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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT OPINION

ON THE DRAFT LAW ON THE CONSTITUTIONAL COURT OF MONTENEGRO

on the basis of comments by Mr Aivars ENDZINS (Member, Latvia) Mr Christoph GRABENWARTER (Member, Austria) Mr Harry GSTÖHL (Member, Liechtenstein) Ms Jasna OMEJEC (Expert for the OSCE Mission to Montenegro, Substitute Member, Croatia)

*****_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.._

Table of contents

1. By letter of 19 May 2008, the Minister of Justice of Montenegro requested an opinion on the Draft Law on the Constitutional Court (CDL(2008)073). The Commission invited Messrs Endzins (CDL(2008)074), Grabenwarter (CDL(2008)076) and Gstöhl (CDL(2008)075) to act as rapporteurs.

2. On 16 June 2008, Messrs Endzins and Gstöhl, accompanied by Mr. Dürr from the Secretariat, participated in a meeting with the Working Group, which prepared the draft. This Group is composed of representatives of the Ministry of Justice, the Constitutional Court and the governmental Secretariat for Legislation. On 17 June 2007, the Commission's delegation participated in a public Round Table, organised in co-operation with the OSCE Mission to Montenegro on this subject during which Ms Jasna Omejec presented her comments as an expert for the OSCE. These comments as well as the results of the meeting and the Round Table have been included in the present opinion.

3. The present opinion was adopted by the Commission at its … Plenary Session (Venice, …).

1. General Remarks

The draft Law on the Constitutional Court is composed of 116 articles divided into five chapters. It addresses almost all relevant questions of a modern law of this type. Chapter one ("general provisions") is followed by a chapter on the organisation of the Court. Chapter III on the various proceedings before the Constitutional Court and on legal effect of Constitutional Court decisions is by far the most voluminous chapter of the Draft Law. The only article of Chapter IV, Article 111, deals with "penal provisions". Transitional and final provisions can be found in Chapter V.

4. At the outset it has to be mentioned, that the translation of the draft obviously suffers from some problems so it may be that some of the remarks in this opinion are due to a problem of translation.

5. A second general point is the systematic structure of the law. A proposal for improvement concerns the principle of public proceedings which is dealt with in Article 3 under general provisions and in Article 33 in the main chapter with reference to public hearings. A **new, more systematic approach** may also contribute to reduction of the length of the law.

6. It would also be **advisable to repeat in the Law the provisions of the Constitution rather than just to complete them**. This would ease the reading and understanding and make it unnecessary to work with two texts.

7. This concerns in particular Article 2 of the draft Law, which refers to the wide list of competences enumerated in Article 149 of the Constitution. It would be much easier for consultation of the Law, if it would provide a complete list of the competences in order not to oblige the reader to consult also the Constitution on this matter. In Article 39 of the draft Law such an enumeration is made (even if only for procedural purposes) and such an enumeration would be welcome also for the competences. The same is true for the term of office of the judges, the minimum requirements, the composition of the Court etc. as per Article 153 of the Constitution.

8. In Podgorica, the Working Group pointed out that according to legal tradition in Montenegro provisions from the Constitution are not repeated in a law because as such they could become subject of possible review by the Constitutional Court and this would indirectly make the Constitution itself attackable. The Commission's Delegation pointed out that such a review should logically result in a finding of constitutionality of these provisions because they were

even literally 'constitutional'. The mere fact that a provision is being reviewed by the Constitutional Court does not yet make it inapplicable and even if theoretically the legal provision was annulled, its constitutional counterpart would still apply directly. **The understanding of the law by the individuals but even by lawyers would be much enhanced if the relevant provisions could be found in a single text**.

2. The Venice Commission's opinion on the Constitution of Montenegro

9. At its 73rd Plenary Session (Venice, 14-15 December 2007), the Venice Commission adopted the Opinion on the Constitution of Montenegro (CDL-AD(2007)047, interim Opinion CDL-AD(2007)017) . The Commission then particularly welcomed the wide jurisdiction of the Constitutional Court as set out in Article 149 of the Constitution.

10. However, the Constitution itself also creates a certain number of problems for the functioning of the Constitutional Court. Given that also some recommendations were not taken into consideration, problems stemming from the Constitution itself directly affect the preset draft Law on the Constitutional Court.

