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ANTI-DEADLOCK MECHANISMS FOR THE ELECTION OF JUDGES OF THE CONSTITUTIONAL COURT:

TOWARDS SYSTEMIC SOLUTIONS FOR THE
ESTABLISHMENT OF THE RULE OF LAW AND
FUNCTIONAL INSTITUTIONS

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Judges of the Constitutional Court of Montenegro, charged with for the protection of constitutionality and legality, are elected by members of the National Assembly.¹ Due to the necessary two-thirds majority of all MPs in the first, and three-fifths majority in the second round of voting, the election of judges of the Constitutional Court requires securing the consensus of the parties. Although the election of judges by three-thirds majority in the second vote, which was proposed by the Venice Commission,² is intended to serve as an anti-deadlock mechanism, it is not functional in the current political climate.

The above statement is supported by the fact that the Constitutional Court was deadlocked for almost six months because the MPs could not reach an agreement on the proposed candidates. Consequently, the Court was unable to decide in many cases within its jurisdiction, including the appeals on election processes and whether the President of the State had violated the Constitution.

In the absence of mechanisms that could “force” the MPs to elect the missing judges, the work of the Court was unblocked after six attempts by finally reaching the consensus, under the pressure under the pressure of the European Union and following the announcement of a possible suspension of the accession negotiations. At the beginning, it is important to note that appointments in the judiciary are recognised as one of the key challenges for meeting the benchmarks from Chapter 23 (Judiciary and Fundamental Rights) in the negotiation process between Montenegro and the European Union.

As it is highly probable that in the next two years the Constitutional Court will lose three of the current six judges because they will become eligible for retirement, there is a danger that this institution will end up deadlocked once again, without a quorum required for decision-making. The objective of this paper is to examine the potential mechanisms for unblocking the election of judges of the Constitutional Court in Montenegro through a comparative analysis of models used for the election of constitutional court judges in the region and in the member states of the European Union, and to offer recommendations to reduce the possibility of a repeated deadlock.

Election of Judges of the Constitutional Court of Montenegro: Where Did Things Get Stuck?

The issue of the election of judges of the Constitutional Court was brought to the fore during the opening of negotiations with the European Union, when the European Commission warned, at the very beginning of the negotiations with Montenegro, about the necessity to change the system of appointing the President of the Supreme Court, the Supreme State Prosecutor and judges of the Constitutional Court.³ Before the Constitution was amended in 2013, seven judges of the Constitutional Court were being elected and dismissed by the Assembly, without a qualified majority, on the proposal of the President of the State. However, such a system of electing judges was not aligned with European standards. Additionally, the opinions and the opinions of the Venice Commission warned that there was a danger that at one point all the judges of the Constitutional Court would be in favour of the parliamentary majority.⁴

Changes to the Constitution were thus made with the support of the European Commission in July 2013, with the aim of harmonising it with European standards. Additional goals were: strengthening the independence of the judiciary, depoliticisation, and appointments based on merit.⁵ Once the Constitution was amended in the field of justice, Montenegro opened negotiations in five chapters at the Intergovernmental Conference on Montenegro's accession to the EU,⁶ and it was agreed that the chapters 'Justice and Fundamental Rights' (23) and 'Justice, Freedom and Security' (24) would remain open during the entire process of negotiation.

The above-mentioned amendments to the Constitution⁷ stipulate that judges of the Constitutional Court of Montenegro are to be elected, instead of a majority vote of all MPs, by a qualified, i.e. two-thirds majority (54 out of a total of 81 MPs) in the first round of voting. Voting by a three-fifths majority of all MPs (49) is envisaged in the second round of voting as an anti-deadlock mechanism, at the earliest one month after the first round, in case the required majority was not reached in the first round. Amendments to the Constitution made it impossible for the President of the State to elect all judges, as that could cause a risk of all judges being in favour of his party; instead, two out of seven judges are to be nominated by the President of the State, while the remaining five are to be nominated by the Constitutional Committee. However, it is important to say that, after the consultative hearing of the candidates who applied for a public call for the election of judges of the Constitutional Court, the Constitutional Committee⁸ will vote on candidates who will be proposed to the Assembly by absolute majority, and not by two-thirds majority. The non-governmental organisation Human Rights Action has criticised this solution, pointing out that it jeopardises the goal of the planned two-thirds election in the plenum: to have the opposition also participating in the election to a significant degree.⁹

