

Podgorica, 13 November 2007

**Opinion of the NGO Human Rights Action
on the Guarantees of Human Rights in the New Constitution of
Montenegro¹**

CONCLUDING REMARKS: Human rights guarantees contained in the Constitution of Montenegro should have been better.

We appeal that constitutional amendments be adopted providing for a complete fulfillment of all commitments undertaken by Montenegrin authorities with regard to the Council of Europe, as well as that the Constitution be brought into compliance with international standards and national legislative terminology and be rendered in an unambiguous manner, apprehensible enough for those it is intended to.

We expect that this initiative will face no political problems, taking into consideration that human rights in general, and specifically deficiencies of the Constitution hereby observed, have never been in the focus of interest of political parties, and thus were never a cause of dispute between them.

Constitution creators have considerably improved the text of the Draft and Proposal of the Constitution in respect to the guarantees of national minority rights, constitutional appeal, prohibition of incitement and advocacy of hatred, positive discrimination measures etc., however, many of the recommendations of the Venice Commission and Montenegrin nongovernmental organizations have not been adopted. For example, some 60% of recommendations of the Venice Commission concerning human rights guarantees have been disregarded. Five minimum principles promised to the Council of Europe have been observed, while two have only been partially adopted.

GENERAL – KEY REMARKS

1. Human rights guarantees in the Constitution are below the level set forth in the Charter on Human and Minority Rights and Civil Freedoms of Serbia and Montenegro ("Charter" in further text), what is in contravention of the promise given to the Council of Europe in the form of the fourth minimum principle that the level of guarantees shall not be impaired. Missing are the following rights and prohibitions: the right of *habeas corpus*, prohibition of

detention due to non-fulfillment of contractual obligations, prohibition of inhuman and degrading *punishment*, express warranty of the right to life, appropriate guarantees of the right to defense and a fair trial, guarantees for the apprehended to be brought before the court of law within 48 hours, right to an effective legal remedy due to the infringement of human rights and the right to elimination of consequences of such an infringement; on the other hand, while at variance with the international standard of freedom of expression and provisions of the national Law of Obligations, the Constitution *guarantees* the right to compensation of damage inflicted by publication of incorrect information. There is also an unjustified restriction on the direct implementation of international human rights standards in Montenegro. Such an implementation shall be indispensable should the Constitutional guarantees of human rights be not improved.

2. The manner of election of the president of the Supreme Court and the Constitutional Court justices is in contravention of the principle of independence of judiciary, as well as of the need of avoiding a critical impact of politics in the appointment of judges, as promised to the Council of Europe by virtue of the second minimum principle.

3. Composition and appointment of members of the Judicial Council other than members of judiciary, does not ensure independence of that body from the executive and legislative powers nor will it enable its efficient functioning.

INDIVIDUAL REMARKS (Articles 1-153)

1. **Article 1:** Human rights should also be mentioned in the first Article of the Constitution, in such a manner as to precisely define the principle of the rule of law and associate it with human rights (see, for example, the Constitution of the Republic of Serbia Constitution, Articles 1 and 3).²

2. **Articles 6 and 17, Human Rights:** The title of Article 6 is Human Rights and Freedoms, nevertheless, the reference to "human" rights has been unreasonably left out from the text of the Article (it existed in the Draft Constitution). This is important as human rights differ from all other "rights and freedoms" laid down and protected by the state. Specifically, in Article 17, par. 1, the word "human" should be added to the words "rights and freedoms", as only human rights are exercised directly on the basis of ratified international treaties. Taking into consideration the fact that the Charter on *Human* and Minority Rights of the former state union of Serbia and Montenegro was applied in Montenegro, as well as that Montenegro acceded to the European Convention of *Human Rights* and Fundamental Freedoms (ECHR)³, we find it appropriate that *human* rights which represent a corpus of fundamental rights and freedoms guaranteed by the international law should be *claris verbis* separated as such in the text of the Constitution from all other rights existing in the Montenegrin legislation. Unlike Articles 6 and 17, Articles 24 and 25 refer to the guaranteed *human* rights and freedoms, while in Article 149, a constitutional complaint is foreseen in the

event of infringement of *human* rights and freedoms guaranteed by the Constitution, and not just "rights and freedoms".

