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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT OPINION

**ON THE DRAFT AMENDMENTS
TO THREE CONSTITUTIONAL PROVISIONS
RELATING TO THE CONSTITUTIONAL COURT,
THE SUPREME STATE PROSECUTOR
AND THE JUDICIAL COUNCIL**

OF MONTENEGRO

On the basis of comments by

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I. Introduction

1. In its previous Opinions of 2007 on the Constitution of Montenegro (CDL-AD(2007)047) and of 2011 on the draft amendments to the Constitution and on the draft amendments to the law on courts, the law on state prosecutor's office and the law on the judicial council (CDL-AD(2011)010), the Venice Commission examined the judicial structure of Montenegro and expressed the view that the constitutional guarantees for the independence of the judiciary needed to be improved. The Venice Commission stressed that it was necessary to avoid both politicisation and self-perpetuating government of judges.

2. In December 2012, the Venice Commission adopted an opinion on two sets of draft amendments to the constitutional provisions relating to the judiciary (CDL-AD(2012)024), in which it welcomed that the proposed amendments to the Constitution represented steps in the right direction, as they limited the role of parliament and sought to establish a balanced composition between judges and lay members within the Judicial Council. The Venice Commission welcomed in particular the proposal to provide for election and dismissal from duty of the President of the Supreme Court by the Judicial Council and no more by parliament.

3. At the 95th Plenary Session (14-15 June 2013), Mr Ranko Krivokapic, Speaker of Parliament, informed the Venice Commission that the parliamentary working group had terminated its work, but three provisions remained open, with alternative proposals: Article 127 on the Judicial Council, Article 135 on the Supreme State Prosecutor and Article 153 on the Constitutional Court (CDL-REF(2013)033). Mr Krivokapic requested the Venice Commission's opinion on these three provisions, stressing that the Montenegrin parliament would examine this matter before the summer recess. The Commission, in view of the urgency, authorised the rapporteurs to transmit the draft opinion to the Montenegrin parliament, prior to the next Plenary Session.

4. *The present opinion was transmitted to the Montenegrin authorities on 24 June 2013 and was subsequently endorsed by the Venice Commission at its ... Plenary Session (Venice, ...).*

II. Analysis of the draft amendments

A. General remarks

5. The three constitutional provisions under consideration all contain alternative proposals insofar as the manner of election is concerned, and specifically as regards the anti-deadlock mechanisms.

6. The Venice Commission has repeatedly stressed the importance of providing for anti-deadlock mechanisms in order to ensure the functioning of the state institutions¹.

7. Qualified majorities aim to ensure that a broad agreement is found in parliament, as they require the majority to seek a compromise with the minority. For this reason, qualified majorities are normally required in the most sensitive areas, notably in the elections of office-holders in state institutions. However, there is a risk that the requirement to reach a qualified majority may lead to a stalemate, which, if not addressed adequately and in time, may lead to a paralysis of the relevant institutions. An anti-deadlock mechanism aims to avoid such stalemate. However, the primary function of the anti-deadlock mechanism is precisely that of making the original

¹ Joint Opinion on the draft law on the temporary state commission on miscarriages of justice of Georgia (CDL-AD(2013)013 § 47); Opinion on Act CLXIII of 2011 on the prosecution service and Act CLXIV of 2011 on the status of the prosecutor general, prosecutors and other prosecution employees and the prosecution career of Hungary (CDL-AD(2012)008 § 58); Opinion on two sets of draft amendments to the constitutional provisions relating to the judiciary of Montenegro, CDL-AD(2012)024, § 41; Opinion on the draft law on the courts of ordinary jurisdiction of Georgia, CDL-AD(2013)007, § 52.

procedure work, by pushing both the majority and the minority to find a compromise in order to avoid the anti-deadlock mechanism. Indeed, qualified majorities strengthen the position of the parliamentary minority, while anti-deadlock mechanisms correct the balance back. Obviously, such mechanisms should not act as a disincentive to reaching agreement on the basis of a qualified majority in the first instance. It may assist the process of encouraging agreement if the anti-deadlock mechanism is one which is unattractive both to the majority and the minority.

