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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**OF THE COUNCIL OF EUROPE**  
**(VENICE COMMISSION)**

**MONTENEGRO**

**OPINION**

**ON SOME QUESTIONS RELATING TO THE PROCEDURE OF EARLY  
TERMINATION OF THE MANDATE OF CONSTITUTIONAL COURT  
JUDGES DUE TO AGE LIMITS**

**Adopted by the Venice Commission at its 143<sup>rd</sup> Plenary Session  
(online, 13-14 June 2025)**

**On the basis of comments by**

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**Mr Philip DIMITROV (Expert, Former Member, Bulgaria)**  
**Mr Michael FREND (Member, Malta)**  
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## I. Introduction

1. By letter of 25 March 2025, Mr Miloško Spajić, Prime Minister of Montenegro, requested an opinion of the Venice Commission of the Council of Europe on some questions relating to the procedure of early termination of the mandate of Constitutional Court judges due to age limits.
2. Ms Marta Cartabia (Member, Italy), Mr Philip Dimitrov (Expert, Former Member, Bulgaria), Mr Michael Frendo (Member, Malta) and Mr Eirik Holmøyvik (Member, Norway) acted as rapporteurs for this opinion.
3. On 24 and 25 April 2025, a delegation of the Commission composed of Mr Philip Dimitrov (Expert, Former Member, Bulgaria) and Mr Eirik Holmøyvik (Member, Norway), accompanied by Ms Simona Granata-Menghini, Secretary of the Commission, and Mr Khagani Guliyev, legal officer, visited Podgorica and had meetings with the President of Montenegro, with members of parliament from the majority and from the opposition, with the Minister of Justice, with the Constitutional Court, the Supreme Court, the Judicial Council, and civil society organisations, as well as representatives of the international community. The Commission is grateful to the authorities of Montenegro and the Council of Europe Programme Office in Podgorica for the excellent organisation of the meetings.
4. This opinion was prepared in reliance on the English translation of the relevant provisions of the Montenegrin legislation. The translation may not accurately reflect the original version on all points.
5. This opinion was drafted on the basis of comments by the rapporteurs and the results of the meetings on 24 and 25 April 2025. The draft opinion was examined at the joint meeting of the Sub-Commissions on Constitutional Justice and Fundamental Rights on 12 June 2025. Following an exchange of views with Mr. Bojan Božović, the Minister of Justice of Montenegro, it was adopted by the Venice Commission at its 143<sup>rd</sup> Plenary Session (online, 13-14 June 2025).

## II. Request and scope of the opinion

6. The request originated in a political agreement signed on 15 March 2025 between the government and opposition representatives in order to put an end to a controversy as regards the interpretation of the relevant domestic law relating to early termination of the mandate of a judge of the Constitutional Court on the grounds that she reached the retirement age.
7. The request is based on arguments and questions/requests which were submitted separately by the government and opposition representatives.
8. The government representatives have asked the Venice Commission to reply to the following questions:

*In cases where the conditions for the termination of a function due to reaching retirement age are indisputably met, in accordance with Article 154, paragraph 1 of the Constitution, does the function of a Constitutional Court judge cease even if the Constitutional Court does not determine the obvious fulfilment of the conditions for termination of office, at a session of the Constitutional Court, in accordance with Article 154, Paragraph 3? I.e., is the determination of the reasons for termination of office at a session of the Constitutional Court merely declaratory in nature, and in that regard, did the Constitutional Committee act beyond its competence when, based on the letter from the President of the Constitutional Court, in response to an inquiry regarding the age and tenure of all judges, it adopted the conclusion that the reasons for termination of judge Đuranović's office had been met due to fulfilling the old-age retirement conditions?*

9. The opposition representatives have requested the Venice Commission's opinion on the following issues:

*In the context of all the above, the signatories of the Agreement, who belong to the opposition, expect the Venice Commission to determine whether Article 154, paragraph 3 of the Constitution of Montenegro has been violated, i.e., whether the actions of the Constitutional Committee of the Parliament of Montenegro and the Conclusion regarding the retirement (fulfilling the conditions for old-age retirement) of Constitutional Court judge Dragana Đuranović are formally unconstitutional, and whether the act of acknowledgement of the President of the Parliament of Montenegro is also unconstitutional.*

10. The Venice Commission observes at the outset that it has been asked to interpret the domestic constitution and legislation in the light of the actions taken by the Parliament and the Constitutional Court relating to the termination of the mandate of constitutional court judges due to age limits.

11. As the Venice Commission has previously made clear, it is not within its mandate to provide interpretations of national constitutional norms: this is for the Constitutional Court itself to do<sup>1</sup>. Accordingly, the present opinion does not intend to take a stance on the constitutionality of the actions taken by the Parliament and the Constitutional Court or the interpretation of the disputed provisions of the domestic law; instead, it will assess the matters in question in the light of European and international standards and of comparative analysis of legislation and practice. In particular, the Venice Commission will formulate some recommendations aiming at avoiding similar situations in the future.<sup>2</sup>

12. The Venice Commission will examine the question of whether the legal framework concerning the early termination of mandate of constitutional court judges due to age limits, as it has been presented by the Montenegrin authorities and stakeholders, may be considered to comply with the applicable international standards and good practice.

