Justice. With regard to the appointment of the two legal experts, the former provision which was contained in Article 84 of the Law on the Prosecutors' Office whereby the two legal experts were elected at the proposal of the President, he having obtained a prior opinion of the Protector of Human Rights and Freedoms, is no longer in the new proposed constitutional text so it would appear that the Parliament will be at large to nominate whomever they please. It might have been preferable to retain the current provision which ensures a degree of suitability of the candidates for election by the Parliament. In other words, the existing legal provision for electing the two lawyers could have been given constitutional status.

51. The draft amendment of the Constitution also deals with the competencies of the Prosecutorial Council. The existing text simply states that the Prosecutorial Council shall ensure the independence of the State Prosecutorial Service and state prosecutors. The proposed amendment continues to proclaim that the Prosecutorial Council shall ensure the autonomy of the State Prosecution Service. It goes on to provide (proposed new Article 136b) that the Prosecutorial Council shall have the competence to elect 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.

52. A proposed new Article 136c will provide that cessation of office and dismissal from office as a head of a state prosecution service as a state prosecutor shall take place in such cases and according to such procedures as are prescribed by law. It provides expressly that a head of a state prosecution service and a state prosecutor shall be dismissed from office where there is a final guilty verdict for a crime committed with intent and through misuse of the prosecutorial office.

53. These proposals represent a substantial improvement in the guarantees for the independence of the prosecutors. **The transfer of the power to appoint state prosecutors from the Parliament to the Prosecutorial Counsel is to be welcomed. It is also welcome that the composition of the Prosecutorial Council, as well as its competencies, is given constitutional expression, though it would have been preferable if the two legal experts to be appointed by the Parliament had to be appointed from amongst persons selected in some way which would guarantee the quality and integrity of the candidates. In this respect the existing arrangements might have been given constitutional expression.** The balance of membership of the Prosecutorial Council, whereby five members are elected by the prosecutors, three by the Parliament, one by the bar and one appointed by the Ministry of Justice seems to be an appropriate one, although there will now be no representative of the law faculties. Incidentally, the proposed new Article 136a appears to be incorrect in that it is stated that there will be a president and 10 members (making a total of 11), but the detailed provision as to who are to be its members only adds up to 10 and not 11.

54. A number of the Venice Commission's recommendations in its opinion CDL-AD(2007)047 have not, however, been adopted. **While the Venice Commission was not opposed to the appointment of the Supreme State Prosecutor by the Parliament it did recommend that the appointment should require a qualified majority and in case this is to be included in the Constitution, a procedure to resolve any potential deadlock should be provided for. The Venice Commission also recommended that the grounds for dismissing the Supreme State Prosecutor should also be regulated in the Constitution.** These proposals have not been followed.

4.2 On the proposed amendments to the Law on the State Prosecutor's Office

55. These proposals have been drafted in such a way as to be consistent with the proposed amendments to the Constitution, though, as stated concerning the judiciary, they could to a considerable extent be capable of standing alone even if these amendment are rejected. It would, of course, be desirable that both the Constitution and the law be amended if this were possible.

56. There are a number of changes proposed to the laws concerning the necessary professional and working qualities of candidates for appointments as prosecutors. The proposed amendments to Article 33, which continue to require an opinion from the prosecutors' office when candidates for appointment come from that office, have an additional provision that the opinion given by the state prosecutor is to be based on the opinion of the prosecutors' conference and available data on the work of the candidate. There are more detailed provisions in relation to assessment of candidates' qualities. For example, one of the functions to be taken into account in appointing an advancing deputy state prosecutor is the capability of that person for executing the office based on work experience and the results of work assessed on the number and complexity of cases completed, the method of case processing, the quality of work, as well as the ability to handle a workload and to meet legal deadlines. It is now proposed that this information has to be justified. Similarly, in assessing the criteria for appointing a state prosecutor under the headings of ability to organize work in the prosecutors' office, and knowledge of the prosecutors' administration affairs, the opinion on this also has to be justified.

57. Under the proposed Article 33a one of the criteria for appointment as a state prosecutor or deputy state prosecutor is "decency". On looking at the proposed new Article 33b relating to the appointment of deputy prosecutors, as well as Article 33v dealing with the deputy state prosecutor, the assessment of "decency" is to be based on (1) "the fact that he / she has not been sentenced for criminal acts rendering him / her unfit to execute prosecutor's office, nor punished for minor offences"; (2) "reputation and chaste behaviour"; as well as (3) "relationship with colleagues and clients". Certainly to west European eyes it seems somewhat strange that a qualification for appointment as a prosecutor would seem to involve a judgment about the moral standards applied by the prosecutor in his or her personal life. One might also argue that the whole concept of "decency" is a very subjective one and could possibly be used to discriminate against a candidate where the real objection to that candidate was something different.