11. Issues raised in the Opinion are:

1. The Commission criticised the nomination of all the Judges and the President of the Constitutional Court by the President of the Republic and their election by Parliament even without a qualified majority. This presents a series of risks of political dependence on the majority and political exposure of the Court.
2. While Article 149 of the Constitution enumerates a number of procedures before the Constitutional Court, Article 150 defines who has standing before the Court, without differentiating between the various procedures but as having the right to ask "for the assessment of constitutionality and legality". The Constitution thus introduces an *actio popularis,* which risks overburdening the Court.
3. The possibility for the Constitutional Court to initiate *proprio motu* the assessment of the legality and constitutionality of laws is inappropriate since it unduly drags the Constitutional Court into the political arena.
4. For the issue of retroactive effect of Constitutional Court decisions, it would have been more prudent not to establish a rigid rule, especially not in the Constitution, and to leave some discretion to the Constitutional Court.
5. It would also have been preferable to leave the election of the President to the Court itself.
6. Finally, it seems excessive to remove a judge from office if he or she publicly expresses his or her political convictions.

12. Consequently, also the present opinion will recommend the amend the Constitution in a number of points even if it may be possible to attenuate some problems by way of the Law on the Constitutional Court.

3. Chapter I (Introductory Provisions)

13. The status of the Constitutional Court as an independent institution has not been provided for in the Draft Law. Therefore it is recommended to include in Article 1 that the Constitutional Court of Montenegro is an **independent judicial institution**", which exercises the jurisdiction set forth in the Constitution and this Law". In addition Article 1 should also provide that direct or indirect interference with the activity of the Constitutional Court in relation to judging shall not be permissible.

14. Article 3 on the publicity of the work of the Constitutional Court should probably be merged with Articles 33 to 36. Paragraph 3 could be aligned to the wording of Article 6 (1) 1 of the

European Convention on Human Rights, although only a part of the proceedings will be subject to this provision.

15. It is not clear whether the publication of decisions of the court concerns all decisions or not; it would not be a bad idea to leave it to the Court to decide which decisions shall be published.

16. Article 4(3) already provides that the President of the Court has the right to participate in the parliamentary session on the adoption of the budget. This provision is to be welcomed. However, this direct participation can become void of substance if the Government has already reduced the Court's budget proposal before submitting it to Parliament. As an additional guarantee of the independence of the Constitutional Court, Article 4(2) should specify that the budget claims by the Constitutional Court shall not be amended by the Government without the agreement of the Court.

17. According to Article 6 the method of work and of decision-making of the Constitutional Court shall be regulated by this Law, and it shall be regulated in more details by the **Rules of Procedure**. This technique is common and usually works well in practice. The way those Rules are adopted and published should be made clear (see also Article 114). The Working Group agreed that the Rules of Procedure should be published in the Official Journal.

18. A **number of provisions are quite detailed and should be** taken out of the Law and be **transferred to the Rules of Procedure** (e.g. Articles 22(2), 25, 31, 34, 35, 37, 41, 44). This is important not only from a practical point of view but also as a guarantee for the procedural autonomy of the Court, which otherwise would have to seek an amendment to its Law for each minor change in its procedure.

3. Chapter II (Organisation of the Constitutional Court)

19. Article 7 provides that "[t]he President and judge of the Constitutional Court shall be elected and dismissed in a manner and under conditions prescribed by the Constitution." The relevant provisions can be found in Articles 82, 91, 95, 153 and 154 of the Constitution. Unfortunately, neither the Constitution nor the Draft Law determine the **procedure for the choice of candidates**. It is not clear whether the names or CVs of the candidates are published, whether the candidates are being invited to a Parliamentary hearing before the elections take place, whether conclusions are adopted after such hearings. Especially due to the fact that Parliament elects the judges with a simple majority, the procedure before the election has to be **as transparent as possible** in order to ensure a high professional level of the judges. The Working Group Pointed out that in the Comments on the Draft Law on the Judicial Council of Montenegro (CDL(2007)129), the Commission had insisted not to bind the political organs in their appointment decisions upon the advice of other bodies (the Supreme Judicial Council). However, this issue concerned only the appointment of the President of the Supreme Court of Montenegro and certainly does not exclude that Parliament itself follows a specific procedure without being bound in its final decision by the advice of any other body.

20. It follows neither from the Constitution nor from the Draft Law whether one and the same person may be re-elected as Constitutional Court judge. The **lack of the prohibition of** r**e-election may undermine the independence of a judge**. In some countries constitutional court judges are appointed until retirement (e.g. Armenia, Austria, Belgium) or appointed only for one term (for example – Hungary, Lithuania).

21. Article 153(2) establishes that "[t]he Constitutional Court judge shall be elected for the period of nine years" without further provision on a partial renewal of the Court. This may create problems as concerns the continuity and predictability of the case-law of the Court. It might happen that all judges of the Court change at the same time. A solution to that problem could be a system of rotation whereby one third of judges are renewed every three years. For

example when the Constitutional Court of Lithuania was established for the first time, 3 judges were elected for a 3 year term, 3 judges for a six year term and 3 justices for a nine year term of office. Only judges, who had initially not been elected for a 9 year term of office were eligible for a second 9-year term after an absence from the Court for a minimum of three years. This problem is however unlikely to arise in practice because Article 2 of the Constitutional Law for the Implementation of the Constitution provides that all bodies (including the Constitutional Court) continue to exercise their mandate. The Constitutional Court already exists since 20 years and the terms of office of the members will probably already be spaced in time.

