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(VENICE COMMISSION)

OPINION

ON THE CONSTITUTION OF MONTENEGRO

Adopted by the Venice Commision
at its 73rd Plenary Session
(Venice, 14-15 December 2007)

On the basis of comments by

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TABLE OF CONTENTS

I. Introduction

1. At its 71st Plenary Session (Venice, 1-2 June 2007), the Venice Commission adopted an Interim Opinion on the draft constitution of Montenegro (CDL-AD(2007)017), which was based on a draft text of the constitution which had been submitted to the Commission on 16 April 2007 (CDL(2007)053). This opinion was transmitted to the Parliament of Montenegro.

2. In August 2007, the speaker of the parliament of Montenegro submitted to the Commission a revised version of the draft constitution. The rapporteurs analysed this text and engaged in discussions with the parliament of Montenegro with a view to improving it.

3. On 19 October 2007, the parliament of Montenegro adopted the constitution (CDL(2007)105). It also adopted the Constitutional law for the implementation of the constitution of the Republic of Montenegro (CDL(2007)015, appendix).

4. It is recalled that in the process of accession to the Council of Europe, the Montenegrin authorities committed themselves to ensuring that the new Constitution would incorporate the following minimum seven principles:

A. the Constitution must stress that the Republic of Montenegro is a civic state, based on civic principles by which all persons are equal and not on the equality between constituent peoples;

B. the Constitution must provide for the independence of the judiciary and recognise the imperative of avoiding any decisive role of political institutions in the procedure of appointment and dismissal of judges and prosecutors;

C. in order to avoid conflict of interests, the role and tasks of the Public Prosecutor should not include, both the application of legal remedies for the protection of constitutionality and legality and the representation of the Republic in property and legal matters;

D. the efficient constitutional protection of human rights must be ensured. The Constitution should provide for the direct applicability of the human and minority rights, as was recognised in the Charter on Human and Minority rights of Serbia and Montenegro. The constitutional reform therefore needs to provide for at least the same level of protection of human rights and fundamental freedoms as the one provided for in the Charter, including the rights of minorities ;

E. the Constitution should state that capital punishment is prohibited at all times;

F. the Constitution should include transitional provisions for the retrospective applicability of human rights protection to past events. It should also include provisions on the retrospective applicability of the European Convention on the protection of Human Rights and Fundamental Freedoms and Protocols;

G. the Constitution should regulate the status of the armed forces, security forces and intelligence services of Montenegro and the means of parliamentary supervision. It should provide that the position of the commander-in-chief be held by a civilian.

5. This opinion on the newly adopted constitution of Montenegro, prepared on the basis of the rapporteurs' comments, was discussed and adopted by the Commission at its 73rd Plenary Session (Venice, 14-15 December 2007).

II. Part One: Basic provisions

Article 7 (prohibition of infliction of hatred)

6. The prohibition of incitement of hatred on any ground is welcome.

Article 8 (prohibition of discrimination)

7. The text of this general clause on prohibition of discrimination has been amended to reflect the concern previously expressed by the Venice Commission that special measures, such as those set out in Article 4 of the Framework Convention for the Protection of National Minorities, should not be seen as discrimination. The text is therefore now in conformity with the Framework Convention. It is also in conformity with ECRI Recommendation 7 (2002).

Article 9 (legal order)

8. Article 9 provides that international treaties and agreements shall form an integral part of the internal legal order, have supremacy in case of conflict with domestic law, and be directly applicable in case of conflict with domestic law. This provision, which is line with one of the relevant commitments which Montenegro undertook vis-à-vis PACE (point V), is to be welcome. It is of importance also for minority protection and for the status of the Framework Convention for the Protection of National Minorities. As was previously said (Interim opinion on the draft constitution of Montenegro, CDL-AD(2007)017, § 17, hereinafter "the interim opinion"), the words "when they regulate the relations differently from the internal legislation" were unnecessary. A reference to the need to implement human rights treaties in the light of the practice of the respective monitoring bodies would have been welcome.

Article 11 (Division of powers)

9. As previously said (Interim opinion, § 19), it would have been preferable in paragraph 3 of Article 11, to put "state" power.

10. In paragraph 4, the reference to checks and balances which the Commission found "is vague and possibly meaningless" (interim opinion, § 20), has now been replaced by the equivalent terms "balance and mutual control".

Article 12 (Montenegrin citizenship)

11. Paragraph 3 of this provision provides for the possibility of extraditing Montenegrin citizens "in conformity with international obligations", which is an important clause, for example for co-operation with the International Criminal Court.

III. Part Two: Human Rights and liberties

A. General observations

12. The provisions of the draft Constitution of Montenegro on fundamental human rights and freedoms had been severely criticised by the Venice Commission on account of their technical flaws which resulted, notwithstanding the attempt to ensure the implementation of the Council of Europe founding principles, in an insufficient level of human rights protection.

