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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

OPINION
ON THE DRAFT LAWS ON COURTS

AND
ON RIGHTS AND DUTIES OF JUDGES AND
ON THE JUDICIAL COUNCIL

OF MONTENEGRO

Adopted by the Venice Commission
at its 101st Plenary Session
(Venice, 12-13 December 2014)

on the basis of comments by

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I. INTRODUCTION

1. On 2 September 2014, the Permanent Representative of Montenegro to the Council of Europe requested the opinion of the Venice Commission on the Draft Laws on Courts and on the rights and duties of judges and the Judicial Council (CDL-REF(2014)043 and CDL-REF(2014)044). The opinion of the Venice Commission was required on two further draft laws having been prepared in the context of the on-going reform of the judiciary in Montenegro: the Draft Law on the State Prosecution Service, the Draft Law on Special State Prosecutor's Office.

2. Mr Johan Hirschfeldt, Mr Kaarlo Tuori and Mr Jan Velaers acted as rapporteurs on behalf of the Venice Commission concerning the Draft law on Rights and Duties of Judges and Judicial Council; Mr Johan Hirschfeldt, Ms Hanna Suchocka, Mr Kaarlo Tuori and Mr Jan Velaers acted as rapporteurs concerning the Draft law on Courts.

3. On 27-28 October 2014, a delegation of the Venice Commission visited Podgorica and held meetings with representatives of the authorities (the Ministry of Justice, the Parliament, the Supreme Court and lower level courts, the State Prosecutor's Office, the Judicial Council and Prosecutorial Council) as well as professional associations of judges and prosecutors and civil society. The Venice Commission is grateful to the Montenegrin authorities and to other stakeholders met for the excellent co-operation during the visit.

4. This Opinion is based on the English translation of the draft laws provided by the Montenegrin authorities. The translation may not always accurately reflect the original version on all points, therefore certain issues raised may be due to problems of translation.

5. This present Opinion was adopted by the Venice Commission at its 101th Plenary Session (Venice, 12-13 December 2014).

II. BACKGROUND

6. The Parliamentary Assembly of the Council of Europe, in its June 2012 Resolution 1890 (2012) on "The Honouring of obligations and commitments by Montenegro", pointed out, in the area of the rule of law, the need for judicial reform, which remained a priority for Montenegro. The adoption of constitutional amendments to de-politicise the judiciary was also a strong requirement from the European Commission to start the EU accession negotiations.

7. Montenegro has already taken steps aiming at ensuring, in line with European standards and best practices, the independence and efficiency of its judicial system. To achieve these goals, amendments to the Constitution were introduced in 2013. These amendments, among others improvements, have introduced limitations to the role of the Parliament in the sphere of the judiciary and provided a constitutional framework for the de-politicisation of the judiciary.

8. Following the changes to the constitutional framework, new legislation on the judiciary has been elaborated aimed at strengthening the independence of judiciary and its efficiency. The opening, in December 2013, of Chapter 23 on *Judiciary and fundamental rights* in the negotiation process for EU accession, based on a detailed Action Plan prepared by the Montenegrin authorities, gave an additional impetus to the efforts made in this area. A new judicial reform strategy for 2014-2018, adopted in April 2014, articulates and complements further the key priorities of the reform listed in the Action Plan.

9. In its previous Opinions of 2007 on the Constitution of Montenegro (CDL-AD(2007)047), of 2011 on the draft amendments to the Constitution and on the draft amendments to the law on courts, the law on state prosecutor's office and the law on the judicial council (CDL-AD(2011)010), and on the draft amendments to the Constitution of Montenegro (CDL-AD(2012)024 and CDL-AD(2013)028), the Venice Commission examined the judicial structure of Montenegro and expressed the view that the constitutional guarantees for the independence of the judiciary needed to be improved. The Venice Commission stressed that it was necessary to avoid both politicisation and self-perpetuating government of judges; it considered the constitutional reforms made in this respect to be in line with international standards.

10. The Draft laws on courts and on rights and duties of judges and Judicial Council of Montenegro are important steps of a larger program aiming at implementing the 2013 constitutional amendments dealing with the Judiciary and the Judicial Council, the Prosecution Service, and the Constitutional Court, all of them addressed to meet European standards.

11. It is not the purpose of this opinion to provide a detailed and exhaustive review of the draft laws. It will therefore focus on the provisions raising more critical issues.