22. The term of office of nine years is not as long as it is in other countries like in Germany (12 years, maximum age 65) or Austria (until the age of 70). There are, however, countries with shorter terms (e.g. Liechtenstein). It also corresponds to the term of office in the European Court of Human Rights according to Protocol No. 14. It is sufficient regarding the requirement of independence.

23. The Court shall consist of seven judges (Art 153 (1) of the Constitution). This is a relatively small size for a Constitutional Court (Germany: 16, Austria: 14). However, bearing in mind the size of the country the number of judges seems adequate (the Liechtenstein Staatsgerichtshof has only 5 judges).

24. The last paragraph of Article 9 refers to a majority for taking a decision which shall be the majority of "all judges". This wording is in conformity with the Constitution. However, in the context of Article 9 of the draft Law it is a vote on the suspension of a judge or the President of the Court in relation to a criminal investigation. The **person under investigation should not vote** (and also not participate in the deliberations) in his or her own case. The Working Group has agreed to change this provision.

25. It is most important to ensure that after the end of office of a judge, the position does not remain vacant for a prolonged period. In a few countries in Europe, Parliament was indeed very late with the appointment of new judges and in one case, the Court was in-operational for more than a year and a half because the number of remaining judges had fallen below the quorum. Therefore, Article 10 should provide that **judges remain in office until their successor takes up office**. A number of countries have specific provisions to this effect (e.g. Latvia, Russia, Slovenia, Spain). The Working Group argued that such a provision would be unconstitutional because it would effectively prolong the term of office of a judge to more than the nine years specified in the Constitution. This could be argued as concerns the judges whose term of office ends but this should not be an obstacle for those judges who retire for reason of age because their nine year term has not yet ended.

26. Pursuant to Article 12 of the draft law the Court shall designate a judge who shall substitute the President of the Constitutional Court in instances when he is absent or prevented from performing his duties. The Working Group explained that this substitution rule is to remedy to the lack of an explicit constitutional provision on a **Vice-President**. However, it should be possible to **introduce such a function also by ordinary law** as long as the functions of the Vice-President to not infringe upon the prerogatives of the President. Not least from the viewpoint of the close bi- and multilateral international relations between constitutional courts in Europe, it is important to to be able be represented abroad by a Vice-President and not only a substitute.

27. Moreover, the draft law lacks a provision as to the event that the substitute / Vice-president is prevented as well. The oldest judge could be empowered to deputise the president so that the representation of the Constitutional Court is ensured at any moment.

28. The **right of a Constitutional Court judge to return to his/her previous position can only be ensured in the public sector** (Article 13). Private companies cannot be obliged to re-establish a working contract with an employee who left the company nine years ago. Tenure

until retirement would, of course, avoid this problem and be the best solution from the viewpoint of independence but this would require a constitutional amendment.

29. Another point concerns the **number of judges required to have a quorum**. Neither the draft law nor the Constitution lay down explicitly if a valid vote requires the attendance of all seven judges or if a still smaller, minimum number is sufficient. A provision setting up a minimum number for decision-making secures the autonomy and independence of the Court since otherwise the absence of a single judge is capable of paralysing the Court. The Working Group agreed to fix this quorum at four judges.

30. Moreover, profane reasons such as diseases, deaths and so on might also give rise to adjournments of decisions especially since the draft law does not mention any provision as to substitute judges who are destined to represent regular judges in whatever case of prevention. Most notably – apart from above mentioned diseases – preventions may arise from bias. The legislator could add such provisions regarding substitute judges to grant efficiency of the Constitutional Court. A system of substitute judges seems advisable for cases of diseases, deaths or bias. Such systems exist in Austria or Liechtenstein and with the ECHR ("ad-hoc-judges"). Admittedly, they are more frequent in systems where the judges only work in part time sessions and have another profession as the main source of their income. Also complex issues of remuneration could arise from a mix of full time judges and part-time substitutes.

31. Article 18 of the Draft Law specifies the salary of Secretary General of the Constitutional Court and his/her deputy. However, the Draft does not **regulate salaries and social guarantees of judges and other staff of the Court**. The Working Group pointed out that social issues of Judge and legal advisers are regulated in the legislation on social security on the civil service and in the judiciary in particular. Only the Secretary General of the Court would not be covered this way and needed a specific regulation in the Law on the Constitutional Court. Other members of the Working Group explained that the Court had agreed to be covered in such regulations because then no other legislation was available.