In addition, an early notice of meeting the requirements for retirement or the expiry of a mandate, to be submitted to the proposer (the President of the State or the Constitutional Committee, depending on who the proposer is) six months in advance, was introduced as a preventive mechanism against possible deadlocks. According to the notices that were submitted by the Constitutional Court of Montenegro,¹⁰ since the amendments to the Constitution were made in 2013 the Constitutional Court has informed the Assembly about the judges' fulfilment of requirements for retirement on four occasions, following which public calls for the election of judges were announced, but were unsuccessful. All notices were delivered within the deadline, that is, six months before the fulfilment of the requirements for age-based retirement, except in the case of judge Dragoljub Drašković. In this case, on 1 November 2022 the Constitutional Court informed the Assembly that the court has failed to reach an agreement on whether the judge became eligible for retirement on 1 January 2022 (three judges supported this position) or in October 2021. In either case, the deadline for notifying the Assembly was missed.¹¹

Although the election of judges by a qualified majority in the Assembly contributes to their legitimacy, given that the parliamentary majority is forced to reach a consensus with the minority, there is a risk and greater probability of a deadlock caused by failure to reach an agreement. This risk is increased in countries where there is no established political culture of reaching agreements among different political subjects. Such is the case with Montenegro, where the Constitutional Court was in deadlock from September 2022 until the end of February 2023 due to the retirement of one judge, while previously the Court barely had a quorum as it functioned with four¹² out of a total of seven judges, as envisaged by the Constitution. Namely, although the first (of five unsuccessful) public calls for the election of judges of the Constitutional Court was announced in August 2020, the MPs were unable to reach an agreement. In the meantime, the number of judges kept decreasing until the Court's final deadlock, caused by the retirement of judge Iličković, occurred in September 2022. The refusal of the parliamentary majority to vote for the candidates, the boycott of the work of the Assembly by the opposition, and the ineffectiveness of the Constitutional Committee all contributed to the crisis. The above is supported by the fact that the Constitutional Committee held interviews with candidates who applied for the first competition in August 2020, no less than nine months after the competition was closed,¹³ and almost half a year since the establishment of parliamentary committees

In its report for 2022, the European Commission noted that the instability of the Government, tensions within the ruling majority, and the procrastination in the decision-making process and the implementation of reforms affected the functioning of Montenegrin institutions and the blockade of the work of the Constitutional Court.¹⁴ Due to the impossibility of reaching an agreement regarding the election of judges of the Constitutional Court, at the beginning of 2023 the European Union threatened to suspend the accession negotiations with Montenegro.¹⁵ Namely, on its own initiative or at the request of a third of the member states, the European Commission is allowed to make a recommendation to temporarily suspend negotiations, following which the Council of the EU can take a decision by a qualified majority. It was precisely under the pressure

of the European Union and the international community that the parties reached a consensus at the end of February 2023. Once this happened, three of the four missing judges were elected in the sixth attempt.¹⁶ Still, the MPs could not agree on the fourth missing judge, so the Constitutional Court is currently¹⁷ not operating in full composition.

Until late February 2023, when a consensus was reached on the election of three¹⁸ of the four missing judges, the Constitutional Court was unable to decide on 2,512 constitutional appeals, as well as on 285 initiatives for the review of constitutionality.¹⁹ Among other things, due to the lack of a quorum in this period, it could not decide whether the President of Montenegro had violated the Constitution by not proposing a Prime Minister Designate for the composition of the new Government,²⁰ on the constitutionality of changes to the Law on the President,²¹ and on complaints about the election process in the Capital City, which is why the election results were announced after a delay of four months. The Constitution of Montenegro prescribes numerous competences of the Constitutional Court, including deciding on the compatibility of laws, other regulations and general acts with the Constitution, on constitutional appeals due to violations of human rights and freedoms, on election disputes, and whether or not the President violated the Constitution.²²

Although the Court is formally unblocked, the current composition, i.e. the number of judges is not optimal for its functioning. According to the Constitution of Montenegro, the Constitutional Court consists of seven judges, who decide by majority vote of all judges. The odd number of judges is important because it prevents the possibility of the court being deadlocked when deciding, that is, of having an equal number of judges' votes on both sides. In this regard, this number of judges was envisaged to make it possible for the court to operate; namely, in the case of three votes 'for' and three 'against', the decision is reached by the vote of the seventh judge. This sort of deadlock in decision-making and a new crisis in the work of the Constitutional Court was caused by the election of three of the four missing judges. Namely, six judges could not make a decision regarding the initiative to review the constitutionality of the decree on the dissolution of the Assembly, issued by the President of the State, because three judges voted for and three against.²³ In this way, although the Constitutional Court was formally unblocked, its work was hampered by the absence of another judge who would prevail in the case of an equal number of votes.

