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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

OPINION

ON THE DRAFT LAW ON THE CONSTITUTIONAL COURT OF MONTENEGRO

Adopted by the Venice Commission at its 100th Plenary Session (Rome, 10-11 October 2014)

on the basis of comments by

Mr Aivars ENDZIŅŠ (Member, Latvia)
Mr Guido NEPPI MODONA (Substitute Member, Italy)
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I. Introduction

1. By letter dated 2 September 2014, the Permanent Representative of Montenegro to the Council of Europe requested opinions on several draft laws implementing the constitutional amendments of 2013, including the draft law on the Constitutional Court of Montenegro (CDL-REF(2014)034, hereinafter "the draft law").

2. The Venice Commission has invited Mr Aivars Endziņš, Mr Neppi Modona and Ms Wedam Lukić to act as rapporteurs for this opinion.

3. Due to time constraints, it was not possible to organise a visit to Montenegro in order to obtain clarifications. Therefore, this opinion had to be prepared on the basis of the rapporteurs' written comments only.

4. Following an exchange of views with the Deputy Minister of Justice of Montenegro, Ms Branka Lakoćević, the present opinion was adopted by the Venice Commission at its 100th Plenary Session (Rome,10-11 October 2014).

II. General remarks

5. Following independence, Montenegro regulated the position of the Constitutional Court in the new Constitution adopted in 2007, which the Venice Commission examined at its 73rd Plenary Session.[1] On this basis, Montenegro adopted in 2008 the Law on the Constitutional Court, which the Venice Commission examined at its 76th Plenary Session.[2] Certain provisions of the Constitution relating to the Constitutional Court were amended by the constitutional amendments of 2013. The Venice Commission endorsed an opinion on these amendments at its 96th Plenary Session.[3] The present draft Law on the Constitutional Court is a result of the alignment of the draft Law with the amended Constitution. However, the Montenegrin authorities expressly requested an opinion on the whole draft law, not only the newly introduced provisions.

6. The 2013 amendments to the Constitution were an important step to meet European standards. Following the recommendations of the Venice Commission, Articles 91 and 153 of the Constitution now provide that the seven judges of the Constitutional Court are elected by Parliament with a two-thirds majority in the first round of voting (and with a three-fifths majority in the second round of voting). Two of the judges are elected on the proposal of the President of Montenegro and five on the proposal of the competent working body of the Parliament.

7. The selection of candidates is carried out by the two proponents on the basis of a public call. The judges are elected for a non-renewable period of twelve years. The President of the Constitutional Court is elected by the constitutional judges themselves from among the judges for a three years non-renewable period.

8. This opinion is based on an English translation of the law. Some of the issues raised in this opinion could relate to problems of translation.

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[1] CDL-AD(2007)047, Opinion on the Constitution of Montenegro, adopted by the Venice Commission at its 73rd Plenary Session (Venice, 14-15 December 2007).

[2] CDL-AD(2008)030, Opinion on the Draft Law on the Constitutional Court of Montenegro, adopted by the Venice Commission at its 76th Plenary Session (Venice, 17-18 October 2008).

[3] CDL-AD(2013)028, Opinion on the Draft Amendments to three Constitutional Provisions relating to the Constitutional Court, the Supreme State Prosecutor, and the Judicial Council of Montenegro, endorsed by the Venice Commission at its 96th Plenary Session (Venice, 11-12 October 2013).

III. Remarks article by article

A. Basic provisions

9. Article 2 of the draft law takes up an earlier recommendation of the Venice Commission that the independence of the Constitutional Court should be explicitly mentioned in the Law. This article should be complemented by a clause providing that the Court's decisions and the constitutionally conform interpretation of the challenged legal norm provided therein shall be obligatory for all public bodies.