13. The text of the Constitution which was adopted by the Montenegrin parliament on 19 October 2007 meets most of the recommendations made by the Venice Commission in its previous opinion and in the course of various meetings with the Montenegrin authorities. It does not meet all of these recommendations and it would have been preferable if these provisions of the Constitution had been prepared in a way that would have facilitated direct comparison with the provisions of the European Convention on Human Rights. However, the Constitution includes a general clause on "limitations of human rights and liberties" and it also contains provision for the direct applicability and supremacy of human rights treaties, including the European Convention on Human Rights.

14. The text of Part II of the Constitution deserves therefore a generally positive assessment although further improvements could have been made.

B. Fundamental Rights and Freedoms (Articles 17-78)

Article 17 (Grounds and equality)

15. This provision has been duly supplemented, as recommended by the Venice Commission, and now includes a reference to the applicable international treaties. It would have been preferable that it also mentions the "generally accepted principles of international law".

Article 18 (Gender equality)

16. This new provision on gender equality is to be welcomed.

Article 20 (Legal remedy)

17. Unfortunately, this provision has remained unchanged since the previous Article 18 of the draft Constitution. The Venice Commission had indicated (interim opinion, § 29) that it did not correspond fully to Article 13 ECHR, nor to the opinion of the Parliamentary Assembly on Accession of the Republic of Montenegro to the Council of Europe (No. 261(2007)) ("PACE opinion"), 19.2.2.2. If breaches of Article 13 ECHR are to be avoided, it is essential that this provision be interpreted by the Montenegrin courts in a manner that gives full effect to the Convention requirement.

Article 21 (Legal aid)

18. The new formulation of paragraph 3 meets the previous recommendation of the Venice Commission (interim opinion, § 30).

Article 23 (Environment), and Articles 62 (Right to work) and 70 (consumers protection)

19. The Venice Commission had expressed the view that it would have been preferable to avoid that the Constitution contain merely programmatic rules, so that certain individual rights should instead be formulated as state objectives (interim opinion, §§ 20, 83, 87).

20. The Montenegrin authorities have chosen to maintain the formulation they had put in the draft Constitution.

Article 24 (Limitation of human rights and liberties)

21. This provision on the conditions for restricting the exercise of fundamental rights and freedoms has been drastically improved in respect of the draft constitution, and now contains the necessary elements of legality, legitimate aims and proportionality in a democratic society,

thus reflecting correctly the European Convention on Human Rights. It meets the recommendations of the Venice Commission (interim opinion, § 32).

22. This general clause applies to all articles of the Constitution concerning fundamental rights and freedoms. This makes it unnecessary to repeat the three conditions in all subsequent articles.

Article 25 (Temporary limitation of rights and liberties)

23. The term "proclaimed" has been added in the first paragraph, to meet the recommendation of the Venice Commission in this respect (interim opinion, § 34). The other recommendations of the Venice Commission have not been taken onboard.

Article 26 (Prohibition of the death penalty)

24. This provision only prohibits the death penalty. However, it does not state the right to life set out in Article 2 ECHR, a right which imposes a weighty obligation on state authorities to inquire into the reasons for the loss of life. Nor does this Article mention the possibility, preserved by Article 2 ECHR, of depriving of life as a consequence of use of force when absolutely necessary in defence of any person from unlawful violence; in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 27 (Bio-medicine)

25. This provision reflects most of the relevant recommendations of the Venice Commission.

Article 28 (Dignity and Inviolability of persons)

26. The provision certainly goes further than previously in meeting the Commission's recommendations (interim opinion, § 39). It now sets out the prohibition of torture and inhuman and degrading treatment, but not the prohibition of inhuman and degrading punishment, as well as the prohibition of slavery and servitude. Forced labour is prohibited by article 63 (interim opinion, §§ 93 and 94).

Article 29 (Deprivation of liberty)

27. This provision now duly refers to the need for any deprivation of liberty to be in accordance with a procedure prescribed by law; instead of stating the only permissible grounds for deprivation of liberty, as stated in article 5 ECHR paragraph 1, it refers to "reasons provided for by law". Thanks to the direct applicability of the ECHR, the law will have to conform to Article 5 § 1 ECHR, but it would have been preferable to state such grounds in the constitution.

28. Article 29 § 7 states that "Unlawful deprivation of liberty is punishable". It is unclear whether it is intended to make all breaches of article 26 a criminal offence. If it is so, would it have that effect without further legislation? The immediate consequence of unlawful deprivation of liberty must be release, and this should have been stated explicitly.

Article 30 (Detention)

29. This provision has not been modified since the draft constitution. The Venice Commission had recommended to make provision for the possibility of seeking more frequent review of the detaining decisions and to insert an express reference to the right of detainees to be released on bail (this is only implicit in the first paragraph).

