Strasbourg, 7 December 2006

CDL(2006)106
Engl.Only

Opinion no 392 / 2006

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

EXPERT MEETING

ON THE CONSTITUTIONAL REFORM OF THE REPUBLIC OF MONTENEGRO

Podgorica
28 November 2006

SPEECHES BY

Mr Kaarlo TUORI (Member, Finland)
Mr Anthony BRADLEY (Substitute Member, United Kingdom)
Mr Asbjørn EIDE (Expert, Norway)
Mr Guido NEPPI MODONA (Substitute Member, Italy)

GREETING SPEECH
By Mr Kaarlo TUORI

We are all familiar with the background to our meeting. Montenegro declared itself independent in June this year, after a referendum held in previous May. In June Montenegro also applied for a membership in the Council of Europe.

In the Declaration of Independence, adopted by the National Assembly, Montenegro stated its intention to promulgate a new constitution in order to "continue to develop as a civic State, multiethnic, multicultural and multi-confessional society, founded on the respect and protection of human freedoms and rights, minority rights, principles of parliamentary democracy, the Rule of Law, market economy". Correspondingly, in its resolution on "Consequences of the referendum in Montenegro", the Parliamentary Assembly of the Council of Europe called on Montenegro "to adopt a new Constitution as soon as possible, in full compliance with European standards and in consultation with the Venice Commission".

My colleague, Professor Bradley, and I were asked by the Parliamentary to write a report on the conformity of the Montenegrin legislation with the standards of the Council of Europe. In that capacity we, together with Mrs. Simona Granata-Menghini, visited Podgorica in late August. In our report we also emphasized the need of a constitutional reform and pointed out the main issues to be dealt with.

The reform is urgent already for legal technical reasons, in order to confirm constitutionally the new state status of Montenegro. But it is also needed for substantial reasons. Thus, due to the independence, not only the Constitutional Charter of the State Union of Serbia and Montenegro but also the complementary Charter on Human and Minority Rights ceased to be in force. This engendered a clear lack with regard to the constitutional protection of human and minority rights. New constitutional provisions, corresponding to the requirements and – when possible – even to the text of the relevant international human rights instruments, such as the ECHR, must be adopted. Other issues where the need of new constitutional provisions is pressing include the independence of the judiciary, states of emergency and armed forces.

During our visit in late August we had the opportunity to discuss not only with representatives of the ruling coalition but also with the main opposition parties. Our impression was that there exists quite a large consensus on the main substantial constitutional issues, such as human rights and the relations between the executive and legislative state bodies. The eventual disagreements appear to concern primarily issues of a more symbolic character. It is to be hoped that such disagreements do not endanger a successful constitutional reform. The Constitution should not be burdened with divisive value-laden provisions, which are not necessary in a modern constitution, nor should the preamble include such formulations of the underpinning values which cannot be subscribed to by the people of Montenegro as a whole.

I want to stress the importance of a constitution for the legitimacy of the political and legal order of the polity in question. In Montenegro you are drafting the first constitution of an independent state, which further enhances the Constitution's legitimatory function. The constitutional process should also aim at healing the eventual wounds inflicted during the campaign for independence.

The Constitution cannot achieve its legitimatory effects, if its adoption is not preceded by open public debates among the political forces as well as within the civil society and the population at large. In these debates, as large a consensus as possible on the substantial constitutional issues should be reached.

The legitimacy of the Constitution is also boosted, if it is adopted in a procedure accepted by all the relevant political forces and ensuring the necessary constitutional consensus. We know that the law on the procedure to be followed in the adoption of the new Constitution has been submitted to constitutional review. It would be inappropriate for me to comment on a matter pending before the Constitutional Court. Let me only once more emphasize the significance of a comprehensive agreement on both substantive and procedural issues for the legitimacy of the Constitution and the new independent state of Montenegro.

On behalf of the delegation of the Venice commission I would like to thank our hosts, especially you Mr. Speaker, for your kind invitation. I am sure that we will have a sincere and fruitful discussion, which will contribute to the success of the constitutional process.

SPEECH
By Mr Anthony BRADLEY

PRELIMINARY OBSERVATIONS
ON HUMAN RIGHTS PROVISIONS OF THE 'EXPERT TEXT'

1. For a full discussion of the provision for protecting human rights made in the 'Expert Text' dated 8 September 2006, four main headings would be appropriate, as follows:
(a) General provision on the legal status of human rights in the expert text
(b) The means of protecting human rights, in particular the role of the courts and the Ombudsman
(c) A detailed commentary on the substantive provisions stating the protected rights (with clause-by-clause comparison with the European Convention on Human Rights (ECHR), the 1992 Constitution of Montenegro, and possibly the Charter of the State Union of Serbia and Montenegro, 2002, dealing with Human and Minority Rights and Fundamental Freedoms)
(d) The effect of emergency powers on the protected rights.
Unfortunately in the time available I can only deal with headings (a) and (b) and make some general remarks about the text of the substantive provisions.

(a) General provision on the status of human rights in the expert text

2. The text is notable for the very generous provision that it makes in giving general guarantees that the observance of human rights and freedoms is an important feature of the state of Montenegro. (See in particular articles 9, 10, and 18-23). Admittedly, such guarantees are written in very general terms and this may deprive them of concrete legal effect and thus they may not necessarily give guarantees that are directly enforceable. However, the four elements of article 9 are important, concerning (1) a general undertaking that Montenegro will guarantee and protect human rights and freedoms; (2) a reminder that the exercise of human rights implies responsibilities and duties as well as rights; (3) a prohibition of provocation or incitement to ethnic, racial, religious or other forms of hatred and intolerance; and (4) a guarantee to national and ethnic minorities of various rights relating to their identity.