3. **Article 8, Prohibition of Discrimination:** It is logical that the clause relating to the prohibition of discrimination should commence with the paragraph setting forth that "Everyone shall be equal before the law", which is inserted in Article 17, par. 2, thus it should be transferred to Article 8, par 1.

4. **Article 9, Legal Order:** The guarantee that ratified international treaties and generally accepted rules of the international law shall have supremacy over domestic *legislation*, and not with *domestic law* (as it was laid down by Article 10 of the Constitutional Charter of the State Union of Serbia and Montenegro) may result in practice in conflicting interpretations with respect to the supremacy of international standards in relation to the Constitutional provisions. The term "national law" should be used as it is a broader term than legislation, comprises both the Constitution and by-laws and is hence more appropriate for the international obligation of Montenegro to ensure the implementation of international human rights standards regardless of the fact whether they are prescribed by the Constitution or not. No country will, for example, be pardoned by the European Court of Human Rights on the grounds that its Constitution does not prescribe some guarantee or prescribes it in a manner different from that of the ECHR.

The last part of the sentence of Article 8, stating that international standards shall be directly applicable solely "in case of conflict with domestic legislation", leaves room for conflicting interpretations in a situation where national laws do not govern at all some specific issues. Thus, that part of Article 8 should be deleted as it represents an unnecessary presumption to the detriment of the implementation of international standards (see item 17 of the *Interim Opinion of the Venice Commission on the Draft Constitution of Montenegro, adopted at its the 71st Plenary Session held on 1-2 June 2007*, No. CDL-AD(2007)017, hereinafter referred to as: the V.C. Opinion). The Constitutional Charter of the former State Union of Serbia and Montenegro prescribed that international standards *should be applied directly*, without any restrictions (see Article 10 of the Constitutional Charter of SCG).

5. **Article 12, Montenegrin Citizenship:** The sentence contained in Article 12, par. 2, worded like this: "Montenegro shall protect the rights and interests of Montenegrin citizens", raises some concern with respect to the protection of foreigners' rights by Montenegrin state authorities, particularly of their human rights Montenegro is obligated to protect on the basis of international treaties. The meaning of this paragraph should be amended by supplementing it with a reference to abroad, what has probably been the intention of the Constitution maker, and say instead that "Montenegro shall protect the rights and interests of Montenegrin citizens **abroad**", while pursuant to Articles 6 and 17, its state authorities shall protect human rights (fundamental human rights and freedoms) of all persons within its jurisdiction, both Montenegrin citizens and foreigners (to this end, see the

Constitution of the Republic of Serbia, Articles 13 and 17, and the Constitution of the Republic of Croatia, Articles 10 and 26).

6. **Article 17, Grounds and Equality:** In paragraph 1 of this Article, a reference should be made to the "human" rights and freedoms, as well as to the "generally accepted rules of the international law". Human rights and freedoms are those that have grounds in the international treaties, and not any other individual rights guaranteed by the state within its legal order (see item 2 above); par. 1 should be supplemented by the words "**in accordance with the practice of respective monitoring bodies**", as set forth in Article 10 of the Charter on Human and Minority Rights and Civil Freedoms⁴ and in conformity with the V.C. Opinion, Item 17. It is indispensable to make a direct reference to the need of interpretation of human rights provisions in the light of the practice of the European Court of Human Rights, the Human Rights Committee, Committee Against Torture, and other international bodies monitoring the implementation of international treaties on human rights and bring decisions which are binding for countries, due to the fact that international treaties cannot be understood appropriately without any knowledge of their interpretation in the practice of such international bodies. It is by inserting this reference into the Constitution that the meaning of the provisions of Article 118, par. 2 would also be largely improved. "Courts of law shall rule on the basis of the Constitution, law and ratified and publicized international treaties". It is very important to stress this in the Constitution, as justices in Montenegro have not yet gotten into the habit of implementation of international standards nor of the interpretation of human rights in accordance with the practice of international bodies.