After the National Assembly of Montenegro elected three judges in February 2023,²⁴ the Constitutional Court has six judges, counting those who were already there.²⁵ However, although currently operational, the Constitutional Court may soon once again find itself without a quorum, as several judges are about to qualify for retirement in the upcoming period. Namely, if the provisions of the Law on Pension and Disability Insurance remain in force,²⁶ judge Dragana Djuranović will qualify for age-based retirement²⁷ at the end of 2023. Three of the remaining five judges will also soon qualify for retirement: Judge Milorad Gogić will qualify in one year, while judges Budimir Šćepanović and Desanka Lopičić will do so in two years.²⁸ Based on the above, it can be expected that the Constitutional Court of Montenegro will once again be without a quorum by the end of 2024, unless the members of the parliament reach an agreement

on judges who would take their places.

Due to the impossibility of solving the crisis in the Parliament of Montenegro, proposals were made in the public to unblock the judiciary by electing judges using a 'lottery',²⁹ to dissolve the Assembly, or to introduce a state of emergency due to the threat to the constitutional order.³⁰

However, such practices have never been used in the countries of the European Union, nor were they recommended by the Venice Commission even in more complicated cases of deadlock such as the one in Tunisia, where the Constitutional Court provided for by the then Constitution has not been established since 2014 because of the absence of a two-thirds majority required for it.³¹

In relation to the above, models of anti-deadlock mechanisms for the election of judges of the Constitutional Court from the region and the European Union, as well as

the possibility of applying them in Montenegro, will be analysed below.

Regional and EU Examples of Anti-Deadlock Mechanisms for the Election of Judges of the Constitutional Court

A qualified majority is necessary to ensure a high level of legitimacy of the highest judicial instance in the country, while also ensuring the power of the parliamentary minority to block the election in case they are not involved in the decision-making process. In its opinions on the composition and election of judges of constitutional judges in Europe, the Venice Commission indicated that a balanced composition of constitutional courts is important, as it must guarantee these courts' independence from various interest groups and make them resistant to party influences. In this regard, it is necessary to find a balance between the high legitimacy of judges and possible deadlocks caused by the fact that they were not voted for (appointed).³²

The Venice Commission emphasises that it is the states themselves that should find solutions and anti-deadlock mechanisms that work in their own context, noting that these mechanisms must not serve as a disincentive to reaching an agreement in the first instance, that is, by qualified majority. However, it is important to find an anti-deadlock mechanism that would be "unattractive" to both the majority and the minority in the Assembly, that is, one that will encourage them to reach a compromise in the first round of voting.

By analysing the constitutions of the member states of the European Union and the countries of the region, as well as the opinions of the Venice Commission, it is possible to distinguish several types of anti-deadlock mechanisms. The mechanisms mentioned in the analysis include: extending the mandate of current judges until the election of their successors, reducing the necessary number of votes in the following rounds of voting, election by neutral bodies after an unsuccessful vote in the Assembly, election of judges by several different bodies (from the executive, judicial and legislative branches of power) with the necessary qualified majority in the Assembly, and the election of reserve/replacement judges.

a) Extending the Mandate

The practice of extending the mandate of current judges of constitutional courts until the election of their successors exists in Slovenia, Spain, Latvia, Croatia and Albania.

In the case of the Federal Constitutional Court of Germany, 16 judges are elected by the German Bundestag, i.e. the lower house of the federal parliament, and the Bundesrat, i.e. the upper house of the federal parliament, which is composed of representatives of

the federal units. The Bundestag and the Bundesrat elect eight judges each, by a two-thirds majority. What is specific is that, after the term of office of a judge of the Federal Constitutional Court of Germany expires, said judge continues to discharge his/her office until his/her successor is elected.³³ In addition, if the judge's mandate ends prematurely, the same body that elected the judge will elect his/her successor within one month. If no "successor" has been elected by the Bundesrat or Bundestag within two months of the end of the judicial office or early departure, the oldest member of the Election Committee from the above parliamentary houses will ask the court to propose candidates for election. If only one judge is to be elected, the Federal Constitutional Court will propose three candidates. If more judges are to be elected, the court will propose twice as many candidates as needed.