Article 31 (Respect for person)

30. This provision refers specifically to the dignity of persons who are deprived of their liberty or whose liberty is restricted. It supplements Article 28.

Articles 32 (Fair and public trial)

31. As recommended by the Venice Commission, the guarantee of an "independent and impartial tribunal established by law" has been added.

Articles 33 (Principle of legality) and 34 (More lenient law)

32. These provisions rightly mirror Article 7 ECHR.

Article 36 (Ne bis in idem)

33. This provision now correctly contains the right "not to be tried", nor punished twice for the same offence.

Article 37 (Right to defence)

34. This provision has been modified following the remarks of the Venice Commission (interim opinion, §§ 55 and 56). Two fundamental aspects of the right of defence have been added (the right to be informed promptly, in a language which one understands and in detail, of the accusation and the right to have adequate time and facilities for the preparation of the defence. However, the text omits some important rights of defence specified in Article 6 § 3 ECHR, in particular rights in respect of the attendance and examination of witnesses and the right to have the free assistance of an interpreter.

Article 38 (Compensation of damage for illegal action)

35. This provision rightly secures the rights stated in paragraph 5 of Article 5 ECHR and in Article 3 of Protocol no. 7.

Article 39 (Movement and residence)

36. This provision has been duly modified following the Venice Commission's previous remarks (interim opinion, §§ 58-61).

Article 40 (Right to privacy)

37. The right to respect for private and family life has been duly added following the Venice Commission's previous remarks (Interim opinion, § 96). This provision is to be read in conjunction with Article 24.

Articles 41 (Inviolability of home) and 42 (Confidentiality of correspondence)

38. These provisions are now to be read in conjunction with Article 24.

Article 45 (Electoral right)

39. It would have been preferable to add a formula setting out in general terms the necessity of ensuring effective participation of minorities in public life (Interim opinion, § 65).

Article 46 (Freedom of thought, conscience and religion)

40. This provision has been duly modified according to the suggestions of the Venice Commission (Interim opinion, § 67). It is now to be read in conjunction with Article 24.

Article 47 (Freedom of expression) and Article 49 (Freedom of the press)

41. While these two Articles give effect to many aspects of Article 10 ECHR, it would have been preferable if they could have been drafted in a way more closely corresponded to the Convention. The Articles give emphasis to the protection of "dignity, reputation and honour" and the provision of a remedy for the publication of untrue, incomplete or incorrectly conveyed information that does not necessarily represent the Strasbourg Court's approach to Article 10 ECHR.

Article 51 (Access to information)

42. This new provision is to be welcomed (Interim opinion, § 97).

Article 53 (Freedom of association)

43. This provision has been duly amended following the suggestions of the Venice Commission (Interim opinion, § 75).

Article 54 (Prohibition of organizing)

44. The Venice Commission's previous remarks concerning this provision were regrettably not taken into consideration, with the exception of the lifting of the prohibition for the listed categories of civil servants to express their political beliefs publicly (Interim opinion, §§ 77-79).

Article 55 (Prohibition of operation and establishment)

45. The meaning of the term "secret organisations" has now been clarified.

Article 56 (Right to address international organisations)

46. The title of this provision has been duly clarified.

Article 57 (Right of recourse)

47. This provision has been duly complemented by the words "individually or collectively". However, it would have been preferable if the statement of the right of recourse had not been qualified by the potentially intimidating phrase "unless having committed a crime in doing so".

Article 58 (Property)

48. The right to property has duly been moved to the chapter on human rights. The possibility of regulating the use of property has been duly added. "Fair" compensation has duly replaced the previously foreseen compensation "at market value". There is no more clause on general state property of "assets of special historical importance", which is to be welcomed (Interim opinion, §§ 107-110).

Article 66 (Strike)

49. This provision has been duly modified according to the Venice Commission's suggestions (interim opinion, §§ 85-86).

Article 71 (Marriage)

50. The principle of equality between spouses, foreseen in Article 5 of Protocol 7 to the ECHR and by Article 25 of the 2002 Charter of Human Rights has been duly added (interim opinion, § 88).

C. Special – Minority rights (Articles 79-80)

51. It would have been preferable not to use the word "special" in the title.

Articles 79 (Protection of identity) and 80 (Prohibition of assimilation).

52. Articles 79 and 80 of the adopted constitution are rather comprehensive; together, they appear to cover the main minority rights as contained in the European Framework convention.

53. It would have been preferable to replace the term "proportional" in paragraph 10 ("proportional" representation of minorities was already foreseen by the 1992 Constitution of the Republic of Montenegro) by "fair" or "adequate".