The provision of para. 2 should be transferred into Article 8, as stated above.

7. **Article 19, Protection:** This Article should be amended in the following manner: «Everyone is entitled to an equal **and effective legal protection** of his/her human rights and freedoms, **as well as to the elimination of consequences in case of violation of human rights and freedoms**". Otherwise, a dilemma will still remain as to what kind of protection is being guaranteed by this Article, statutory or legal, and no right to an effective legal remedy for violation of human right will be provided as prescribed by Article 13 of the ECHR, opinion of the Parliamentary Assembly of the Council of Europe on Accession of the Republic of Montenegro to the Council of Europe, as well as explicitly suggested by the Venice Commission (V.C. Opinion No. 18). Such a guarantee was contained in the Charter, Article 9, para. 1. Please also see our comments on Article 38, in item 18 below, with respect to the right to an effective legal redress in case of violation of human rights.

8. **Article 20, Legal Remedy:** This provision is related to the right to legal remedy in all cases and not only in the case of violation of human rights. After the word "right", a **comma should be added and then the word "obligation"**.

9. **Article 24, Restrictions on Human Rights and Freedoms:** The provision of para. 1 of this Article has been considerably improved. Nevertheless, a valuable instruction for governmental authorities concerning interpretation of limitation on human rights should be added as it existed in Article 5 of the Charter: **“When restricting human rights and interpreting such restrictions, all state authorities shall be obligated to take into account the substance of rights being restricted, relevance of the purpose of limitation, nature and scope of limitation, balance between the limitation and its purpose and whether there exists any manner whatsoever to accomplish the purpose by minor restrictions to the rights. Restrictions may in no case encroach upon the substance of the guaranteed right”.**

Furthermore, this Article should also foresee a guarantee that formerly existed in the Charter, Article 57, setting forth that the **accomplished level of human and minority rights may not be impaired.**

10. **Article 25, Interim Restrictions on Human Rights:** In para. 1 of this Article restrictions on human rights are allowed “during the state of war or the state of emergency “to the extent necessary”, while the ECHR (Article 15) and the International Covenant on Civil and Political Rights⁵ (Article 4) (hereinafter referred to as: ICCPR), allow for certain departures from such provisions under extraordinary circumstances **“threatening the life of the nation”** and allow for restrictions **“to the extent required by the exigencies of the situation”**. See also the recommendation of the Venice Commission (V.C. Opinion, item 22).

In paragraph 4, the following prohibitions are **lacking**: *the prohibition on lifting the slavery prohibition* (Article 4, par. 1 of the ECHR and Article 4, par. 2 of the ICCPR), *the prohibition on detention solely on the grounds of non-fulfillment of contractual obligations* (Article 1 of the Protocol no. 4 of the ECHR; arts. 4 and 11 of the ICCPR), and *the prohibition on abolishment of anyone’s right to be recognized as a person before the law* (Article 16 of the ICCPR).

Contrary to the international obligations of Montenegro in virtue of Article 11 of the ICCPR, the *prohibition on detention for non-fulfillment of contractual obligations* has been left out from the Constitution. This right has been explicitly guaranteed by the Charter, Article 14, para. 4.

The prohibition of the restriction on *the right to life* is laid down, though this right has not been envisaged at all by the Constitution as an independent right. The prohibition on restriction of the right to life does not imply solely the prohibition of abolishment of the death penalty and cloning, as these appear to be the only aspects of the right to life laid down by the Constitution, Articles 26 and 27, par. 2.