III. ANALYSIS OF THE DRAFT LAWS

A. General remarks

12. In general, both draft laws are of a high quality and aim to follow the applicable standards, as recommended by the opinions of the Venice Commission, as well as to implement the 2013 constitutional amendments. The Draft laws on rights and duties of judges and on Judicial Council and on courts are meant to regulate issues currently ruled by the Law on Judicial Council,[1] and by the Law on Courts. [2]

13. The Montenegrin authorities have decided to propose two separate draft laws in the area of the judiciary: the Draft law on courts and the law on rights and duties of judges and on the High Judicial Council. To adopt two separate laws on this field seems, however, not to be the best solution, as both issues are closely connected. The Draft law on courts regulates the independence of judges. Chapter I (**Articles 3 to 5**) and Chapter VII (**q**) also include provisions on procedural fundamental rights, even though the wording is different than the corresponding provisions in both the Montenegrin Constitution and the European Convention on Human Rights. However, the provisions concerning individual judges, mainly those dealing with their appointment and dismissal and their disciplinary responsibility, appear in the Draft law on rights and duties of judges and on the Judicial Council.

14. As the Venice Commission has already stated in other occasions, in order to interpret correctly all provisions, the two laws have to be read together. Therefore, "a single law would make the regulations more coherent and understandable".[3]

[1] Law on the Judicial Council (Official Gazette of Montenegro 13/08, 39/11, 46/11 and 51/13).
[2] Law on Courts (Official Gazette of the Republic of Montenegro 5/02, 49/04 and Official Gazette of Montenegro 22/08, 39/11 and 46/2013).
[3] CDL-AD(2007)003, *Opinion on the Draft law on the judiciary and on the Draft law on the status of judges of Ukraine*, para. 6.

B. Specific comments concerning the Draft law on courts

1. Misdemeanour courts

15. Misdemeanour courts are regulated in **Articles 8 to 11**[4]. The drafters intend to establish three misdemeanour courts and a High Misdemeanour Court. The transfer of the power to adjudicate misdemeanour proceedings to the judiciary is to be welcomed. Under the current system, bodies in charge of misdemeanour procedure do not have the status of courts, although in such procedures sentence of imprisonment may be passed.

16. It is essential to ensure that appointment of judges of these courts - so far, appointed by the executive - complies with the constitutional provisions on judges' appointment (**Article 128.4 of the Constitution**).

17. It would be also advisable to examine whether it would not be more efficient to transfer the more serious misdemeanours to the existing penal courts and to provide for an alternative sanctioning competence of the police or the prosecutorial service, for the less serious misdemeanours, provided that access to court is guaranteed.

2. The system of courts

18. There are two High Courts, one in Bijelo Polje and one in Podgorica. According to **Article 15**, there is a proposal for more centralisation in adjudication of certain cases: "*Notwithstanding the rules on territorial jurisdiction, the High Court in Podgorica shall adjudicate on criminal proceedings conducted on charges for criminal offences of: 1). organized crime, regardless of the prescribed punishment; 2) cases having elements of corruption, regardless of the prescribed punishment (…); 3) money laundering; 4) trafficking in persons*".

19. A strong concentration of cases in one court could result in longer and less efficient procedures. The same type of consideration concerns the new Commercial Court (**Article 16**). Instead of the two courts existing under the current Law in force, there is a proposal to establish only one court which will have its seat in Podgorica and this could overload this court. However, this is a decision for the authorities of Montenegro to adopt taking into account the country's specific circumstances, needs and resources, including in terms of availability of specialised judges to address the concerned cases.

3. Internal independence

<u>"Legal positions of principle"</u>

20. **Articles 24, 26 and 38** of the Draft law on courts provide for the possibility for the Supreme Court and **Article 40** also for the General Meeting of Judges of a court, to take "*a legal position of principle*", which shall be mandatory on other courts and tribunals. **Article 26** of the Draft law provides that the Supreme Court may, *ex officio* or upon the request of a court, take a legal position of principle "*on contested legal matters arising from case law in view of ensuring uniformity in the application of law by courts*". "*These legal positions of principle shall be mandatory on all the courts*." **Article 38** of the Draft law provides that the full Bench of the Supreme Court shall be convened and chaired by the chief justice of the Supreme Court, on his/her own initiative, upon the proposal of the head of a division, or upon the proposal of the court which seeks a legal position of principle to be developed or

[4] As stipulated by article 9, "*[t]he misdemeanour court shall have jurisdiction to adjudicate upon petitions for initiating misdemeanour proceedings and upon petitions for court determination.*"

modified.

