Final Mission Report

by Jasna Omejec

EU Expert Mission on amending the Law on the Constitutional Court of Montenegro

JHA IND/EXP 54959

Podgorica, 20 - 24 January 2014

CONTENT

I. INFORMATION OF THE EXPERT MISSION ................................................................. 2

II. DESCRIPTION OF THE MISSION ............................................................................. 2
   1. Working method ........................................................................................................... 3
   2. Daily working schedule ............................................................................................ 3

III. SITUATION IN MONTENEGRO CONCERNING CONSTITUTIONAL JUDICIARY ...... 5
   1. Background .................................................................................................................. 5
   2. Suggestions and Conclusions ..................................................................................... 8

Annex (2)

Zagreb, February 2014
I. Information of the Expert Mission

Name: Expert Mission on amending the Law on Constitutional Court of Montenegro

Subject: 23 Judiciary and fundamental rights

Event: JHA IND/EXP Nr. 54959

Beneficiary Institution: Ministry of Justice of Montenegro

Podgorica 20/01/2014 09:00 – 24/01/2014 16:00

MNE Participants

Ministry of Justice:
Branka Lakočević, Director General for Justice
Nataša Radonjić, Senior Advisor I
Bojana Burzan, Advisor
Slavica Bajić, Secretariat for Legislation of the Government of Montenegro (22/01/2014)

Constitutional Court:
Desanka Lopičić, President
Dragica Davidović, Deputy Secretary General, Chief of the Department for Laws and Secondary Legislation

EU Experts

Mr Michael Groepper (Germany)
Ms Jasna Omejec (Croatia)

Jasna Omejec, LLD
- President of the Constitutional Court of the Republic of Croatia
- Full professor at the Department of Administrative Law of the Law Faculty, University of Zagreb
- Member of the European Commission for Democracy through Law (the Venice Commission) from the Republic of Croatia

II. Description of the Mission

European Commission's DG Enlargement within the framework of the TAIEX Instrument at the end of 2013 engaged me as an expert in the Expert mission on amending the Law on the Constitutional Court of Montenegro (hereinafter referred as to "the LCCM").

The Mission was held in Podgorica, Montenegro, from 20th till 24th January 2014. It entailed working meetings with the working group of the Ministry of Justice of Montenegro and Constitutional Court of Montenegro (hereinafter referred as to "the CCM"), during which the text of the LCCM was elaborated.

1 Law on the Constitutional Court of Montenegro (Zakon o Ustavnom sudu Crne Gore), Official Gazette no. 64/2008, 46/2013, 51/2013.
1. Working method

At the first meeting held on 20 January 2014 the following working method was agreed on:

- One part of the current LCCM is to be analysed every day, and each particular article in this part is to be elaborated. Our views as to the necessary revisions, amendments or deletion of the elaborated Articles shall be harmonised. The EU experts will orally give their suggestions on the necessary revisions or amendments of the separate legal provisions or the proposals for their deletion and provide the relevant explanation. Each proposal will be analysed.

- After the meeting each EU expert will provide the working group with his/her written proposals regarding the part of the LCCM which was elaborated that day. These written proposals have to reach the members of the working group in an E-mail in the same evening. Ms Jasna Omejec will provide her proposals in Montenegrin language, while Ms Michael Groepper will write them in English, and his text will be translated in Montenegrin language not later than 9.00 AM the next morning.

Annex I: Proposals of the revisions and amendments to the LCCM given by Ms Jasna Omejec (in Montenegrin language)

- The Ministry of Justice is to prepare separate working material for the last meeting on 24 January consisting of a three-column table: first column entailing the LCCM Article currently in force; second column entailing Ms Omejec's proposal (if any) for that Article, and third column entailing Mr Groepper's proposal (if any) for that Article. This material will be thoroughly (article to article) examined at the last meeting on Friday in order to find out which LCCM articles are agreed upon, and which are not (these articles will require further elaboration).

Annex II: Final comparative table of the revisions and amendments to the LCCM compiled by the Ministry of Justice of Montenegro (in Montenegrin language)

2. Daily working schedule

This item presents the work of EU experts and the Montenegrin working group in chronological order.

Day 1: Monday 20 January 2014

09:30 – 16:00 - Meetings at the Ministry of Justice – Vuka Karadžića 3, Podgorica

Determining the working methods

Organisation of the Federal Constitutional Court and the role of the constitutional judiciary in a developed democratic society - the experiences of the Federal Republic of Germany (Mr Groepper's presentation)
Organisation of the Constitutional Court and the role of the constitutional judiciary in democracy in transition - the experiences of the Republic of Croatia (Ms Omejec’s presentation)

DISCUSSION 1: The LCCM analysis (Articles 1 - 6 GENERAL PROVISIONS) and discussion of the situation in the constitutional judiciary in Montenegro; detection of the most important problems and establishment of issues to be entailed in the general provisions of the LCCM.