10. Article 3 determines that the public nature of the work of the Constitutional Court is ensured, *inter alia*, through the publication "of statements from the sessions". This is probably an inexact translation of the words "*saopštenja sa sjednica*", which means reports on the sessions. In practice, this might be just information that a session on certain cases took place. Detailed reports would overburden the Court, in particular in view of the high case-load due to individual complaints.

11. Article 4, in connection with Articles 104 and 105 of the draft Law, ensures the financial independence of the Constitutional Court, which is welcome. Article 4 also states that the funds and "conditions for the operation" of the Constitutional Court shall be provided by the State. These conditions must be regulated exclusively in the Constitution, the Law on the Constitutional Court and its rules of procedure[4].

B. Judges of the Constitutional Court

12. Article 6 puts into effect the new constitutional rules dealing with the selection and election of constitutional judges. The President of Montenegro and the "responsible working body of the Parliament" (together referred to as "the proposers") issue a public call for the selection of candidates. According to Article 153 of the Constitution they must be "reputable lawyers" who have turned at least 40 years of age and have 15 years of service in the legal profession. The list of candidates is published by the proposers on their websites and shall be available to the public at least for ten days. The candidates who meet the requirements for the selection will be interviewed by the proposers, who on the basis of the (written) evidence and the interviews prepare a reasoned proposal for the Parliament. The proposal must take into account "the proportional representation of minorities and other minority ethnic groups and gender-balanced representation". An individual candidate may apply to public calls for candidates by both proposers. In such a case, proposers have to co-ordinate their proposals.

13. The same person may be elected President or judge of the Constitutional Court only once. In the first voting in the Parliament, a Constitutional Court judge is elected by a two-thirds majority vote, and in the second voting by a three-fifths majority vote of all deputies. The President of the Constitutional Court is elected by the judges of the Constitutional Court from among their own number.

14. This mechanism guarantees good transparency and enhances public trust in the Constitutional Court but it could be further improved. The objective of the 2013 constitutional amendments was to ensure a balanced composition of the Constitutional Court. Therefore it is recommended that the Law on the Constitutional Court explicitly regulate the composition of the "competent working body of the Parliament" such that the representatives of all political parties are represented therein.

[4] On the importance for the Court to enjoy a sufficient scope of autonomy in the adoption of the rules of procedure, see CDL-AD(2004)023 Opinion on the Rules of Procedure of the constitutional court of Azerbaijan, para. 9.

15. It would be better to specify who are the "reputable lawyers" mentioned in Article 153 of the Constitution, for instance law professors, high ordinary and administrative magistrates, lawyers with a minimum of 15 years of profession.

16. Article 6 should also determine a deadline on how much time before a vacancy the public call for candidates should be published. Draft Article 10.3 provides that the Court has to inform the proposers of upcoming retirements six months in advance but there is no deadline for the proposers to act upon such information.

17. Article 9.1 provides that professors of law can continue teaching once they are appointed as judges. This exception rests on the implicit assumption that the constitutional judges have the time to perform the two functions of judge and teacher in parallel. The limitation to professors of law seems too narrow. Judges should be allowed to teach any subject (e.g. political science) and not only to "continue" teaching.

18. Article 9 also provides that membership in institutes and associations of lawyers, as well as humanitarian, cultural and sports associations are not prohibited. The explicit reference to "institutes and associations of lawyers" might be not appropriate, since the regular frequenting of such associations could damage the public perception of the impartiality of the constitutional judge.

19. Article 10 provides that judges can tender their resignation and that Parliament adopts a decision on the termination of office within 30 days as of the date of request. After that period, the term of office of Constitutional Court Judges shall expire. Parliament should have no role in the resignation of a judge. Judges cannot be forced to remain in office against their will. The mandate should automatically terminate after the 30 days period.