32. The application of general rules for the civil service and the judiciary is not appropriate for the Constitutional Court, which in view of its position as an independent organ of constitutional adjudication not only needs guarantees of non-interference in its activities, budgetary and procedural guarantees but also specific material guarantees. The Draft Law should set out the equivalence of the judges and the President of the Court with other high State Officials. As concerns the legal advisers, specific knowledge of international case-law available in foreign languages is required. In order to attract such qualified personnel, the conditions of remuneration at the Court need to be attractive. Consequently, also the five year tenure of the Secretary General in Article 18 should be converted to permanent tenure.

33. Norms on immunity and disciplinary liability are also not included in the Draft Law.

34. The reference to the *relevant procedural laws* in Article 20 is ambiguous. No matter where cases before the Constitutional Court originate from (civil, criminal or administrative law), the proceedings before the Constitutional Court are specific constitutional proceedings. Therefore **it should be clear which procedure code applies by default** if the law on the Constitutional Court and the Rules of Procedure do not provide an answer. The law could provide for the code of civil procedure in general and for the code of criminal procedure in specific proceedings (impeachment, suspending political parties).

35. Bias is tackled only indirectly, namely by means of the draft law which refers to provisions of relevant procedural laws to apply *mutatis mutandis* if a matter of procedure before the Constitutional Court is not regulated by the draft law. Nonetheless it might be **preferable to lay down the regulations concerning bias and the procedure for challenging a judge** clearly in the draft law given the specific competences of the Court.

36. Instead of an application *mutatis mutandis*, the law could provide for an *analogous* application, which allows for a wider discretion of the Court.

4. Chapter III (Proceedings before the Constitutional Court and Legal Effect of its Decisions)

1) Common provisions

37. Articles 21 to 24 deal with the participants in proceedings. Article 21 contains a very detailed list of participants. The value of this list appears questionable for two reasons. Firstly, the term "participant" is not apt to determine rights in the proceedings. It is preferable to refer to "parties of proceedings". Secondly, item no. 10 contains a general clause concerning the capacity of "participant" for "other persons, in accordance with the law". It is suggested to draft a more consistent, shorter and more general provision on parties in proceedings, which may very well leave some discretion to the Constitutional Court.

38. The list also gives the impression that these "participants" can take part in each type of proceedings. One solution would be to move the determination of the parties from chapter III.1.a to each type of procedure in chapter III.2. Article 21 could then be deleted. The Working Group agreed to **replace the term "participants" with the term "parties" and preferred keep Article 21 but to specify there who the parties are for each specific type of procedure**.

39. In Article 22, it should be clarified who are "*other persons*" who have a right of access to the file. Members of the Working Group argued that the legislation on public information empowered every person to have access to public files. While this approach is certainly very transparent, it should be re-considered whether such a wide access is really intended. At least, the present law could indicate that **access is given within the limits of the legislation on access to public documents** (there will probably be some limits).

40. As an exception to the general procedure whereby submissions to the Court can be submitted by mail, Article 25(6) provides in electoral or referendum disputes that submissions shall be submitted directly to the Court. This disadvantages persons living out of the capital who have not only to respect the very short deadlines but also to bring their claim to Podgorica in person. The Working Group pointed out that the deadlines in electoral issues are necessarily very short, that the country is small and the capital can be reached easily and finally that the mail service in Montenegro would be notoriously unreliable. A solution to this problem might be – not only in electoral cases - to **allow the submission of a complaint by fax, which then has to be followed by a written submission** (by mail or directly). The deadline would however be respected if the fax arrives in time.

41. Article 27 refers to the allocation of tasks to a judge rapporteur. The Rules of Procedure should define the procedure for the allocation of cases to the reporting judges in an objective manner.

42. In the case of individual complaints, Article 29(3) should specify that the **complaint** not only **be served** to the authority, which took the original decision but also **to the authority (court) which took the decision in last instance** before the case was brought to the Constitutional Court (exhaustion of remedies). Both the original – often administrative - and the last instance authority – typically a court - should have the possibility to react. If the constitutional complaint is directed against a court decision, the Court should even **give the party in whose favour the decision was taken an opportunity to make a statement** (see also Article 94(3) of the Law on the Federal Constitutional Court of Germany). While they should have the possibility to make a statement, **courts should not be obliged** to do so

because they usually "speak through their judgement" only. Consequently, an exception to the obligation to provide information / make a statement should be made in Article 30.

43. The time limit of 15 days for the authority concerned to provide documentation and information (Article 30) is probably too short. Even if the words "at least" make it clear that this is only a minimum time limit that may be extended, there is a danger that such a minimum becomes the rule in practice. As pointed out above, these **authorities should not only have the obligation to provide such information but have the right to present their position**. Such a substantive statement requires preparation and for the sake of the quality of such a reply, the deadline should be longer.