11. **Lacking guarantees of the right to life:** The prohibition of the death penalty and cloning referred to in Article 26 and Article 27, item 2, is all that has remained in the Constitution from the guarantees to life. Actually, in

Article 28, par. 2, the inviolability of physical integrity has been guaranteed, but the right to life specifically described and guaranteed by both the ECHR (Article 2) and the ICCPR (Article 6) is of a much broader meaning. The Venice Commission has recommended (V.C. Opinion, item 23), that the guarantees of the right to life be governed in accordance with the provision of Article 2 of the ECHR. The Human Rights Action has advocated so far that the Constitution should, on the basis of the practice of the European Court of Human Rights, make even a step forward and *expressly lay down the obligation of the state to undertake all reasonable measures for the purpose of protection of human life, as well as to engage in effective investigation of causes of death reasonably suspected of not being natural ones*. The reason of such of our advocacy is that we are of the opinion that the obligation of state to engage efficiently in the investigation of murders has not yet been adequately rooted in the practice of Montenegro nor it has been prescribed as an obligation of state bodies by virtue of the procedural aspect of protection of the right to life pursuant to Article 2 of the ECHR and Article 6 of the ICCPR, as well as the practice of the European Court of Human Rights and the Human Rights Committee.

Therefore, we are of the opinion that a comprehensive provision on the right to life should be included in the Constitution which would, apart from the prohibition of the death penalty, guarantee the right to life at least in such a manner as to, in accordance with Article 2 of the ECHR, set forth the following: **“Everyone’s right to life shall be protected by law. Deprivation of life resulting from the use of force which is no more than absolutely necessary: in defense of any person from unlawful violence; in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; in action lawfully taken for the purpose of quelling a riot or insurrection, shall not be regarded as violation of the right to life”**, and to add also that: **“the state shall undertake all requisite and reasonable measures for the purpose of protection of the right to life”**.

The right of a mother to decide on the termination of pregnancy in accordance with law should also be included either in this Article or elsewhere, within Articles 72 or 73.

12. **Article 27, Biomedicine:** Par. 1 is unnecessary as it is not concrete enough. In par. 3, apart from the prohibition of medical and other scientific experimentation (testing), it should also be added and **“interventions”** as recommended by the Venice Commission (V.C. Opinion, item 38).

13. **Article 38, Personal Dignity and Inviolability:** This Article sets forth several different human rights guaranteed by the ECHR and the ICCPR, under separate articles. The Venice Commission (V.C. Opinion, item 25) has already indicated to the need that the same methodology be also implemented to the Constitution of Montenegro in order to avoid any further misunderstandings in the implementation of international conventions, however, these suggestions have not been adopted.

The term "safety" referred to in par. 1 is not in accordance with the official translation of the guarantee referred to in Article 5, par. 1 of the ECHR ("Everyone has the right to liberty and **security** of persons"), and Article 9 of the ICCPR ("Everyone has the right to liberty and personal **security**"). Apart from the terminological compliance with the existing official translations of international treaties, the word "**security**" has also a concrete meaning and it implies a physical security, while the term "safety" may also mean a material safety, etc. In the Law on Police, Article 2, par. 1, item 1, within the provisions relating to the duties of police, "the protection of **security** of citizens" has been stated, what is in fact the "security" all international standards are dealing with, and what results from the practice of bodies in charge of supervision of their implementation.

In par. 3, provisions on the prohibition of torture should be amended by adding the words "**or punishment**", pursuant to Article 3 of the ECHR and Article 7 of the ICCPR.

14. Article 29, Deprivation of Liberty: The provision inadmissibly left out from this Article is that everyone who is deprived of his liberty shall be entitled to take proceedings by which the lawfulness of his detention shall be judged and his release ordered if the detention is unlawful (the so-called ***habeas corpus***) guaranteed by Article 5, item 4 of the ECHR and Article 9, para. 4 of the ICCPR. This right was also expressly guaranteed by the Charter, Article 14, para. 6.