20. Pursuant to Article 10.3 of the draft Law, the Constitutional Court shall notify the proposer that nominated a judge for election six months before the expiry of the term of office of the judge or before the fulfilment of the conditions for receiving an old-age pension. In accordance with Article 154 of the Constitution, the draft Law regulates the reasons and procedure for the termination of judicial office (Articles 10-12), however, it does not regulate what the consequences are if a nominated candidate is not elected even in a repeated vote. In order to avoid a situation in which judicial positions are vacant due to the fact that new judges have not been elected, the law should explicitly provide that upon the expiry of the term for which a Constitutional Court judge has been elected, s/he continues to perform his/her office until the new judge takes up office.[5]

21. Article 11 should determine the kind of offences and their level of gravity which render the judge "unfit for duty"; what are the situations of "permanent incapacity for the function", and the context and the modalities through which the judge "publicly expressed his political beliefs". The principle of legality demands that the conditions for such a very serious sanction as the removal be specified in a very detailed and precise way, without giving too wide discretionary power to the Parliament to which the proposal of removal is submitted by the Constitutional Court.

22. Article 12 provides that during criminal proceedings against a constitutional judge, the judge can be suspended from the office; the decision must be taken with the majority of all judges, without the participation of the judge subject to the criminal proceeding. The suspension is not provided for in the Constitution, but it is a quite common remedy when the criminal proceeding refers to a very serious offense.

[5] CDL-AD(2008)030, Opinion on the Draft Law on the Constitutional Court of Montenegro, para. 25. See for example Article 165.2 of the Constitution of Slovenia.

23. Article 13 provides that the participation of a constitutional judge can be challenged for a specific proceeding under certain conditions (when he/she is a party in the proceeding, a legal representative of a party; blood relations / marriage to a party, decision of the case in other court etc.). These cases of incompatibility are not provided for in the Constitution, but they are welcomed, since they are an important guarantee of impartiality of the constitutional judge. Normally, a judge who deems to be incompatible recuses him/herself. Self-recusal could be explicitly provided for in Article 14. That Article could also state that, unless the judges is recused or has recused him or herself, his or her he participation in a court session cannot be refused.

24. Article 15 allows a Constitutional Court judge who is not eligible for an old-age pension upon the expiry of his/her term of office to continue working for the Constitutional Court as an adviser. It is indeed advisable that financial security be provided for a Constitutional Court judge for a certain period of time following the expiry of his/her term of office, as this has a positive influence on judicial independence. There is a question, however, if the proposed solution is the most appropriate one without further regulation. This rule could result in a former Constitutional Court judge having a decisive influence on the decisions of the Constitutional Court also after the expiry of his/her term of office. In addition, it is questionable whether it is acceptable from the viewpoint of his/her former office to be in a subordinate position in relation to newly elected judges and even the Secretary General. In order to avoid such problems, it would be advisable to specifically regulate the position of former Constitutional Court judges in the rules of procedure of the Constitutional Court.

C. President of the Constitutional Court

25. Articles 16 to 20 implement the amended Article 153.5 of Constitution, which regulates the election of the President by the constitutional judges from among the judges themselves for a three years non-renewable period. While the election procedure as set out in the draft law seems somewhat complicated, it guarantees the secrecy of the vote.

26. Article 17 attributes the usual powers to the President of the Constitutional Court. It is welcome that among his/her competences paragraph 2 provides that the President "shall take care of preserving the independent position of the Constitutional Court in relation to all the state authorities".

D. The Secretary General and the Office of the Constitutional Court

27. Article 21 of the draft law determines the requirements that a candidate must satisfy in order to be appointed Secretary General. Article 24 determines the requirements for Constitutional Court advisers. In both instances candidates have to hold a degree in law and have seven years of work experience. In light of the importance of the role of the Secretary General for the organisation of the work of the Constitutional Court, it would be appropriate that stricter requirements applied for the appointment of the Secretary General. To ensure the necessary flexibility for the Court, the powers of the Secretary General should be determined in the rules of procedure rather than in the law.[6]

28. According to Article 21.2, the Secretary General shall "take care of and be responsible" for the enforcement of the acts of the Constitutional Court. Being "responsible" is asking too much from a staff member who cannot be held responsible, for instance for inaction by Parliament. The Secretary General can only be in charge of following up on the execution of the decision.