3. The protection of human rights is closely bound up with a state's observance of law, and the principle ('rule of law', *Rechsstaat, état de droit*) that government must be conducted according to law. This gives significance to article 12, which imposes on public authorities the limitation that what they do must be authorised by the Constitution, laws and regulations (and they may not do what is not so authorised). In this context, also relevant are the essential qualities of public administration (articles 136-138). These principles, requiring the State and state organs to observe the 'rule of law' will, in particular, be enforced by the Administrative Court (article 145). However, article 145 permits jurisdiction of the Administrative Court to be excluded in special cases: excessive use of this possibility would be damaging to the principle of 'rule of law'.

4. The expert text is notable for the emphasis, particularly in article 10, that international law and ratified treaties are part of the internal legal order, are directly applicable, and have supremacy over national law. The same emphasis on the importance of international law is made in article 19 (protecting the individual's right of access to international institutions, such as the European Court of Human Rights, to protect his or her rights and freedoms), article 20 (duty to interpret human rights provisions of the Constitution with regard to international standards), article 23 (requirement that national authorities may limit rights and freedoms in

a way that is legitimate and no more than necessary to achieve the purpose in question (proportionality); article 160 (national laws must be compatible with the Constitution and with generally accepted rules of international law and ratified treaties); and article 167 (Constitutional Court to decide constitutional questions on the basis of the Constitution, international law and treaties).

5. It is clear from these general statements that the expert text seeks to secure that all actions and decisions by the Government and other state entities should observe fundamental principles of legality, wherever these principles are expressed. This aim is important. But for it to be achieved, it will be necessary for the state entities themselves and the national courts to have a good knowledge and understanding of these principles and of relevant obligations in international law. This requires not only knowledge of the texts of the relevant treaties, but also knowledge and understanding of how international norms are given specific application by international courts and tribunals in the cases that they decide.

(b) The means of protection of human rights, in particular with regard to the role of the ordinary courts, the Constitutional Court and the Ombudsman

6. Article 142, dealing with principles of exercising judicial power, contains provisions that entrust the courts with particular functions in respect of human rights. In particular, "Courts shall protect human rights and freedoms, rights and legal interests of business and other entitles, resolve disputes within their jurisdictions … providing in such a way constitutionality, legality and legal certainty." Moreover, judicial decisions are to be based on the Constitution, laws, generally accepted rules of international law and ratified treaties. Article 144 states that the Supreme Court, sitting as a court of all its members, shall decide on 'constitutional complaints' for protection of human rights and freedoms and other issues determined by the law.

7. In addition to these broad functions vested in the ordinary civil and criminal courts, article 167 states that protection of constitutionality and legality is the function of the Constitutional Court. That Court must, *inter alia,* decide on the compatibility of laws with the Constitution, generally accepted rules of international law and ratified treaties. It must decide on constitutional appeals regarding violation of human rights and freedoms guaranteed by the Constitution, as well as many other matters, such as conflict of authority between the courts and other state bodies, impeachment questions, and the prohibition of activities by political parties. As we have seen from article 142, it appears that all courts, including the Supreme Court, are charged with protecting constitutional rights and freedoms. However, this means that there is a big overlap of jurisdiction between the Supreme Court and the Constitutional Court. Thus, the text does not make it clear when a citizen can bring a 'constitutional complaint' rather than relying on constitutional rights and freedoms in the course of other proceedings – compare article 144 (Supreme Court) and articles 167-68 (Constitutional Court). These matters may to an extent be clarified in the laws on procedure in these courts, but this expert text does not state how a 'constitutional complaint' may be initiated, and whether this may be in the ordinary civil or criminal courts, in the Supreme Court or in the Constitutional Court. It may be that a litigant who relies on a constitutional issue in the course of other proceedings is not considered to be raising a 'constitutional complaint'. But if the Supreme Court is intended to have jurisdiction to deal with 'constitutional complaints', does that Court have the power of the Constitutional Court to prevent action from being taken that may be unconstitutional and would cause irreparable harm? (compare article 170).

8. It must be hoped that the draft Constitution will have a clearer approach to the question of jurisdiction. In some legal systems, all courts may as necessary apply the Constitution to cases coming before them and for this purpose may decide the interpretation of the Constitution; in these countries, if there is no Constitutional Court, the Supreme Court has the last word on interpretation of the Constitution. In other legal systems, the only court that may interpret and apply the Constitution is the Constitutional Court, so that all other court proceedings must be adjourned if necessary so that a constitutional question can be

considered by the Constitutional Court (by means of a 'reference' procedure, or some form of appeal?). In between these two polar positions, there are many intermediate systems. In my opinion, it would be very unfortunate if (for example) a criminal court could not decide a question of human rights (for instance, an allegation that the accused person had been tortured to give a confession) because this question concerned a constitutional question – namely alleged breach of the individual's human rights. Also, there should be the usual right of appeal against the first court's decision of such a matter. The same applies to the civil courts – for instance, in a family dispute, since the Constitution includes provisions relating to rights of parents and the child: it would be unfortunate if a party to such proceedings could not rely on their constitutional rights, and absurd if the civil court could not apply the constitutional provisions relating to family rights. However, if an individual's complaint is that a law passed by Parliament infringes the Constitution, then it may be justifiable to reserve to the Constitutional Court the power to hold that the law is invalid because it is unconstitutional. Cases of this kind could reach the Constitutional Court either by means of a special procedure ('constitutional complaint') initiated in that court, or possibly by a reference or even an appeal from the ordinary courts.