44. Conversely, Article 30(2) only authorises the Court to request the opinion of Parliament in the procedure of the constitutionality of a law ("*may request*"). This exception for Parliament is neither in the interest of constitutional proceedings nor that of Parliament itself. **Parliament should always be given a chance to present its opinion**, when its acts are under scrutiny by the Constitutional Court. Of course, like for the courts, Parliament cannot be forced to give such a reply.

45. Article 32(4) providing that a request be rejected if the Court has already dealt with the matter should at least be qualified by specifying that this should be the case only if no new circumstances have come up since the last decision.

46. In the light of the possibly case-load of the Court, the **possibility of dealing with cases in a written procedure should be improved**. Under the head of "public hearing" Article 33 provides for (compulsory) public hearings in certain proceedings (paragraph 1), possible restrictions in proceedings for review of constitutionality or legality (paragraph 2) and a general clause within the discretion of the Constitutional Court (paragraph 3). Given the likely workload the Court it is not realistic to hold too many hearings, especially where there is no chamber system.

47. Article 39 determines which cases should be decided by a "decision". Like with Article 22 of the Draft Law, the general list remains unclear as to in which procedure the various decisions can be taken. The elements of the article could be integrated either into the chapter of the specific procedures or, if the list should remain, it should indicate in which procedures the various decisions can be taken.

48. It is probably not necessary to settle items 9 and 10 on the rejection of a petition and a constitutional complaint / appeal respectively in the 'heavy' form of a decision, especially also because the non acceptance of the initiative to initiate proceedings for review of constitutionality or legality is taken in the 'lighter' form of an order (Article 40(4)).

49. Apart from the issue of publication, the Draft Law does not differentiate between decisions and orders. Article 151(1) of the Constitution provides that the Constitutional Court shall decide by majority vote of all votes, i.e. four judges have to vote in favour of a decision. Is the vote of four judges also required for orders or can orders also be adopted in a smaller composition? If so, **it might be of interest to deal with the admissibility of constitutional complaints in smaller chambers of three judges, which would issue orders rather than decisions**.

2) Proceedings for the review of constitutionality and legality of general acts

50. It is quite unusual that a Constitutional Court can initiate proceedings *ex officio*: According to Article 43 procedures for assessing the constitutionality or legality of general acts may be initiated by the Constitutional Court itself ("on its own by an order"). As already pointed out in the Opinion on the Constitution, a general power of the Court to start proceedings on its own initiative would make the Court a political actor and the Court could loose its independent

position. Each decision to take up a case or not to do so could be criticised as a political choice. Consequently, **the Court should be limited to act on its own initiative only in cases when it has to apply a norm of which it doubts the constitutionality.** This is the situation for example in Austria, where the Constitutional Court can suspend an individual complaint case and start abstract norm control proceedings on its own initiative. Such a limitation of the powers of the Court to cases where it has to apply a law in another procedure would contain this danger for the independence of the Court.

51. Article 43 of the Draft Law only refers to Article 150(2) of the Constitution but also according to the Working Group Article 150(1) of the Constitution remains directly applicable and provides that "any person may file an initiative to start a procedure for the assessment of constitutionality and legality". This amounts to an ***actio popularis*** which enables everyone to bring cases for abstract review against any general act independently if this general act has any relevance for the person. The Croatian experience with the *actio popularis* is most telling. Among may others, a single (retired) person has brought nearly 800 requests for constitutional review without having any personal link to these acts. Such a wide access **can totally overburden the Court**. The Working Group pointed out that Article 150(1) only give a right to an "initiative", which need not be taken up by the Court. Nonetheless, according to Article 40 of the Draft Law has to make an order when it does not accept such an initiative.

52. According to Article 47 the Constitutional Court shall not be limited by the petition or initiative. This gives some additional discretion to the Court (the Austrian Constitutional Court for example is bound by the allegations in the application to the Court).

53. Article 49 enables the Court to suspend the enforcement of an individual act or action taken on the basis of the general act whose constitutionality or legality is being assessed, where that enforcement could cause "irreversible detrimental consequences". This criterion seems rather strict in comparison with those available to other constitutional courts. For example, Article 32(1) of the German Law on the Constitutional Court and Article 85 (2) of the Austrian Law on the Constitutional Court provide for interim measures with suspensive effect also in cases of weighty disadvantages or other important grounds in the public interest guided by the principle of proportionality.

54. Article 50 is to be welcomed because it specifies that courts can make requests to the Constitutional Court only in proceedings pending before the Court. The wide formulation in Article 150.2 of the Constitution, which does not provide for such a limitation, should probably be amended.

55. The **ordinary courts should** not only **make preliminary requests** when they are asked to do so by the parties but **also when they themselves have doubts about the constitutionality of a law they have to apply**.

56. According to Article 51(1), the Court shall discontinue proceedings if, during the proceedings, the Law was harmonised with the Constitution and/or international treaties. There may be situations when it is important to have a finding of unconstitutionality of a law even if this law is no longer in force. The Court should indeed have discretion when to continue the proceedings.