58. Article 35 of the Law is being amended to require that an interview with candidates takes place in all cases (at present the interview can be dispensed with where a person has been interviewed previously within the previous year or has been given several negative assessments). Article 35a is being amended to provide that where written testing is carried out the testing is to be anonymous. Article 8 of the draft amending law proposes to insert a new Article 35 dealing with the subject of scoring, but there is already an Article 35 which deals with the interview with candidates. The numbering here would appear to be an error. On the whole, the proposed amendments to these provisions, while they are quite difficult to follow, at least in the English text, would seem to represent an attempt to make appointment procedures more objective and transparent.

59. There are a number of changes made in relation to disciplinary responsibility. In the first place, a proposed new Article 38a will provide for a prosecutorial code of ethics to be determined by the extended session of the Supreme State Prosecutors Office, following a previously obtained opinion from the sessions of the subordinate state prosecutors' offices. There is also to be a Prosecutorial Code of Ethics Commission which will monitor the application of the Code of Ethics. This Commission can give advisory opinions whether certain

conduct is in accordance with the Code of Ethics. Article 40 of the Law is being extended to provide for a two year ban on promotion where a person has had a reduction in salary imposed as a disciplinary measure.

60. Article 41 which deals with the grounds for disciplinary responsibility, is being amended to a considerable extent. The existing grounds for disciplinary liability are somewhat mechanical and include not taking cases in the order they are registered, rejecting the performance of tasks and duties, failing to appear or being late, being absent from work. To these are now being added a number of important matters which were not included in the existing law. These include a failure to ask to be excused in cases where there is a reason for the prosecutor to be excused, not meeting deadlines or stalling procedures, not informing the state prosecutor of cases where the procedure is taking longer, not allowing supervision of the work, failing to attend mandatory training programmes or failing to act according to the instructions given to him or her.

61. In the existing text there are very explicit prohibitions on conduct considered as harming the reputation of the prosecutorial office. These include appearing in work in a state that is not appropriate to the exercise of the prosecutorial office by reason of being under the influence of alcohol or narcotic drugs, behaving indecently in public places or disturbing the public peace and order, or behaving in an improper or insulting manner towards individuals, state authorities or other persons. This will now replaced by a text which includes in the definition of harming the reputation of the prosecutorial office, (1) behaving in a manner that is not appropriate for its exercise, (2) giving incomplete or false information on one's property to the Commission for the Conflict of Interest, (3) accepting gifts contrary to regulations, (4) behaving in an improper or insulting manner towards other persons, (5) disclosing confidential information, (6) using the office to further private interests, or (7) performing activities incompatible with the exercise of the prosecutor's office. This is both a more comprehensive definition and is more appropriate in that it is hardly necessary to specify so precisely examples of inappropriate or incompatible behaviour such as exercising one's functions while drunk.

62. There are some changes proposed in the composition of the disciplinary committee of the Prosecutorial Council. At the moment that committee consists of a chairman and two members appointed by the Prosecutorial Council from amongst its own members. Under the new proposal only the Chairman of the Committee will be appointed from amongst the members of the council but the other two members are to be appointed from amongst state prosecutors who are not members of the Prosecutorial Council.

63. In principle it might seem that the disciplinary committee of the Prosecutorial Council should have a structure parallel to the corresponding body of the Judicial Council. However there are two problems with this approach as well as with the current draft. Firstly, the decisions of a disciplinary body consisting entirely or mainly of prosecutors may lack credibility with the general public. Secondly, unlike judges, prosecutors do not have individual independence. A disciplinary committee consisting entirely or mainly of serving prosecutors could be entirely subservient to the Supreme State Prosecutor. Instead of choosing two prosecutors from outside the Prosecutorial Council it would be preferable to establish at regular intervals a panel of persons of undoubted ability and integrity (but not necessarily lawyers) from whom the two members to decide a case, together with the Chairman, elected by the Prosecutorial Council, could be picked at random when necessary. Such persons could include, for example, retired judges or prosecutors, members of the ombudsman's office, distinguished academics or former academics, or other persons with a proven record of achievement.

64. Article 52 of the existing law provides for the removal from office of state prosecutors or their deputies if they are sentenced for a criminal offence which renders them unfit for exercise of office, if they exercise the office unprofessionally or in an unconscionable manner or have permanently loss the ability to exercise the office. They may also be dismissed for failing to

achieve positive results when directing office activities, for failing to initiate the procedure for the removal or disciplinary proceedings although so authorized, or where a person has had a disciplinary measure imposed twice in the course of a particular term of office. A proposed new Article 52a will now add a definition of what is meant by acting unprofessionally and negligently. It is not a complete definition but says that unprofessional or negligent exercise of office includes a number of matters such as significantly failing to achieve the expected results both in quantity and quality of work, stalling proceedings or not taking proceedings for processing thus causing an interruption of the proceedings or allowing the statute of limitations to run, not complying with the principle of truth or fairness during criminal proceedings, failing to successfully exercise the leading role in a pre-trial procedure, or having a significant number of unconfirmed indictments or unaccepted legal remedies compared to the total number of indictments filed in the previous three years, or where a prosecutor does not proceed in a large number of cases for a longer time period.