Regarding the guarantee referred to in Article 29, par. 6, apart from the right of a person deprived of liberty to have the defense council of his choice present at the hearing, to be promptly informed of his right to legal assistance and be enabled to communicate with his defense council, immediately after the arrest (see Article 15, para. 1 of the Charter; the UN Basic Principles on the Role of Lawyers, 1990).

15. Article 30, Detention: Lacking – the guarantee that everyone who is arrested shall be brought promptly before the court, at latest within a period of 48 hours, otherwise he shall be released (Article 5, par. 3 of the ECHR, Article 9, para. 3 of the ICCPR, and also Article 15 of the Charter).

The Venice Commission has requested that this Article should also be amended by inserting the possibility of seeking more frequent review of the detaining decisions than the given time limits, as well as that the provision should be made for the right of detainees to be released on bail (Opinion of the Venice Commission, items 44 and 45).

16. Article 32, Fair and Public Trial: This provision has not been amended fully in compliance with the recommendation of the Venice Commission (the V.C. Opinion, 49, 50), and thus it should be done at least in accordance with the provisions of Article 17 of the Petty Charter, i.e. pursuant to Article 6, par. 1 of the ECHR: "**In determination of his civil rights and obligations or any of criminal charges against him, everyone is entitled to a fair and public hearing within a reasonable**

time by an independent and impartial tribunal established by law. Judgments shall be pronounced publicly and hearings shall be held in public, unless otherwise prescribed by law”.

17. **Article 35, Presumption of Innocence:** The Venice Commission has recommended that in para. 3, the following words should be added: “Any reasonable doubt in respect to guilt”, what has not been adopted, as should have been also according to our opinion as not every kind of suspicion should suffice.

18. **Article 37, Right to Defense:** This article has been amended, though insufficiently, thus the following should be added: *The accused shall be entitled to the free assistance of an interpreter in order to be able to understand the accusation against him, as well as throughout the entire court proceedings* (Article 6, para. 3(e) of the ECHR, Article 14, para. 3(f) of the ICCPR, if he cannot understand the language used in court; to have adequate time and *facilities* for the preparation of his defense (Article 6, para. 3 (b) of the ECHR, Article 14, para. 3 of the ICCPR), as well as to attend hearings in person, (Article 14, par. 3(d) of the ICCPR, to examine witnesses against him or to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him (Article 6, para. 3(c) of the ECHR and Article 14, para. 3(c) of the ICCPR. The Venice Commission has expressly stated in its opinion that the Constitution must contain these guarantees related to a fair trial (the V.C. Opinion, item 56).

19. **Article 38, Compensation for Unlawful Acts:** The title itself does not correspond in entirety to its contents – namely, it does not foresee the general right to compensation for unlawful proceeding by state bodies what would be reasonable (see, for example, the Constitution of the Republic of Serbia, Article 35, par. 2, but solely the right to compensation for unlawful and ungrounded deprivation of freedom, i.e. ungrounded judgment. The Constitution also foresees a minor scope of guarantees than the Charter which in Article 22 also guaranteed the right to rehabilitation to the person wrongfully convicted. Our suggestion is to eliminate the above deficiency by foreseeing the right to effective legal protection of human rights and elimination of consequences of their violation, as suggested above with respect to the amendment of Article 19, in view of the Article 9, para. 1 of the Charter.

Regarding the right to compensation, we stress that it is by a gross negligence that the right to compensation for suffered torture and other cruel, inhuman or degrading treatment has been omitted from the Constitution, as expressly guaranteed by Article 14 of the UN Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment. On the other hand, the Constitution expressly guarantees the right to compensation for incorrect publication of data or information (Article 49, par. 3) which cannot be found in any international treaty on human rights and which is not completely in compliance with the practice of the European Court in Strasbourg, nor with Article 198, par. 2 and Article 199 of