54. There is no definition of a minority nation or community in the Constitution. The Commission in this connection notes, as it has previously done, that, unlike the Constitution, the Law on Minority Rights adopted in 2006 contains a citizenship-based definition of national minority in spite of the criticism expressed in this regard by the Venice Commission (CDL-AD(2004)026, §§ 31-36)[1]. The law should be amended and the word "citizen" taken out of the definition. Indeed, the scope of the minority rights should be understood in an inclusive manner and these rights should be restricted to citizens only to the extent necessary.

D. Protector of Human Rights and liberties (Article 81)

Article 81

55. Regrettably, of all suggestions made by the Venice Commission with a view to reinforcing the independence of this important institution (Interim opinion, § 103), only, and only in part, the one on the mandate has been followed.

56. Article 91 now provides that the ombudsman is elected by parliament with the majority vote of the total number of MPs: a qualified majority should have been provided instead.

IV. Part three: Organization of powers

A. General comments on the provisions on the state organs

57. The text of the Constitution provides for a clearly parliamentary system of government. This is a welcome choice which should prevent authoritarian tendencies and power struggles between President and Prime Minister. Compared to the draft Constitution, the text was improved in many places and in particular an effort was made to provide for more stable institutions. The text deserves therefore a generally positive assessment although further improvements could have been made.

[1] See also the Venice Commission's Report on non-citizens and minority rights, CDL-AD(2007)001.

B. Parliament of Montenegro (Articles 82-94)

Article 82 (Responsibility)

58. The list of responsibilities of parliament appearing in this article corresponds to a large extent to the list in the draft constitution. Some provisions were amended as recommended in the Interim Opinion, in particular it is welcome that parliament may no longer provide an authentic interpretation of laws. A number of items nevertheless remain problematic.

59. Point 1, giving to parliament the responsibility to *adopt* the Constitution, is to be interpreted in a declaratory way, that is, as not founding any new competences in addition to those established under Part VII. Nevertheless, its wording is inappropriate: it should refer to "change" and not "adopt" the constitution.

60. Points 13 and 14 give to parliament the power to elect/ appoint and dismiss to a number of independent positions, such as the presidency of the Supreme Court, the Constitutional Court or the position of Prosecutor General. This will be examined in more detail below with respect to the individual positions. The parallelism made between appointments and dismissals is, however, inappropriate in general since parliament should not have the power to dismiss holders of independent offices before the end of their term unless for specific grounds defined by law or preferably the Constitution. This is made clear by Article 154 for the members of the Constitutional Court. The holders of the other positions do, however, not have such a guarantee and their independence, although enshrined in the Constitution, is therefore compromised.

61. As regards point 15, while parliaments do indeed often decide on the waiving of the immunity of their members, there is no reason to involve parliament in decisions on the immunity of other office holders.

Article 83 (Composition of the Parliament)

62. This article seems not sufficient as the only article on parliamentary elections. It would be desirable to have rules in the Constitution on the proclamation of election results and on the Central Election Commission.

Article 86 (Immunity)

63. Insofar as this Article protects the free expression by deputies of opinions expressed as members of parliament, it is desirable and necessary. The broader immunity of Deputies for any act committed is traditional in many democracies and has been regarded by the Venice Commission as still pertinent for new democracies where there may be a risk of unwarranted prosecution of opposition members. In Montenegro this risk seems at present remote. The recent case law of the European Court of Human Rights tends to consider such wide immunity as an obstacle to the right of access to the courts.

64. It seems not justified to regulate immunity for the President, members of government and especially judges in the same manner as immunity of members of parliament. Immunity of the Head of State should be regulated separately, having regard to the impeachment procedure. Judges should not enjoy general immunity and there is no justification for involving parliament in waiving their immunity.

Article 87 (Cessation of the mandate of the Member of Parliament)

65. The third alternative is unclear at least in the English translation, although it may be that it is intended to refer to a situation in which a Member of Parliament is incapacitated on medical grounds from continuing to act.

Article 88 (Constitution of the Parliament)

66. It would be prudent to provide for an alternative manner of convocation in case the previous Speaker does not act. Convocation is made dependent on the publication of the election results. The Constitution does, however, fail to regulate the procedure for this publication. Surprisingly, it does not even mention the Central Election Commission.

Article 92 (Dissolution of the Parliament)

67. The new wording of paragraph 2 of this article makes it, compared to the draft Constitution, far more difficult to dissolve parliament. This is a welcome contribution to political stability since the possibility remains that parliament may reduce its mandate according to Article 84.4. To be compatible with the following paragraph, the paragraph should read "the Government may propose to the President to dissolve…"

Article 93 (Proposing laws and other acts)

68. The third paragraph on the referendum should probably be understood as leaving the decision on whether to call or not to call the referendum to parliament (cf. Art.81.11). Other issues, such as the matters which may not be submitted to referendum will have to be regulated by law. It would have been advisable to introduce a reference to regulation by law into this paragraph.