65. These more detailed provisions seem designed to specifically deal with the situation where a corrupt prosecutor may decide to interfere with a prosecution simply by failing to prosecute it in a timely or efficient manner. As this is likely to be the primary method used by any prosecutor who has been bribed by a defendant in order to prevent a conviction it seems appropriate that the law should expressly declare that such matters are to be regarded as unprofessional and negligent.

66. Article 71 of the law will be amended to provide that appointments as special prosecutors are to be made, not by the Supreme State Prosecutor, but by the Prosecutorial Council on his proposal. Article 74 will be deleted so that the method of removing special prosecutors and their deputies is now the same as for other prosecutors.

67. There are a number of amendments to Articles 83-86 dealing with the Prosecutorial Council. These include conferring on the Prosecutorial Council the function of appointing and removing from office special prosecutors and deputy special prosecutors. The Prosecutorial Council will now propose the budget rather than establishing it and under revised Article 128 the Supreme State Prosecutor settles the Budget. The provisions relating to composition of the Prosecutorial Council follow the provisions of the proposed constitutional amendment. These have already been discussed above in discussing the proposed amendments to the Constitution (see *supra*).

68. A new article 97a extends the functions of the session of the Supreme State Prosecutors' Office (or Conference of Prosecutors as it is referred to in the English text of the original law). It can given opinions on regulations relevant to the exercise of the prosecutors' office, initiate passing of relevant laws from other regulations in the field of the judiciary, consider reports submitted to the Parliament, consider issues of relevance to ensure the application of the judicial information system in so far as relates to the State Prosecutors' Office and determine the methodology of reporting on the work of the office and the annual work schedule.

69. Article 98 of the law is amended to allow the state prosecutor to delegate administrative prosecutorial affairs to a deputy or a clerk. This seems to be a desirable reform as it may be appropriate to delegate administrative work to a non-lawyer rather than waste the time and expertise of a lawyer on tasks he or she may not be wholly suited.

70. A new Article 103a requires the Prosecutorial Council to submit an annual report to Parliament.

71. A proposed new Article 109a provides that an assigned case is to be taken from a deputy prosecutor only if it is found that the deputy is acting inappropriately or if he or she is unable to perform the prosecutorial function. This includes the ability to act in a timely manner and in the prescribed time frames. The decision to withdraw the case may be appealed.

5 Conclusions

72. Dealing with the problem of independence of the Judiciary and its relations with political power, the Venice Commission in the 2007 Opinion (paragraph 81) took into account "that Montenegro has experienced very acute problems relating to the effectiveness and impartiality of the judiciary", and that "the Montenegrin political class is firmly convinced that these difficulties can be overcome only through oversight of the judiciary by parliament". In the light of the peculiar situation of the Montenegrin judiciary the Venice Commission took note of the reasons why the 2007 Constitution had given the Parliament the power to elect the President of the Supreme Court, the President of the Constitutional Court, and the Supreme State Prosecutor and State Prosecutors.

73. These and others provisions concerning the judiciary were in a certain sense to be considered as transitional, temporary provisions. Their aim was to give the Montenegrin political authorities the time and the possibility to "overcome their difficulties in achieving an effective and impartial judiciary; the constitutional provisions under consideration will then need to be amended in order to guarantee the full independence of the judiciary" (Venice Commission Opinion- paragraphs 90, 82).

74. Four years have passed and now the time has come for the Montenegrin authorities to accomplish the target of guaranteeing full independence to the judiciary and to the Constitutional Court, according to the European standards and the suggestions of the 2007 Venice Commission Opinion.

75. The proposed amendments to the Constitution and to the three laws under consideration are steps in the right direction and attempt to truly improve the existing situation. However, in order to achieve the goal of building a solid and independent judiciary, the Venice Commission considers that the Constitution should be changed in order to:

a. provide that the election of the President of the Supreme Court should be done by the Judicial Council alone,
b. change the composition of the Judicial Council in order to create an adequate balance,
c. change the composition of the Constitutional Court.

76. In addition, as a change in the Constitution would not be sufficient in order to redress the situation of the judiciary in Montenegro, in the Venice Commission's opinion the legislation should also be changed in the way recommended above and in particular concerning:

a. The transparency and effectiveness of disciplinary proceedings against judges and prosecutors.
b. The composition of the disciplinary panel inside the Judicial Council and the prosecutorial Council.
c. The existence of better remedies for victims of judicial misbehaviour.
d. The competencies of the Judicial and Prosecutorial Councils
e. The improvement of the processes of appointment of judges and prosecutors.

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