the Law of Obligations (for example, if a journalist has done everything reasonably possible on the date of publication of information in order to check its accuracy, and if he has had a well-grounded reason to believe in its authenticity, the conviction to compensation means the violation of his right to the freedom of expression, see, for example, the judgment *Thomas vs. Luxembourg*. Article 198, par. 2 and Article 199 of the Law of Obligations are worded like this: "However, a person shall not be held liable for the damage caused to other person by reporting inaccurate information, being unaware that such an information is inaccurate, if he or the one the information was reported to had a serious interest therein" (Article 198, par. 2 of the Law of Obligations); "In the event of violation of a personal right, the court may order the judgment to be disclosed or a rectification to be made at the expense of the damager, order the damager to withdraw the statement by which the damage has been caused, or anything else in order to achieve the purpose as that of the compensation" (Article 199 of the Law of Obligations).

We again stress that the provision which guarantees the right to compensation in the manner similar to that of Article 35, par. 2 of the Constitution of the Republic of Serbia ("**Everyone is entitled to the compensation for material and/or immaterial damage caused to him by an unlawful or wrongful acts of any state body, holders of public authorities or a local self-government body**") or at least the amendment of Article 19 as proposed above, would be more suitable and far more progressive.

20. **Articles 39, 40, 41, 42, 46, 47, 50, 51, 52, 53:** All these provisions fail to set out that restrictions may be introduced solely on the basis of law, if requisite in a democratic society for the pursuit of relevant legitimate aims, regardless of the general provision on restrictions to human rights provided for in Article 24, par. 1, as there are absolute human rights the restriction of which is prohibited, such as the prohibition of torture, slavery etc., and with respect to such distinctions, all doubts should be avoided.

21. **Article 47, Freedom of Expression:** Regrettably, this has not been defined in accordance with Article 10 of the European Convention. Specifically the restriction referred to in par. 2 "by the right of others to dignity" is a rather vague category which is not in accordance with the restriction allowed for by the ECHR and which may bring to a too broad interpretation.

In par. 3, the guarantee of the right to compensation for reporting inaccurate data or information, due to reasons referred to in item 19 to the comments on Article 38, should be deleted.

22. **Article 54, Freedom of Assembly:** The Venice Commission has requested that the part of par. 1 "without authorization, subject to registration with the competent authorities" be deleted, as this issue is to be prescribed by law, depending on the size of the assembly and on its taking place – whether in the open air or not, etc.

23. **Article 54, Prohibition of Organization:** The Venice Commission has found the absolute prohibition of "political organization" in the state authorities as being unacceptable.

Furthermore, the expression "political organizations" referred to in para. 2 is broader than the legal term "political parties", allows arbitrary interpretation and hence presents a too restrictive limitation of freedom of association.

The Venice Commission is of the opinion that the prohibition of political association by foreign nationals is problematic and that it should be avoided or exceptionally prescribed by law (V.C. Opinion, item 78).

24. **Article 56, The Right to Recourse to International Organizations:** It should be added "... **and institutions**", referring primarily to the institutions such as: the European Court of Human Rights, the Human Rights Committee, the Committee Against Torture and other bodies established by international treaties, which are not "international organizations". Furthermore, with respect to the reasons of recourse "for the purpose of protection of rights and freedoms guaranteed by the Constitution", this cannot be regarded as completely precise: international organizations and institutions hear appeals (representations) due to the breach of rights from international treaties on human rights which are binding for a state, and not due to the violation of rights guaranteed by the Constitution of that country. The Constitution may also guarantee the rights which are not related to international treaties and thus to any competencies of international bodies in charge of the supervision of implementation of such treaties. The comment of the Venice Commission on Article 54 of the Draft Constitution has been given to this end (the V.C. Opinion, item 81).

25. **Article 58, Ownership:** In paragraph 1: "The right to ownership shall be guaranteed", the following should be added: "**and other proprietary rights**", in accordance with Article 1 of the Protocol 1 of the ECHR and the pertaining practice of the European Court of Human Rights, which interpret the meaning of property/possessions in a broader sense than ownership (*svojina*). The same approach as suggested has been adopted in the Constitution of the Republic of Serbia, Article 58.