9. There are indeed various solutions to these questions that would comply with European standards. But it must be hoped that a clearer account of what is intended in Montenegro can be given in the draft Constitution. Otherwise, there is a real risk of time-wasting and expensive uncertainty and frustration, as litigants and their lawyers struggle to find a procedure acceptable to the courts in question. Under the expert text, there is a danger of a conflict of jurisdiction arising between, for instance, the Supreme Court and the Constitutional Court. Moreover, if the case concerns an alleged breach of rights under the ECHR, a preliminary question as to admissibility may be raised at Strasbourg as to whether the individual has exhausted all domestic remedies (article 35/1, ECHR). Such procedural difficulties are likely to impede efforts to obtain a just solution when it is alleged that human rights have been infringed.

10. There are several other matters relevant to protecting human rights that may be mentioned.

(a) Particularly relevant to judicial protection of constitutional rights and freedoms is the status of the judiciary, in particular the independence of the courts and the judges. The entire constitutional scheme for judicial protection of individual rights and freedoms will be nugatory if the judges are not qualified by professional standing, legal status and personal character to decide such cases independently and impartially (compare article 6/1, ECHR). Discussion of the proposed procedures for appointing judges will need to take account of the role of the judiciary in protecting human rights.

(b) It must be welcomed that the office of Protector of Human Rights and Liberties should be in the Constitution (articles 153-156). The task of this officer, in Montenegro as in many other countries, is capable of providing a very useful, accessible and practical means of assisting individuals who claim that they have been unfairly treated by state agencies in respect of their rights and liberties. This is particularly so if the Protector receives complaints concerning failures by the courts to deal promptly and efficiently with cases before the courts. However, the expert text does not give any indication of the powers that the Protector should have, the procedures that the Protector will customarily follow and the remedies that may be provided to the individual. It is possible that such matters can be governed satisfactorily by the law dealing with the office of Protector. But the expert text would be improved if more consideration could be given to the matters relating to the Protector that should be in the Constitution (possibly omitting some of the present detail); in particular, the Constitution should give some indication of the powers and procedures that may be exercised by the Protector.

(c) The new Constitution will, when it is enacted and takes effect, open a new era in the history of the government and legal system of Montenegro. Provisions in the Constitution should so far as possible look to the future of the new State, rather than to the past. However, the Constitution should include transitional provisions that enable serious questions that have arisen out of earlier events (and were not settled under the previous Constitution) to be given proper consideration. Such transitional provisions should apply *inter alia* to serious allegations of breaches of human rights that have not been adequately investigated, and also to cases that were instituted but never heard by the court of the Union State of Serbia and Montenegro. Unless such transitional provisions are included, there is a real danger that any continuing attempts to raise these issues from the past under the new Constitution will never be considered on their merits.

C The substantive provisions in the expert text setting out the rights and freedoms protected by the Constitution

11. As already explained, time does not permit me to attempt a detailed commentary on the substantive provisions setting out the rights and freedoms included in the expert text (articles 24-80). These rights and freedoms range very widely from the right to life and human dignity (articles 24, 25), the presumption of innocence in criminal cases (article 36), the inviolability of the home (article 42), freedom of thought, conscience and religion (article 46), to the rights of the child (article 65), the right to work (article 67), the right to health protection (article 71) and pension insurance rights (article 74), the right to a healthy environment (article 79) and protection for the rights of consumers (article 80).

12. Many of these articles are derived from earlier constitutional texts applicable in Montenegro, but it appears that the detailed provisions have been subjected to greater or less re-phrasing. Since the expert text declares that the Constitution shall be interpreted with regard to international obligations, it is very doubtful whether on questions that are covered by the ECHR there is any advantage in seeking to depart from the text of that Convention and to produce a different version for Montenegro. The political and civil rights guaranteed by the ECHR set out important European standards that are binding on all states that belong to the Council of Europe. The European Court of Human Rights has made an abundant body of decisions that provide a rich jurisprudence on such matters as the right to liberty (article 5 ECHR), the right to a fair trial (article 6), the right to respect for home and private life (article 8) and the protection and enjoyment of property rights (First Protocol, article 1). If questions as to the compatibility of the law in Montenegro with these ECHR standards arise before the European Court of Human Rights, the answers to those questions will depend on the jurisprudence of that Court, interpreting and applying the ECHR, not on the textual differences that may exist between the Convention and the national Constitution.

13. It is absolutely correct that the Constitution of Montenegro should include protection for these fundamental rights. What is unnecessary, and indeed undesirable, is for the Constitution of Montenegro to re-state these fundamental rights in a manner that will raise time-wasting and technical questions that are likely to impede protection of the European rights. For instance, the expert text gives an absolute guarantee for the right of property (article 39) only to qualify this by reference to the law of expropriation (article 97). While every European state has in its laws a law on expropriation, at the level of guaranteeing protection for the rights of property it is difficult to see why the national constitution should not simply set out the guarantee given in the ECHR (First Protocol, article 1). This would make it possible to deal directly with the case-law of the Strasbourg Court, which gives authoritative guidance on the meaning of the protected rights.