The same is the case with the election of judges of the Constitutional Court of Croatia, where, according to the Constitution of that country, a judge's mandate is extended until the new judge takes office in the event that the new judge has not been elected or has not taken office by the time of its expiry, up to a period lasting no longer than six months. The Constitution of Albania³⁴ also stipulates that a judge of the Constitutional Court will remain in office until the appointment of his/her successor, except in the case of: resignation, dismissal, established facts of incompatibility with discharging office, and established facts of incapacity to discharge the office. When a judge's mandate ends because s/he has reached the age of 70 or his/her 9-year mandate expires, s/he will continue to perform his/her duties until a new judge is elected.

The Constitutional Court of Latvia is composed of seven judges, whose election is confirmed by a majority of votes in the Assembly (*Saeima*). Three judges are elected on the proposal of at least 10 MPs, two on the proposal of the Cabinet of Ministers, and two more on the proposal of the Plenary Session of the Supreme Court. If the Assembly fails to approve another judge of the Constitutional Court in place of a judge whose mandate has expired or who has reached the age of 70, that judge's mandate shall be deemed extended until the time when the Assembly elects another judge and s/he takes the solemn oath. Also, the mandate of judges whose term of office was terminated due to the expiry of their term of office or their age will be extended until the issuance of judgments in the cases whose investigations were started with the participation of this judge.

In the Article that prescribes the duration of the mandate of the 9 judges of the Constitutional Court of Slovenia, the Constitution of Slovenia stipulates that after the expiry of his/her mandate, a judge will continue to perform his/her duties until a new judge is elected. In this country, judges are elected by the Assembly, by a majority vote of all MPs, on the proposal of the President of the Republic. Also, the Constitution of Slovenia envisages the possibility for the President of the Republic to propose more candidates than necessary for the election of judges, and in such cases the order of candidates is determined by lot. If none of the candidates receives the required majority, or if an insufficient number of judges is elected, the vote is taken once again regarding the candidates who received the largest number of votes.

Although this is not defined by the Constitution of Montenegro, Article 15 of the Law on the Constitutional Court of Montenegro stipulates that "when the office of a judge of

the Constitutional Court ceases due to the expiry of his/her mandate, and the proposer does not propose or the Assembly does not elect a judge to the vacant position, the Assembly will simultaneously make a decision terminating the office of the judge of the Constitutional Court whose term of office has expired and the decision that said judge will continue to discharge the office of a judge of the Constitutional Court until the election of a new judge, but not longer than for a period of one year." This possibility has never been used In Montenegro because, since 2013, when this provision entered into force, the office of all judges ceased because they qualified for age-based retirement. It is also possible to raise the question of constitutionality of the above-mentioned legal provision since the Constitution of Montenegro prescribes that the term of office of judges lasts 12 years and that judges cannot be re-elected.

However, unlike the constitutions of the member states of the European Union, the Constitution and the Law on the Constitutional Court of Montenegro do not provide for the continuation of the office of a judge until the election of a new one in the case of a judge who has become eligible for retirement, which until now was the most common reason for the termination of office of judges of the Constitutional Court of Montenegro.

b) Reduction of Majority Vote

Another anti-deadlock mechanism that can be noted in the systems of appointing judges of constitutional courts is the reduction of the number of votes necessary for their election in the subsequent rounds of voting. Such voting systems can be found in the constitutions of Italy and Slovakia. In Italy, the five judges elected in the Parliament are elected by a qualified majority of the MPs in the first three voting rounds, and by a three fifths majority in all subsequent rounds.³⁵

Such an anti-deadlock mechanism is already envisaged in Montenegro, since, according to the Constitution, in the second round judges of the Constitutional Court are elected by a three-fifths majority, instead of a two-thirds majority. It was precisely in the opinion on Montenegro that the Venice Commission stated that a "decreasing majority" in the subsequent rounds of voting is a desirable anti-deadlock mechanism. However, as a disadvantage of this model, it has been warned that it can prevent the majority from seeking consensus in the first round because they will know that their candidate will win in the subsequent rounds.³⁶

c) Election by Neutral Bodies

Besides the introduction of a decreasing number of votes in the subsequent rounds, in its opinion on amendments to the Constitution in Armenia³⁷ the Venice Commission stated that, in countries where the political culture is not sufficiently developed to reach a compromise, the anti-deadlock mechanism can be the nomination of new candidates by neutral bodies if the voting in the Parliament proves unsuccessful.