### **III. Background**

#### **A. Factual background**

13. The request for the present opinion stems from events taking place since June 2024 and having resulted in the termination of the mandate of a judge of the Constitutional Court due to age limit. Although these events are not the object of the Commission's analysis, a summary thereof is useful in order to provide a better understanding of the backdrop against which the request has to be understood.

14. The controversy arises as to the question which law is applicable to determine the retirement age of the constitutional court judges. The judge in question invoked the operation of the Labour Law, in order to terminate her mandate as judge of the Constitutional Court at the age of 66 instead of 65, as would have been the case by operation of the Law on Pension and Disability Insurance.

15. On 27 June 2024 the Constitutional Court held a vote and decided, by four votes to two, that the conditions for informing the proposer about the fulfillment of the conditions for retirement of the judge in question had not been met, and therefore did not send any notification to this end.

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<sup>1</sup> Venice Commission, [CDL-AD\(2024\)002](#), Bosnia and Herzegovina – Opinion on certain questions relating to the functioning of the Constitutional Court of Bosnia and Herzegovina, para 16.

<sup>2</sup> Venice Commission, [CDL-AD\(2020\)010](#), Albania – Opinion on the appointment of judges to the Constitutional Court, para 95.

The judge in question and two other judges who found themselves in a similar situation took part in the vote. No formal decision was issued; only the minutes of the meeting indicate that no majority could be reached and therefore no decision was taken to send a notification to the Parliament in accordance with Article 154 of the Constitution and Article 7 of the Law on the Constitutional Court.

16. Having received no notification, the Constitutional Committee of the Parliament took the initiative to ask the President of the Constitutional Court to provide information on the age and years of service of all the judges of the Constitutional Court. The President of the Constitutional Court provided this information by a letter dated 11 December 2024.

17. On 17 December 2024 the Constitutional Committee of the Parliament, considering this letter as a “notification” within the meaning of Article 154 of the Constitution, held, on the basis of Article 17 of the Law on Pension and Disability Insurance, that the judge, having turned 65, had met the conditions for age-based retirement and decided to terminate her mandate and to start the procedure to elect a new judge. On a previous occasion, parliament had followed this procedure to bypass the lack of notification.<sup>3</sup>

18. The parliamentary committee also conveyed the letter of the President of the Constitutional Court containing the birth dates and years of service of all the judges to the President of Montenegro, as proposer in respect of two other judges of the Constitutional Court. The President, however, did not act upon it.

## B. Legal background

### 1. The relevant provisions of the domestic law concerning the Constitutional Court and its judges

19. The Constitution of Montenegro contains the provisions pertaining to the ordinary courts and the Constitutional Court in two separate chapters: part five entitled “Judiciary” (Articles 118-128) and part six entitled “Constitutional Court of Montenegro” (Articles 149-154).

20. Article 121 of the Constitution regulates the duty of the judges of the ordinary courts and reads as follows:

#### *Article 121 (standing duty)*

*The judicial duty shall be permanent.*

*The duty of a judge shall cease at his/her own request, when he/she fulfills the conditions for exercising the right to an old-age pension (**kada ispuni uslove za ostvarivanje prava na starosnu penziju**) and if the judge has been sentenced to an unconditional imprisonment sentence<sup>4</sup>.*

*The judge shall be released from duty if he/she has been convicted of an act that makes him/her unworthy of the judicial duty, if he/she performs the judicial duty in an unprofessional or negligent manner or loses permanently the ability to perform the judicial duty.*

*The judge shall not be transferred or sent to another court against his/her will, except by the decision of the Judicial Council in case of reorganisation of courts.*

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<sup>3</sup> Case of judge Dragoljub Drašković (2021).

<sup>4</sup> In original Montenegrin version Article 121 § 2 of the Constitution reads as follows: “Sudiji prestaje funkcija ako to sâm zatraži, **kada ispuni uslove za ostvarivanje prava na starosnu penziju** i ako je osuđen na bezuslovnu kaznu zatvora.”

21. Article 105 of the Law on the Judicial Council and Judges regulates the procedure relating to termination of office of the judges of the ordinary courts. It provides as follows:

*Article 105 (termination of office)*

*When one of the reasons for the termination of judicial office arises, the Judicial Council shall be immediately notified thereof by: the court president for a judge, the president of the immediately higher court for the court president, a General Session of the Supreme Court for the President of the Supreme Court.*

*The Judicial Council shall make a decision on the termination of office of the President of the Supreme Court, the court president or a judge no later than 30 days from the date of receipt of the notification.*

*The office of the persons referred to in paragraph 2 of this Article shall terminate on the date of adoption of the decision of the Judicial Council, except in the case of termination of office with the expiry of mandate, when the office shall terminate upon the expiry of the mandate.*

*The Judicial Council shall submit the decision on termination of office to the court president or judge whose office is terminated and the court in which the person was exercising office, publishing it in the Official Gazette of Montenegro.*

22. Article 151 of the Constitution relating to the decision of the Constitutional Court provides as follows:

*Article 151 (decision of the Constitutional Court)*

*The Constitutional Court shall decide by majority vote of all judges.*

*The decision of the Constitutional Court shall be published.*

*The decision of the Constitutional Court shall be generally binding and enforceable.*

*When necessary, the Government shall secure the enforcement of the decision of the Constitutional Court.*