8. The Venice Commission is aware of the difficulty of designing appropriate and effective anti-deadlock mechanisms, for which there is no single model. One option is to provide for different, decreasing majorities in subsequent rounds of voting, but this has the drawback that the majority may not seek a consensus in the first round knowing that in subsequent rounds their candidate will prevail. Other, perhaps preferable, solutions include the use of proportional methods of voting, having recourse to the involvement of different institutional actors or establishing new relations between state institutions. Each state has to devise its own formula.

B. The Judicial Council

9. In its last opinion, the Venice Commission welcomed the parity between judicial and lay members and the election of the President from among the Judicial Council members who do not perform judicial functions (with the exclusion of the Minister of Justice). The Venice Commission did not express any position on the mechanism of election/appointment of the lay members, but suggested that it should be preferable that the lawyers and law professors elected by the Parliament not be members of the Parliament itself.

10. The Venice Commission pointed out that the parity of judicial and lay members would not pertain in disciplinary proceedings, since the Minister of Justice cannot sit and vote in such cases, and suggested to add in article 127 of the Constitution a provision dealing with a smaller disciplinary panel within the Judicial Council with a parity of judicial and lay members (CDL-AD(212)024, §§ 20-21).

11. Draft Article 127 maintains the parity between the judicial and the lay members of the Judicial Council. It provides that all the four lay members, all renowned lawyers, should be elected by the Parliament, instead of, as was provided for in the previous amendment and in Article 127 of the Constitution, two by the Parliament (one proposed by the majority and one by the opposition) and two appointed by the President of the Republic.

12. In the view of the Venice Commission, entrusting the Parliament with the power to elect all the four lay members of the Judicial Council with a qualified majority is in keeping with the fundamental function of the Judicial Council to avoid both the risk of politicization and the risk of corporatist and self-perpetuating government of the judiciary. The three-fifths majority in the second round as provided for in the alternative b) seems to be an appropriate solution, also in order to compensate for the removal of the power to appoint two lay members of the President of the Republic, as is provided in Article 127 of the present Constitution. On the contrary, alternative a) providing for the majority of all MPs in the second round of voting does not represent an acceptable solution, as it would act as a disincentive for the majority to reach an agreement in the first round of voting.

13. The provision in draft Article 127 that the candidates for lay members should be selected on the basis of a public call for candidatures is welcome, as it enhances the transparency of the procedure, hence the public trust in the High Judicial Council.

C. The Supreme State Prosecutor

14. In its last opinion, the Venice Commission welcomed the proposal to provide for the election and dismissal of the Supreme State Prosecutor by Parliament by a two-thirds majority upon the proposal of the Prosecutorial Council; the Commission recommended however to introduce an anti-deadlock mechanism (CDL-AD(2012)024, § 41).

15. Draft Article 135 maintains the two-third majority in the first round of voting and contains two options for the second round of voting: either a) the majority of all MPs or b) the majority of three fifths.

16. In the Venice Commission's opinion, a three-fifth majority clearly represents the preferable option, the majority of all MPs provided for in the second round would, instead, fail to provide an incentive for the majority to reach a compromise with the minority.

17. The Venice Commission, however, considers that the election of a single candidate leaves less room for compromise in a voting procedure as compared to the election of several candidates. A more appropriate election procedure could thus be envisaged for the Supreme State Prosecutor than two rounds of voting at decreasing majorities. For example, it could be envisaged that the best candidate, selected by the Prosecutorial Council on the basis of a public call, could be submitted to parliament to be elected with a three-fifths majority. Should this not be possible, then the Prosecutorial Council would recommend two or more suitable candidates from those who answered the public call and parliament should elect one of the nominated candidates by absolute majority.