[6] CDL-AD(2004)023 Opinion on the Rules of Procedure of the Constitutional Court of Azerbaijan, paragraph 9.

29. Article 23 should indicate that, in their advisory function, the Constitutional Court advisers are bound by the instructions of the Constitutional Court Judges only, not that of the Secretary General.

30. Article 26 provides that the Court may "hire experts in certain fields to carry out specialized activities". The law should provide that rules for hiring such experts be set out in the rules of procedure.

E. Proceedings before the Constitutional Court and the Legal Effects of its Decisions

31. In its 2008 Opinion on the Draft Law on the Constitutional Court of Montenegro, the Venice Commission underlined that it would be advisable to repeat in the Law certain provisions of the Constitution[7] which concern the wide list of competencies of the Constitutional Court enumerated in Article 149 of the Constitution. This advice was unfortunately not followed also in the draft of the new Law. Instead, Article 27 enumerates possible participants in individual proceedings in detail. These provisions should be moved to the various types of proceedings rather than be concentrated in the common provisions. E.g. Article 48.1 provides that proceedings for the review of constitutionality and legality can be initiated by "the submission of a motion by the applicants authorised by the Constitution". While Article 48 simply refers to the Constitution, Article 27 sets out the parties. In order to provide a clear picture, Article 48 should expressly state who can initiate the proceedings and who the other parties are. Once this is done for all types of proceedings, Article 27 should be deleted.

32. It seems that the term "participants" used in the English translation of Article 27 correctly refers to "parties" in the original text ("učesnik").

33. Article 150.1 of the Constitution provides that "any person" may file an initiative to start the procedure for the assessment of constitutionality and legality. Article 27, if retained, and Article 60 should specify that the term „ person" includes also legal persons.

34. Article 28 insists on the initiation of proceedings in written form. The wording of this provision should not exclude the submission of cases via a future electronic court management system. Detailed regulations could be left to the rules of procedure.

35. Article 29 is missing in the English translation. This is probably just an error in numbering, which should be corrected.

36. Article 30 should provide a scope for the "prescribed deadline" for remedying deficient applications or should refer to the rules of procedure for such deadlines. This is also true for Article 33.1 ("set period of time") and Article 80 ("time period determined by the Constitutional Court").

37. Article 32.3 provides that, in questions dealing with the constitutionality of a law, "the Constitutional Court may seek the opinion of the Parliament if it considers it is necessary to make a decision on initiating the proceeding". This provision is vague and could interfere with the autonomy and independence of the Constitutional Court. Such a possibility might be used to give Parliament a chance to change the law before formal proceedings are initiated. A priori this might seem reasonable. However, Parliament would change the law on the basis of a mere presumption that the law might be found unconstitutional. Parliament would not benefit from the decision of the Constitutional Court, which would indicate, where precisely the

[7] CDL-AD(2008)030, Opinion on the Draft Law on the Constitutional Court of Montenegro, adopted by the Venice Commission at its 76th Plenary Session (Venice, 17-18 October 2008), para. 6.

unconstitutionality resides. In any case, such a procedure would delay the Constitutional Court proceedings. As a consequence, this procedure should be removed from the draft.

38. Article 35.5 allows the rejection of a motion, an initiative, a constitutional complaint, a complaint, or other applications when it finds this motion etc. clearly (or manifestly) unfounded. This is not a new provision but the further development of coherent case-law on this criterion is essential for dealing with the high case-load of the Constitutional Court of Montenegro. While it is be necessary to quickly declare inadmissible manifestly unfounded cases in order to deal with a high number of cases, a sufficiently thorough examination of constitutional complaints is required for recognition of the constitutional complaint as an effective remedy by the European Court of Human Rights.