23. Article 153 of the Constitution concerning the composition of the Constitutional Court reads as follows:

*Article 153 (composition and election)*

*The Constitutional Court shall have seven judges.*

*The Constitutional Court judge shall be elected for the period of nine years.*

*The President of the Constitutional Court shall be elected from amongst the judges for the period of three years.*

*The person enjoying reputation of a renowned legal expert, with minimum 15 years of experience in this profession may be elected to the position of the Constitutional Court judge.*

*The President and the judge of the Constitutional Court shall not discharge duties of a Member of the Parliament or other public duties or professionally perform some other activity.*

24. The Constitution of Montenegro regulates the cessation of duty of the judges of the Constitutional Court in its Article 154 which reads as follows:

*Article 154 (cessation of duty)*

*The duty of the President and the judge of the Constitutional Court shall cease prior to the expiry of the period for which he/she was elected, at his/her own request, when he/she*

*fulfills the conditions for old-age pension (**kad ispuni uslove za starosnu penziju**) or if he/she was sentenced to an unconditional imprisonment sentence<sup>5</sup>.*

*The President and the judge of the Constitutional Court shall be released from duty if he/she has been found guilty of an offense that makes him/her unworthy of the duty, if he/she permanently loses the ability to perform the duty or if he/she expresses publicly his/her political convictions.*

*The Constitutional Court shall establish the emergence of reasons for cessation of duty or release from duty, in its session and shall inform the Parliament of that case.*

*The Constitutional Court may decide that the President or the judge of the Constitutional Court that penal action has been initiated against shall not perform the duty for the period of duration of that action.*

25. The Law on the Constitutional Court of Montenegro contains relevant provisions relating to the nomination of judges of the Constitutional Court in its Article 7 which provides as follows:

#### *Article 7*

*The President of Montenegro and responsible working body of the Parliament of Montenegro (hereinafter: the proposers) shall conduct the procedure of nominating the judges of the Constitutional Court after receiving a notice on the termination of office or dismissal of a judge of the Constitutional Court.*

*The Constitutional Court shall notify the proposer who nominated the judge on the fulfilment of conditions for old-age pension or on the expiration of the term of office of the judge of the Constitutional Court six months before the fulfilment of the conditions for old-age pension, or before the expiry of the term of office.*

*The proposer who nominated the judge shall inform the Parliament of Montenegro (hereinafter: the Parliament) about the termination of his/her office when the termination followed a request of a judge of the Constitutional Court or when he/she gets sentenced to an unconditional prison sentence, and shall also inform the Parliament about the dismissal of the judge of the Constitutional Court due to a conviction for an offence that renders him/her unworthy for exercising the office, due to permanent incapacity to exercise the office or public expression of political beliefs.*

26. Article 43 of the Law on the Constitutional Court lists the circumstances in which a judge of the Constitutional Court is prevented from sitting in the examination of a case. This Article stipulates as follows:

#### *Article 43*

*A judge or the President of the Constitutional Court shall be exempted from the deliberations and decision-making in a certain case if:*

- 1) He/she is a participant in the proceedings, a legal representative or an attorney of a participant in the proceedings;*
  - 2) A participant in the proceedings, a legal representative or an attorney of a participant in the proceedings is a blood relative of his/her to any degree in the direct line, and to the third degree in the lateral line, or his/her spouse or common-law partner or relative by marriage up to the second degree, regardless of if the marriage has terminated;*
  - 3) He/she participated in deciding upon the case in court or administrative proceedings.*
- If the case referred to in paragraph 1 of this Article refers to the President of the Constitutional Court, the session of the Constitutional Court shall, under a reasoned initiative of three judges, be convened by the Deputy President.*

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<sup>5</sup> In original Montenegrin version Article 154 § 1 of the Constitution reads as follows: "Predsjedniku i sudiji Ustavnog suda prestaje funkcija prije isteka vremena na koje je izabran ako to sâm zatraži, **kad ispuni uslove za starosnu penziju** ili ako je osuđen na bezuslovnu kaznu zatvora."

27. Article 47 of the Law on the Constitutional Court defines the requirements for decisions and resolutions adopted by the Constitutional Court and reads as follows:

*Article 47*

*The Constitutional Court shall issue decisions and resolutions.*

*A decision or a resolution of the Constitutional Court shall contain: recitals, disposition and reasoning.*

28. Article 48 of the Law on the Constitutional Court lists the circumstances in which the Constitutional Court takes a decision and reads as follows:

*Article 48*

*By a decision, the Constitutional Court shall:*

- 1) Determine that the law or some of its provisions are not in conformity with the Constitution and ratified and published international agreements, or that they were not in conformity with the Constitution while they were in force;*
- 2) Determine that another regulation or some of its provisions are not in conformity with the Constitution and the law, or that they were not in conformity with the Constitution and the law while they were in force;*
- 3) Adopt a constitutional complaint for violation of human rights and freedoms guaranteed by the Constitution;*
- 4) Determine that the President of Montenegro has violated the Constitution;*
- 5) Resolve the conflict of jurisdiction;*
- 6) Ban the activities of a political party or non-governmental organisation;*
- 7) Adopt a complaint for violation of rights during elections or during a referendum;*
- 8) Abolish measures and actions of state authorities taken during the state of war or the state of emergency;*
- 9) Reject: proposals for the review of unconstitutionality and illegality, proposals for determining if the President of Montenegro has violated the Constitution, proposals for resolving the conflict of jurisdiction and the proposal for ban on work of a political party or non-governmental organisation;*
- 10) Reject a constitutional complaint or complaint as unfounded.*

