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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

MONTENEGRO

DRAFT OPINION
ON THE DRAFT LAW ON AMENDMENTS TO THE LAW
ON THE JUDICIAL COUNCIL AND JUDGES

on the basis of comments by
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I. Introduction

1. By a letter of 5 March 2018, the Minister of Justice of Montenegro requested the assistance of the Venice Commission in relation to the nomination of the lay members of the new Judicial Council, due to start its mandate on 3 July 2018. In fact, due to the boycott exercised by the opposition, it appeared difficult for parliament to be able to nominate such lay members in due time. There was therefore a risk that the new Judicial Council could not start functioning after the expiry of the mandate of the current Judicial Council.
2. On 3-4 May 2018, a delegation of the Venice Commission composed of Ms Marta Cartabia and Mr Philip Dimitrov, accompanied by Ms Simona Granata-Menghini, Deputy Secretary, travelled to Podgorica and met with representatives of the parliamentary majority and opposition, with the President of the Judicial Council, the President of the Constitutional Court, the President of the Supreme Court, the Ministers of Foreign Affairs and of Justice to discuss possible solutions to this issue.
3. On 31 May 2018, the Minister of Justice requested the Venice Commission's opinion on draft amendments (CDL-REF(2018)026) to the Law on the Judicial Council and judges (hereinafter LJCJ) subsequently prepared.
4. The present opinion, prepared on the basis of the comments by Ms Cartabia and Mr Dimitrov acting as rapporteurs and against the background of the discussions held in Podgorica, was adopted by the Venice Commission at its Plenary Session (Venice, ...).

II. Background

5. The chapter on the judiciary of the Constitution of Montenegro was revised in 2013.
6. The composition of the Judicial Council was changed as follows (revised Article 127 of the Constitution):

The Judicial Council shall have a president and nine members.

The members of the Judicial Council shall be:

- 1) *president of the Supreme Court;*
- 2) *four judges to be elected and released from duty by the Conference of Judges, taking into account equal representation of courts and judges;*
- 3) *four reputable lawyers that are elected and released from duty by the Parliament at proposal of the competent working body of the Parliament upon announced public invitation;*
- 4) *Minister in charge of judicial affairs.*

The President of the Judicial Council shall be elected by the Judicial Council from among its members who do not perform judicial functions, by two-third majority vote of the members of the Judicial Council.

The Minister in charge of judicial affairs may not be elected the president of the Judicial Council.

The vote of the President of the Judicial Council shall be decisive in case of equal number of votes.

The composition of the Judicial Council shall be proclaimed by the President of Montenegro.

The term of office of the Judicial Council shall be four years.

7. The required majority for the election of the four "reputable lawyers" was set out in the amended Article 91 of the Constitution:

[...] The Parliament shall elect and release from duty the judges of the Constitutional Court, the Supreme State Prosecutor and four members of the Judicial Council from among reputable lawyers by two-third majority vote in the first voting and by three-fifth majority in the second voting of all the Members of the Parliament no sooner than a month. [...]

8. In its previous opinions on various sets of amendments to the Constitution of Montenegro, the Venice Commission had addressed the issue of the number and manner of election of the lay members of the Judicial Council. In its opinion of 2011, the Commission recommended having an equal number of judges and lay members; of the latter, the Commission suggested that two could be elected by parliament: one by the majority and one by the opposition.¹

9. In its opinion of 2013, the Commission noted that it was now proposed to provide that all four lay members be elected by parliament with a qualified majority and expressed the view that such solution was “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”.² The Commission upheld the qualified majority of three fifths in the second round of voting, because it considered that the alternative option of providing for the majority of all MPs in the second round “would act as a disincentive for the majority to reach an agreement in the first round of voting” [for the first round, a 2/3 majority is required].

