

HUMAN RIGHTS ACTION ON PROPOSED AMENDMENTS TO THE CONSTITUTION OF MONTENEGRO

The proposed amendments continue to provide solutions that are contrary to recommendations of the Venice Commission and do not ensure the independence of the Constitutional Court and Protector of Human Rights and Freedoms. The proposed amendments do not exclude political influence in the Judicial Council since the members of the Judicial Council who are not judges are not forbidden from being politically engaged. Non-governmental organizations are not provided an opportunity to propose prominent legal experts for members of the Judicial Council to be elected in the Parliament. Legal solution pursuant to which the Minister of Justice cannot vote in disciplinary proceedings against judges and the one forbidding court presidents to be members of the Judicial Council have been unjustifiably left out. The proposed thorough reform of the provisions on the prosecution has not been conducted either. Under the proposed solution, from the possible adoption of amendments to the Constitution pursuant to which the Parliament shall no longer decide on the appointment of prosecutors, until the amendment of the Law on the State Prosecutor's Office which would entrust this authority to the Prosecutorial Council, no prosecutor could be appointed or dismissed (and bearing in mind the past experience in Montenegro, this loophole may not be amended for some time). Only a number of such shortcomings in the proposed amendments could be overcome by urgent amendments to relevant laws, but without a comprehensive constitutional reform there shall be no appropriate preconditions for the full rule of law in Montenegro.

The following is the analysis of the solutions offered in proposed amendments to the Constitution of Montenegro.

1. **OFFENCES AND SECONDARY LEGISLATION:** Proposed amendments to Articles 33 and 34 of the Constitution have been improved in accordance with the suggestions of the Human Rights Action (HRA) by mutually harmonizing them and providing for criminal offenses and sanctions to be prescribed only by law.
2. **THE CONSTITUTIONAL COURT:** Independence of judges of the Constitutional Court has still not been provided, since it is prescribed that judges shall be elected by a majority of all parliamentarians, meaning that they are elected exclusively with the will of the ruling majority. HRA proposal for the Parliament to elect and dismiss judges of the Constitutional Court by a 2/3 majority at the proposal of the President of Montenegro, Judicial Council and relevant parliamentary committee has not been accepted, although HRA pointed out that such election method exists, for example, in Croatia and Germany, and that pursuant to the opinion of the Venice Commission such system functions well. It should be noted that in its opinion of 14 June 2011 the Venice Commission pointed out

that more attention should be paid to the reform of the Constitutional Court, especially in terms of its independence, particularly pointing out that under the current legal solution judges of the Constitutional Court are elected by simple majority.

Furthermore, HRA proposal for the Parliament to elect the judges of the Constitutional Court at the proposal of the President of Montenegro, Judicial Council and relevant parliamentary committee has not been accepted either, leaving the solution under which only the President of the State proposes all judges. The proposed solution is contrary to the opinion of the Venice Commission, which stressed that the system in which all judges are elected at the proposal of the President solely "does not guarantee a balanced composition of the Court" and in particular "if the President is coming from one of the majority parties, it is therefore likely that all judges of the Court will be favourable to the majority".