During the evening - Composing the written proposals of the revisions and amendments of the LCCM parts that were elaborated during the day

Day 2: Tuesday 21 January 2014

09:30 – 16:00 - Meetings at the Ministry of Justice – Vuka Karadžića 3, Podgorica

DISCUSSION 2: The LCCM analyses (Articles 6 - 18 ORGANISATION OF THE CONSTITUTIONAL COURT) and discussion of necessary measures aimed at improving the Montenegrin system regarding the organization of the CCM.

DISCUSSION 3: The LCCM analyses (Article 4 in conjunction to Articles 90 and 91 FINANCIAL RESOURCES OF THE CONSTITUTIONAL COURT) and discussion of necessary measures aimed at improving the Montenegrin system regarding the financial autonomy of the CCM.

During the evening - Composing the written proposals of the revisions and amendments of the LCCM parts that were elaborated during the day

Day 3: Wednesday 22 January 2014

09:30 – 16:00 - Meetings at the Ministry of Justice – Vuka Karadžića 3, Podgorica

DISCUSSION 4: The LCCM analyses (Articles 19 - 47 PROCEDURE BEFORE THE CONSTITUTIONAL COURT AND LEGAL EFFECT OF ITS RULINGS - GENERAL PROVISIONS) and discussion of necessary measures aimed at improving the Montenegrin system regarding the procedure before the CCM in general (Parties to the Procedure, Preliminary Procedure, CCM’s Modes of Operation, CCM’s Enactments, Cost of Procedure and Proper Application of Procedural Acts).

DISCUSSION 5: The LCCM analyses (Articles 37 - 47 PROCEDURE FOR REVIEW OF CONSTITUTIONALITY AND LEGALITY) and discussion of necessary measures aimed at improving the Montenegrin system related to the procedure for the review of compliance of an act with the Constitution and ratified and published international treaties or of other regulations with the Constitution and the law.

During the evening - Composing the written proposals of the revisions and amendments of the LCCM parts that were elaborated during the day
Day 4: Thursday 23 January 2014

09:30 – 16:00  - Meetings at the Ministry of Justice – Vuka Karadžića 3, Podgorica

DISCUSSION 6: The LCCM analyses (Articles 48 - 58 CONSTITUTIONAL APPEAL PROCEDURE) and discussion of necessary measures aimed at improving the Montenegrin system regarding: - the constitutional appeal procedure for the review of individual acts of a state authority, public administration authority, local self-government authority, or a legal person exercising public authority, for reason of violation of human rights and freedoms guaranteed by the Constitution after all effective legal remedies have previously been exhausted; - the effect of the CCM decisions in relation to the decisions of the ordinary courts in proceedings on constitutional appeals.

DISCUSSION 7: The LCCM analyses (Articles 66 - 71 PROCEDURE RULING ON CONFLICT OF JURISDICTION) and discussion of necessary measures aimed at improving the Montenegrin system regarding the motion for ruling on the conflict of jurisdiction between courts and other state authorities, between state authorities and local self-government authorities, and between the authorities of the local self-government units.

During the evening  - Composing the written proposals of the revisions and amendments of the LCCM parts that were elaborated during the day

Day 5: Friday 24 January 2014

09:30 – 16:00  - Meetings at the Ministry of Justice – Vuka Karadžića 3, Podgorica

DISCUSSION 8: Comparative analysis of all the proposals and suggestions of the EU experts for improving the Montenegrin system regarding the normative framework of the constitutional judiciary - by the articles of the LCCM

CONCLUSIONS OF THE MISSION: Final words of EU experts and Ms Branka Lakočević, Director General for Justice in the Ministry of Justice of Montenegro

III. Situation in Montenegro concerning Constitutional Judiciary

1. Background

1. The Constitutional Court of Montenegro (CCM) was established by the 1963 Constitution of the Socialist Republic of Montenegro, and started working on 15th February 1964. From that day a number of important changes took place: from the dissolution of the former SFRY and collapse of Yugoslav federalism to a two-member federation (Federal Republic of Yugoslavia) to a State Union of Serbia and Montenegro to a present sovereign and independent (unitary) State on 3 June 2006. Those changes influenced the role of the Constitutional Court in many ways during this time.
2. On 19 October 2007 the Parliament of Montenegro adopted the new Constitution (Official Gazette no. 1/07). The list of competences of the CCM in Article 149 is positive and provides a basis for the CCM with wide competencies (in particular, the constitutional appeal has been granted following the exhaustion of other legal remedies that are available and effective). ²

