

Podgorica, 21 July 2013

**ASSESSMENT OF DRAFT AMENDMENTS TO THE CONSTITUTION OF
MONTENEGRO OF 10 JULY 2013**

THAT WILL BE DISCUSSED IN THE PARLIAMENT OF MONTENEGRO AT SESSION
ON 31 JULY 2013

The proposed amendments to the Constitution represent an opportunity for the de-politicization of the judiciary, State Prosecutor's Office and Constitutional Court, as the Parliament will no longer be competent for the appointment of the President of the Supreme Court, President of the Constitutional Court and state prosecutors, while the judges of the Constitutional Court, Supreme State Prosecutor and four members of the Judicial Council from outside the ranks of judges will be appointed through qualified, two-thirds majority of all MPs, which ensures the participation of the opposition in their appointment.

However, not all of the proposed solutions are consistent and in accordance with the recommendations of the Venice Commission, and if they are not changed or properly specified, they will not allow for the achievement of the goal – de-politicization of the judiciary, State Prosecutor's Office and Constitutional Court.

Namely:

(1) HRA commends the introduction of the qualified majority of two-thirds of all the MPs for the appointment and dismissal of judges of the Constitutional Court, the Supreme State Prosecutor and four members of the Judicial Council, as well as majority of three-fifths of all MPs as a de-blocking mechanism, in accordance with the recommendations of the Venice Commission. However, **we criticize the proposal that four members of the Judicial Council and five judges of the Constitutional Court, appointed by the Parliament, are to be proposed to the Parliament by the “relevant working body of the Parliament”** (Amendment VIII item 3 and Amendment XVI paragraph 3), **because this allows for pre-selection of candidates by simple majority in the parliamentary committee, contrary to the aim of the appointment through two-thirds majority in the plenum – to ensure that the opposition participates in the appointment.**¹ The Draft amendments submitted to the Venice Commission

¹ The competent Administrative Committee of the Parliament has 13 members, 6 of which are from the opposition, 6 from the ruling coalition, while one representative of the Bosnian party often supports the ruling coalition – for

for consideration did not contain the part of the provision stating that the Parliament shall appoint candidates “at the proposal of the relevant working body of the Parliament”, but only that they shall be “appointed by the Parliament based on the public invitation to submit applications”.²

Although it would be unreasonable not to take into account that the 2/3 majority of all the MPs would be necessary for the appointment of a candidate, which includes members of the opposition, the risk of pre-selection of candidates, who applied to the announcement, by the committee is not excluded in this proposal and can cause severe complications in practice. Therefore, we urge that the Draft amendments be changed so that they prescribe that **the parliamentary committee submits to the Parliament the “draft list of all candidates who meet the legal requirements”, instead of just a “proposal”, in order to prevent such pre-selection.**

On the other hand, in relation to the appointment of the Supreme State Prosecutor (Amendment IV), it is clearly prescribed that in the first round of voting, the Parliament shall vote on one candidate proposed by the Prosecutorial Council, but if the need arises for a second round, the Parliament shall appoint the Supreme State Prosecutor “**from all the candidates who meet the legal requirements**”. However, this solution is not prescribed for the candidates for judges of the Constitutional Court and members of the Judicial Council, proposed to the Parliament by the relevant working body (Amendments VIII and XVI), in case that 2/3 majority is not provided in the plenum for candidates chosen by the parliamentary committee.

(2) **Amendment IV, which amends Article 91 of the Constitution and prescribes what majority is applied in the Parliament, does not prescribe the appointment of the Protector of Human Rights and Freedoms (Ombudsman) through the same two-thirds majority,** as the Venice Commission proposed in its Opinion on the Constitution of Montenegro in December 2007³, in order to ensure the independence of this important state body for the protection of human rights.

(3) The proposed constitutional changes do not exclude the possibility that members of the Judicial Council, who are renowned lawyers from outside the ranks of judges, or judges of the Constitutional Court, as well as members of the Prosecutorial Council, be politically engaged, or to be in a different form of conflict of interest that could compromise the independence and impartiality of bodies of which they are members. HRA believes that it is therefore necessary that **the Law on the Judicial Council, Law on the Constitutional Court or Law on State Prosecutor’s Office prescribe additional guarantees of independence of members of these bodies in the form of provisions on membership criteria and conflict of interest.**⁴ This is

example, they supported the candidate of the ruling coalition in the presidential elections). Anyhow, the simple majority in this committee is contrary to the 2/3 majority in the plenum.

² See Article 127, paragraph 2, item 3 of the document submitted to the Venice Commission, available at: [http://www.venice.coe.int/webforms/documents/?pdf=CDL-REF\(2013\)033-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2013)033-e).

³ International human rights standards and constitutional guarantees in Montenegro, Human Rights Action, Podgorica 2008, p. 204, available at: <http://www.hraction.org/wp-content/uploads/knjiga-cg.pdf>.