29. Article 49 of the Law on the Constitutional Court lists the circumstances in which the Constitutional Court takes a resolution and reads as follows:

*Article 49*

*By a resolution, the Constitutional Court shall:*

- 1) Initiate proceedings;*
- 2) Reject the initiative for instituting the proceedings for the review of the constitutionality and legality;*
- 3) Dismiss a motion, initiative, constitutional complaint, complaint and other petitions in the cases referred to in Article 37 of the present Law;*
- 4) Suspend the proceedings in the cases determined by the present Law;*
- 5) Suspend the enforcement of an individual act or action, repeal the measure of suspension or dismiss the application for suspension of enforcement of an individual act or action;*
- 6) Decide on issues of administering the proceedings.*

30. The Rules of Procedure of the Parliament of Montenegro enumerate the competences of the Constitutional Committee of the Parliament in its Article 38a (Constitutional Committee) which reads in its relevant part as follows:

*Article 38a (Constitutional Committee)*

*The Constitutional Committee shall:*



- ...
- *Submit to the Parliament a proposal for the election of five judges of the Constitutional Court;*

## **2. The relevant provisions of the domestic law concerning the retirement age of the judges of the Constitutional Court**

31. Until August 2020 the Law on Pension and Disability Insurance and the Labour Law provided for the same conditions for retirement, namely to reach the age of 67 and to have at least 15 years of service.

32. Following amendments to the Law on Pension and Disability Insurance in 2020, the age for retirement was lowered and different ages depending on gender were introduced (66 for men and 64 for women). On 24 October 2023 the Constitutional Court, however, declared those provisions unconstitutional as discriminatory. In December 2023, the Parliament amended Article 17 of the Law on Pension and Disability Insurance, introducing the same age limit (65) for men and women.<sup>6</sup>

33. In the meantime, in 2021 the Parliament also amended Article 164 of the Labour Law lowering the age of termination of employment by force of law from the age of 67 to the age of 66.<sup>7</sup>

34. It follows that, as of 1 January 2024, there is a difference in the age-limit provided by the Labour Law (66) and the age-limit provided by the Law on Pension and Disability Insurance (65).

35. During the discussions with the interlocutors it has been explained to the Venice Commission delegation that while the Law on Pension and Disability Insurance establishes the conditions for the exercise of the right to an old-age retirement of an employee, the Labour Law establishes the conditions for the termination of employment by force of law due to age, regardless of the employee's wish to exercise his or her right to old-age retirement.

36. The wording of Article 121 (concerning judges of the ordinary courts) and Article 154 (concerning judges of the Constitutional Court) of the Constitution differs: the ordinary court judges shall cease their duty when they "fulfill the conditions for exercising the right to an old-age pension" and the constitutional court judges when they "fulfil the conditions for old-age pension (see paragraphs 20 and 24 above). The Law on the Constitutional Court does not regulate the retirement age of the judges of the Constitutional Court.

37. During the discussions with the interlocutors the Venice Commission delegation learned that while there is a well-established case-law of the Supreme Court of Montenegro on the applicability of the relevant provisions of the Law on Pension and Disability Insurance to the retirement age of the judges of the ordinary courts, there is no case-law of the Montenegrin courts as regards the applicable law to the retirement age of the judges of the Constitutional Court.

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<sup>6</sup> Article 17 of the Law on Pension and Disability Insurance reads as follows in its relevant part: "*an insured person acquires the right to an old-age pension when he or she reaches the age of 65 and has at least 15 years insurance service.*"

<sup>7</sup> Article 164 of the Labour Law reads as follows in its relevant part: "*employment shall be terminated by force of law when the employee reaches the age of 66 and has at least 15 years insurance service.*"

#### IV. Analysis

##### **A. As to the compliance of the legal framework in force with international standards concerning the early termination of the mandate of the constitutional court judges**

38. The Venice Commission wishes to stress at the outset that security of tenure until the mandatory retirement age or the expiry of the term office is a fundamental guarantee of judicial independence, and that the grounds of early termination of the mandate of judges are limited to incapacity or professional misconduct.<sup>8</sup>

39. The principle of irremovability is even more important in the case of the judges of the Constitutional Court, as this institution plays a paramount role in the functioning of democracy as a final arbiter on constitutional law issues, in the respect of the rule of law and in the protection of human rights. The Venice Commission has previously underlined that "while the basic requirements for judicial independence are the same for both ordinary and constitutional court judges, the latter must be protected from any attempt of political influence due to their position, which is particularly exposed to criticism and pressure from other state powers."<sup>9</sup> The security of tenure of constitutional court judges is an essential guarantee of their independence. Irremovability is designed to shield the constitutional court judges from influence from the political majority of the day. It would be unacceptable if each new government could replace sitting judges with newly elected ones of their choice.<sup>10</sup>

40. An age limit is, in principle, an objective ground of cessation of mandate and it is up to the democratic legislator to define the retirement age of judges. However, "in the past, the Commission has repeatedly been critical of changes to the retirement age or term of office of judges, even as part of a general reform of the judiciary, in particular if such changes were made in haste and without convincing justification. Retroactive changes to the retirement age or term of office of judges affect the independence of judges and may, dependent on the number of judges affected, also have negative effects on the efficiency of a court."<sup>11</sup>