39. In line with the new text of Article 151 of the Constitution, Articles 37 and 39 deal with the establishment of panels of three judges for deciding constitutional complaints, that are provided for in Article 60. The panel has a chairman and two judges, determined by the President of the Constitutional Court; the panel may only decide by an unanimous vote; where no unanimity is reached or the panel holds that the case is of broader importance, the constitutional complaint shall be discussed at an expert meeting with the constitutional judges before being submitted to the plenary session.

40. The institution of panels is welcomed.[8] In this regard, the Venice Commission has previously pointed out that smaller panels of judges deciding matters initiated by one of the types of individual access are a common and useful method for alleviating the Constitutional Court's case-load.[9]

41. Article 38 gives a judge the right to state the reasons for which s/he is fully or partially against the decision taken and to request that this opinion be published in the "Official Gazette of Montenegro", together with the decision to which it relates. This possibility of giving dissenting opinions contributes to the transparency of the work of the Constitutional Court. All dissenting opinions should be published (at least on the web-site of the Court).

42. As for the publicity of the hearings, Article 40 provides that the Constitutional Court shall hold a public hearing when it finds it is necessary, "particularly when it is a matter of complex constitutional – legal issue". It would be better specify a catalogue of criteria, in order to give to the Constitutional Court guidance when to hold public hearings. Conversely, in order to deal with a high number of individual complaints, a rule could be introduced that, upon proposal by the rapporteur judge, the Court decides in writing when the case-file contains sufficient information.

43. Article 47 provides that the Court may order that the costs of the proceedings may have to be reimbursed by the applicant whose complaint failed. This formulation might have a seriously chilling effect on applications. Only applicants making abusive applications should be obliged to cover the costs of the proceedings. Furthermore, legal aid should be available for constitutional complaints like in ordinary court proceedings.

44. Pursuant to Article 48, proceedings for the review of constitutionality and legality are initiated by the submission of a petition by the applicants authorised by the Constitution. Article 150 of the Constitution allows the Constitutional Court to initiate proceedings for the assessment of constitutionality on its own initiate. As such, this constitutional provision is quite

[8] see CDL-AD(2011)010, 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 adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011), para. 25.

[9] CDL-AD(2010)039rev, Study on individual access to constitutional justice - Adopted by the Venice Commission at its 85th Plenary Session (Venice, 17-18 December 2010), para. 225.

dangerous because it could bring the Court into the political arena[10] where it could be attacked on why it initiated one proceeding but not another. The draft law seems to try to contain the danger of this *proprio motu* initiation of proceedings by providing that the Court can initiate proceedings "particularly if" the issue of constitutionality of a provision arises in other proceedings. This would be similar to the Austrian system where the Constitutional Court stays its proceedings in an individual case and starts an abstract procedure to control a legal provision if it has to apply that provision in the individual case and when the Court has doubts about the constitutionality of that provision. Such internal initiation of proceedings does not entail the same danger for the Court of making a 'political' selection of cases to be initiated without a concrete case at hand. However, the draft law presents this initiation of a case only as an example – *arg.* "in particular". In order to reduce this danger, the law should exclude all other *proprio motu* initiation of cases by the Court. A constitutional amendment would finally solve this problem.

45. In cases in which a legal gap would be created due to the annulment of a legal provision, Article 57 of the draft Law allows the Constitutional Court to determine the date of publication of the decision in the official gazette and inform the relevant state authorities and the public thereof through its website, and deliver the decision to the participants in the proceedings.

46. This is an unusual if not disputable provision whose purpose is to soften the strict provision of Article 152 of the Constitution, pursuant to which a law ceases to be valid on the date of the publication of the decision of the Constitutional Court. Nevertheless, it still does not provide for a solution in cases in which the Constitutional Court establishes that a law is not in compliance with the Constitution due to an unlawful gap in the law. In such cases, the Constitutional Court Act of the Republic of Slovenia, for instance, allows the Constitutional Court to adopt a declaratory decision, regardless of the fact that the Slovene Constitution only provides for the abrogation of a law. A coherent solution to this issue would require a constitutional amendment.