14. It is for instance not clear whether the expert text gives protection for private life (as required by article 8 ECHR) or the freedom of assembly in the manner required by the ECHR. This is a matter that concerns both the general statement of the constitutional right

in question, and also the permitted restrictions, qualifications and exceptions to those rights (see in particular the second paragraphs of articles 8-11 ECHR). Any restrictions of the guaranteed rights in national law must meet the European standards as set out in ECHR and as interpreted by the Strasbourg Court.

15. To summarise these comments, there is a very strong case for including in the Constitution the ECHR text of the protected rights without alteration, so far as the ECHR covers the civil and political rights in question. The Constitution may, of course, provide for rights and freedoms that go beyond the area covered by the ECHR. Indeed, it is widely felt today that individuals have rights that go beyond the scope of the ECHR into such questions as health, social security, employment and the environment. On these matters too, any declaration of rights in the Constitution should be made in full knowledge of obligations that may apply to Montenegro under any relevant international treaties. Moreover, different methods of enforcement and protection may be appropriate for social and economic rights: judicial methods of enforcement that are necessary to protect the right to life or to enforce prohibition of torture may be unsuitable for the protection of the rights of consumers (for instance, complaints about a defective TV set or a leaking roof in a rented house). Inappropriate means of enforcement for such rights could lead to a weakening in the proper protection of fundamental civil and political rights.

16. One real difficulty is that even if the text of the ECHR rights is included in the Constitution, a reading of this text alone does not convey full understanding of the obligations that exist in respect of those rights. Thus, the right to life under article 2 ECHR has been held by the European Court of Human Rights to imply a weighty obligation on state authorities to conduct a full, fair and effective investigation into cases where individuals have disappeared after they have been in the custody of a state agency. One solution might be for the framers of the Constitution to try to set down in the Constitution the substance of any such implied obligations. But to cover every such obligation would require a very long text, and this would need to be amended from time to time in accordance with continuing developments in the jurisprudence of the Court. The Constitution cannot be a substitute for scholarly treatises written in this area. What could be included in the Constitution to draw attention to the problem and to provide a practical solution for the needs of Montenegro might be to provide for an expert body, operating as a Human Rights Commission, possibly reporting both to the Government and to Parliament, that would be charged with such tasks as (a) keeping the jurisprudence of the Strasbourg Court under review, (b) summarising the obligations on state authorities that are recognised in that jurisprudence, (c) giving guidance to state authorities on how their powers may be used to comply with those obligations, and (d) advising whether changes in the law of Montenegro are needed for the law to comply with those obligations.

SPEECH
By Mr Asbjørn Eide[1]

PRELIMINARY OBSERVATIONS ON THE PROVISIONS PERTAINING TO MINORITY-RIGHTS CONTAINED IN THE EXPERT TEXT

Let me at the outset express my satisfaction that the expert text attaches importance to minority rights. This is reflected in the fact that a specific section is devoted to these issues. Minority rights are rightly placed within Part II on human rights and freedoms. This takes into account that minority rights are an integral part of human rights, and it is to be hoped that this approach is reflected also in the structure and content of the forthcoming draft Constitution.

Minority rights provisions in the expert text (notably in Article 81) are, however, written in a rather descriptive manner, and, while it is useful to have a dialogue on them already at the present stage, it is even more important to continue this dialogue once the actual draft Constitution is made available.

Getting the minority provisions right is of essential importance in any multi-ethnic country, and the need for particular care is highlighted in the case of Montenegro by the fact that the legislative framework aimed to advance minority rights has already encountered constitutional challenges (as we all know, earlier this year, the Constitutional Court found certain provisions of the new law on minority rights and freedoms unconstitutional). It is therefore particularly important that the necessary guarantees for minority rights are contained in the constitution itself, to form an incontrovertible part of the Constitutional Order. I note also with appreciation that under the expert draft Article 167, the Constitutional Court shall decide 'on the basis of the constitution, generally accepted rules of international law, confirmed and published international agreements and laws.' This would imply that the future Constitutional Court will take into account the Framework Convention for the Protection of National Minorities. It is necessary to ensure harmony between the constitutional provisions and that Convention. Furthermore, the constitutional and other norms on national minorities will soon be carefully scrutinized in the framework of the monitoring mechanism of the Framework Convention for the Protection of National Minorities. Montenegro became a Party to the Convention in June of this year, and the monitoring mechanism is due to begin in June 2007 with the submission of the first State Report, followed by a visit of the Advisory Committee of independent experts, who will prepare an Opinion for the Committee of Ministers of the Council of Europe.

While not attempting to provide an exhaustive analysis, I would like to make a number of specific remarks, not only on the articles devoted solely to minority rights but also on other related provisions:

In the expert draft, there is a general reference to minority rights in Article 9 paragraph 4. The terms 'minority nations, national minorities and ethnic minorities', which are taken from Article 1 of the Law on Minority Rights and Freedoms, are not without problems. I would suggest a different formulation, e.g. *'The protection of the rights of persons belonging to national and ethnic minorities form an integral part of human rights and shall be guaranteed in conformity with the relevant international instruments'.* Let me also add that footnote 1, which refers to the Law on Minority Rights and Freedoms, gives the wrong impression (at least in the English version) that the law on minority rights and freedoms was enacted in agreement with the relevant European institutions. While there is much to be welcomed in the law and a number of our expert comments were taken into account, there are some elements in the law that do not

1 Senior Fellow of the Norwegian Center for Human Rights at the University of Oslo, Visiting Professor at the University of Lund, Former President of the Advisory Committee on the Framework Convention for the Protection of National and the Former Chair of the UN Working Group on Minorities

reflect the comments and suggestions made. For example, that law contains a citizenship-based definition of the term national minority in spite of the criticism expressed in this regard by myself and colleagues from the Venice Commission. During the consultation on the law, held in Podgorica on 16th March 2004, I recommended that the word 'citizen' be taken out.