41. The Venice Commission has therefore repeatedly stated that "the retirement age for judges should be clearly set out in the legislation. This is also necessary from the standpoint of legal certainty. Any doubt or ambiguity has to be avoided and a body taking decisions on retirement should not be able to exert discretion. The absence of clear provisions could be used to exert pressure on the judge."<sup>12</sup>

42. The need to avoid discretionary and even arbitrary interpretation of the applicable legislation is especially important as concerns parliament. The forced retirement of a sitting judge by

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<sup>8</sup> Venice Commission, [CDL-AD\(2020\)016](#), Armenia – Opinion on three legal questions in the context of draft constitutional amendments concerning the mandate of the judges of the Constitutional Court, para. 28.

<sup>9</sup> Venice Commission, [CDL-AD\(2024\)038](#), Amicus curiae brief for the European Court of Human Rights in the case of Shevchuk v. Ukraine on standards on the disciplinary rules concerning presidents and judges of constitutional courts, para. 9.

<sup>10</sup> Joint Opinion, Venice Commission and the Directorate of Human Rights and Rule of Law (DGI) of the Council of Europe Armenia, [CDL-AD\(2019\)024](#), – Opinion on the amendments to the judicial code and some other laws, para. 58.

<sup>11</sup> Venice Commission, [CDL-AD\(2020\)016](#), Armenia – Opinion on three legal questions in the context of draft constitutional amendments concerning the mandate of the judges of the Constitutional Court, para. 28. The European Court of Human Rights also considered the irremovability of judges during their term of office "as a corollary of their independence" (see [Maktouf and Damjanović v. Bosnia and Herzegovina](#) [GC], nos. 2312/08 and 34179/08, § 49, ECHR 2013 (extracts)) and found that "this can hardly be reconciled with the particular consideration to be given to the nature of the judicial function as an independent branch of State power and to the principle of the irremovability of judges, which – according to the Court's case-law and international and Council of Europe instruments – is a key element for the maintenance of judicial independence" (see [Baka v. Hungary](#) [GC], no. 20261/12, § 172, 23 June 2016).

<sup>12</sup> Venice Commission, [CDL-AD\(2013\)034](#), Ukraine – Opinion on proposals amending the draft law on the amendments to strengthen the independence of judges of Ukraine, para. 52.

parliament, which is a political body, on the basis of disputed domestic law provisions, may undermine the security of tenure and the judicial independence.

43. The Venice Commission also underlines the importance of the mutual respect and cooperation between all the constitutional bodies in a democratic society. Compliance with the rule of law cannot be restricted to the implementation of the explicit and formal provisions of the law and of the Constitution only. It also implies constitutional behaviour and practices, which facilitate the compliance with the formal rules by all the constitutional bodies and the mutual respect between them<sup>13</sup>.

44. The Venice Commission observes that the determination by the Constitutional Court itself of the existence of any ground for early termination of the mandate of a constitutional court judge should be considered as an element ensuring the organisational autonomy and independence of the Constitutional Court by preventing any possible undue interference from outside. The exercise of this power by the Constitutional Court is particularly important in the cases where the existence of a ground for early termination of the mandate of a constitutional court judge is not obvious and is likely to be subject to divergent interpretation.

45. In this context, the Venice Commission has previously stressed that “the supreme state interest lies in the preservation of the institutions of the democratic state. The respect for the principle of separation of powers requires that no branch of power/constitutional institution should be permitted by way of deliberate inaction or mere incapability of acting to block the functioning of another branch of power/constitutional institution.”<sup>14</sup> In the Commission’s view, state interest in the functioning of the Constitutional Court may thus imply on the one hand that there should be mechanisms in place that prevent delays in the renewal of the composition of the Constitutional Court, but also, on the other hand, that no state institution, including the Constitutional Court itself, should have the power to block the process of nomination.

46. Indeed, the Venice Commission has previously recommended the establishment of a mechanism of notification in order to avoid any inaction by the nominating authority and late nominations which may prevent the Constitutional Court from effectively functioning on account of vacancies in its composition<sup>15</sup>. Accordingly, a notification mechanism must be seen mainly as one of the procedural safeguards in order to ensure the continuing effective functioning of the Constitutional Court.

47. In Montenegro, Article 154 of the Constitution establishes three grounds for early termination of the mandate of the judges of the Constitutional Court: at the judge’s own request, when the judge fulfills the conditions for old-age pension and if the judge was sentenced to an unconditional imprisonment sentence. The same Article also provides that “*the Constitutional Court shall establish the emergence of reasons for cessation of duty or release from duty, in its session and shall inform the Parliament of that case*”. In the same vein, according to Article 7 of the Law on the Constitutional Court, “*the Constitutional Court shall notify the proposer who nominated the judge of the fulfilment of conditions for old-age pension or on the expiration of the term of office of the judge of the Constitutional Court six months before the fulfilment of the conditions for old-age pension, or before the expiry of the term of office*”.