⁴ For more details, see: Judicial Council of Montenegro Operation Analysis 2008-2013, available at: <http://www.hraction.org/wp-content/uploads/JUDICIAL-COUNCIL-OF-MONTENEGRO.pdf>.

particularly important because one of the four renowned lawyers, members of the Judicial Council, in accordance with the proposed amendments to the Constitution, **will be President of the Judicial Council, who will have a casting vote in case of a tie** (Amendment VIII).

(4) We commend the exclusion of the possibility that the Minister of Justice be President of the Judicial Council, although we repeat that the Minister should have been completely excluded from the membership, if the aim was to prevent the influence of the executive branch on the independence of the Council.⁵ In the same regard, we support the limitation of competences of the Minister of Justice in the operation of the Judicial Council, in the form of suggestions that he/she does not vote in the disciplinary proceedings against judges. **However, for the principle of non-interference of the executive branch to be consistently applied, it should be prescribed that the Minister cannot vote on the dismissal of judges, nor on their appointment**, and not just on their disciplinary responsibilities. The decision on dismissal of a judge has more serious consequences on the judge than the decision on the disciplinary responsibility. The proposed provision of Amendment IX is not sufficient, because the procedure of dismissal of a judge does not imply the prior identification of his/her disciplinary responsibility.⁶

(5) Appointment of the Supreme State Prosecutor through qualified two-thirds majority is a major advancement in ensuring the independence of the State Prosecutor's Office. The decision that the Supreme State Prosecutor is appointed in the first round of voting at the proposal of the Prosecutorial Council also contributes to the independent operation, and if the proposed candidate does not receive the required majority, in the second round of voting, the Parliament makes a selection from all the candidates who meet the legal requirements. HRA commends the consideration of all suggestions of the Venice Commission on the appointment of the Supreme State Prosecutor. However, **we draw attention to the lack of logic in the prescribed solution in Amendment IV, paragraph 3**: "... in the second round of voting, the Parliament appoints the Supreme State Prosecutor from all the candidates who meet the legal requirements *set by the proponent*", **because the proponent in this case is the Prosecutorial Council** (see Amendment X, paragraph 2)⁷, **which is not competent to prescribe the legal requirements**. Requirements for the appointment of the Supreme State Prosecutor are prescribed by Art. 24 and 25 of the Law on State Prosecutor's Office. We therefore suggest that the phrase "prescribed by the proponent" should be deleted from the proposed amendments.

(6) We notice that the Constitutional Committee submitted the text of Article 135, paragraph 5⁸ to the Venice Commission for opinion, which prescribed reasons for the dismissal of the Supreme State Prosecutor, later commended by the Venice Commission in its opinion of 24 June 2013. However, **the Proposal of amendments of 10 July 2013 does not contain reasons for the dismissal of the Supreme Public Prosecutor, and we urge them to be returned** and prescribe that the Supreme State Prosecutor shall be dismissed from duty if he/she was found

⁵ *Ibid.*

⁶ *Ibid.*

⁷ "The Parliament of Montenegro shall appoint and dismiss the state prosecutor, at the proposal of the Prosecutors' Council, based on the public announcement, after the hearing in the Constitutional Committee."

⁸ Document submitted to the Venice Commission, available at:

[http://www.venice.coe.int/webforms/documents/?pdf=CDL-REF\(2013\)033-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2013)033-e)

guilty of an offense that makes him/her unworthy of the prosecutorial duty, if he/she is found guilty of any offense to unconditional imprisonment through a final decision, and if he/she performs the duty in an unprofessional or non-conscientious manner.

(7) We commend the prescription of competences of the Prosecutorial Council through constitutional amendments, including that it appoints prosecutors, which was omitted in the previous Draft amendments. However, **we believe that the Constitution should prescribe the composition of the Prosecutorial Council and appointment of its members, in accordance with the recommendation of the Venice Commission.** The Prosecutorial Council should be modelled on the Judicial Council, through amendments to the Law on State Prosecutor's Office, as recommended by the Venice Commission.

(8) In Amendment X, paragraph 6, Amendment XII and Amendment XIII, the word "rukovodioc" should be replaced with the word "rukovodilac", in accordance with the ORTHOGRAPHY OF THE MONTENEGRIN LANGUAGE, item 193.⁹

NOTE: In relation to the above mentioned criticism in the Explanation of Proposed Solutions, which is an integral part of the Draft Amendments to the Constitution of Montenegro on 10 July 2013, there is no answer. As it is unfortunately common in Montenegro, completely inappropriate for the importance of amending the Constitution, "Explanation of Proposed Solutions" is just a short summary of the proposed amendments, and nothing more.

For the Human Rights Action

Tea Gorjanc-Prelević, executive director

⁹ Available at: <http://www.gov.me/files/1248442673.pdf>