This is an issue that is not addressed explicitly in the present expert draft for the constitution, but it is to be hoped that the scope of minority rights is understood in an inclusive manner and that they are restricted to citizens only to the extent necessary. In this connection, it is to be welcomed that the expert text generally construes human rights as rights of "everyone" rather than of citizens only. I note, however, that there are some exceptions (which might be due to an oversight): In Article 19, dealing with effective remedies, the last paragraph says that 'The citizens shall have the right to recourse to international institutions for protection of human rights and freedoms'. I assume that it was the intention to use the word "everyone" in this paragraph in the same way as in the preceding paragraphs of that Article. Similarly, it is important to review the wording of Article 61, bearing in mind that freedom of movement should not apply to citizens only but cover all individuals who are lawfully in the country (*cf*. Article 2 of Protocol No. 4 to the European Convention on Human Rights). Furthermore, the exact meaning and implications of the use of term "Montenegrin national" (in addition to the term "citizens of Montenegro") in Article 61 are not clear to me, and they need to be considered carefully, including from the perspective of non-discrimination and other pertinent human rights principles.

Article 10: The reference to international treaties and to their direct applicability is of importance also for minority protection and for the status of the Framework Convention for the Protection of National Minorities. This could be further strengthened with a reference to the need to implement human rights treaties in the light of the practice of the respective monitoring bodies.

Article 15 paragraph 3 (local government): The guarantees for "official use" of languages of national minorities, which usually contains obligations going beyond the requirements of Article 10, paragraph 2, of the Framework Convention (such as the use of the language as an internal working language), could be usefully supplemented by a more limited and specific right to use a minority language *in contacts* with administrative authorities. In respect of such rights, the Advisory Committee's "jurisprudence" suggests that such a right would need to be linked to a lower threshold than the 50% threshold proposed in Article 15 for the official use, but it would on the other hand imply less extensive obligations and concern mainly communication with the public and not communication *within* the official structures. It is true that Article 35 provides important related guarantees, but only when the "rights or duties" of the individual concerned are at stake.

Article 18: It would be important to couple the Article on non-discrimination with an explicit authorization to introduce positive measures along the lines envisaged, *inter alia*, in Article 4, paragraph 2, of the Framework Convention. While this could be said to be implicit in the current wording, stating it clearly would help to prevent unnecessary future challenges in this respect. It is true that Article 82 could be seen as providing further legal basis for such measures but it applies only to one particular field, and it also appears to be too restrictive.

Article 51: This Article also deals with basic human rights with particular importance for national minorities (and contained also in the Framework Convention). It seems unnecessary to envisage a general obligation of prior notification at the constitutional level, and that is probably also not intended, but the language is unclear. The circumstances where prior notification is necessary should be spelled out through law to the extent it meets the test of paragraph three (which would become paragraph 2 if present paragraph 2 is deleted).

Article 52: The prohibition of any forms of "political association" by persons without Montenegrin citizenship is formulated so broadly that it could give rise to undue restrictions. While the provision, at its core, pursues a legitimate aim, it requires more specific and detailed formulation in order to avoid unacceptable restrictions. Such details are difficult to include in a constitutional text. 'Political parties' are generally understood to refer to those who participate in parliamentary

and other public elections. While it is generally legitimate to limit voting rights in elections to citizens, this should not exclude individuals who do not (yet) hold citizenship from membership in such parties, even if they cannot vote.

The term 'political association' is much wider and has no clear meaning. It might be construed to include activities of those minority organisations whose activities have (also) political connotations and whose membership include non-citizens, which would be very problematic from the perspective of international minority standards. In light of these ambiguities, it is preferable –as suggested in the expert text - to delete the last paragraph. Limitations to the rights contained in Article 52 should pass the test of Article 23 (and the notion that the limitations should be aimed to protect a "public interest" should be added to the latter).

Article 56: As regards access to voting rights, the condition of two-year continuous residency before the vote seems excessive and could have particularly substantial consequences for minority communities, whose transfrontier contacts (protected under the Framework Convention) are often frequent and may involve also temporary residency outside the country of their habitual residency.

Article 58: Access to citizenship is an issue that is mentioned only briefly in the expert text. What is contained in Article 58 para. 1 is acceptable as it stands, but it covers only a small part of the issues that need to be clarified. Allocation of citizenship following the formation or consolidation of new entities when a larger unit has been dissolved raises special problems, and it is essential to take an inclusive approach rather than to exclude existing residents from citizenship. The issue of citizenship has significant implications (also) for minorities and would merit careful consideration, bearing in mind also that "allocation of citizenship following the formation or consolidation of new entities is often slow and contested" (*cf.* my related comments, dated 21 May 2004, on the draft law on minority rights and freedom).

Article 81 needs to be redrafted. As noted in footnote 2 of the draft, this paragraph as it now stands is of descriptive nature and should be given a more normative content, in line with the language in the Framework Convention. I shall therefore not venture into a full analysis of that Article here; that can be done only once the positive intentions of the present text in Article 81 have been developed and an actual draft constitution is made available. Nevertheless, some preliminary comments could already be made:

- The qualification "special" in the title does not seem necessary, and it could give rise to unfortunate interpretations. Depending on the connotations of the corresponding term in the original version, this could give the impression that these rights are seen as certain types of privileges.