III. General remarks

10. In its 2013 Opinion, the Venice Commission elaborated on the need to achieve a broad agreement and political compromise as concerns the election of the Judicial Council's lay members by parliament:

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

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 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

¹ Venice Commission, Opinion on the draft amendments to the Constitution of Montenegro, as well as on the draft amendments to the law on courts, the law on the state prosecutor's office and the law on the Judicial Council of Montenegro, CDL-AD(2011)010, § 19.

² Venice Commission, Opinion on the draft Amendments to three Constitutional Provisions relating to the Constitutional Court, the Supreme State Prosecutor and the Judicial Council of Montenegro, CDL-AD(2013)028, § 12.

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.”

11. Institutions that cannot function do not fulfil their constitutional purpose and give bad name to democracy. So it is crucial to have anti-deadlock mechanisms.

12. Thus, the Commission stressed the importance of providing for qualified majorities,³ but warned about the risk of stalemates and recommended to devise effective and solid anti-deadlock mechanisms, giving some examples of possible options.

13. The Commission has previously underlined that qualified majorities strengthen the position of the parliamentary minority, by giving them the negative power to block decisions: *“Parliamentary rules on qualified majority [...] constitute an instrument that may effectively and legitimately protect opposition and minority interests, both when it comes to procedural participation, powers of supervision and certain particularly important decisions. At the same time, this is an instrument that restricts the power of the democratically elected majority, and which should therefore be used with care, and tailored specifically to the national constitutional and political context.”*⁴

14. The Commission also found that *“the more formal rights and competences the opposition (minority) is given within a constitutional and parliamentary system, the greater the responsibility of the same opposition not to misuse these powers, but to conduct their opposition in a way loyal to the basic system and the idea of legitimate and efficient democratic majority rule. This however, is not an issue that can be legally regulated, or perceived as any form of formal “responsibility”, but is rather to be seen as a political and moral obligation.”*⁵

15. Anti-deadlock mechanisms have to discourage the opposition from behaving irresponsibly but should not create opportunities for the majority by impossible proposals to lead to the necessity for the application of such mechanisms. This is why they should be limited in time and, while avoiding permanent blockages they should not aim at avoiding any blockage at all, which can be an expression of the need for political change.

16. In 2013, the Montenegrin constitutional legislator followed the Venice Commission’s recommendations to require qualified majorities (with a decreasing majority in the second round) for the appointment of the judges of the Constitutional Court, the Supreme State Prosecutor and four lay members of the Judicial Council. This choice was in line with European standards and deserves in principle to be praised.

³ The Venice Commission has consistently recommended to provide for qualified majority when the election of top officials is made by parliament: see Compilation of Venice Commission’s Opinions and Reports in relation to the election by parliament of constitutional court judges, prosecutors general, members of Supreme Judicial and Prosecutorial Councils, the Ombudsman, CDL-PI(2018)003.

⁴ Venice Commission, Report On The Role Of The Opposition In A Democratic Parliament, CDL-AD(2010)025, § 76.

⁵ Ibid., § 158.

17. It is true that boycott of parliament by the opposition may frustrate the very intention to provide protection to the opposition itself and lead to the paralysis or dysfunction of the state institutions. The Venice Commission has previously expressed the view that “*In principle, the opposition should express its views in the parliament and a boycott is justified only exceptionally.*”⁶ The Commission nevertheless considered that for processes such as the amendment of the Constitution which require the broadest political support, “*even if the ruling coalition has the necessary number of votes in the Parliament to pass the amendments, it does not absolve the Government from conducting a genuine all-inclusive debate*”.⁷

18. One thing is ruling the country in government – which is the job of the majority elected by the people – another thing is changing the fundamental principles of the Constitution which requires the broadest support of a wide number of social and political actors from the majority and the opposition alike. The same can be said in relation to all safeguards procedures and institutions, included the Judicial Council. In a Constitutional state, democracy cannot be reduced to the rule of the majority, but encompasses as well guarantee measures for the opposition.