3. However, unlike Article 149 of the Constitution, other provisions regulating the CCM retained a number of problematic solutions reflecting the regional legal tradition.³

These provisions were improved in 2013. Namely, the Parliament of Montenegro, at the sitting held on 31 July 2013, adopted the Amendments I to XVI to the Constitution of Montenegro, designed to enhance the independence of the judiciary.⁴ According to the Amendment XV to the Constitution, the CCM is now allowed to decide on constitutional appeals by a council consisting of three judges (instead of a plenum). According to the Amendment XVI to the Constitution, the Parliament is no longer competent for the appointment of the President of the CCM, while the judges of the CCM are elected through qualified, two-thirds majority of all the MPs.⁵

In September 2013, the Parliament adopted amendments to the LCCM with a view to aligning it with the constitutional amendments XV and XVI.⁶

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² Article 149 of the Constitution prescribes:

"The Constitutional Court shall decide on the following: 1) Conformity of laws with the Constitution and confirmed and published international agreements; 2) Conformity of other regulations and general acts with the Constitution and the law; 3) Constitutional appeal due to the violation of human rights and liberties granted by the Constitution, after all the effective legal remedies have been exhausted; 4) Whether the President of Montenegro has violated the Constitution, 5) The conflict of responsibilities between courts and other state authorities, between state authorities and local self-government authorities, and between the authorities of the local self-government units; 6) Prohibition of work of a political party or a non-governmental organization; 7) Electoral disputes and disputes related to the referendum, which are not the responsibility of other courts; 8) Conformity with the Constitution of the measures and actions of state authorities taken during the state of war or the state of emergency; 9) Performs other tasks stipulated by the Constitution. If the regulation ceased to be valid during the procedure for the assessment of constitutionality and legality, and the consequences of its enforcement have not been recovered, the Constitutional Court shall establish whether that regulation was in conformity with the Constitution, that is, with the law during its period of validity.

The Constitutional Court shall monitor the enforcement of constitutionality and legality and shall inform the Parliament about the noted cases of unconstitutionality and illegality."


⁴ Amandmani I do XVI na Ustav Crne Gore, Official Gazette no. 38/2013 (entered into force on 31 July 2013).

⁵ According to Article 5 para 2 of the Constitutional Law for the Implementation of Amendments I to XVI to the Constitution of Montenegro, which also entered into force on 31 July 2013, public call for the election of all judges of the Constitutional Court has been announced within 30 days from the day of alignment of the LCCM with the 2013 Amendments to the Constitution. The new judges of the CCM were elected at the end of the year 2013.

⁶ Article 5 para 1 of the Constitutional Law for the Implementation of Amendments I to XVI to the Constitution of Montenegro prescribed that "the Law on Constitutional Court of Montenegro shall be aligned with the Amendments within 45 days from the day of entry into force of this Law".
4. However, these 2013 Amendments to the Constitution failed to remove all deficiencies of the constitutional framework for the efficient constitutional judiciary in Montenegro. I will mention just one example. Article 152 para 1 of the Constitution of Montenegro prescribes:

"Cessation of validity of a regulation

Article 152
When the Constitutional Court establishes that the law is not in conformity with the Constitution and confirmed and published international agreements, that is, that other regulation is not in conformity with the Constitution and the law, that law and other regulation shall cease to be valid on the date of publication of the decision of the Constitutional Court.

(...)"

According to Article 152 para 1, the Constitution of Montenegro does not enable the CCM to postpone the entry into force of its decisions so to prevent the detrimental consequences, leaving the Parliament the necessary time for harmonising the repealed law or other regulations with the views of the CCM. Thus, the CCM's reluctance to repeal laws and other regulations is understandable in a situation when it is obvious that their momentarily repeal will cause legal vacancies in the legal system or seriously disrupt the national and social life of Montenegro. Therefore, Article 152 para 1 of the Constitution of Montenegro is a significant obstacle for the more efficient work of the CCM in the field of abstract control of laws and other regulations.