21. Moreover, the Draft law not only confers the power to issue "legal positions on principle" to the Supreme Court, but also to the general meeting of judges**. Article 40, para. 1.1** of the Draft law establishes that the general meeting of judges, which includes all the judges of a court, shall "*develop or modify legal positions in cases under the jurisdiction of the concerned court, where such cases are significant for the case-law*". **Article 40, para. 2** further provides that "*the general meeting of judges shall develop a legal principle when it finds that there are dissenting views between different panels or judges of the court concerned as how a law should be applied or when an individual panel or a judge derogates from the previously established legal position*."

22. The Draft law does not explicitly establish that the legal positions of the general meeting of judges are mandatory to all the judges. **Article 40, para. 3**, however, implicitly seems to confirm the mandatory effect, as it states that "their application shall be **monitored**."[5] (Article 40, para. 3). Binding positions can be deemed problematic from the perspective of the internal independence of judges. By contrast, discussing common positions in similar cases to be dealt with by different panels or different individual judges is an appropriate task for a general meeting of judges. During the visit to Podgorica, the Venice Commission was informed that it was not the intention of the drafters that the "legal positions on principle" issued by the general assemblies of judges would be mandatory. In order to avoid a misunderstanding, the non-mandatory character should be stated explicitly.

Right of the President of the court to examine court files

23. **Article 37** of the Draft law confers the right to the president of the court to examine the files of a case assigned to a judge. This right is very largely defined as it may be exercised in relation to: a) a petition filed by a party to a proceeding; b) a request filed by the Protector of Human Rights and Freedoms; c) initiation of a procedure to establish disciplinary accountability; d) an application for recusal of a judge; e) an application to expedite proceedings (application for review); withdrawal of an allocated case, and f) in other cases where so stipulated by law. In the cases referred to in paragraph 1 of Article 37, the president of the court may request the judge to deliver him/her data in writing or a report on the cases and on the reasons due to which such cases were not finalised within the statutory deadline or within a reasonable time.

24. This provision confers the president of the court a very large right to interfere in the cases assigned to the judges of the court and thus threatens to undermine the internal independence of these judges. Only when there are serious and objective indications of the dysfunction of the judge can such interference be justified. The Venice Commission recommends to add this as a prerequisite condition, and to delete, among the reasons given to examine the case, a) ("a petition filed by a party to a proceeding") and f) ("in other cases where so stipulated by law"), as they are too large.

Supervision by high level courts

25. **Article 66**, under the Chapter VII dealing with the relations between courts, adds to this that "*Courts shall submit to higher instance courts, at their request, data and notifications and enable them to examine directly the work of courts and judges in view of monitoring and studying case-law and controlling court work in organisational and professional terms. The general meetings of divisions of courts of the next higher instance shall also discuss matters of common interest to the lower instance courts from the territory of those courts.*"

[5] Emphasis added.

26. Internal independence is a key element of the independence of the judiciary. As stated by the Committee of Ministers,

> "*22 … In their decision making judges should be independent and impartial and able to act without any restriction, improper influence, pressure, threat or interference, direct or indirect, from any authority, including authorities internal to the judiciary. Hierarchical judicial organisation should not undermine individual independence.*
> *23. Superior court should not address instructions to judges about the way they should decide individual cases, except in preliminary rulings or when deciding on legal remedies according to the law.*"[6]

27. In its *Report on the Independence of the judicial system*, the Venice Commission stated that "[*A] hierarchical organisation of the judiciary in the sense of a subordination of the judges to the court presidents or to higher instances in their judicial decision making activity would be a clear violation of this principle*."[7] The Consultative Council of European Judges (CCJE) has emphasised that "*judges should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of the law*". Internal independence does not exclude doctrines such as that of precedent in common law countries (i.e. the obligation of a lower judge to follow a previous decision of a higher court on a point of law directly arising in the latter case).