3. THE PROTECTOR OF HUMAN RIGHTS AND FREEDOMS: Same as in the case of the Constitutional Court, HRA proposal for the Parliament to appoint and dismiss the Protector of Human Rights and Freedoms by a 2/3 majority so as to provide his/her independency, i.e. the appointment of a person who will be favourable not only to the majority, has not been accepted. Therefore, our proposal to delete the words "shall appoint and dismiss the Protector of Human Rights and Freedoms" from Article 91, paragraph 2 of the Constitution, in accordance with section 56 of the Venice Commission Opinion on the Constitution of Montenegro, no. 392/2006 of 20 December 2007, has not been accepted (translation is published in the book "International Human Rights Standards and Constitutional Guarantees in Montenegro", Human Rights Action, Podgorica, 2008, www.hraction.org).
4. DISMISSAL OF JUDGES: It is stipulated that the judges shall be dismissed only if convicted in a final decision of a criminal offense committed by abuse of the judicial function, and not always when convicted of an offense that makes him/her unworthy of the judicial office, as provided in the existing solution in paragraph 3 of Article 121 of the Constitution, and, for instance, in the Constitution of the Republic of Croatia.
5. APPEAL AGAINST DISMISSAL: HRA proposal for a judge to have the right to file a constitutional appeal against the decision on dismissal, and not a claim to the Administrative Court, as it is currently provided, has not been accepted. Independent status of the judicial function within the regular court system requires an appeal to the body outside of that system - for example, how will the Administrative Court convincingly resolve an appeal against dismissal of a judge of the Administrative Court?!
6. INCOMPATIBILITY OF JUDICIAL FUNCTION: HRA proposal to amend the provision of Article 123 of the Constitution providing for the incompatibility of the judicial function with other functions, so that the legislator is obliged to specify by law what is considered as "professional performance of other activities" and what is not, as prescribed e.g. in the Constitution of the Republic of Serbia, has not been accepted. For

example, it is common for judges to write and publish books, teach at universities and participate in professional projects, but, despite an earlier HRA recommendation, this has not yet been specified in the Law on Courts and the Law on the Judicial Council, and it is up to the will of the Judicial Council to decide in each individual case, leaving the judges in uncertainty.

7. APPOINTMENT OF THE PRESIDENT OF THE SUPREME COURT: The proposal for the President of the Supreme Court to be appointed and dismissed by the Judicial Council with a 2/3 majority has been accepted, which is consistent with the opinion of the Venice Commission and the earlier HRA proposal.
8. PRESIDENTS OF THE COURTS IN THE COMPOSITION OF THE JUDICIAL COUNCIL: With regard to the Draft, the Proposal omits the wording that four judges in the composition of the Judicial Council elected by the Conference of Judges cannot be from the ranks of the presidents of courts. HRA finds such solution poor and reemphasizes that no president of any court, including the President of the Supreme Court, should be a member of the Judicial Council. The Judicial Council should supervise the work of courts and courts are managed by their presidents. It is therefore logical that the presidents of courts are not members of the council that supervises their work, and this particularly applies to the President of the Supreme Court, whose position entails the highest degree of responsibility for the work and state in courts. It should be pointed out once again that the proposed solution disregards the risk that the authority which the court president logically holds among other judges may affect the judges who are members of the Judicial Council and to whom the court president is the superior, to accept his standpoint uncritically.
9. MEMBERS OF THE JUDICIAL COUNCIL WHO ARE NOT JUDGES: Under the proposed amendment, as regards the members who are not judges, the Parliament should elect two distinguished legal experts at the proposal of the parliamentary majority and opposition, while two renowned legal experts shall be elected and dismissed by the President of Montenegro. HRA finds such solution suitable, since it proposes that the members elected and dismissed by the Parliament are not parliamentarians but distinguished legal experts, which is in line with HRA proposal and the recommendation of the Venice Commission. However, HRA proposal which has not been accepted suggested the introduction of restrictions for these members of the Judicial Council to ensure that they are not politically engaged, and are selected from the list of candidates proposed by civil associations (NGOs), based on the criteria and procedure prescribed by law (modelled after the procedures for appointment of NGOs representatives in the RTCG Council, the Council for Cooperation between the Government and NGOs, the Council for Protection against Discrimination, the Council for Civilian Control of the Police),¹ or on the basis of open competition (for example, for members appointed by the President). Thus, there are no restrictions for members of the Judicial Council who are not judges in

¹ Law on Public Broadcasting Services of Montenegro, *Sl. list br. 79/2008*, Art. 28, 29, 30, 37, Decision on the Establishment of the Council for Cooperation between the Government of Montenegro and NGOs, *Sl. list br. 28* of 14 May 2010, Art. 7-12.

terms of their political engagement. The Minister of Justice and Human Rights is also a member of the Judicial Council and, as a representative of the executive branch, he too compromises the Council as an impartial and independent body. By reason of all of the aforementioned, the proposed solution is incomplete and only partially contributes to the avoidance of politicization of the Judicial Council. Therefore, the law should prescribe that the Judicial Council members who are not judges were not members of any political party or actively engaged in a party, directly elected in elections or performed function as the Government member for at least several years before the appointment. The same restriction should be prescribed for judges of the Constitutional Court.