18. The Venice Commission stresses that it has not seen the proposed composition of the State Prosecutorial Council; it refers to its own recommendations in this respect (CDL-AD(2012)024, §§ 47-50).

19. The provision in draft Article 135 that the candidates for the post of Supreme State Prosecutor should be selected on the basis of a public call for candidatures is welcome, as it enhances the transparency of the procedure, and hence should increase public trust in the prosecutor's office.

20. Finally, the Venice Commission welcomes that the grounds for dismissing the Supreme State Prosecutor have been provided for in draft Article 135, in line with what it had previously recommended (CDL-AD(2012)024, § 41).

D. The Constitutional Court

21. Under the present Constitution, the judges of the Constitutional Court are elected and dismissed by parliament on the proposal of the President of the Republic, without any qualified majority, for a renewable term. In this respect, the Venice Commission had previously stated that this manner of election seriously undermined the independence of the constitutional court in that it did not secure a balanced composition of the court, and was not in line with international standards. The Venice Commission had therefore recommended that, if constitutional judges were to be elected by parliament, their election should be made by a two-third majority with a mechanism against deadlocks, and that the mandate of the constitutional judges should be non-renewable (CDL-AD(2007)047, §§ 122,123; CDL-AD(2012)024, § 35). The Commission had also stated that while the "parliament-only" model provides for high democratic legitimacy, appointment of the constitutional judges by different state institutions has the advantage of shielding the appointment of a part of the members from political actors (CDL-AD(2012)009, § 8).

22. Draft Article 153 provides for appointment and dismissal of constitutional judges by parliament on the proposal of the President of Montenegro (two candidates) and of the relevant committee of parliament (five candidates) by a two-thirds majority. The qualified majority requirement is welcome, as it has been strongly recommended by the Venice Commission.

23. As an anti-deadlock mechanism, a second-round of voting is proposed with two options: either a) by the majority of all MPs or b) by a three-fifths majority. The Venice Commission finds that the second option is clearly preferable, as the first option would provide no incentive for the majority to reach a compromise with the minority and would therefore leave room for the election of five members all belonging to the ruling parties.

24. In line with the Venice Commission's recommendations, draft Article 153 provides that the twelve-year mandate of constitutional judges be non-renewable.

25. Draft Article 153 provides that the President of the Constitutional Court be chosen by the members of the court, a provision which the Venice Commission welcomes (CDL-AD(2012)024, §§ 37-38).

26. Proposal of candidates by both the President and the parliamentary committee must be made on the basis of a public call. This is welcome, as it enhances the transparency of the procedure, hence the public trust in the Constitutional Court.

III. Conclusions

27. The Venice Commission has repeatedly stressed the need for Montenegro to achieve full independence of the judiciary and of the Constitutional Court and the importance to avoid both self-perpetuating and a politicised government of judges. The Commission has encouraged Montenegro to amend its constitution in line with its recommendations.

28. The Venice Commission welcomes the draft amendments on the judicial council (draft Article 127), the Supreme State Prosecutor (draft Article 135) and the Constitutional Court (draft Article 153) which have been submitted to its consideration. They follow most of its previous recommendations and are in keeping with international standards.

29. As concerns the alternative options relating to the anti-deadlock mechanisms for the election and dismissal of the four lay members of the Judicial Council and of the seven constitutional judges, the Venice Commission finds that a second round of voting with a qualified majority of three fifths is an acceptable solution, clearly preferable to a second round of voting by majority of all MPs.

30. As concerns the appointment and dismissal of the Supreme State Prosecutor, while the proposal to do so by two rounds of voting, at two-thirds and subsequently three-fifths majority would seem acceptable, the Venice Commission considers that more suitable alternatives could be found.

31. The Venice Commission renews its availability to assist the authorities of Montenegro in amending the Constitution and achieve the reform of the judiciary and of the constitutional court.