C. President of Montenegro (Articles 95-99)

Article 95 (Responsibility of the President)

69. As regards point 5, it seems questionable whether the President should have the power to propose the Ombudsman as well as, in particular, all members of he Constitutional Court (see also below).

70. Since the granting of amnesty is a power of parliament under Article 81.16, the President should have the power to grant pardons but not an amnesty.

Article 98 (Cessation of mandate)

71. While the text is not extremely clear, it would seem that parliament is under an obligation to start an impeachment procedure and submit the issue of violation of the Constitution to the Constitutional Court if 25 MPs request this. This threshold seems quite low. There is the risk of the Court deciding that the President has violated the Constitution and Parliament voting against dismissal. The authority of the President would be greatly weakened in such cases.

D. Government of Montenegro (Articles 100-112)

Article 100 (Responsibility)

72. This Article has been amended as suggested in the Interim Opinion.

Article 102 (Composition of the government)

73. Paragraph 2 is not explicit with respect to the distribution of tasks between the Prime Minister and individual ministers.

Article 107 (Issue of no confidence)

74. It is welcome that the threshold for introducing a motion of no confidence has been raised to one third of the members of parliament.

Article 111 (Civil service)

75. The establishment of a professional civil service is a key challenge for all post-socialist countries. The draft Constitution unfortunately does not contain any indication as to the status of civil servants.

E. Local self-government (Articles 113-117)

a. General comment

76. This Chapter is substantially improved with respect to the draft constitution.

b. Article-by-article analysis

Article 113 (Manner of decision-making)

77. The newly introduced paragraph 2 is a substantial improvement of the text. The express mention of "citizens", however, should not be interpreted as preventing the extension of the vote to non-citizen residents.

Article 116 (Property-related powers and financing)

78. It is welcome that, contrary to the draft Constitution, municipalities will have the right to own property.

F. The courts (articles 118-128)

a. General observations

79. The provisions on the judiciary in the newly-adopted constitution reflect in several respects the previous suggestions of the Venice Commission. The appointment and dismissal of judges has been duly removed from the hands of the parliament. The Judicial Council has a balanced composition.

80. The parliament has however retained some influence, notably through the appointment of the President of the Supreme Court and of the Public Prosecutors. These solutions are problematic in the light of the European standards.

81. The Commission is however cognizant that Montenegro has experienced very acute problems relating to the effectiveness and impartiality of the judiciary. The Montenegrin political class is firmly convinced that these difficulties can be overcome only through oversight of the judiciary by parliament. This certainly helps explain why the new Constitution has given such role to parliament through the power to elect the President of the Supreme Court and the Public Prosecutors.

82. The Commission, while welcoming the steps forward already taken by Montenegro towards the independence of the judiciary, hopes that in the near future the effectiveness and impartiality of the judiciary will improve so as to enable Montenegro to complete the reform fully guaranteeing its independence.

b. Article-by-article analysis

Article 120 (Publicity of trial)

83. In conformity with the recommendations of the Venice Commission (Interim opinion, §154), the exceptions to the principle of the publicity of trial are now enumerated exhaustively, similarly to Article 6 ECHR.

Article 121 (Standing duty)

84. This article should have set out that decisions on release from duty of a judge must in any case, including in the cases foreseen in the third paragraph, be taken by the Judicial Council. This principle will have to be stated in the law.

85. As suggested by the Venice Commission in its previous Interim opinion (§155), Article 121 now sets out that the transfer of a judge against his or her will is only possible by decision of the Judicial Council in case of restructuring of the courts.

Article 123 (Incompatibility of duties)

86. The Venice Commission had previously pointed out (Interim opinion, § 156) that it is common in other European countries to allow judges to perform certain activities such as teaching. Article 123 of the Constitution, instead, does not allow judges to perform any other professional activity.

Article 124 (Supreme Court)

87. According to article 124, the President of the Supreme Court is elected "by the Parliament at the joint proposal of the President of Montenegro, the Speaker of the Parliament and the Prime Minister".

88. The legislative power (Parliament and its Speaker), the President of Montenegro and the executive power in person of the Prime Minister are thus involved in this appointment, while the judiciary is completely excluded. This solution is problematic: it gives the impression that the whole judiciary is under the control of the majority of the Parliament, and that the President of Montenegro, the Speaker of the Parliament, and the Prime Minister take part in the political control of the judges: it therefore risks undermining the public confidence in the independence and autonomy of the whole judiciary, no matter if all the other judges are appointed by an independent Judicial Council.

89. In addition, it might happen that the President of Montenegro, the Speaker of the Parliament and the Prime Minister do not reach an agreement for a joint proposal; it follows that, in this case, it would be the "responsible working body of the Parliament", that is to say the parliamentary commission on the judiciary, to elect by itself the President of the Supreme Court, as provided for by the last paragraph of article 124.