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<sup>13</sup> Venice Commission, Romania – [CDL-AD\(2012\)026](#), Opinion on the compatibility with constitutional principles and the rule of law of actions taken by the Government and the Parliament of Romania in respect of other State institutions and on the Government emergency ordinance on amendment to the Law No. 47/1992 regarding the organisation and functioning of the Constitutional Court and on the Government emergency ordinance on amending and completing the Law No. 3/2000 regarding the organisation of a referendum, para 72.

<sup>14</sup> Venice Commission, [CDL-AD\(2022\)050](#), Montenegro – Opinion on the draft amendments to the law on the Judicial Council and Judges, para. 25.

<sup>15</sup> Venice Commission, [CDL-AD\(2017\)011](#), Armenia – Opinion on the draft constitutional law on the Constitutional Court, paras. 22-24.

48. The Venice Commission notes that the above-mentioned provisions of the domestic law expressly require two actions to be taken by the Constitutional Court in the procedure relating to early termination of the mandate of a judge of the Constitutional Court for the fulfilment of conditions for old-age pension: first, the establishment in a session of the fact of the fulfilment of conditions for old-age pension and, second, the notification to the proposer who nominated the judge in question of the fulfilment of conditions for old-age pension, six months before the fulfilment of conditions for old-age pension.

49. The Commission also notes that the Law on the Constitutional Court does not regulate the form of such “establishment”, which does not seem to belong to either a “decision” or a “resolution”. The Constitutional Court appears to have interpreted Article 154 of the Constitution as requiring a “decision”, which in turn requires a majority vote; the Constitutional Court however, rather than deciding specifically on the existence of the conditions for the cessation of mandate, has taken decisions only on whether or not to send the notification to the proposer. As a consequence of this interpretation, when the Constitutional Court did not reach the majority in favour of the notification, it did not take any formal decision, and there only exists the record of the voting with at times, but not always, the reference to the law which the Constitutional Court took into consideration. In most cases, the Constitutional Court’s position as to the applicability of the Labour Law may only be deduced a contrario, by the failure to reach the majority necessary to send the notification to the proposer. Even when the Constitutional Court indicated the law which it considered applicable, it did not provide any reasons.

50. As a consequence, while there is case-law of the Supreme Court of Montenegro on the applicability of the Law on Pension and Disability Insurance to the retirement age of the judges of the ordinary courts, there is no case-law concerning the applicability of either the Law on Pension and Disability Insurance or the Labour Law in respect of the retirement age of the judges of the Constitutional Court.

51. The Venice Commission is aware of the difference between the different nature of the judicial mandate of the ordinary judges and of the constitutional court judges. It has also noted, as underlined by several of its interlocutors, that the Constitution of Montenegro uses different wording in Articles 121 and 154 as regards the grounds of termination of the duty of the judges of the ordinary courts and the mandate of the judges of the Constitutional Court for the fulfilment of conditions for old-age pension. It does not belong to the Venice Commission to decide whether there should be a different legal regime of retirement for ordinary and for constitutional court judges: any difference of treatment, as justified as it may be, should be explicitly provided in the law or in the case-law.

52. The Venice Commission has already expressed its concerns about the lack of a specific regulation of judges’ social rights, including their retirement age, in the Montenegrin legislation<sup>16</sup>. In that connection, the Venice Commission refers to its above-mentioned observations concerning the importance of the clear definition of the retirement age of judges in the domestic law (see paragraphs 38-41 above).

53. The Constitutional Court of Montenegro took a(n implicit) decision as to the non-applicability of the Law on Pension and Disability Insurance to the judges of the Constitutional Court. In this connection, it should be noted that a fundamental principle of the rule of law is the supremacy of the Constitution and the respect of the binding effect of the decisions of the Constitutional Court, when there is one, by all state powers and authorities<sup>17</sup>. It follows that, even if the applicability of

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<sup>16</sup> Venice Commission, [CDL-AD\(2022\)050](#), Montenegro – Opinion on the draft amendments to the law on the Judicial Council and Judges, paras. 14 and 75.

<sup>17</sup> Venice Commission, [CDL-AD\(2024\)040](#), Albania – Opinion on the implementation by Parliament of Constitutional Court decisions, para. 21. Venice Commission, [CDL-AD\(2016\)007](#), Rule of Law Checklist, section II.A.1., § 46.

the Labour Law was not unequivocally and explicitly established, the procedure provided for by the Law on the Constitutional Court, requiring a formal notification by the Constitutional Court, ought to have been respected by the Parliament.

54. The Venice Commission, however, regrets that the Constitutional Court has consistently failed to issue written formal decisions providing relevant reasoning for not sending a notification to the Parliament. The Venice Commission draws attention to the fact that Article 47 of the Law on the Constitutional Court requires that a decision or a resolution shall contain reasoning; furthermore, it stresses that the European Court of Human Rights has stated that under the principle linked to the proper administration of justice, decisions of courts and tribunals should adequately state the reasons on which they are based.<sup>18</sup> The obligation for courts to give reasons for their decisions is also applicable to the proceedings before the Constitutional Courts.<sup>19</sup> In the Commission's view, the need for a reasoned decision was even more important in the circumstances of the instant case in view of the importance of the matter and it was reasonable to expect that such a decision would be based on adequate reasoning.<sup>20</sup> Moreover, it is essential for other state authorities to be aware not only of the operative part of the decision but also arguments leading to that outcome in order to properly implement a decision of a constitutional court.<sup>21</sup> Instead of providing guidance as to the retirement age of its justices, as would have been its task, the Constitutional Court therefore contributed to the confusion and ensuing legal uncertainty. The Venice Commission is of the view that the Constitutional Court in the future, pending a possible legislative reform, should provide explicit and sufficient reasons, through formal decisions or resolutions, as to which law is applicable to the retirement of the judges of the Constitutional Court.