28. The Venice Commission analysed the so called "uniformisation procedure" in the opinion on the Hungarian Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary:

> "The Venice Commission underlines the need for consistency of legal interpretation and implementation. However, unlike the *stare decisis* doctrine or a continental appeal system, the system established in the AOAC provides for an active interference in the administration of justice of the lower courts and tribunals. According to Section 26.2 AOAC, the chairs and division heads of courts and tribunals shall continuously monitor the administration of justice by the courts under their supervision. According to Section 26.4 AOAC, chairs and division heads have to inform the higher levels of the courts, up to the *Curia*, of judgements handed down contrary to "theoretical issues" and "theoretical grounds". This turns court presidents into supervisors of the adjudication of the judges in their courts (see also Section 27 AOAC). The AOAC establishes precise rules on "authoritative Court rulings and decisions" (Section 31 AOAC) and on "law standardisation procedures" (Sections 32 to 44 AOAC). Moreover, it appears from Section 67 ALSRJ that the evaluation of the judges will be conducted on the basis of an activity assessment, of which data such as "decisions of second instance and review decisions" form a part. This seems to suggest that non-compliance with rulings of the higher courts will negatively influence the evaluation of judges.
> (…)
> Insofar as all rules imply an interference in the administration of justice of the lower courts or tribunals, they can have a chilling effect on the independence of the individual judge and must be deemed to be in contradiction with the spirit of Article 26.1 of the Fundamental Law, which reads as follows: "Judges shall be independent

[6] Recommendation CM/Rec(2010)12, adopted by the Committee of Ministers of the Council of Europe on 17 november 2010. See also, among other texts, the *Magna Charta of Judges* (Fundamental principles, para. 3); the *Bordeaux Declaration* (para. 21), the *Universal Charter of the Judge* (Article 2) and the *Kyiv Recommendations on judicial independence*, para. 35.
[7] CDL-AD(2010)004.

and only subordinated to Acts; they shall not be given instructions as to their judicial activities."[8]

29. The provisions of the Draft law on courts of Montenegro contain an analogous system. They are also likely to undermine the independence of individual judges, which shall rule on the basis of the Constitution, laws and published international agreements (**Article 118 of the Constitution** of Montenegro), and not on the basis of the mandatory instructions of other judges or higher courts.

30. During the visit to Podgorica, the Venice Commission was informed that the Supreme Court has the power to issue "legal positions on principle" already under the present Act; this power is based on **Article 124, para. 2 of the Constitution**, which confers to the Supreme Court the mission to "secure unified enforcement of laws by the courts". It was also informed that the Supreme Court very rarely uses this power. However, guaranteeing the coherence of the interpretation of the law should be fulfilled without affecting the internal independence of the judges (see also para. 26). As also stated in another opinion concerning Ukraine, "granting the Supreme Court the power to supervise the activities of the general courts (**Article 51.1**) would seem to be contrary to the principle of independence of such general courts".[9]

4. External independence

Government interference with the internal organisation of the courts

31. Some provisions of the Draft law seem to confer to the government a right of interference with the organisation and functioning of the Courts. According to **Article 27**, "*[T]he organisation and manner of internal operations of courts shall be regulated by the court's Rules of procedure issued by the public administrative body in charge of judicial tasks (hereafter, the Ministry of Justice) after having obtained the opinion of the Judicial Council."* **Article 30, para. 3**, establishes that "*Presidents of court(s) shall adopt an internal organisation and job descriptions act of the court, subject to approval of the Government of Montenegro*".

32. In the light of the external independence of the judiciary and the principle of separation of powers, it should be explained why the power to issue the Court's "Rules of procedure", which regulate "the organization and manner of internal operations of courts", is conferred to the Ministry of Justice. Moreover, it is not clear for what reason the internal organisation and job descriptions act of the court, adopted by its president (**Article 30**), should be approved by the Government of Montenegro.

Government supervisory powers

33. Moreover, several provisions of the Draft confer to the Ministry of Justice powers over the judiciary. **Article 47** imposes the obligation on the president of the court to deliver the activity report of the court to the Ministry of Justice, and, at the request of the Ministry of Justice, to deliver specific or periodic reports which are necessary for the performance of tasks falling under their jurisdiction. These obligations seem to place the president of the court in a position of subordination to the Ministry of Justice.

34. According to **Article 50**, "the performance of court administration tasks shall be

[8] Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, adopted by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012), CDL-AD(2012)001, paras. 72 and 73.
[9] CDL-INF(1997)6, para. 6.

supervised by the Ministry of Justice. In exercising its supervision functions, the Ministry may not take actions that interfere with court's decision issuance in legal cases." **Article 52** further establishes the possibility for the Ministry of Justice to carry out inspections in courts, for example, in relation to the organisation of work in courts, acting upon citizens' petitions and complaints against *the work of courts*[10] (also present in **Article 54** ***in fine***, in this case in relation to *court administration tasks*[11]), or concerning the work of the Secretariat of the Judicial Council, specifically, its activities relating to court administration or the work of clerks and archives.