However, reviewing the constitutions of the European Union member states, we found

no example of the election of candidates by neutral or mixed bodies in the case of constitutional court judges. Still, although there is no similar anti-deadlock mechanism for the election of judges of the Constitutional Court in Serbia, amendments to the Constitution that provide for such a mechanism for the election of lay members of judicial councils were recently adopted. Namely, if the Assembly fails to elect all four members of the High Judicial Council and the High Prosecutorial Council within the time limit set forth by law, the remaining members are to be elected by a commission consisting of the Speaker of the National Assembly, President of the Constitutional Court, President of the Supreme Court, the Supreme Public Prosecutor and the Protector of Citizens (Ombudsman), by majority vote.³⁸ It is however important to emphasise that civil society organisations criticised this solution, pointing out that this mechanism, which was supposed to be an exception and not the rule, was used at the very beginning of the application of the constitutional amendments, and that the decision of the five-member commission mirrored the previous position of the parliamentary majority.³⁹

d) Combined Election by the Executive, Legislative and Judicial Branches of Power

The fourth, and last, recorded anti-deadlock mechanism in the constitutional systems of the European Union is the appointment of judges of constitutional courts by several different bodies (a combination of the executive, judicial and legislative branches of power). In its opinions, the Venice Commission stated that models according to which only the Assembly can decide on candidates for judges do have high democratic legitimacy, but that the inclusion of several different bodies protects the appointment of a number of candidates from political influences.⁴⁰ Additionally, it can be concluded that it would be more difficult to block the work of the court in the event that some of the judges are not elected in the Assembly if the other two appointing bodies did elect candidates, thus creating a quorum for decision-making.

In neighbouring Serbia, judges of the Constitutional Court who are elected by the National Assembly are elected by a simple majority of MPs. However, the system of electing judges of the Constitutional Court in Serbia is different from the elections in Montenegro as not all judges are elected by the Assembly, but only a third of them. Namely, Serbia has chosen a mixed system for electing judges, where all three branches of power have the “final say” in the election of judges: five judges of the Constitutional Court of Serbia are elected by the National Assembly, five are appointed by the President of the Republic, and five by the general session of the Supreme Court.

The National Assembly elects five judges of the Constitutional Court of Serbia from among 10 candidates proposed by the President of the Republic; the President of the Republic appoints five judges of the Constitutional Court from among 10 candidates proposed by the National Assembly, and the general session of the Supreme Court appoints five judges from among 10 candidates proposed by the High Judicial Council and the High Prosecutorial Council at a joint session.⁴¹ Experts say that the above system of election

of judges was adopted to make sure that no body participating in the election can have a decisive influence on the composition of the Court, i.e. to ensure a certain balance.⁴²

Similar to Serbia, the Constitutional Court of Italy also has 15 judges. A third of them are chosen by the President of the Republic, a third by the Parliament, and a third by the courts. The last third of the judges are elected by members coming from three bodies: three judges are elected by the Supreme Court, one judge is elected by the State Council, and one judge is elected by the Court of Auditors, by an absolute majority of the members. In the event that there is no majority, judges are elected in the second round from among those candidates who received the highest number of votes in the first round of voting. According to information from the Constitutional Court of Italy, reaching a consensus on the election of judges in the Parliament takes a long time. As stated, elections are often delayed due to the difficulty of reaching a consensus, so the Court continues to operate in a reduced capacity, but never with fewer than 11 judges.⁴³

e) Reserve/Replacement Judges

An additional mechanism, although not mentioned in the opinions of the Venice Commission and present in only one country, can be the election of reserve/replacement judges. Namely, the Constitutional Court of Austria consists of 14 judges: president, deputy president and 12 members. However, that Court also has six reserve/replacement judges, who are called to duty in case of partiality of regular judges, their temporary absence, or termination of office.⁴⁴ The president, deputy president and six members are elected by the President on the recommendation of the Federal Government; the remaining six members are also appointed by the President: three on the proposal of the National Council (the lower house of the Austrian Parliament), and three more on the proposal of the Federal Council (the upper house). A two-thirds majority is required in the parliament to support candidates.