90. The Commission considers that it would have been more appropriate to provide that the President of the Supreme Court should be appointed by the Judicial Council with the qualified majority of two thirds, and not only with the absolute majority of its members as for the appointment of other judges. The Commission understands however that this political election of the President of the Supreme Court reflects the will of the Montenegrin political class to ensure the accountability of the judiciary. The Commission hopes that the system currently envisaged by the Constitution will help Montenegro overcome its difficulties in achieving an effective and impartial judiciary; the constitutional provisions under consideration will then need

to be amended in order to guarantee the full independence of the judiciary. Pending this reform, the Commission encourages the Montenegrin authorities to ensure that the election of the President of the Supreme Court and the State Prosecutors be carried out with the highest possible majority.

91. On the other hand, as long as the Constitution provides that the election of the President of the Supreme Court is a purely political act, it is preferable that the Judicial Council should not be involved in the election procedure at all, in order to avoid potentially serious conflicts between the judiciary and the other State powers.

92. As concerns the other judges of the Supreme Court, it is worth underlying that they are appointed and dismissed by the Judicial Council, which is welcome (see comments below). However, the President of the Supreme Court is ex officio chairman of the Judicial Council, a provision which in itself is not the best solution (see para. 96 below).

Articles 125 (Election of judges), 126 (Judicial Council) and 127 (Composition of the Judicial Council)

93. Under the new constitution, judges and presidents of the courts are no more elected by the Parliament, but they are appointed by the Judicial Council, whose composition and system of appointment are now suitable for preserving, as stipulated in article 126, the autonomy and independence of the courts and the judges.

94. Following closely the remarks and the suggestions of the Venice Commission's interim opinion, article 127 now provides that the Judicial Council has ten members: the minister of justice and the President of the Supreme Court are ex officio members; four members are judges elected by the Conference of Judges; two are members of the Parliament elected by the Parliament itself (it would have been preferable that they be elected among lawyers and law professors), one by the majority and one by the opposition; two by the President of the Republic among "renowned lawyers". President of the Judicial Council is the President of the Supreme Court.

95. The composition of the Judicial Council ensures a good balance among the judiciary (five judges out of ten members) and the political power (two members elected by the Parliament, two by the President of the Republic, and the minister of justice, member ex officio but with no voting rights in respect of disciplinary proceedings – see article 128, last paragraph).

96. In the Venice Commission's view, however, it would have been preferable, instead of entrusting ex officio the President of the Supreme Court with the chairmanship of the Judicial Council, to provide that the President be elected by the Judicial Council among the lay members, in order to ensure the necessary links between the judiciary and the society, and to avoid the risk of an "autocratic management" of the judiciary.

97. The reason for the provision, in paragraph 3 of article 125, that the presidents of the courts cannot be appointed as members of the Judicial Council is unclear.

G. Army of Montenegro (Article 129)

98. Taken together, the constitutional provision on the army comply with the commitment to the Council of Europe to "regulate the status of the armed forces, security forces and intelligence services of Montenegro and the means of parliamentary supervision" and to "provide that the position of the commander-in-chief be held by a civilian".

99. It is welcome that the Constitution now explicitly provides that the army defends the country in accordance with the applicable rules of international law.

100. The principle of civilian control of the armed forces is provided with more substance by other provisions of the Constitution, in particular the subsequent articles on the Defence and Security Council and Article 81, which entrusts to parliament the adoption of the national security and defence strategy (point 6) and the decision on including army units in international forces (point 8).

H. Defence and Security Council (Articles 130-133)

Articles 130 (Responsibility) and 131 (Composition)

101. The Defence and Security Council, which includes the Speaker of Parliament, ensures civilian control of the armed forces.

Article 133 (Proclamation of the state of emergency)

102. According to the last paragraph of this Article, the state of emergency shall last until the circumstances that have caused it have ceased to exist. The issue which organ, and in which procedure, determines whether these circumstances continue to apply is not addressed.

I. State Prosecution (Articles 134-138)

a. General observations

103. Unlike in the previous draft, a separate chapter is now devoted to the State prosecution.

104. All prosecutors, and all members of the prosecutorial council, are appointed and dismissed by parliament with no qualified majority. The prosecutorial system provided by the Constitution is therefore totally under the control of the ruling party or parties: This is not in conformity with European standards.

b. Article-by-article analysis

Article 134 (Status and responsibility)

105. The protection of state interests has been appropriately removed from the tasks of the prosecutor (see PACE opinion, 19.2.1.3); the law will have to foresee the manner in which these interests will be protected otherwise, normally through public defence attorneys. It would be interesting to know what are the “other punishable acts” prosecuted by the State Prosecutor.