35. **Article 50, para. 2** includes a specific provision which rightly sets out that "In exercising its supervision functions, the Ministry of Justice may not take actions that interfere with court's decision issuance in legal cases". However, it should be noted that no clear-cut boundary separates supervision of court administration from supervision of fulfilment of adjudicative tasks. It should also be noted that Articles 25 and 29-30 of the Draft law on rights and duties of judges and on judicial council implies a certain supervisory task of the Judicial Council as well. It should be considered whether the Judicial Council could be entrusted with the supervision of court administration as defined in Chapter IV of the Draft law on courts (see **Article 47.2**).

36. It should be considered to harmonize the two laws in this respect, limiting the supervisory role of the Ministry of Justice in a clearer manner. It is recalled in this context that Montenegro has a long history of risk of politicisation of the judiciary, and that, as proposed in the Draft law on rights and duties of judges and on judicial council, the Judicial Council will have a special (more balanced) composition to combat both this risk and the risk of too corporatist approach within the judiciary.

5. Schedule of assignments and allocation of cases

37. **Articles 31 to 33** establish the rules concerning the adoption by the president of the court of the annual schedule of assignments. It is a well-conceived system, which excludes any external interference, provides for the participation of the judges of the court and guarantees transparency.

38. According to **Article 34, para. 1**, cases shall be allocated using a random method. The way in which cases are divided at random will be specified in more detail in the court's "Rules of Procedure" (**Article 35**). Automatic allocation of cases can be welcomed and the procedure is in line with European standards. Indeed, as formerly stated, "*in order to enhance impartiality and independence of the judiciary, it is highly recommended that the order in which judges deal with the cases be determined on the basis of general criteria, to take into account the workload or the specialisation of judges*".[12] *"The procedure of distribution of cases between judges should follow objective criteria".*[13] However, it could be useful to the adequate functioning of the judiciary that the specialisation of the judges could be taken into account when assigning the cases. If it is done following transparent and established criteria, this would not be contrary to the principle of the "natural judge", foreseen by the law.[14] The re-allocation of cases to "a newly-appointed judge" may be a source of concern and would need to be reconsidered.

[10] Emphases added.
[11] Emphases added.
[12] See the *Report on the Independence of the Judicial System Part I: The Independence of Judges,* CDL-AD (2010)004.
[13] CDL-AD(2002)026, para. 70.7.
[14] See the *Opinion of the Venice Commission on the draft amendments to the Constitution of Montenegro*, CDL(2011)044, para. 32.

6. Assistance of judges by experts and advisers

39. According to **Article 43**, "*the president of court may engage persons who possess the required expertise, or set up an expert team or an expert working body to clarify specific professional issues arising in the course of work of courts, as well as to clarify issues and take positions on matters within the scope of work of court divisions and general meetings of judges, and to assist judges in case preparation, in analysis and monitoring of case law and in other issues that are of importance for the efficient work of courts and judges*."

40. According to **Article 61** of the Draft law, advisors have the task to "*assist judges, in their work, draft decisions and carry out, either independently or under the judge's supervision and according to the judge's instructions, other expert task as provided by law or regulations adopted on the basis of law*".

41. As these experts and advisers will have the task "to assist judges", the law has to provide guarantees that the right to a fair trial by an independent and impartial judge is not affected and that the professional secrecy is kept. The legislator must take into account that, if these experts and advisers do not meet the requirements of independency and impartiality, their assistance might create the impression that the judges themselves are not independent and impartial. Therefore, their status and specific role should be clearly established. The independence of the judiciary may require certain duration of the labour relationship not only for judges, but also for their staff. Recruiting experts and advisers on a non-permanent basis could therefore be questioned. In any event, it should be made clear that judicial decisions remain under the direct responsibility of judges.

7. Judicial trainees

42. **Article 64** of the Draft law indicates that law faculty graduates meeting the general requirements for working in state bodies may be employed as judicial trainees and refers to a separate law (most probably to be subsequently adopted) for the special conditions and procedure for entering into employment, duration of traineeship and training during the traineeship. Judicial trainees seem to be a different category, not directly related to the access to the judicial career. It is important to ensure that the position of trainee is not assimilated to that of a non-experienced judge under probationary period.