Of the six reserve/replacement judges, three must be women and three men; of the six, four must be judges, one a university professor and one a lawyer. They are free to continue practicing their professions in addition to being engaged as constitutional judges. As stated by the Constitutional Court of Austria, this system ensures that the knowledge and experience of the most important legal professions are reflected in the decisions made by the Court.⁴⁵

Below is information on the existence of constitutional courts in the countries of

the region and the European Union, the number of judges, the method of their election, the required qualified majority and their term of office:

State	Number of judges	Who elects judges?	By what majority?	Length of mandate
Montenegro	7	Judges are elected by the Assembly: two on the proposal of the President and five on the proposal of the Constitutional Committee of the National Assembly.	In the first vote by a two-thirds majority, and in the second vote by a three-fifths majority of all MPs.	Twelve years, there is no renewal of mandate.
Serbia	15	Five judges of the Constitutional Court are elected by the National Assembly, five are appointed by the President of the Republic, and five by the general session of the Supreme Court. ⁴⁶	By a simple majority of the MPs in the Assembly.	Nine years, no more than two mandates.
Bosnia and Herzegovina	9	Four members are elected by the House of Representatives of the Federation of Bosnia and Herzegovina, and two by the National Assembly of the Republic of Srpska. ⁴⁷ The remaining three members are elected by the President of the European Court of Human Rights following consultation with the Presidency. Judges elected by the European Court of Human Rights are not citizens of Bosnia and Herzegovina or any of the neighbouring countries. ⁴⁸	By majority vote.	No limits, judges can discharge office until they turn 70 years of age.
Albania	9	Three judges are appointed by the President, three are elected by the Assembly and three by the Supreme Court. ⁴⁹	By a three-fifths majority in the Assembly, among the three candidates proposed by the Council for Judicial Appointments. If the Assembly fails to elect a candidate within 30 days from the submission of the list, the first-ranked candidate is elected.	Nine years, without the right to re-election.

Kosovo	9	The President of the Republic appoints judges, on the proposal of the Assembly.	The decision to nominate seven judges requires a two-thirds majority of the present MPs. A majority vote is required to take a decision on the proposals of the remaining two judges. ⁵⁰	Nine years, without the possibility of renewing the mandate.
Austria	14	Judges are appointed by the President on the proposal of the Federal Government or one of the two houses of the Austrian Parliament. The Government proposes candidates for president, vice president, six members and three replacements. The National Council proposes three members and two replacements, while the Federal Council proposes three members and one replacement. ⁵¹	A two-thirds majority for judges who are elected by the National Assembly.	Twelve years, with the possibility of re-election.
Belgium	12	Judges are appointed by the King of Belgium, from a list of two candidates proposed alternately by the House of Representatives and the Senate (bicameral parliament). ⁵²	By a two-thirds majority in both houses of the Parliament.	For life.
Bulgaria	12	One third are elected by the Parliament, one third are appointed by the President, and one third are elected at a joint session by judges of the Supreme Court of Cassation and the Supreme Administrative Court. ⁵³	By a majority vote of the present MPs.	Nine years, without a possibility of re-election/re-appointment.
Croatia	13	Judges are elected by the Croatian Parliament. ⁵⁴	By two-thirds majority.	Eight years, can be extended until the election of a new judge, for a maximum of 6 months. There is no prohibition of re-election.
Cyprus	There is no Constitutional Court; instead, the Supreme Court reviews the constitutionality of laws and is competent in cases of conflicts of jurisdiction between the authorities. ⁵⁵			

Czech Republic	15	Judges are appointed by the President of the State, with the consent of the Senate of the Czech Parliament. ⁵⁶	Voting in the Senate of the Parliament is done by a simple majority of senators who are present. If the President does not receive consent within 60 days of his request because the Senate did not vote within the specified period, it is deemed that the Senate has given consent. ⁵⁷	Ten years, no explicit prohibition of re/election.
Denmark	There is no Constitutional Court and the review of the constitutionality of acts is left to other courts: district courts, the Higher Court and the Supreme Court. ⁵⁸			
Estonia	There is no Constitutional Court and it is the Supreme Court (the highest court in Estonia) that is responsible for reviewing constitutionality. The Court consists of the Civil Chamber, the Criminal Chamber, the Administrative Law Chamber and the Constitutional Review Chamber. ⁵⁹			
Finland	Like other Nordic countries, Finland has no Constitutional Court. Constitutional control is carried out <i>ex ante</i> (the Constitutional Committee in the Parliament and the Justice Chancellor) and <i>ex post</i> through revision by the courts, primarily the Supreme Court and the Supreme Administrative Court. ⁶⁰			
France	9	Instead of the Constitutional Court, there is a Constitutional Council (<i>Conseil constitutionnel</i>), which is the highest constitutional authority. The President of the State, the Speaker of the Parliament and the Speaker of the Senate elect three members each.	The appointment of a proposed candidate can be blocked by a three-fifths majority. "The President of the Republic cannot appoint a member of the Council when the sum of negative votes in each committee is equal to at least three-fifths of the votes of both committees." ⁶¹	Nine years, no re-election.
Germany	16	The lower and upper houses of the federal parliament elect eight judges each. ⁶²	A two-thirds majority for the election of judges is necessary in both houses of parliament.	Twelve years, with no possibility of re-election.
Greece	There is no Constitutional Court and, according to the Constitution of Greece, any court has the right and duty to control the constitutionality of acts. ⁶³			
Hungary	15	Judges are elected by the Parliament.	A two-thirds majority is required. ⁶⁴	Twelve years, no explicit prohibition of re-election.
Ireland	There is no Constitutional Court. The Supreme Court of Ireland has jurisdiction to decide whether a law that was passed by the Parliament (<i>Oireachtas</i>) is unconstitutional.			