19. The Venice Commission is of the view that difficulty of reaching a qualified majority and the ensuing risk of paralysis or dysfunction of an institution – in particular “safeguard institutions” - should not lead to abandon the requirement of a qualified majority but rather to devise tailor-made, effective deadlock-breaking mechanisms.⁸ A balance needs to be found between the superior state interest of the preservation of the functioning of the institutions⁹ and the democratic exigency that these institutions should be balanced and should not be merely dominated by the ruling majority. In other words, the supreme state interest lies in the preservation of the institutions of the democratic state.

IV. Analysis

A. The current regulation of the mandate of the Judicial Council of Montenegro

20. Under Article 127 of the Constitution of Montenegro, the Judicial Council has a mandate of four years. Unlike in several other European Constitutions,¹⁰ no reference is made to the length of the mandate of the Council’s members. This means that the Judicial Council as an entity has a fixed duration: the composition of each Judicial Council is proclaimed by the President and all members start and end their functions on the same date (if one member needs to be replaced, the mandate of the new member expires on the date of termination of the mandate of the

⁶ Venice Commission, Opinion on the seven amendments to the Constitution of “the former Yugoslav Republic of Macedonia” concerning, in particular, the judicial council, the competence of the constitutional court and special financial zones, CDL-AD(2014)026, § 12.

⁷ Ibid.

⁸ See Venice Commission, Opinion on the draft Act to amend and supplement the Constitution (in the field of the Judiciary) of the Republic of Bulgaria, adopted by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015), CDL-AD(2015)022, § 50.

⁹ As regards the superior interest of preserving the functioning of the Constitutional Court as a democratic institution guarantor of the Constitution, see for example: Venice Commission, Amicus Curiae Opinion on the Law on the cleanliness of the figure of high functionaries of the Public Administration and Elected Persons of Albania, CDL-AD(2009)044-e, § 143 and Opinion on the Two Draft Laws amending Law No. 47/1992 on the organisation and functioning of the Constitutional Court of Romania, CDL-AD(2006)006-e, § 7.

¹⁰ For example, Italy, Latvia, Russia, Slovenia and Spain.

Judicial Council).¹¹ The expired Judicial Council is replaced by a new one, which remains in function for four years.

21. The Constitution is silent about the procedure for the appointment of the members of the Judicial Council, which is set out in the Law on the Judicial Council and judges (LJCJ).

22. The participation of lay members is essential for the functioning of the Judicial Council, as the Judicial Council is a “mixed body” meant to ensure the independence of the judiciary without separating or detaching it from the other branches of government. Lay members are necessary in order to avoid the risk that the Judicial Council become a self-regulatory body of the judiciary and for this reason in Montenegro its President¹² is elected from among the lay members (Article 127 of the Constitution), the “President convenes and chairs the meetings of the Judicial Council (Article 25 LJCJ) and the disciplinary panels must be chaired by one of the lay members (Article 114 LJCJ).

B. The proposed draft amendments

1. The prolongation of the mandate of the members of the Judicial Council

23. It is proposed to add a new Article 139a which would read as follows:

“The President and members of the Judicial Council whose term of office has expired shall continue performing their duties in the Judicial Council by the time of promulgation of the new composition of the Judicial Council.”

24. This provision aims at ensuring “*the smooth operation of the judicial branch of power and the protection of the independence and autonomy of courts and judges, which is within the competences of the Judicial Council as stipulated in Article 126 of the Constitution.*”¹³ It seeks to avoid “*the potential legal situation that after the expiry of the term of office of the Judicial Council, new members are not elected*”.

25. The Venice Commission in principle supports the prolongation of the term of office of members of the Judicial Council as a tool to preserve the functioning the democratic institutions of the state.¹⁴ As stated by the government of Montenegro in the statement of reasons, the operation of the Judicial Council is crucial to guarantee the independence of the judiciary; this is an essential element of the Rule of Law. Such prolongation may also function as an anti-deadlock mechanism.