5. On the other hand, the Constitution provides the sufficient framework for some issues, but in elaborating these issues the LCCM itself imposes very powerful restrictions. This is the case, for example, with Article 48 para 1 of the LCCM which is significantly narrower than Article 149 para 1 point 3 of the Constitution. On the one hand, the Constitution prescribes the following:

"Article 149
The Constitutional Court shall decide on the following:

(...) 3) Constitutional appeal due to the violation of human rights and liberties granted by the Constitution, after all the effective legal remedies have been exhausted;"

On the other hand, Article 48 para 1 of the LCCM prescribes as follows:

"Article 48
The constitutional claim may be filed against an individual enactment of a state authority, public administration authority, local self-government authority, or a legal person exercising public authority, for reason of violation of human rights and freedoms guaranteed by the Constitution after all effective legal remedies have previously been exhausted.

(...)"

From the constitutional law point of view, there is a big difference between deciding on "the constitutional complaint for the violation of human rights" and deciding on "the constitutional complaint against an individual enactment" of a state or public authority.
Namely, human rights are not violated only by "individual enactments", as prescribed in Article 48 para 1 of the LCCM. The best examples can be found in the judgments of the European Court of Human Rights (hereinafter referred to as "the ECtHR") in cases Bijelić against Montenegro and Serbia (28 April 2009, no. 11890/05) and Mijušković against Montenegro (21 September 2010, no. 49337/07).

In Bijelić case the ECtHR examined the non-enforcement of a final eviction order and the consequent inability of the applicant to live in the flat at issue.

In Mijušković case the ECtHR examined the belated enforcement of a final custody judgment.

In both cases the violations of human rights within the meaning of Article 149 para 1 point 3 of the Constitution were at issue (the non-enforcement of court decisions), not the "individual enactment" within the meaning of Article 48 para 1 of the LCCM (i.e. final decisions of the courts of justice as such).

The given examples clearly show that there are valid reasons for the review of the LCCM, which was the task of the Expert Mission.

2. Suggestions and Conclusions

1. I find that the Expert Mission on amending the LCCM is entirely successful. Within the boundaries of the Constitution, the suggested revisions will provide for the more efficient constitutional judiciary in Montenegro. However, these are only initial proposals which do not represent the official draft of the new LCCM. Therefore I recommend foreseeing the possibility of timely verification of the official draft of the new LCCM, after it is completed and passed the public debate.7

2. Furthermore, I would emphasise that proper regard for the rule of law and human rights is not merely a matter for ensuring that satisfactory legislation is in place. The implementation of such legislation is also of very great importance if the rule of law and human rights' provisions are not to become a dead letter.

In this light I observe that the CCM comprises only seven judges, among which five are elected only at the end of 2013. Given that I am quite familiar with the situation in the CCM, I estimate that it is highly necessary to organise for the CCM judges and legal advisors specialized seminars on not only judicial techniques for dealing with concrete cases upon constitutional appeals, but also on methods for interpretation of the rights applied by the ECtHR, in particular with regard to Articles 2 and 3, Articles 5 and 6 and Article 8 of the Convention (in a part relating to the right of home), and Article 1 of Protocol No 1 to the Convention.

This is particularly important because of the strong tensions between the Supreme Court of Montenegro and the CCM. Namely, the Supreme Court of Montenegro persistently reiterates that in the procedures upon constitutional complaints the CCM should not have competence to repeal judgments of the courts of law, and in particular the judgements of the highest court of


8
the country. This request the Supreme Court of Montenegro grounds on the complaints addressed to the CCM, which allegedly exceeds its competences and acts as the fourth instance court.

Although the request of the Supreme Court of Montenegro (that the CCM may not repeal the court judgments) is entirely unfounded, the fact remains that the CCM must be capable to deal with concrete cases upon constitutional appeals in a manner which would not make it the fourth instance court. In order to achieve this it is necessary to introduce a high quality education of the CCM judges and legal advisors.

3. To conclude, the high quality and efficient constitutional judiciary poses before all competent state authorities in Montenegro, within their relevant jurisdictions, serious and significant requirements. As the most important I find the following:

- The high quality legal framework of constitutional judiciary, flexible enough to provide the CCM with the space for permanent adaptation to new circumstances in accordance with the development of the society, and which is defined enough to provide the satisfactory level of legal certainty and legal predictability;

- Sufficient budgetary funds for fulfilling all the requirements of the CCM, especially in the present transitional period of building up of the democratic values and accepting the European legal standards in the Montenegrin society;

- Efficient and flexible internal organisation of the CCM's work, which should be regulated exclusively by the Rules of Procedure of the CCM,

- Sufficient number of the top Montenegrin's legal experts who should be trained to work as legal advisers on the different constitutional court cases, in particular constitutional complaints, and who are willing to permanently improve themselves both professionally and linguistically.