57. The cross-reference in Article 52 applying elements of the proceedings for review of constitutionality and legality of general acts also to other proceedings should rather figure in the respective special provisions (Article 88 seq.).

58. Article 56 allows for the re-opening of all individual acts based on a general norm found to be unconstitutional, which were adopted no less than two years for before the request for the reopening. Such requests must be made no more than six months after the Constitutional Courts unconstitutionality decision on the general act. This results retroactive effects, which can

have serious consequences for society. It seems therefore prudent to **entrust the Constitutional Court to decide on the effects of its decisions**. Even with the limitation on two years, such retroactivity can have very costly or negative effects (also on third parties) and **should be avoided** (see also the discussion of Article 62 below).

3. Proceedings upon constitutional complaint

59. The Constitution and the Draft Law provide for a **constitutional complaint against individual acts**, which has to be welcomed in the interest of a **high level of human rights protection**.

60. In line with Article 149 of the Constitution, Article 58 provides that individual complaints can be lodged only after the exhaustion of *effective* remedies. The explicit use of the term "effective" in the Constitution seems to indicate that the exhaustion of non-effective remedies should not be required. Paragraph 2 of Article 58 however provides that effective remedies are "all ordinary extraordinary and extraordinary legal remedies prescribed by law". This inappropriately restricts the individual complaint for two reasons. First, extraordinary remedies are by their very nature exceptional measures and as such they are not available in standard cases. This may however be a minor point and can probably be dealt with trough interpretation. Secondly, there may be ordinary remedies, which are prescribed by law but which are ineffective because they may not be apt to avoid irreversible detrimental consequences for the applicant in the light of the constant jurisprudence of the ordinary courts. In such rare and exceptional cases, **the Constitutional Court should have the possibility to accept individual complaints even before the exhaustion of these inefficient remedies**.

61. Some further suggestions concern technical details: According to Article 59(1) constitutional complaints "may be lodged by anyone who believes that his human right and freedom guaranteed by the Constitution was delivered" (the word "delivered" should probably read as "violated"). Usually, the precondition of a complaint of this type is the "allegation" of a violation of a right because only the proceedings before the Constitutional Court will allow determining whether there has really been a violation.

62. The competence of "state authority or organization in charge of the monitoring and realization of human rights and freedoms" to introduce constitutional complaints may be seen as a step forward. This seems to be an indirect reference to an **action of an ombudsman / human rights protector on behalf of an individual**. This is **to be welcomed**. For the sake of equality this competence could be restricted in situations where two individuals have conflicting human rights. In this case it seems more adequate if the state remains neutral. Moreover the quality of those bodies must be precisely defined in law.

63. One important type of proceedings is missing: There should also be a type of **summary proceedings** before chambers of a few judges dealing with complaints that have not enough prospects to succeed. There are two solutions which have proved their efficacy for three decades now: first, in the German way not to accept a complaint and second the Austrian way to decline jurisdiction. In any event such an instrument is necessary in order to uphold the efficient functioning of a Constitutional Court. The issue whether chambers can be established has already been discussed above.

64. The deadline of 30 days in Article 60(1) for the introduction of an individual complaint should start from the last appeal decision against the individual act (final administrative or court decision).

65. Article 60 paragraphs 2 and 3 allow restitution to a person who on justified grounds missed the time-limit for submitting a constitutional complaint if within 15 days (relative time limit) from the disappearance of reasons which caused him to miss the deadline that person submits an

application for *restitutio in integrum* and simultaneously lodges a constitutional complaint. Restitution cannot be requested after the expiry of a period of three months from the date of missing the deadline (absolute time limit). The latter absolute time limit seems rather short. In Germany it amounts to one year.

66. The Working Group informed the Commission's delegation that the reference in Article 61 to "attorney" does not result in an obligation to be represented by a lawyer.

67. Similar to Article 56 discussed above, Article 62 generalises the effect of an **individual complaint** (even without a two year limitation). Again, this can have serious and unexpected consequences for society. It seems **safer to have a general *ex nunc* effect** with the exception of the petitioner who should benefit from the complaint **and to leave the determination of possible retrospective effects of an individual complaint to the Court. On the other hand, persons imprisoned on the basis of an unconstitutional act should benefit also retroactively from the Constitutional Court decision.**

68. Two alternative versions are proposed for Article 67. Under the first alternative, when the Constitutional Court establishes a violation, it shall after granting the complaint and repealing the act remand the case for repeat procedure to the authority which enacted the repealed act while reparation is conferred irrespectively of the repeated procedure. The second alternative, for its part, seems to turn these consequences into alternatives. Either reparation is conferred or the procedure is repeated. The Working Group explained that in the second alternative, the workload of the Court should be reduced by declaratory decisions, which do not annul the individual act complained of. It would then be up to the ordinary courts to deal with the consequences of the finding of a human rights violation.