Italy	15	One third of the judges are elected by the President of the Republic, one third by the Parliament, and one third by the courts. The last third of the judges are elected by members elected from three bodies: three judges are elected by the Supreme Court, one by the State Council, and one by the Court of Auditors.	The five judges who are elected by the Parliament are elected by a qualified majority of deputies in the first three rounds of voting, and by a three-fifths majority in all subsequent rounds. The last third of the judges is elected by an absolute majority of members, and if there is no majority, judges are elected in the second round from among the candidates who had received the most votes in the first round.	Nine years, with no possibility of re-election.
Latvia	7	Judges are elected by the Parliament (<i>Saeima</i>). Three judges are elected on the proposal of at least ten members of the Parliament, two on the proposal of the Cabinet of Ministers, and two on the proposal of the Plenary Session of the Supreme Court. ⁶⁵	By a majority vote, i.e. at least 51 votes out of a total of 100 deputies in the Assembly.	Ten years, no explicit prohibition of re-election.
Lithuania	9	The Parliament (<i>Seimas</i>) appoints three judges each from the candidates proposed by: the President of the Republic, the Speaker of the Assembly and the President of the Supreme Court.	By a simple majority.	Nine years, no possibility of re-election.
Luxembourg	9	The Constitutional Court consists of the president of the High Court of Justice, the president of the Administrative Court, two advisors of the Administrative Court and five misdemeanour judges proposed based on the joint opinion of the High Court of Justice and the Administrative Court. ⁶⁶	/	Six years, no explicit prohibition of re-election.
Malta	3	The appointment of members of the Constitutional Court is made by the President of the Republic, in consultation with the Committee for Judicial Appointments.	The chief judge (<i>primus inter pares</i>) among the three judges of the Constitutional Court is appointed by the President, with the support of two thirds of the Parliament.	For life, until 65 years of age or until dismissal.
Netherlands	There is no Constitutional Court because the Constitution of the Netherlands (<i>Grondwet</i>) prohibits judicial review of laws and other acts, given that the Netherlands has a system of parliamentary sovereignty (legislative supremacy), which means that no court is allowed to review the validity of legislative acts. ⁶⁷			

Poland	15	Judges of the Constitutional Tribunal are appointed by the Parliament (<i>Sejm</i>), and candidates are proposed by at least 50 MPs.	A simple majority in the presence of at least half of the total number of MPs. ⁶⁸	Nine years, no explicit prohibition of re-election.
Portugal	13	Of the 13 judges, 10 are appointed by the Assembly, and these 10 appoint the remaining three. Six of the aforementioned 13 judges are elected from among judges of other courts in Portugal, while the rest are elected from among lawyers. ⁶⁹	By a qualified majority in the Assembly.	Nine years, mandate is not renewable.
Romania	9	Three judges are appointed by the House of Representatives, three by the Senate, and three by the President of Romania.	By the majority of votes of the MPs present in both houses of parliament.	Nine years, without the possibility of extension / renewal.
Slovenia	9	Judges are elected by the Assembly on the proposal of the President of the Republic. After the expiry of the term of office of a judge of the Constitutional Court, s/he continues to perform his/her duty until the election of a new judge. ⁷⁰ The President of the Republic can propose more candidates than there are vacancies in the Constitutional Court.	The Assembly elects judges by secret ballot, by a majority vote of all MPs.	Nine years, without the right to re-election.
Spain	12	<i>Magistrados</i> are appointed by the King. Of the 12 judges, four are nominated by the Congress, four by the Senate, two by the Government and two by the General Council of the Judiciary. ⁷¹	By a two-thirds majority of all members of Congress, as well as the Senate.	Nine years, one third of the composition is renewed every three years. There is no explicit prohibition of re-election.
Sweden	There is no Constitutional Court, but the Constitution stipulates that the Supreme Court can annul a law that is clearly inconsistent with the Constitution. Unlike other European countries and the United States of America, the highest authority is the Riksdag (Parliament). ⁷²			