10. **THE PRESIDENT OF THE JUDICIAL COUNCIL:** Under the proposed solution, the President of the Judicial Council shall be elected from among the members who are not judges, which reduces the risk of autocratic management of the judiciary, in accordance with the recommendation of the Venice Commission to thereby ensure the necessary link between the judiciary and society. However, given that no restrictions in relation to political engagement are provided for legal experts appointed by the Parliament and President, enabling persons who are politically actively engaged to be appointed, there is a risk for the very President of the Judicial Council, who has a casting vote, to be a politically engaged person and even a member of a political party. Therefore, the proposed solution does not guarantee that half of the members of the Judicial Council shall not be politically engaged, because the four members who are not judges are not subject to these restrictions (and they are appointed by politicians), while the Minister of Justice and Human Rights is a political official and together with them makes half of the Council members. HRA believes that in order to eliminate political influence it is crucial to ensure that the Council member who is to be its President is not politically engaged, which is not provided in the proposed amendment.
11. **CONFLICT OF INTEREST:** In relation to the above, it should be remembered that the Law on the Judicial Council does not contain any provisions on the prevention of conflicts of interest, making the political influence more plausible. This is particularly concerning in Montenegro, given the current practice where the wife of the President of the State is the member of the Judicial Council and President of its Disciplinary Committee and the fact that it is not uncommon for judges to be close relatives of officials of the executive and legislative branches.
12. **THE MINISTER'S RIGHT TO VOTE IN THE COUNCIL:** Reasons for the Proposal leaving out the provision prescribing that the Minister shall not vote in proceedings concerning disciplinary responsibility of judges are unclear, since that further allows for political influence and threatens the principle of separation of powers. Instead, the current restriction should be amended so that the Minister does not vote in the proceedings concerning dismissal of judges either.
13. **APPOINTMENT OF STATE PROSECUTORS:** Contrary to the Draft, the Proposal of amendments does not include all proposed changes to the provisions on the State Prosecutor's Office, except for the deletion of a part of the provisions under which the Parliament was authorized to appoint prosecutors and the Supreme State Prosecutor.

HRA presumes that the intention is to prescribe their appointment by the Prosecutorial Council. Such situation now requires immediate legal action, because in the meantime, from the adoption of the Constitution until the amendment of the Law on the State Prosecutor's Office, no state prosecutor can be appointed or dismissed! Reasons for not conducting a more thorough constitutional reform of the appointment of prosecutors are incomprehensible, especially bearing in mind that the Venice Commission welcomed the solution to prescribe the composition of the Prosecutorial Council and its competencies by the Constitution. The Venice Commission has recommended that the basis for dismissal of the Supreme Public Prosecutor should be prescribed by the Constitution, but this recommendation has not been accepted either.

The law should also prescribe that the Supreme State Prosecutor be appointed by the Prosecutorial Council with a qualified (2/3) majority, as has been proposed for the President of the Supreme Court to be elected by the Judicial Council.

The Venice Commission assessed the changes that have been previously proposed in the draft as steps "in the right direction" which "attempt to truly improve the existing situation" but stressed that they alone will not suffice to change the situation in the judiciary in Montenegro, and that the legislation should be further amended to improve the processes of appointment of judges and prosecutors, the effectiveness of disciplinary proceedings against judges and prosecutors, etc.

Human Rights Action is actively participating in the public debate on constitutional changes within the project "Monitoring of the Judicial Council", with the support from USAID under the program "Effective governance in Montenegro" implemented by the *East West Management Institute*.