- It would be preferable to refer to "persons" belonging to national and ethnic minorities rather than to "members", in line with the terms commonly used in international minority instruments. The word 'person' reflects better the principle of self-identification.

- Article 81 contains a rather comprehensive listing of the relevant rights/issues (note, however, comment on Article 15 above), but certain additional issues could be introduced, including protection against measures altering proportion of minority populations, along the lines provided in Article 16 of the Framework Convention.

- Right to be informed about "social events" in minority languages seems to imply mostly obligations on various actors in the private sphere, which would not sit well in this context (this may also be a translation problem).

Articles 82 - 83

Certain formulations used (such as, minorities “may” establish council; the law “may” stipulate additional rights) do not adequately reflect the fact that these articles are construed as part of the human rights section of the Constitution. It would seem preferable to introduce a clear right of persons belonging to national minorities to take part in the decision-making in the executive and legislative bodies ate various levels (drawing on the terminology used in the Framework Convention) and then complement this by giving the minority councils and the envisaged measures in elected bodies as two examples of measures aimed to ensure the implementation of the said right. The right is partially covered in Article 81, but its reference to adequate representation in local and state bodies could be further developed. (See also comments related to Article 18.)

The formulation in Article 82 that other minority rights must be ‘within the limits which do not infringe upon the equality of the rights of all citizens’ appears to be too restrictive. Adequate measures adopted to ensure full and effective equality between persons belonging to a national minority and those belonging to the majority ‘shall not be considered to be an act of discrimination’ (Framework Convention Article 4 para. 3)

Let me also express a slight concern with Article 140, which concerns the proclamation of a state of emergency, an issue which may also be relevant when there is tension between majorities and minorities. International human rights bodies have often found that states of emergency are introduced without sufficient grounds. Under the European Convention on Human Rights and Fundamental Freedoms (Article 15), derogations can only be made when there is a state of war or other public emergency *threatening the life of the nation*. It is important that the constitutional provision maintains the same very restrictive condition to the introduction of a state of emergency.

Finally, I would like to propose that the drafters consider the inclusion of an explicit reference to the Framework Convention. This could reduce the need to stipulate some of the pertinent principles in detail in the Constitution. The Framework Convention is also a tool to show that there are differences, as regards the scope of application, between minority rights construed for traditional minorities (such as those on topographical indications) and minority rights with a wider scope of application.

SPEECH
By Mr Guido NEPPI MODONA

ANALYSIS OF THE PROVISIONS ON THE JUDICIARY IN THE LIGHT OF THE COUNCIL OF EUROPE STANDARDS.

1. – From a general and formal point of view, the Montenegro Constitution expert text on Judicial Power and State Prosecutor's Office (article 142 to 152) is characterized by a frequent overlapping between constitutional principles and ordinary rules dealing with the organisation and functioning of the Judiciary itself.

For instance, the numerous provisions stating that a specific rule governing the judiciary must be provided for by law could be synthesized, once and for all, in the general principle that the rules governing the judiciary and the judges must be laid out by law. Following this way, most of the rules provided for in the expert text should be deleted and shifted to the ordinary laws on the judiciary.

As for the judiciary, the new Constitution needs no more than few and very concise basic principles, written in articles consisting of few lines.

2. - Coming to the content of the expert text and its compatibility with the Council of Europe standards, I will deal mainly with the rules related to the appointment system of judges and public prosecutors: appropriate rules on judicial appointments are in fact fundamental for preserving the independence and the autonomy of the judiciary from other state powers. In particular, in newly established democracies a political involvement in the appointment procedure is considered to be a danger for the neutrality of the judiciary, while in those with democratically proved judicial systems such methods of appointments are regarded as traditional and effective.

The politicization of the appointment process characterizes both the elective system, where judges are elected by the Parliament or, more rarely, by the people, and the direct appointment system, in case the appointing body is the government and judges are selected on the basis of political reasons. As we will see later, the appointment process is not so politicized when the appointing body is the Head of State, who is normally less involved in the everyday political life.

Among the different methods of the direct appointment system, no doubt that the best solution is to entrust a specific not political body, usually called Judicial Council or, as in Italy, High Council of the Judiciary, with the task to appoint judges. According to this method, judges are normally selected by means of competitive examinations based on merit, aimed to ascertain the legal and juridical qualification, integrity, ability, and efficiency, following the Recommendation No. R (94)12 of the Committee of Ministers of the Council of Europe on the independence, efficiency and the role of judges; that is to say a method of judicial selection which safeguards "against judicial appointments for improper motives"[2].

3. - That being stated as regards the main appointment systems, in short the expert text provides the following rules of judicial appointments: judges are elected by the Parliament upon proposals made by the Judicial Council[3]; proposals are discussed by the Parliamentary

[2] See the UN Basic Principles on the Independence of the Judiciary endorsed by General Assembly resolutions 40/32 of November 29, 1985 and 40/146 of December 13, 1985.

[3] Article 146 provides that the judicial Council consists of five judges elected by judges in the manner established by law; three members of the Parliament elected by the Parliament itself; one member of the Council of Prosecutors; and the minister of justice in charge, who presides over the Council but not votes in the decision making process.

committee responsible for the judiciary; the Committee submits to the Parliament the factual findings and opinions; if the Parliament does not adopt the proposal of the Judicial Council, it must notify the Judicial Council of the reasons for non adoption and in case of repeated proposal the Parliament may refuse it only by a two-third majority of the votes of members of the Parliament.