47. Article 59 envisages, that under certain conditions, anyone whose rights have been violated by a final or enforceable individual act adopted on the basis of a law or other regulation which, on its own initiative, the Constitutional Court by a decision found not to have been or not to be in compliance with the Constitution, is entitled to require the competent authority to amend the individual act.

48. Essentially the same provision had already been criticised by the Venice Commission in the 2008 Opinion on the draft law because it introduces retroactive effects which need to be moderated.[11] This provision can be supported only inasmuch as it refers to acts issued in administrative proceedings or to criminal court judgements where there are no third parties. However, the application of this provision is problematic in cases of judgements issued in civil proceedings. Such retroactive effect could entail an inadmissible interference with the acquired rights of third persons who did not have the opportunity to participate in the proceedings for the review of the constitutionality and legality of the law or other regulation. Such third parties should become parties also in the constitutional proceedings and the Constitutional Court should have the power to determine on the effects of its decisions in such cases.

49. Article 60 of the draft Law provides that, in addition to cases when a violation of human rights was created by an individual (formal) act, the possibility to file a constitutional complaint is extended to instances in which a violation came about by (factual) action or inaction. This is positive.

[10] See already CDL-AD(2007)047, Opinion on the Constitution of Montenegro, adopted by the Venice Commission at its 73rd Plenary Session (Venice, 14-15 December 2007), para. 120.
[11] CDL-AD(2008)030, Opinion on the Draft Law on the Constitutional Court of Montenegro, para. 58.

50. Considering that Article 149.1.3 of the Constitution provides that a constitutional complaint may be filed only after the exhaustion of all effective legal remedies, the Draft Law does not envisage the possibility to file a constitutional complaint before all extraordinary legal remedies have been exhausted if especially justifiable reasons exist.[12] The term "effective" could provide a remedy to this problem. In accordance with the Constitution, Article 60.3 of the draft law provides that a constitutional complaint may be filed after exhaustion of all "effective" legal remedies. This would imply that ineffective remedies would not need to be exhausted. However Article 60.3 continues stating that this "implies" that the applicant should exhaust all legal remedies. The clause "all legal remedies" seems to exclude that the Court could find a legal remedy to be ineffective and to accept the complaint before all remedies are exhausted, even when they are manifestly ineffective. Therefore, the term "effective" should not be defined in the law but to be interpreted by the Constitutional Court.

51. It seems that the Constitutional Court has difficulty in dealing with individual complaints against excessive lengths of procedure.[13] Article 61 of the draft law provides that a constitutional complaint can be filed also against "inaction that violated human rights or freedoms guaranteed by the Constitution". If the inaction of a state body is continues for a long, the complaint can be brought to the Constitutional Court if the applicant proves "that there is no effective legal remedy against it in the legal system of Montenegro". A priori the constitutional complaint could therefore be a remedy against cases of excessive length of procedure. However, in the case *Boucke v. Montenegro*[14] the European Court of Human Rights found "that the Constitutional Court could, at best, quash the decision rendered upon the remedies provided by the Trial within a Reasonable Time Act, and order that the applicant's request for review or an action for fair redress be re-examined by the same body which had rendered the impugned decision in the first place […]. The Constitutional Court itself could neither expedite the proceedings nor award any redress, thereby offering indirect protection rather than a direct and speedy redress." Indeed, Article 67.1 provides that when it finds a violation the Court "shall accept the constitutional complaint and repeal that act, in whole or partially, and shall send the case for retrial to the body that has adopted the repealed act". In order to provide an effective remedy also in cases of excessive length of proceedings, the Court should be empowered not only to decide on the need for damages (first alternative) but – more importantly – to take an acceleratory remedy.[15]

52. Apart from the issue of compensation, the second alternative for Article 67 would exclude the repealing of final court decisions. According to that alternative, when the Constitutional Court finds that a final court decision violated constitutional rights "it shall accept a constitutional complaint, state a violation of rights on the basis of which the court proceedings shall be repeated…" The impossibility for the Constitutional Court to repeal final court decisions is likely to turn the constitutional complaint into an ineffective remedy under the European Convention on Human Rights. Therefore, clearly, the second alternative provided for in Article 67 should not be adopted.