106. The provision of the duty of prosecutors to perform “other duties stipulated by the law” has equally been removed, which is to be welcome in the absence of a clear indication that these duties cannot comprise any duties on behalf of the Government or any public authority that would involve an actual or potential conflict with his duties as State Prosecutor.

Article 135 (Appointment and mandate)

107. Art. 135 provides that the Supreme State Prosecutor and state prosecutors are “appointed and dismissed from duty by the Parliament”. They are appointed for a period of five years; it is not said if the term of office is renewable. The prosecution therefore appears to be clearly subjected to political power; in particular, to the relative majority of the Parliament, since no qualified or absolute majority is required for the appointment.

108. By itself, the system of subjecting the prosecution to political control is not in contrast with European standards. In the present case, the appointment of the Supreme State Prosecutor by parliament can be deemed acceptable, but it would have been necessary to require a qualified majority. Moreover, the Constitution does not limit in any way the grounds upon which the Supreme State Prosecutor and the other prosecutors may be removed from office.

109. It is instead not acceptable to have entrusted the Parliament with the power to appoint all the other state prosecutors. Presumably, these are lawyers who must be selected in view of their technical expertise, and who perform their tasks under the direction of the Supreme State Prosecutor. In fact, they are civil servants, who do not need to be elected and who need to perform their duties without a fixed term.

Article 136 (Prosecutorial Council)

110. The Prosecutorial Council is now regulated by Article 136 of the Constitution, which states that its function is "to ensure the independence of state prosecutorial service and state prosecutors". Its function should also be to oversee that prosecutorial activity be performed according to the principle of legality.

111. Paragraph 3 provides that all members of the prosecutorial council will be elected and dismissed by the parliament. No qualified majority is required. This solution leaves the Council in the hands of the parliament majority; this, coupled with the appointment and dismissal of all prosecutors by parliament with no qualified majority, makes the prosecutorial system of Montenegro too vulnerable to political pressure and jeopardises the possibility for the prosecutorial functions to be carried out in an independent manner according to the principle of legality.

V. Part four: Economic system

A. General comment

112. It is welcome that this Chapter has been shortened compared to the draft Constitution.

B. Article-by-article analysis

Article 143 (Central Bank of Montenegro)

113. It is welcome that the National Bank is to be an independent institution. Such independence will however be meaningful only if it is reflected in safeguards for the position of the Governor and the members of the Council such as a fixed term of office. The unqualified provision in Art. 81.14 that parliament shall appoint and dismiss the Governor of the Central Bank is therefore problematic. There is a need for a law on the National Bank to govern these matters in detail and the Constitution should make reference to such a law.

Article 144 (National Audit Institution)

114. The same considerations apply to the National Audit Institution and the terms of office of the members of the Senate of this Institution. It would seem useful to provide for an Annual Report of this Institution to be submitted to the Government and the Parliament.

VI. Part five: Constitutionality and legality (articles 145-148)

115. In Article 145, it would have been useful to define the various normative acts below the level of a law in the formal sense (regulations, general acts, decrees) as well as their hierarchy (see Interim opinion, § 172).

VII. Part six: Constitutional Court of Montenegro

A. General comment

116. The rephrasing of the requirement for the introduction of the constitutional appeal in cases of violation of fundamental rights is very welcome. Otherwise this Chapter retains a number of problematic provisions reflecting the regional legal tradition. The composition of the Constitutional Court is not balanced.

B. Article-by-article analysis

Article 149 (Responsibility)

117. The list of powers of the Court in the first paragraph of Article 149 is positive and provides a basis for a Constitutional Court with wide competencies. In particular, the constitutional appeal is now granted following the exhaustion of other remedies and no longer if no other remedy exists (i.e. in practice very rarely).

118. The second paragraph addresses a very specific issue which could better have been left to the law.

Article 150 (Initiation of the procedure to assess constitutionality and legality)

119. While Article 149 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". This approach raises numerous problems of interpretation, e.g. the first paragraph of Article 150 could be interpreted- and on its own, would have to be interpreted- as the basis for an *actio popularis*. The persons or bodies enumerated should not have the right to launch all these procedures. It would be preferable to define with respect to each procedure who has the right to initiate it and under which conditions. The Commission made proposals in this respect in the Interim Opinion which were, however, not followed.

120. 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.

Article 152 (Cessation of the validity of a regulation)

121. This Article, in particular its paragraph 2, addresses the delicate issue of a possible *ex tunc* effect of Constitutional Court decisions. At least in the English translation the text is not entirely clear. Is an absolute ruling a final Court decision only or also an administrative act which may no longer be challenged? 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.