26. The Commission considers however that special attention should be paid to Article 127 of the Constitution of Montenegro, which provides that “*The term of office of the Judicial Council shall be four years.*” The effect of the proposed Article 139a is that “*the President and the*

¹¹ Article 21 § 3 LJCJ.

¹² As well as the Vice-President.

¹³ See the Statement of reasons for the proposed amendments.

¹⁴ The Commission had recommended this solution for the judges of the Constitutional Court of Montenegro as well: see Opinion on the Draft Law on the Constitutional Court of Montenegro, CDL-AD(2008)030, § 25 and Opinion on the Draft Law on the Constitutional Court of Montenegro, CDL-AD(2014)033, § 20. This recommendation was followed: see article 15 of the Law on the Constitutional Court of Montenegro, <http://www.ustavisud.me/dokumenti/LAW%20ON%20THE%20CONSTITUTIONAL%20COURT%20OF%20MONTENEGRO%20.pdf>.

members of the Judicial Council whose mandate has expired are to continue performing the functions of members of the Judicial Council until the new composition of the Council is promulgated.¹⁵ This means in effect to prolong the mandate of the whole Judicial Council, which however conflicts with Article 127. In addition, this solution would delay the taking up of functions by the new members who have already been appointed, either by the conference of judges or by parliament.

27. Experience and comparative law teach that generally speaking the judiciary promptly elects the new members of the Judicial Council; the delays usually concern only the lay members elected by Parliament, due to political conflicts or impasse.

28. The Venice Commission considers that the same result could be achieved in line with Article 127 by providing, should the new lay members not be timely elected by parliament, that only the lay members sitting on the old Judicial Council will sit on the new one as acting lay members, preferably for a limited period of time (for the constitutional court judges, this limit is one year¹⁶). This alternative solution would enable the new members who have already been appointed to start sitting on the new Judicial Council, which would provide the latter with more legitimacy than allowing all the members of the expired Council to continue to operate even if for example the new judicial members have been duly elected. This solution also appears like a logical follow up to the possibility, introduced by the draft amendments, for parliament to appoint fewer than all the four members at the same time (see below).

29. In order to ensure compatibility with Article 18 LJCJ, which provides that “a member of the Judicial Council from among the judges or eminent lawyers may be re-appointed as a member of the Judicial Council after the expiry of four years from the termination of the previous mandate in the Judicial Council”, it would be useful to specify in this provision that sitting on the new Judicial Council as acting lay member pending the appointment of the new lay members by parliament does not amount to a re-appointment.

30. As regards the prolongation of the mandate of the President of the Judicial Council, it would seem more acceptable from the viewpoint of legitimacy if the members of the new Judicial Council could elect a new temporary President from among the (acting) lay members: while it is possible that the former President will be re-elected, the choice belongs to the members of the new Council. When the new lay members are appointed by parliament and the Judicial Council gets to a full composition, a new President will be elected. This seems to be the preferable solution even if on the new Judicial Council sit some newly elected Reputable Lawyers and some acting ones (see below).

2. The proposal of candidates for the position of Reputable Lawyer

31. Under the current provisions, the lay members are appointed by parliament after the “competent working body of parliament” (the Committee on Political Affairs) has issued a public call, has published a list of applicants and has made a proposal for “as many candidates as members of the Judicial Council appointed”. This procedure has been interpreted as requiring necessarily a list of all four proposed candidates.

32. The proposed draft amendments provide that “*If the proposal for the election of the members of the Judicial Council referred to in paragraph 6 of this Article contains a smaller number of candidates than the number of the members to be elected, the election procedure*

¹⁵ See the Statement of reasons.

¹⁶ Article 15 of the Law on the Constitutional Court of Montenegro.

shall be repeated for the number of members that were not proposed by the relevant working body of the Parliament.”