69. This calls for several remarks. First it is not evident that a declaratory decision would indeed burden the Court less than a decision, which at the same time annuls the individual act. On the other hand, inevitably it seems, the relations between ordinary courts and constitutional courts are sometimes strained when the latter come to the conclusion of a human rights violation of the former. Unfortunately, it happens not infrequently that ordinary courts avoid implementing decisions of constitutional courts or following them by the letter rather than in substance. Consequently, it is not sure that the ordinary courts would in fact themselves annul their judgements found to violate human rights. This might even result in a conclusion by the European Court of Human Rights that the complaint to the Constitutional Court would not be an effective remedy. The **annulment of the individual act by the Constitutional Court should therefore be preferred to a mere declaratory decision**.

70. Article 68 **asking the Constitutional Court to take into account** the principles of the European Convention on Human Rights is interesting and has to be welcomed from a European point of view. Nonetheless, it leaves room for doubts on the meaning and effect of that provision. The wording, which takes into account the *principles* of the ECHR, may be seen as a restriction of legal effects of the Convention. Article 68 should refer to **the Convention as interpreted by the European Court of Human Rights**. The Working Group agreed to introduce such a provision

71. Article 69 **obliging other state authorities to take into account the legal reasons of the decision of the Constitutional Court when they adopt a new individual act is also a positive element**. Often, the problems with other courts result from the fact that they follow the operative part but not the reasoning of the Constitutional Court.

4) Proceedings for the determination whether the President of Montenegro violated the Constitution

72. At least for respect of the function, the decision on the violation of the Constitution by the President shall also be served to the latter and not only to Parliament (Article 79).

5) Proceedings resolving a conflict of jurisdiction

73. The provisions on **proceedings resolving conflicts of jurisdiction** (Articles 80 to 87) do not make an explicit difference between positive conflicts (two or more authorities act in the same issue, only one is competent) and negative conflicts of competence (two or more authorities deny there competence, but one of them is competent). Therefore the wording in Article 80 remains general and **should be developed**: "The petition to resolve a conflict of jurisdiction shall be submitted by one or both of the conflicting authorities, as well as the person who is unable to exercise his rights due to acceptance or rejection of jurisdiction." It is suggested to **include a provision enabling the Court to quash decisions of authorities having acted without competence.**

74. The deadline of 15 days after the final decision of the declaration of competence or non-competence in Article 83, does not cover the case of a **negative conflict of competence** in which an **authority would simply not deliver any decision**, not even a refusal to decide. Then **a deadline has to be set after which a request for the resolution of a negative conflict of jurisdiction can be introduced**.

6) Proceedings deciding on a ban on the work of a political party or of a non-governmental organisation

75. Article 91 should provide that the **decision banning a party or association be also served to that party or association**.

7) Proceedings deciding on electoral disputes and disputes related to a referendum

76. In the part concerning the procedure of deciding on electoral disputes there could also be a need for more specific provisions bearing in mind the importance and high political significance of such proceedings (Articles 92 seq.). A specific point concerns Article 98(2): In the case of a decision annulling the entire electoral procedure or parts thereof, the **entire electoral procedure or parts thereof shall be repeated within ten days** of the serving of the decision of the Constitutional Court to the competent authority. This **time limit** – like a few others - **does not seem realistic**.

77. By including provisions on disputes relating to elections by Parliament for certain public officials, Article 100 introduces a new category of disputes in Chapter III.7 on proceedings on electoral and referendum disputes. The difference between these two categories of disputes is that while the disputes in Chapter III.7 are related to elections by the general population, Article 100 refers to elections by Parliament. For the sake of a systematic structure, these groups of disputes should be dealt with in separate proceedings.

8) Proceedings deciding on the compatibility of measures and actions of public authorities undertaken during the state of war and emergency

78. Especially in times of crisis, it will not always be possible to learn about measures and actions and to bring a complaint within three days (Article107).

79. With regard to the **legal effect of decisions** Article 152 of the Constitution provides that a law which the Court established to be not in conformity with the Constitution shall cease to be valid on the date of publication of the decision of the Constitutional Court (see also Article 109 of the Draft Law). In the first place it is remarkable that there is **no provision in pursuance**

with which the Court may postpone cessation of validity if appropriate. Admittedly, this consideration has not as much to do with the draft law but with the insofar clear-cut Constitution. Yet in certain instances it might be impossible for the legislator to amend the unconstitutional act at once so that terms postponing cessation of validity could be highly desirable. The Austrian Constitution for example provides for the possibility that the Constitutional Court may postpone the effect of an annulment of a law for 18 months. In one case, the Constitutional Court of Lithuania avoided this problem by announcing a decision publicly but by delaying its formal publication. However, a **constitutional amendment should be considered** to remedy to this serious problem in Montenegro.