Article 153 (Composition and election)

122. This article, together with Article 82.13 and Article 95.5, does not ensure a balanced composition of the Court. All judges of the Court are elected by parliament on the proposal of the President. If the President is coming from one of the majority parties, it is therefore likely that all judges of the Court will be favourable to the majority. An election of all judges of the Court by parliament would at least require a qualified majority. Even so, however, it would not ensure the independence of the Constitutional Court from the political power, which is at variance with the role of guarantor which this Court must have in respect of the political

majority. As the Venice Commission had previously stressed, the guarantees of neutrality and independence of the Constitutional Court would have been duly ensured only through a system of appointment whereby this responsibility is shared between different and autonomous powers and institutions of the State.

123. It would also have been preferable to leave the election of the President to the Court itself.

Article 154 (Cessation of duty)

124. It seems excessive to remove a judge from office if he or she publicly expresses his or her political convictions.

VIII. Part seven: change to the constitution (articles 155-157)

125. These articles have been left unchanged in respect of the draft constitution of August 2007. The Venice Commission had previously expressed the opinion that it was necessary to clarify whether the adoption of the Act on the Change of the Constitution is the final step or it has to be followed by the public hearing provided for in Art. 156. In this and other respects, Articles 155 and 156 overlap in a potentially confusing way.

126. Article 155 addresses the case of change of the constitution in both a narrow and a broad sense, thus including the adoption of a new constitution. It is inappropriate to give parliament the power to adopt an entirely new Constitution. This power risks undermining the stability of the constitutional system.

127. Article 157, read with earlier provisions, does not make clear the circumstances in which a referendum is required for the amendment of the constitution.

IX. Part eight: transitional and final provision

128. The only transitional provision concerns the adoption of a constitutional law on the implementation of the constitution. Such law was indeed adopted at the same time as the Constitution.

129. Article 5 of the Constitutional law reads as follows: “Provisions on international agreements on human rights and freedoms, to which Montenegro acceded before 3 June 2006, shall be applied to legal relations that have arisen after the signature”. The wording of this provision is rather obscure. Given that this provision has been added at the request of the Council of Europe, it can be interpreted as meaning “Provisions of international agreements on human rights and freedoms to which Montenegro was a party (as a federated entity of the State Union) before 3 June 2006 shall be applied to legal relations that have arisen after the date of ratification of those treaties by the State Union”. Only in this case, does this article fulfil one of the principal commitments of Montenegro to the Parliamentary Assembly (PACE Opinion 19.2.1.6). The meaning of this provision should be clarified, and brought to the knowledge of the Montenegrin courts and public.

130. Article 6 of the Constitutional law provides, in conformity with the Venice Commission’s suggestion (Interim opinion, § 192), that existing laws and other regulations continue to be in force until (and unless) harmonised with the Constitution. This was a specific commitment undertaken by the Montenegrin authorities (PACE Opinion, 19.2.2.4).

131. However, Article 11 provides that laws and regulations of the State Union of Serbia and Montenegro will continue to be applied “provided that they are not contrary to the legal order *and interests* of Montenegro”. This formula was already contained in the Proclamation of Independence of Montenegro. The Eminent Lawyers had expressed their concern for this

formula which raised issues of legal certainty "to the extent that it is impossible to define clearly and unequivocally what these interests are, with the result that the formula could prevent Montenegrin courts and authorities from applying the law and ensuring respect for international standards" (Eminent Lawyers' Report on the conformity of the legal order of the Republic of Montenegro with Council of Europe standards, § 76). The Venice Commission confirms its criticism of the reference to the *interests* of Montenegro.

132. The constitutional law contains a long list of laws which must be harmonised with the newly-adopted constitution. The Venice Commission is ready to assist in this important task of ensuring that the laws of Montenegro give full effect to the principles declared in the Constitution.

X. Conclusions

133. The Constitution of Montenegro as adopted by the Montenegrin authorities on 19 October 2007 deserves a generally positive assessment. Not all suggestions previously made by the Venice Commission have been followed, but the text has been substantially improved.

134. As concerns the reform of the judiciary, notably the manner of appointment and dismissal of judges and the composition and functions of the Judicial Council, Montenegro should be commended for its efforts to accept the Council of Europe indications and standards. This was particularly difficult to accept in the light of the Montenegrin current situation, and shows a real commitment towards the Council of Europe and its members. However, earlier paragraphs of this opinion have set out the matters concerning the President of the Supreme Court, the Constitutional Court and State Prosecution which require further attention by the Council of Europe.

135. The implementation of the constitution has a crucial importance in ensuring a successful democratic consolidation of Montenegro. The Venice Commission stands ready to assist the Montenegrin authorities in this further stage. Moreover, every possible attempt will need to be made to enable the Montenegrin courts and legal profession to have a good understanding of the manner in which the Human Rights provisions must be read and applied if they are to comply with the standards set out by the ECHR.