33. This proposal removes the need for agreement between the majority and the opposition on all four candidates at the same time. According to the Statement of reasons, this is an improvement because *“the election of the candidates that have the required majority of votes in parliament is not limited by the obligation to ensure that all the members to be elected from among the eminent lawyers have to get the required majority of votes at the same time.”*

34. In principle, as the appointment requires a qualified majority of 2/3 or 3/5, the votes of at least part of the opposition are at any rate necessary; as a consequence, proposing all four candidates together would appear to offer more chances of agreement within the parliamentary committee, to the extent that the opposition may obtain to choose one or two candidates in exchange for its support for the candidates proposed by the majority. In this respect, it would even seem that a vote “as a single unit” on the four candidates might render the agreement easier.

35. The advantages of the proposal are therefore unclear. However, should the alternative solution of appointing the old lay members as acting lay members on the new Judicial Council (see above) be accepted, the possibility for parliament to proceed with the appointment of at least those candidates who have the qualified majority would represent a clear advantage. Only some acting lay members would then be necessary.

36. It is unclear whether the whole procedure, including the public call, would have to be repeated. This should be specified, possibly in the direction of repeating the procedure within a reasonable time.

V. Conclusion

37. The independence of the judiciary is an indispensable element of the Rule of Law. The due functioning of the Judicial Council, in those legal systems where it exists, is an essential guarantee for judicial independence (See the Venice Commission’s Rule of Law Checklist, E.1.a).

38. In order to ensure democratic legitimacy but avoid politicisation, when lay members are appointed by parliament, they should be voted with a qualified majority in order to ensure that a broad agreement is found, with the majority seeking a compromise with the minority. In order to avoid stalemates, appropriate anti-deadlock mechanisms should be devised. A balance needs to be found between the superior state interest in the preservation of the functioning of the institution and the democratic exigency that the latter should be balanced and should not be merely dominated by the ruling majority. In other words, the supreme state interest lies in the preservation of the institution. Qualified majorities strengthen the position of the parliamentary minority; but the more formal rights and competences the opposition (minority) is given within a constitutional and parliamentary system, the greater the responsibility of the same opposition not to misuse these powers, but to conduct their opposition in a way loyal to the basic system and the idea of legitimate and efficient democratic majority rule.

39. The Venice Commission shares the concern of the Montenegrin authorities to avoid that on account of delays in the appointment of the new lay members by parliament, the new Judicial Council may not start its functions while the old Council has ceased its functions upon the expiry of its four-year mandate.

40. The prolongation of the mandate of the members of the expired Judicial Council is a solution which has been adopted by several European States and has been recommended by the Venice Commission.

41. As the constitution of Montenegro limits the duration of the mandate of the Judicial Council as such to four years, it seems problematic to provide for the extension of the mandates of *all* the old members pending the appointment of *all* the new members. The same result could be achieved more in line with the Constitution by allowing a partial renewal of the composition. The new Judicial Council can be made up of the new judicial members (elected by the judiciary) and the old former lay members as acting lay members of the new Judicial Council, pending the completion of the appointment procedure of the new lay members. This extension would not represent a renewal of their mandate. A temporary new President of the Judicial Council could be chosen among the lay members of the new Judicial Council and would carry out his or her functions until the appointment of the new lay members. Then a new President is to be elected. The temporary one can be confirmed.

42. As regards the proposal to allow the parliamentary committee in charge of the submission of candidates for the post of lay member not to submit all the four candidatures at the same time, the Commission finds that in principle proposing all four candidates together would seem to offer more chances of agreement within the parliamentary committee, to the extent that the opposition may obtain to choose one or two candidates in exchange for its support for the candidates proposed by the majority. On the other hand, if the alternative solution of appointing acting lay members on the new Judicial Council is chosen, the possibility for parliament to appoint at least those candidates who have a qualified majority presents a clear advantage.

43. The Venice Commission reiterates the importance of providing for effective anti-deadlock mechanisms. It hopes nonetheless that the ordinary procedure of appointment of the "reputable lawyers" as members of the new Judicial Council of Montenegro will be successful so that it will not be necessary to revert to this remedial solution.

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