No doubt that to give the Parliament the last word in the appointing process may result in the politicization of judicial appointments. In fact, elections by Parliament are discretionary acts; therefore, even if the proposals are made by the Judicial Council, an elected Parliament will not self-restrain from political considerations, which may prevail over objective criteria[4].

Dealing with such parliamentary involvement, the Venice Commission had the chance to point out that "the parliament is undoubtedly much more engrossed in political games and the appointments of judges could result in political bargaining in which every member of Parliament coming from one district or another will want to have his or her own judge". That is the reason why, instead of entrusting the Parliament with the appointing power, "the right of appointment ought to remain linked with the head of state. Of course, the president also represents a given political tendency but in most cases he/she will demonstrate greater political reserve and neutrality. It therefore seems that entrusting the head of state with the power to nominate judges is a solution that depoliticize the entire process... to a much greater degree"[5].

Anyway, in accordance with European standards[6] the Venice Commission believes that the best way to ensure the independence of judges and to protect the judiciary from political interferences is to entrust a politically neutral High Council of Justice or an equivalent body with the exclusive or an important role in judicial appointments: "It is generally assumed that the main purpose of the very existence of a Supreme Council of the Judiciary is the protection of the independence of judges by insulating them from undue pressures from other powers of the State in matters as the selection and appointment of judges and the exercise of disciplinary functions..."[7]. That is the reason why to the Judicial Council, and not to the Parliament, should be given the task to appoint judges, and also to assign, transfer and promote them, and to exercise disciplinary control. Therefore the composition of the Council comes to have a major importance in protecting the independence of the judiciary.

4. – As for the composition of the Judicial Council, the expert text provides that half of the members are judges, presumably elected within the judiciary, three are members of the Parliament elected by the Parliament itself, one is delegated from the Prosecutor's Council, the last one is the minister of justice in charge. As the Venice Commission had the chance to point out[8], in a system based on democratic principles it is reasonable that the council of justice be linked to the legislative power, since the management of the administrative organisation and the

[4] See the already quoted Recommendation N. R (94)12 of the Committee of Ministers.

[5] Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia, adopted by the Venice Commission in its 64th session on 21-22 October 2005 (CDL-AD (2005)023, § 17.

[6] In the wake of the Recommendation N. R (94)12, see the Opinion N. 1 (2001) of the Consultative Council of European Judges (CCEJ) on Standards concerning the Independence of the Judiciary and the Irremovability of Judges: "Every decision relating to a judge's appointment or career should be based on objective criteria and be either taken by an independent authority or subject to guarantees that it is not taken other than on the basis of such criteria"; the European Charter on the Statute for Judges adopted in Strasbourg in July 1998: "In respect to every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers ".

[7] Opinion on the Reform of the Judiciary in Bulgaria, adopted by the Venice Commission in its 38th Plenary Meeting on 22-23 March 1999, CDL-INF(1999)005e, §28.

[8] Opinion on Recent Amendments to the Law on Major Constitutional Provisions of the Republic of Albania, CDL-INF(1998)09, § 9, 12.

functioning of the judiciary is a public interest of the whole society, which reaches beyond the interests of judges. Nevertheless, in order to favour the depoliticization of the Judicial Council it would be better that the three members elected by the Parliament be selected with a qualified majority among law professors and defence lawyers, instead of being members of the Parliament itself; for the same reason it does not seem appropriate that the minister of justice be a member and the President of the Council, since his presence would imply a direct interference of the executive branch with the judiciary. It is worth mentioning that also the Supreme Court of the Republic of Montenegro adopted the opinion that the minister of justice must not be a member of the Judicial Council and that the lay members must be appointed among lawyers.

Instead of the minister of justice, the Judicial Council should be presided over, as in the Italian system, by the Head of State, who would be the necessary link between the judiciary and other state powers; the vice president, who in fact would carry out the effective functions of president, should be elected by the Judicial Council among the lay members.

The necessity to link in some way the Judicial Council with the other powers of the state would be guaranteed on the one hand by the head of state's presidency; on the other hand the vice-presidency of a lay member, appointed among the three lawyers elected by the Parliament, would have an important meaning in balancing the independence of the judiciary with the role of the legislative power. In fact, the Parliament would be given the possibility to influence in a decisive way the election of the vice-president, since he must be appointed among the three lawyers elected by the Parliament.

As for the links with the executive branch, the need to control from outside the functioning of the judiciary could be guaranteed by entrusting the minister of justice with the power to initiate disciplinary action before the Judicial Council and with the power of veto on the Judicial Council's appointment of presidents of Courts or heads of State Prosecutor's offices. Since the minister of justice is politically responsible for the efficient functioning of the judiciary, it seems reasonable to give him both the powers to initiate disciplinary action and to oppose the appointment of a judge or a State Prosecutor considered non suitable to carry out the task of president of a Court or head of a State Prosecutor's office.

The proposals to entrust the Head of State with the presidency of the Judicial Council, to appoint the vice-president among lay members, to entrust the minister of justice and the Parliament with some powers related to the legal status of judges and state prosecutors, are in accordance with the need of avoiding the risk of "autocratic management" of the judiciary. In fact, "an autonomous Council of Justice that guarantees the independence of the judiciary does not imply that judges may be self-governing" and the organisation of the judiciary "be entirely in the hands of judges"[9]. These are the main reasons why it does not seem shareable the Supreme Court of Montenegro opinion of entrusting its President with the presidency of the Judicial Council.