53. Article 68 requires that the authority to which the case was remanded for a retrial to hear the case no later than 30 days after receiving the decision of the Constitutional Court and to decide the case within reasonable time, whereby it is obliged to respect the legal reasoning

[12] For such a regulation see for instance Constitutional Court Act of Slovenia in Article 51.2

[13] The European Court of Human Rights held: "Although the applicant's constitutional appeal in this regard is still pending, the Court has already held that a constitutional appeal cannot be considered an effective remedy with regard to the length of proceedings and that hence it is not necessary to exhaust that remedy (see Boucke v. Montenegro, no. 26945/06 §§ 76-79, 21 February 2012).", Bulatović v. Montenegro, application no. 67320/10 of 22 July 2014.

[14] ECtHR, 21 February 2012, application no 26945/06, para. 77.

[15] CDL-AD(2006)036, Study on the Effectiveness of National Remedies in respect of Excessive Length of Proceedings adopted by the Venice Commission at its 69th Plenary Session (Venice, 15-16 December 2006), paras. 139 and 179.

of the Constitutional Court stated in the decision. This provision must be welcomed from the viewpoint of strengthening the authority of the Constitutional Court.

54. Negative conflicts of competence ("jurisdiction") may arise also when a state body does not adopt a "decision on the refusal of jurisdiction" but also when they simply do not act at all. Such cases are not covered by Article 78.2. A negative conflict of competence should arise when the state body does not act within a specified deadline.

55. The Venice Commission welcomes that Article 86 defines the conditions under which a political party or non-governmental organisation can be prohibited. The prohibition of political parties (referred to Article 149. 6 of the Constitution without further indications) is a critical issue for the democratic and political order of a State. The threshold for the prohibition of political parties should be quite high.[16] Therefore, it is welcomed that the draft law limits the ban to cases when the activity of the political party or non-governmental organisation "is directed at or has a goal of violent overthrowing of the constitutional order, violation of territorial integrity of Montenegro, violation of guaranteed human rights and freedoms or provoking of racial, religious and other hatred and intolerance".

IV. Conclusions

56. Overall, the draft law "On the Constitutional Court of Montenegro" complies with the rules and principles provided for in the Constitution and European standards and provides a firm basis for an effective work of the Constitutional Court. Nonetheless, some provisions should be further improved to comply with common standards, notably:

1. upon the expiry of his/her mandate, a judge should continue in office until the successor judge takes up office;
2. the procedure allowing the Constitutional Court to seek the opinion of Parliament before the initiation of proceedings should be removed;
3. except for cases of incidental norm control in concrete cases, all other possibilities of initiation of a case by the Court itself should be excluded;
4. the re-opening of cases following the annulment of acts by the Constitutional Court should safeguard the rights of third parties;
5. the enumeration of participants in draft Article 27 should be replaced by a clear indication of who can initiate proceedings and who the other parties are for each type of proceedings.

57. Special attention should be given to shaping the constitutional complaint in a way which ensures that it is recognised as an effective remedy by the European Court of Human Rights, including for cases of excessive length of proceedings. The effectiveness of the individual complaint will also depend on the interpretation of the term "clearly (or manifestly) unfounded" as a criterion for the admissibility of constitutional complaints.

58. The Venice Commission remains at the disposal of the Montenegrin authorities for any further assistance they may need.

[16] See CDL-AD(2010)024, Guidelines on political party regulation, by OSCE/ODIHR and Venice Commission, adopted by the Venice Commission at its 84th Plenary Session, (Venice, 15-16 October 2010), chapter VIII.6.