C. Specific comments concerning the Draft law on rights and duties of judges and on Judicial Council

1. On the Judicial Council

<u>Election of members</u>

43. Constitutional provisions on the composition and the tasks of the Judicial Council have been amended in 2013, in accordance with the opinions of the Venice Commission. The Draft law includes more specific provisions on the Judicial Council. The election of the members from among eminent lawyers is preceded by an open call. However, **Article 16** of the Draft law does not explicitly pronounce whether only those who have announced their interest are eligible. In addition, the term "competent working body of the Parliament of Montenegro" is used. This body could be identified in the law.

44. In defining the required qualification of the members from among eminent lawyers the term "ten years of experience in the field of law" is used. The expression "experience in the field of law" is also employed in provisions in Articles 34-35 on the required qualifications for

judicial appointments. What "the field of law" covers needs further explanation and a clearer definition.

Dismissal of Judicial Council members

45. **Article 18** of the Draft law deals with the dismissal of a Judicial Council member. According to A**rticle 18, para. 1** the grounds for dismissal are: "1) he/she discharges his/her duties unconscientiously and unprofessionally; 2) he/she is convicted of an offence which makes him/her unworthy of discharging duties of the Judicial Council member".

46. The notions "unconscientiously and unprofessionally" and "unworthy of discharging duties" are too vague, and can lead to an arbitrary application of the power to dismiss members of the Judicial Council. It is strongly recommended to define these dismissal grounds more closely.

47. Council's members are also dismissed if a disciplinary sanction is imposed (**Article 18, para. 2**). However, in some cases disciplinary sanctions may be imposed for relatively minor matters, in which case dismissal will be a disproportionate measure.

48. It is important to make it clear in the law that the Council's motion concluding that a Council member has to be dismissed should not based on the substance of the position/decision of the concerned member in respect of individual files. This is essential for ensuring the independence and autonomy of the Judicial Council.

Temporary removal

49. According to **Article 20, para. 1**, a Judicial Council Member shall be temporarily removed from office if: *"(…) 3) indictment against him/her for the offence that makes him/her unworthy of the position in the Judicial Council is confirmed*." The notion "offence that makes him/her unworthy of the position in the Judicial Council" is too vague and can lead to an arbitrary application of the power to temporarily remove members of the Judicial Council. See also the remarks in this respect on paras 66-67 of this opinion.

50. According to **Article 20, para. 2**, Judicial Council members elected from among judges can be temporarily removed from office "*if the procedure for establishing disciplinary liability has been initiated against him/her, by the time of final conclusion of such disciplinary procedure.*" The use of the word "can", instead of the word "shall" which is used in Article 20, para. 1 suggests that there is no obligation to take this decision. In order to enhance legal security and avoid arbitrary decisions in this field, the law should determine the criteria that have to be applied in taking a decision to temporarily remove a Judicial Council member from office on this ground.

Competences of the Judicial Council

51. **Article 128, para. 1.9 of the Constitution** allows for assigning the Judicial Council additional tasks through law. Such tasks are set out in **Article 25** of the draft law.

52. **Article 25** of the Draft law confers the power to the Judicial Council "1) to resolve complaints of the work of judges". This provision leaves open who is entitled to submit such complaints and on what grounds. In the light of the functional independence of the judiciary and taking into account the appeal procedures against decisions of judges, the Judicial Council cannot receive the power to "resolve complaints of the work of judges." The scope of the complaints filed by judges (subparagraph 7) also remains unclear. Clarity should be

provided on the above matters. Complaints should in no case confer the competence to the Judicial Council to interfere in the work of the judges.

2. On the rights and duties of judges

Appointment of judges

53. Provisions on the appointment of judges establish a closed judicial career with strictly defined requirements of judicial experience, the positions of Supreme Court judges being the only exception.[15] This is not a self-evident choice, and arguments can be presented for facilitating the entry from outside the judiciary into at least the Commercial Court and the Administrative Court, perhaps even the High Courts and the Appellate Court.

54. The degree of detail of the provisions on the criteria and the procedure for judicial appointments can be understood in the light of the objective to ensure that appointments are based on merit, as is required by European standards. According to Recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe, "*Decisions concerning the selection and career of judges should be based on objective criteria pre-established by law or by the competent authorities. Such decisions should be based on merit, having regard to the qualifications, skills and capacity required to adjudicate cases by applying the law while respecting human dignity.*" In this respect, the provisions should be welcomed.

55. However, there is a risk in the creation of a kind of pseudo-objectivity and very rigid judicial career. This risk is further enhanced by the process of evaluation, which is also regulated in Chapter VI by very detailed provisions and which is supposed to be carried out every three years (Article 76.1).