5. - The expert text also provides that judges are appointed for the term of five years and reappointed for an unlimited term at the end of the training period. As for temporary appointments, the Universal Declaration on the Independence of Justice, adopted in Montreal in June 1983 by the World Conference on the Independence of Justice, stated that "the appointment of temporary judges and the appointment of judges for probationary periods is inconsistent with judicial independence"; the already mentioned European Charter on the Statute for judges also holds that the existence of probationary periods may danger the independence and impartiality of judges, since they are hoping to be established in post or to have their contract renewed.

The Venice Commission also considers that setting probationary periods can undermine the independence of judges and suggests to ensure that "a temporary judge is guaranteed

[9] *Ibidem*, § 9.

permanent appointment except in circumstances which would have justified removal from office in the case of a permanent judge"[10]; nevertheless the Commission points out that in countries with relatively new judicial systems there might be the need to first ascertain whether a judge has the technical and moral qualifications to carry out his or her functions. In such situation, probationary appointments need to be followed by procedural safeguards in order to ensure that decisions on permanent appointments are based on objective criteria and are dependant on the Judicial Council[11].

6. - The expert test provides that the State Prosecutor's Office enjoys the same guarantees of independence and autonomy established in favour of the judiciary (article 150, § 1 and 2) and that all the guarantees regarding judges shall apply to state prosecutors and their deputies (article 150, § 8). Also the appointment system provided for in article 151 is the same established for judges in article 146: proposals for appointment are formulated by the Council of Prosecutors, composed in the same manner as the Judicial Council, and state prosecutors are elected by the Parliament.

Moreover, the expert text provides that state prosecutors enjoy the same principles of legality, autonomy and independence from other state powers as judges and are ruled as if they shared the same judicial organization. It would therefore seem more appropriate and reasonable to unify the two Judicial Councils in a unique body, which could be named Council of the Judiciary, presided over by the Head of State, who would guarantee the necessary link between the judiciary and other state powers. The unified Council of the Judiciary might be made-up of the President of the Supreme Court and the Supreme State Prosecutor, both appointed by right, three judges (elected by all judges), three state prosecutors (elected by all state prosecutors), three members of the Parliament and three law professors or defence lawyers elected by the Parliament with a qualified majority. The vice-president, who in fact would exercise the real powers of the President, should be appointed by the Council among the lay members elected by the Parliament.

The unified Council of the Judiciary should be entrusted with all provisions dealing with the legal status of judges and state prosecutors, that is to say appointments, assignments, transfers, promotions, disciplinary measures, dismissals; the outside control on the judiciary would be accomplished, as we already told, by means of the powers of the minister of justice to initiate disciplinary action and to veto on the Council's appointment of presidents of Courts or heads of state prosecutor's Offices.

The proposed solution not only would simplify the judicial organization and allow to allocate more resources to the courts and state prosecutor offices, but the whole judiciary, that is to say both judges and public prosecutors, would be ruled by the principles and guarantees of legality.

7. - The expert text (articles 146, § 10; 149, § 8) provides that judges and state prosecutors enjoy the same immunity as the members of the Parliament, that is to say also immunity from criminal proceedings, as stated in article 105 in favour of Parliament's members. On the one hand, it is contradictory to entrust judges and state prosecutors with immunity from prosecution, since their main task is to enforce criminal law; on the other hand the independence of judicial functions entails without any doubt that judges and public prosecutors cannot be held responsible for their decisions and acts, provided that they behaved in good faith, and this is the only kind of immunity they need to be entrusted with.

---

[10] Opinion on Draft Constitutional Amendments concerning the Reform of the Judicial System in the Former Yugoslav Republic of Macedonia, adopted by the Venice Commission at its 64th plenary session, on 21-22 October 2005, CDL-AD(2005)038, § 23.

[11] Opinion on the Provisions on the Judiciary in the Draft Constitution of the Republic of Serbia, adopted at the same 64th plenary session, CDL-AD(2005)023, §§ 13-15.

øMoreover, to entrust the Parliament with the power to decide on judges and state prosecutors immunity from prosecution (see articles 146 and 149 of the expert text) would imply severe interference with their autonomy and independence.

8. - The expert text provides that the competency on protection of human rights and liberties is given both to the Supreme Court (articles 33, § 4, 142, § 1, 144, § 3) and the Constitutional Court. The overlapping and uncertainty of the competency in a such critical and important field could endanger the immediate and efficient protection of fundamental human rights.

The best way to avoid the negative consequences of the mentioned rules seems to entrust all ordinary judges and courts, and of course among them the Supreme Court, with the competency on every violation of human rights and liberties, and the Constitutional Court with the competency on the complaints of constitutionality, that is to say the contrast between ordinary laws and human rights and civil liberties provided for by the Constitution.

9. - Most of the constitutions include provisional regulations addressed to rule the transition from the old to the new constitutional system.

Would the Republic of Montenegro had such a necessity with regard to the appointment system of judges and state prosecutors, it could be provided with a provisional regulation that for a short period, such as two or three years, the new rules are not enforced; in the transitory period, the Parliament would be entrusted with the right to appoint judges and states prosecutors carrying out the rules now in force and the minister of justice with the power to initiate disciplinary action before the Council of the Judiciary.

Such a temporary regulations would allow both to adopt in the final text of the Constitution an appointment system consistent with the independence of the judiciary and to give the Parliament and the minister of justice the provisional means to face the peculiar situation of the judiciary of the Republic of Montenegro.