Strasbourg, 6 June 2008 **CDL(2008)074***

Opinion 479/2008 Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS

ON THE DRAFT LAW ON THE CONSTITUTIONAL COURT OF MONTENEGRO

by

Mr Aivars ENDZINS (Member, Latvia)

***** *This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents..*

1. The status of Republic of Montenegro's Constitutional Court as an independent institution has not been entrenched in the Draft Law. Therefore it would be recommended to express Article 1 in the following wording:

   "The Constitutional Court of Montenegro (hereinafter – the Constitutional Court) is an independent institution of judicial power, which within the jurisdiction set forth in the Constitution of Montenegro (hereinafter – the Constitution) and this Law shall regulate the organisation of the Constitutional Court, the proceedings before the Constitutional Court, the legal effect of its decisions and other issues relevant for the work of the Constitutional Court."

   It would be advisable to supplement Article 1 with the second part-
   "Direct or indirect interference with the actions of the Constitutional Court in relation to judging shall not be permissible".

2. As an additional guarantee of the independence of the Constitutional Court, it would also be advisable to supplement Article 4 (its second part) with the following text: "Budget claims by the Government shall not be amended without the agreement of the Constitutional Court."

3. Article 7 of the Draft Law provides that "The President and judge of the Constitutional Court shall be elected and dismissed in a manner and under conditions prescribed by the Constitution."

   The above procedure is established by Articles 82, 91, 95, 153 and 154 of the Constitution. Unfortunately, neither the Constitution nor the Draft Law determine the procedure of the choice of candidates, it is not determined whether the personal data of the candidates are published, whether the candidates are being invited to the sitting of the Parliament's Legal Affairs Committee before the elections take place at the Parliament, whether the above Committee expresses its conclusion on the candidates etc.

   The second part of Article 153 establishes that "The Constitutional Court judge shall be elected for the period of nine years". It may create problems as concerns the doctrine of the continuity of the established constitutional proceedings, as it may happen that the whole body of the Court changes at one and the same time.

   It follows neither from the Constitution nor from the Draft Law whether one and the same person may repeatedly be nominated and elected for the office of the Constitutional Court judge. In principle, the option of re-election may undermine the independence of a judge. There are States in which Constitutional Court judges are nominated without the limitation of the term of office (e.g. Belgium, Austria, Armenia) or the reappointment is possible only once (for example – Hungary). Article 103 of the Republic of Lithuania Constitution, for example, provides that the Constitutional Court shall consist of nine justices, each appointed for a single nine-year term of office, but every three years, one-third of the Constitutional Court shall be reconstituted.

   When organizing the Constitutional Court in Lithuania, 3 justices were elected for a 3 year term, 3 justices for a six year term and 3 justices – for a nine year term of office. The justices, who have initially not been elected for a 9 year term of office, after three years – during the next process of rotation - may be elected for the whole 9-year cycle.

   Perhaps it is possible to envisage also something similar in the Draft Law?

Article 10 of the Draft Law shall definitely be supplemented by the second part, stating – " If upon termination of authority of office of a Constitutional Court justice or upon his//her reaching the retirement age the Parliament has not confirmed another justice, the authority of the Constitutional Court justice shall be regarded as prolonged to the moment of confirmation by the Parliament of a new justice and he/she has sworn the oath," or "In case the new justice was not appointed on the fixed time, the justice, whose term of office has expired, shall act for him/her until the new justice is appointed and takes an oath."

This amendment should ensure the continuity of the work of the Constitutional Court.[See COL – JU (2008)02, VADEMECUM on Constitutional justice (revised)].

4. The Draft Law should be supplemented with specific norms on the salary and social guarantees of the Constitutional Court judges. The more so because Article 18 of the Draft Law envisages the salary of Secretary General of the Constitutional Court and his/her Deputy. The norms on the immunity and the potential disciplinary liability are also not included in the Draft Law.

5. Article 149 of the Constitution establishes an area of authority for the Constitutional Court. To my mind it is too extensive and may end in the Court being overloaded. The last part of the above Article, which determines that "The Constitutional Court shall monitor the enforcement of constitutionality and legality and shall inform the Parliament about the noted cases of unconstitutionality and illegality" is not conceivable.

   Such a formulation reminds the once in the socialist system existing universal supervision by the Procurator's Office.

6. Article 150, the third part, which establishes that "The Constitutional Court itself may also initiate the procedure for the assessment of constitutionality and legality" is directly related to the above formulation.

   If the Constitutional Court may initiate cases, then it becomes the accomplice of passing any anti-constitutional or illegal normative act. Besides, it may cause the possibility of politicisation of the Constitutional Court. At the beginning of the 90's such a norm existed in the Russian Federation. Later the Constitutional Court of Russia took part (and on its own initiative) in the conflict between the President and the State Council. At the present moment the above norm is not included in the Constitutional Court Law of the Russian Federation.

7. To my mind the structure of Section III of the Draft Law should be changed. It would be more logical to start by specifying who - within the categories of cases, existing in the authority of the Constitutional Court – has the right of submitting a claim. At the present moment it follows from the first part of Article 150 that "Any person may file an initiative to start the procedure for the assessment of constitutionality and legality ", but at the same time it follows from the second part of the same Article that "The procedure before the Constitutional Court for the assessment of constitutionality and legality may be initiated by the court , other state authority, local self-government authority and five members of the Parliament."

   Evidently, it is necessary to first determine who has the right of submitting the claim and only then specify the range of participants to the case and the representatives, authorised by them. Thus, Article 21 of the existing Draft Law shall be materially specified.

8. It would be necessary to specify what concrete requirements are established for any claim, which is being submitted to the Constitutional Court, including an account of the

true circumstances of the case, the legal justification of the application, the concrete claim presented to the Constitutional Court. The application must be accompanied by explanations and documents, necessary to determine the circumstances of the case.

Claims of a particular nature shall have particular requirements, for example, claims by the courts of general jurisdiction etc.

9. Regulation of the constitutional complaint causes serious doubt. I am of the opinion that the existing regulation may paralyse the Constitutional Court's performance. It would be more suitable for the competence of the Administrative Court (if there is such a court in Montenegro, or will beset up).

   I believe that the performance of the Constitutional Court might be facilitated if, within its competence, there was only the assessment of the conformity of a normative act with the fundamental human rights and freedoms, guaranteed in the Constitution, in cases when application of one or the other anti-constitutional normative act has caused the violation. Assessment of an individual act only after the person has exhausted all the other ordinary legal remedies, including the court of general jurisdiction, makes the Constitutional Court the court of fourth instance. Furthermore, if the constitutionality of the legal norm, applied by a court of general jurisdiction, has been contested.

10. It should be specified under what circumstances the Constitutional Court judge has the right of refusing to initiate a case, in what concrete terms after receiving the claim the issue on initiating the case or refusing to initiate it shall be decided. It shall also be stated whether such a decision may be appealed.

11. The terms of preparation and review of cases of different categories shall also be established, including the term of the announcement of the Court decision (judgment).

12. The possibility of reviewing the cases in a written procedure shall also be discussed.

13. Are all the cases reviewed by the whole body of the Court (by seven judges), what is the minimum quorum? May categories of certain cases be reviewed by three judges? The Draft Law unfortunately does not give answers to these questions.

14. The procedural order, also stressing what issues shall be solved at the organisational sessions of the Court, shall also be specified.

Unfortunately, within the framework of the time limit I was not able to present a more precise analysis of the Draft Law as well as recommend specific formulations and solutions. I do hope that the elaboration of the Draft Law will continue and that its authors will discuss the expressed thoughts and suggestions.