56. **Articles 48 to 50**, in relation to the rights of candidate judges, seem to comply with the international standards. Indeed, the refusal to confirm the judge in office is made "according to objective criteria and with the same procedural safeguards as apply where a judge is to be removed from office."[16] It can however be criticised that the draft does not determine a maximum period during which a candidate judge can be employed in a basic court. **Article 48** only refers to "a limited period of time pending decision on his/her election" and **Article 49** states that the training period shall last minimum one year.

Promotion and transfer of judges

57. **Article 63** establishes for judges a right to promotion to higher instance courts and **Article 75** establishes the procedure for permanent voluntary transfer of judges. The relationship of the promotion and transfer to the appointment procedure is unclear: if the appointment procedure is launched only if no judge invokes his/her right to promotion or applies for a permanent voluntary transfer, then this further strengthens the closeness of the judicial career.

58. **Article 74** provides that a judge may be transferred without consent to another court in the event of court restructuring which leads to decreasing or dissolving a number of judicial posts. It should be recalled that, according to the European Charter on the Status of Judges,

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[15] See Article 35: "*to be elected judge of the Supreme Court, a person has to have at least 20 years of experience as a state prosecutor, lawyer, notary, deputy notary or professor of law or at least 20 years of experience in other jobs in the field of law after having passed judicial exam.*"

[16] Venice Commission, *Report on judicial appointments*, adopted at its 70th Plenary session (Venice, 16-17 March 2007), CDL-AD(2007)028.

para. 3.4, transferring a judge against his/her will is an exception permitted "in the case of a lawful alteration of the court system"; the Venice Commission has also been restrictive about this possibility.[17] The term "court restructuring" may be too wide. To use the term "restructuring of the court system" would be preferable, thereby sorting out minor changes that do not give reason for transfer against the will of a judge. It could also be argued that a judge should not be transferred against his/her will due to court restructuring to a lower court than the court where he/she has his/her actual judgeship. A provision guaranteeing this principle and the principle of securing the same future salary for the judge as in his/her actual position would also be welcomed.

Evaluation of judges

59. A system on evaluation of judges is generally to be welcomed. In its opinion on Armenia,[18] the Venice Commission has commented exhaustively on such a system and has been critical against a too close connection between the evaluation system and the system on disciplinary liability of judges. The drafted evaluation system in Montenegro is very detailed and of a good technical quality as such. However it should be stressed that such a system properly implemented will consume a lot of time, personal and economic resources to guarantee results that could be relied upon in the long run.

60. **Article 76** of the Draft law establishes that the judges of the Supreme Court are excluded from the evaluation system. As stated by the Venice Commission in the opinion on Armenia mentioned above, it is recommended to include the Supreme Court judges in an evaluation system.[19]

61. A careful management of the use of indicators, such as "the number of quashed decisions" mentioned in **Article 76**, is highly advisable.[20]

62. **Articles 86 and 87** seem unclear. In **Article 86**, grades distribution is ambiguous, mainly concerning what grade should be given if the judge has been evaluated as "unsatisfactory" in two sub-criteria, but satisfactory in four sub-criteria. Concerning **Article 87**, the fact that decisions of the Judicial Council – or the Evaluation Committee – are declared to be final, with the addition that "administrative dispute may be initiated against it", seems contradictory. It is also unclear whether the possibility to initiate an administrative dispute means the decision at issue may be appealed to the Administrative Court.

Incompatibility and Immunity

63. **Article 91** enounces that "*upon request of the president of the court or the judge, the Judicial Council shall give opinion about whether certain activities are incompatible with discharging duties of judicial office*". A reference to **Article 123 of the Constitution** should be added, to make it clear that incompatibility has been exhaustively regulated at constitutional level.

64. **Article 92** states that when the court of appropriate jurisdiction has established that there are reasons to place the judge in detention due to a criminal offence committed while discharging duties of judicial office, it shall without delay request from the Judicial Council to decide whether it approves of such detention. It is not clear for what reasons and on what

[17] See CDL-AD(2010)004, *op. cit.,* para. 43.
[18] See *Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Draft Law amending and supplementing the judicial code (evaluation system for judges) of Armenia*, CDL-AD(2014)007, para 28.
[19] See CDL-AD(2014)007 paras. 20-22.
[20] See also CDL-AD(2014)007, paras. 39-40.

grounds the Judicial Council has to approve or disapprove of the detention of the judge. Probably, this provision has to be read in conjunction with **Article 122** of the Constitution on the "Functional immunity", which states that "the judge shall not be detained without approval of the Judicial Council". In order to avoid misunderstanding Article 92 of the Draft, it should explicitly refer to Article 122 of the Constitution; it should also mention that the Judicial Council can only refuse its approval if it assesses that the judge cannot be held responsible as his/her functional immunity is at stake.