55. One additional issue which was mentioned during the meetings with various interlocutors is whether the judges of the Constitutional Court who were personally affected by the retirement age issue ought to have participated in the vote. The Venice Commission observes that the relevant provisions of the Law on the Constitutional Court do not seem to prevent expressly the judges of the Constitutional Court from participating in the vote on similar issues and no practice has been established in that connection within the Constitutional Court. The Venice Commission reiterates that it must be ensured that the Constitutional Court as guarantor of the Constitution can function as a democratic institution and the possibility of excluding judges must not result in the inability of the Constitutional Court to take a decision.<sup>22</sup> In that connection, the Venice Commission cannot overlook the fact that in case of exclusion of three judges in question from the vote there would be no quorum for taking a decision of the Constitutional Court which had at that time only six judges. At the same time, the Venice Commission shares the concerns expressed by the interlocutors since the trust of the public in the judiciary is paramount in a democratic society and the actions of the judges should not be perceived as the use of their position for personal interests. "Nemo iudex in causa propria" is a fundamental principle of natural justice. Moreover, the failure of the judges of the Constitutional Court to abstain from taking part in the examination of a clear case of conflict of interest may not only lead to a loss of confidence in the judiciary, but also in the entire constitutional system. Accordingly, the Constitutional Court should use extensive self-restraint in order to avoid any impression of favouring the personal

<sup>18</sup> [Garcia Ruiz v. Spain](#) [GC], no. 30544/96, § 26, 21 January 1999.

<sup>19</sup> [Paun Jovanović v. Serbia](#), no. 41394/15, §§ 102-110, 7 February 2023.

<sup>20</sup> [Lorenzo Bragado and Others v. Spain](#), nos. 53193/21 and 5 others, § 145, 22 June 2023.

<sup>21</sup> Venice Commission, Romania – [CDL-AD\(2012\)026](#), Opinion on the compatibility with constitutional principles and the rule of law of actions taken by the Government and the Parliament of Romania in respect of other State institutions and on the Government emergency ordinance on amendment to the Law No. 47/1992 regarding the organisation and functioning of the Constitutional Court and on the Government emergency ordinance on amending and completing the Law No. 3/2000 regarding the organisation of a referendum, para 66.

<sup>22</sup> Venice Commission, [CDL-AD\(2020\)016](#), Armenia – Opinion on three legal questions in the context of draft constitutional amendments concerning the mandate of the judges of the Constitutional Court, para. 71; Venice Commission, [CDL-AD\(2024\)038](#), Amicus Curiae brief for the European Court of Human Rights in the case of Shevchuk v. Ukraine on standards on the disciplinary rules concerning presidents and judges of constitutional courts, para. 20.



interest of the judges when deciding matters affecting them personally. The obligation to give adequate reasons for its decisions is also essential in this context.

## **B. Proposals for amending the legislation in order to avoid similar situations in the future**

56. Already during the visit to Podgorica, the interlocutors of the Venice Commission's delegation agreed on the need for legislative reform in order to ensure that in the future similar situations will not arise again. The Venice Commission warmly welcomes this readiness to improve the legal framework and is ready to assist Montenegro in this process. Below, the Venice Commission points to some elements which such a reform could include.

57. In the first place, the Venice Commission is of the opinion that the issue of the retirement age of the judges of the Constitutional Court should be expressly addressed in the legislation on the Constitutional Court, as it is clear that the absence of clear and coherent legislative provisions were the reason for the controversy at issue.

58. Secondly, in parallel with the adoption of a clear statutory framework concerning the retirement age of the judges of the Constitutional Court avoiding any ambiguity, the introduction of a simplified default mechanism concerning the notification on the fulfilment of conditions for old-age pension of the constitutional court judges may be considered. While the details of such a default mechanism will have to be determined following discussions with all the relevant stakeholders, the Commission recommends designing a mechanism which aims at avoiding any possible institutional deadlock or abuse from any institution involved in the procedure. In this context, it should be recalled that the Law on the Constitutional Court does not seem to regulate how the "establishment" of the conditions for old-age pension should be made. For example, once the legislation provides unequivocally for the age and conditions for old-age pension of the judges of the Constitutional Court, the law could entrust the President of the Constitutional Court to notify the proposers of the upcoming vacancy, without the need for a formal vote.

59. Thirdly, the Venice Commission refers to its previous recommendation about the advisability to adopt a provision allowing a judge of the Constitutional Court to continue to perform his or her office until the new judge takes up office, in order to avoid a situation in which judicial positions are vacant due to the fact that new judges have not been nominated.<sup>23</sup>

60. Finally, the provisions on recusal of constitutional court judges on account of conflict of interest could be expanded, with due regard to procedural guarantees and to the preservation of the functioning of the Constitutional Court.