Conclusion

Apart from being a European standard and a recommendation of the European Commission, a qualified parliamentary majority for the election of judges of the Constitutional Court is necessary for ensuring the legitimacy in the election of persons to sensitive positions in state institutions. Therefore, a qualified majority in the National Assembly of Montenegro is necessary, as is in most countries of the European Union, and should lead to the rapprochement of the parliamentary majority and minority, which - in this system of election of judges of the Constitutional Court - are turned towards the other in seeking a compromise and achieving a consensus on the election of candidates.

However, the analysis showed that the election by a two-thirds majority is not easy to achieve. There are many member states of the European Union that also admit that they have difficulties reaching a solution, and the constitutional courts themselves say that this method leads to frequent deadlocks (as in the case of Italy). Montenegro is no exception, as demonstrated by the previous two years of political and institutional crisis during which members of the Parliament were unable to reach an agreement. The anti-deadlock mechanism envisaged by the 2013 amendments to the Constitution, which foresee the election of judges by a three-fifths majority in the second round of voting, is not functional since there is no political culture of reaching a compromise between the parliamentary majority and the minority in Montenegro and the selection of candidates is often the subject of trade. Although the Constitutional Court is not formally deadlocked at the moment, as it has the quorum required for work, the structural problem has not been resolved and it is quite probable that in the near future it will be deadlocked once again, considering that in the next two years three judges will fulfil the requirement for retirement.

The solutions that have so far been offered to the Montenegrin public as a way out of the institutional crisis, envisaging the election of candidates by lottery, by dissolution of the Assembly or by introducing a state of emergency, have no basis in the constitutional systems of the countries of the European Union and were never proposed by the Venice Commission in cases of serious deadlocks. Instead, some of the anti-deadlock mechanisms that do exist in the constitutions of the European Union states, and which Montenegro should consider in the coming period, include extending the mandate of current judges until the election of their successors, reducing the necessary number of votes in the subsequent rounds of voting, election by neutral bodies after an unsuccessful voting in the Assembly, and the election of judges by several different bodies (a combination of the executive, judicial and legislative branches of power).

Since Montenegro already has an anti-deadlock mechanism of reducing the qualified majority for the election of judges, which is not functional in its context, and the extension of the mandate of judges until the election of new ones is possible only in the event of the expiry of the mandate, below are the recommendations for improving the situation.

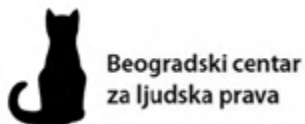
Recommendations

1. Montenegro must not deviate from the European standard of electing judges of the Constitutional Court by a qualified majority, i.e. by a two-thirds majority in the first round of voting, as this serves to achieve the legitimacy of judges;
2. Since the envisaged anti-deadlock mechanism for the election of judges of the Constitutional Court by three-fifths majority in the second round in the Assembly does not ensure a way out of the deadlock, Montenegro should consider amending the Constitution and the Law on the Constitutional Court of Montenegro with the aim of introducing other anti-deadlock mechanisms, based on the review of solutions from comparative practice from the countries of the European Union and the region;
3. Members of the National Assembly should consider potential changes to the Law on the Constitutional Court of Montenegro so that, in addition to extending the mandate of judges until the election of new ones in the event of the expiration of their mandate, it also provides for the extension of the mandate of judges for up to one year in cases of eligibility for retirement, following the example of the countries of the European Union;
4. The European Union, as an organisation whose members use various anti-deadlock mechanisms for the election of constitutional court judges, as well as the Venice Commission, as an expert and advisory body in constitutional matters, should provide expert support to Montenegro in finding the best solution for overcoming potential future crises, in accordance with European standards.

About the Project

This publication is written within the project “Fundamentals in focus: European integration beyond action plans”. The overall objective of this project is to substantively contribute to the sustainable rule of law reforms in Serbia and Montenegro by bridging the gaps between political criteria and the rule of law reforms under Cluster I within the new EU enlargement methodology.

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Endnotes

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