80. Even more than the possibility for the Court to initiate proceedings on its own motion, Article 110 brings the Constitutional Court in the political arena. The **law should restrict the task to monitor the implementation of constitutionality and legality from a general supervision to monitoring the execution of its own decisions**.

5. Remarks on provisions in Chapter IV (Penal Provisions)

81. Article 111 provides for "penal provisions" for certain cases of misconduct of parties in the Constitutional Court proceedings. Such disciplinary measures form a common feature of procedural law. However, one should bear in mind that such sanctions may - following the case law of the ECHR - be qualified as criminal charges within the meaning of Article 6 of the ECHR. In this case the procedural guarantees must be respected. Some countries also have penal provisions for the non-execution of Constitutional Court decisions.

6. Conclusion

82. The Draft Law is very well drafted and sets out the functions and procedures of the Constitutional Court in a coherent way. The Working Group has prepared a very good text, which can serve the Court as a sound basis with only some modifications.

83. The Venice Commission welcomes the introduction of a "full" individual complaint, including against individual acts and the reference to the European Convention on Human Rights to be taken into account. The obligation for other state authorities to take into account the legal reasons of the decision of the Constitutional Court when they adopt a new individual act is also a very positive element.

84. Some issues result not so much from the Draft Law but from the Constitution itself. The Commission therefore recommends amending the Constitution in a few points:

1. The election of the judges of the Constitutional Court should require a qualified majority
2. The Court should be enabled to elect the President to the Court itself.
3. The re-election of the judges should be excluded.
4. A clear basis for the introduction of chambers should be introduced.
5. Judges should remain in office until their successor takes up office.
6. The *actio popularis* without legal interest should be excluded.
7. The Court should be enabled to postpone the entry into force of its decisions in order to give time to Parliament to avoid a legal void created by the annulment of a law.
8. The Court should not be able to initiate cases on its own motion and should not have a general competence to monitor constitutionality and legality.

85. Other issues can be resolved on the basis of ordinary law these are in particular:

1. The Law should repeat the provisions of the Constitution rather than just to complete them in order to provide a single text which governs the work of the Court

2. The Law should define the Constitutional Court as an independent judicial institution
3. The budgetary independence of the Court should be guaranteed by specifying that the budget claims by the Constitutional Court shall not be amended by the Government without the agreement of the Court.
4. The procedural autonomy of the Court should be safeguarded by leaving more scope for regulation to the Rules of Procedure.
5. The Law should regulate salaries and social guarantees of judges and other staff of the Court.
6. The procedure for the choice of candidates for judges should be regulated. Parliamentary hearings should provide for a transparent election.
7. A judge being investigated should not vote in his / her own case.
8. At least the case of old-age retirement judges should remain in office until their successor takes up office.
9. The position of a Vice-President should be introduced
10. The right of a constitutional court judge to return to his/her previous position stipulated can only be ensured in the public sector
11. The Law should make it clear be clear which procedural code applies by default.
12. Rules concerning bias and the procedure for challenging a judge should be introduced
13. The list of participants / parties should make clear in which proceedings they can participate
14. The access of any person to the case-file should be limited in line with the legislation on access to public documents.
15. It should be possible to introduce complaints by fax to be followed by a written submission by mail or directly.
16. In exceptional cases, the Constitutional Court should have the possibility to accept individual complaints even before the exhaustion of remedies if those are inefficient.
17. Both the original and the last instance authority with adopted an individual act should have a possibility to present their position on an individual complaint against this act.
18. If the constitutional complaint is directed against a court decision, the Court should even give the party in whose favour the decision was taken an opportunity to make a statement courts and Parliament should be allowed but not obliged to make such a statement
19. The possibility of dealing with cases in a written procedure should be improved.
20. The Court should be limited to act on its own initiative only in cases when it has to apply a norm of which it doubts the constitutionality.
21. Ordinary courts should also be enabled to make preliminary requests to the Constitutional Court when they themselves have doubts about the constitutionality of a law they have to apply.
22. Both for abstract review and constitutional complaints, the effects of a decision should be limited to future cases but the Court could be enabled to extend these effects also retroactively then it finds this to be appropriate. Persons imprisoned on the basis of an unconstitutional act should benefit also retroactively from the Constitutional Court decision.
23. The annulment of the individual act by the Constitutional Court should therefore be preferred to a mere declaratory decision.
24. A provision enabling the Constitutional Court to quash decisions of authorities having acted without competence should be introduced.
25. A number of time limits do not seem realistic.
26. The law should restrict the Constitutional Court's task to monitor the implementation of constitutionality and legality in general to monitoring the implementation of the execution of its own decisions only.

86. The Venice Commission remains at the disposal of the authorities of Montenegro for further assistance in this matter.