Disciplinary liability

65. The provisions on disciplinary liability and dismissal are very detailed; they generally meet European standards. It has to be welcomed that **Article 97** of the Draft law enumerates exhaustively three types of disciplinary offences. According to **Article 97, paras 3, 4,** it is considered to be a "severe disciplinary offense" when a judge "4. Unjustifiably fails to recuse himself/herself in the cases in which there is a reason for his/her recusal." The reasons on the basis of which a judge has to recuse himself/herself should be determined and defined by the law. The decision of a judge not to recuse him/herself should only be considered a "very serious offense" in cases in which there is manifestly a reason for his/her recusal and not in cases in which this decision is based on his or her interpretation of the law.

66. The "severe disciplinary offences" established under sub-paragraph 7 ("to behave in a manner which is inappropriate for judicial office") and 8) (to "treat participants in judicial proceedings and court employees in an inappropriate manner") could include a great variety of offences. It would not be in compliance with the principle of proportionality to consider them all as "severe" offences. The "severe disciplinary offence" included in sub-paragraph 9) is also formulated too largely and should be restricted to confidential information.

67. Finally, as already stated (paras. 47 and 48 of this opinion), the provision contained in **Article 97, para. 3, sub-para. 1**, is too large. According to it, a judge is dismissed by the Judicial Council if he/she has been convicted of an offence which makes him/her unworthy of discharging duties of judicial office; this provision should be more precise. The wording should be further harmonised with **Article 121, para. 3 of the Constitution**, which states that "*the judge shall be released from duty if he/she has been convicted of an act that makes him/her unworthy of the judicial duty, if he/she performs the judicial duty in an unprofessional or negligent manner or loses permanently the ability to perform the judicial duty*".

68. **Article 99** grants the Minister of Justice the right to initiate disciplinary proceedings against judges. It may be asked whether this is in harmony with the independence of the judiciary and the principle of the separation of powers.

69. **Article 103** deals with the composition of the disciplinary panels. They are composed of three members, two from among judges who are Judicial Council Members and one from among reputable lawyers who are Judicial Council Members. It is not clear whether the disciplinary panel is composed case-by-case, or whether there is only one disciplinary panel which will conduct all disciplinary procedures. The principle of the "natural judge" implies that disciplinary procedures have to be conducted by a disciplinary jurisdiction "foreseen by the law". This excludes an *ad hoc* disciplinary panel, composed on a case-by-case basis. This has to be mentioned explicitly in Article 103.

70. In **Article 105**, there should the possibility for the judge to have the hearing in camera instead of in public, following the general principle enounced in Article 4.[21] The law should determine in which cases this applies.

IV. CONCLUSIONS

71. The Venice Commission welcomes the efforts made by Montenegro, as part of the process aiming at the European integration of the country, to establish a modern legal and institutional framework for the operation of the judiciary, in line with the 2013 constitutional amendments and the applicable standards. Overall, both draft laws are of a high quality and aimed at following former recommendations issued by the Venice Commission.

72. Nonetheless, a number of issues should be further examined and relevant provisions further improved to comply with the relevant standards. It is recommended in particular that:

- the internal independence of judges be guaranteed by: not submitting them to mandatory instructions of other judges or mandatory legal positions of principle; avoiding granting the Supreme Court the power to supervise the work of the general courts; avoiding authorizing supervision of basic courts by higher courts; reviewing courts' presidents' powers to interfere in the cases assigned to the judges;

- the interference of the government in the internal organisation of the courts and its supervisory powers be limited in order to ensure full respect for the external independence of the judiciary and the principle of separation of powers;

- the rules, grounds and procedure on dismissal and temporary removal of Judicial Council members be clarified to with a view to ensuring the independence and autonomy of the Council;

- increased clarity be provided concerning the rules on incompatibility, immunity and disciplinary proceedings against judges.

73. The Venice Commission remains at the disposal of the Montenegrin authorities for any further assistance they may need.

[21] See CDL-AD(2014)041 on Serbia, paras. 35-37.