## **V. Conclusion**

61. The request for the present opinion stems from events taking place since June 2024 and having resulted in the termination of the mandate of a judge of the Constitutional Court due to age limit. A controversy has arisen as concerns the applicability of either the Labour Law, which provides for an age limit of 66, or the Law on Disability and Invalidity Pension, which since 2024 provides an age limit of 65. The Venice Commission stresses that it is not within its mandate to provide interpretations of national constitutional norms and the disputed provisions of the domestic law or to assess the constitutionality of particular actions taken by the Parliament and the Constitutional Court. Its task is limited to assessing the matters in question in the light of European and international standards and practice and formulating some recommendations aiming at avoiding similar situations in the future.

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<sup>23</sup> Venice Commission, [CDL-AD\(2014\)033](#), Montenegro – Opinion on the draft law on the Constitutional Court of Montenegro, para. 20.

62. The Commission recalls that security of tenure until the mandatory retirement age or the expiry of the term office is a fundamental guarantee of judicial independence, and is even more important in the case of the judges of the Constitutional Court, as this institution which plays a paramount role in the functioning of democracy as a final arbiter on constitutional law issues, in the respect of the rule of law and in the protection of human rights. While an age limit is, in principle, an objective ground of cessation of mandate and it is up to the democratic legislator to define the retirement age of judges, the Commission has been critical of changes to the retirement age or term of office of judges, even as part of a general reform of the judiciary, when they were hasty, not supported by convincing reasons, or retroactive, as they may affect the independence and the efficiency of the Court. For the sake of legal certainty too, the retirement age for constitutional court judges should be clearly set out in the legislation, avoiding any doubt or ambiguity and any discretion on the part of the body taking decisions on retirement, especially if it is a political body such as parliament. On the contrary, the determination by the Constitutional Court itself of the existence of any ground for early termination of the mandate of a constitutional court judge should be considered as an element ensuring the organisational autonomy and independence of the Constitutional Court by preventing any possible undue external interference.

63. The supreme state interest in the functioning of the Constitutional Court implies on the one hand that there should be mechanisms in place that prevent delays in the renewal of the composition of the Constitutional Court, but also, on the other hand, that no state institution, including the Constitutional Court itself, should have the power to block the process of nomination. In addition, if a blocking or delay of the renewal takes place, mechanisms should be set for the Constitutional Court to be able to continue functioning.

64. In Montenegro, Article 154 of the Constitution establishes three grounds for early termination of the mandate of the judges of the Constitutional Court: at the judge's own request, when the judge fulfills the conditions for old-age pension and if the judge was sentenced to an unconditional imprisonment sentence. Two actions are required to be taken by the Constitutional Court in the procedure relating to early termination of the mandate of its judges for the fulfilment of conditions for old-age pension: first, the establishment in a session of the fact of the fulfilment of conditions for old-age pension and, second, the notification to the proposer who nominated the judge in question of the fulfilment of conditions for old-age pension, six months before the fulfilment of conditions for old-age pension.

65. The Law on the Constitutional Court does not regulate the form of such "establishment", which does not seem to belong to either a "decision" or a "resolution". The Constitutional Court appears to have interpreted Article 154 of the Constitution as requiring a "decision", which in turn requires a majority vote; the Constitutional Court however, rather than deciding specifically on the existence of the conditions for the cessation of mandate, has taken decisions only on whether or not to send the notification to the proposer. As a consequence of this interpretation, when the Court did not reach the majority in favour of the notification, it did not take any formal decision, and there only exists the record of the voting, with at times, but not always, the reference to the law which the court took into consideration. In most cases, the Constitutional Court's position as to the applicability of the Labour Law may only be deduced a contrario, by the failure to reach the majority necessary to send the notification to the proposer. Even when the Constitutional Court indicated the law which it considered applicable, it did not provide any reasons.

66. While it is regrettable that the lack of specific legislative provisions on the age of retirement of the judges of the Constitutional Court, coupled with the failure of the Constitutional Court to clarify the applicable law through formal reasoned decisions, has led to such legal uncertainty, the Commission is of the view that even if the applicability of the Labour Law was not unequivocally and explicitly established, the procedure provided for by the Law on the Constitutional Court, requiring a formal notification by the Constitutional Court, ought to have been respected by the Parliament. The Commission recalls in this respect the duty of loyal cooperation among state institutions, in a democratic state governed by the rule of law.

67. The Commission is also of the view that, even if the applicable legislation does not provide for extensive rules of conflict of interest and self-recusal, the judges of the Constitutional Court should exercise self-restraint, with due regard to the need to ensure that the Constitutional Court as guarantor of the Constitution can function as a democratic institution.

68. The Commission warmly welcomes the fact that its interlocutors were of the opinion that legislative reform is required to ensure that a similar situation should not arise again. This opinion refers to elements which could become part of such reforms. In order to avoid similar situations in the future, the Venice Commission recommends considering the following proposals:

- to adopt a clear statutory framework expressly addressing the retirement age of the judges of the Constitutional Court;
- to introduce a simplified default mechanism concerning the notification on the fulfilment of conditions for old-age pension of the constitutional court judges;
- to adopt a provision allowing a judge to continue to perform his or her office until the new judge takes up office, in order to avoid a situation in which judicial positions are vacant due to the fact that new judges have not been nominated;
- to consider expanding the provisions on recusal of constitutional court judges on account of conflict of interest, with due regard to procedural guarantees and to the preservation of the functioning of the Constitutional Court.

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