26. **Articles 72, 73, 74:** A definition of child is lacking, namely when the legal age is attained, particularly in Article 72, where it is only to be supposed that para. 2 refers to underage children, and para. 3 to the children of full age.

27. **Article 73, Protection of Mother and Child:** In this or in Article 72, the right of mother to the birth control (or termination of pregnancy) should be foreseen in accordance with law.

28. **Article 75, par. 1, Right to Schooling:** As opposed to "schooling", the term: the right to *education* is the official translation of Article 13 of the International Pact on Economic, Social and Cultural Rights, guaranteed by which is the right to education (Official Gazette of the SFRY, No. 7/1971), as

well as the official translation of Article 2, Right to Education, of the Protocol 1 of the ECHR (Official Gazette of SCG, International Treaties, No. 9/2003). The term "education" implies a more comprehensive meaning than the term "schooling".

29. Article 93, par. 2, Proposal of Laws and Other Enactments by Citizens: The right of citizens to legislative initiatives has been made completely meaningless by introducing restrictions to this right - that citizens are entitled to exercise this right solely through deputies authorized by them, excluding thus the right to multiparty initiatives. Namely, all deputies (members of parliament) has already been vested with the right to a legislative initiative pursuant to par. 1. It is in this manner that the already attained level of the citizens' right to participation in the governance of society referring to in Article 25, item a) of the ICCPR, has been impaired without any justifiable need, and thus this restriction must be regarded as being ungrounded and in contravention to the above cited Article of the ICCPR which is binding for Montenegro.

5. COURT

30. Article 122, Article 86, par. 4, Immunity: Discrimination with respect to the scope of immunity between justices of regular courts, who enjoy solely the functional immunity, and justices of the Constitutional Court, i.e. the President of the Constitutional Court, who enjoy a broader immunity as members of parliament, represents an unjustifiable discrimination.

31. Article 123, Incompatibility of Function: An extremely rigid restriction to the professional engagement of judges: "Judges may not be deputies or perform any other public function and neither engage in any professional activity", may also raise the question of membership of judges in the Judicial Council as that is also regarded a "public function", while the general prohibition on "engaging in any professional activity" might also be interpreted as the prohibition of any academic engagements of judges, prohibition of writing and publication of books, painting, exhibiting and selling paintings, writing TV and movie screenplays, etc. The Venice Commission states that it is common in other European countries to allow judges to perform certain activities such as teaching (V.C. Opinion, item 127, 157; for the opinion that the above represents a rather restrictive solution, see also the Final Comments on the Draft Constitution of Republic of Montenegro, OSCE, 28 May 2007, item 87). A more suitable solution would be that **judges may perform other public functions and engage in professional activities in accordance with law and the Code of Judicial Ethics**, whereas the law and the Code would further set forth which of functions or activities are incompatible with the performance of judicial function.

32. **Article 124, Supreme Court:** The manner of election of the president of the Supreme Court is in contravention of the principle of independence of judiciary, and judiciary is discredited as judges are completely excluded from the procedure of election of the president of the Supreme Court, and it is also in contravention of the principle of avoiding decisive political influence over judicial appointments, as the president of the Supreme Court is proposed and elected solely by politicians. It is in this manner that the minimum principle of the Council of Europe has not been complied with, relating to the avoidance of any predominant political influence in the appointment of judges and prosecutors (see also the OSCE opinion that the judicial self-regulatory body should be included in the procedure of appointment, particularly of the president of the Supreme Court, item 67). None of the neighboring countries does make such a provision.

Croatia: The president of the Supreme Court of the Republic of Croatia is appointed and dismisses by the Croatian Parliament, based on a prior opinion of the General Meeting of the Republic of Croatia Supreme Court and the competent board of the Croatian Parliament, and upon the proposal of the President of the Republic (Constitution of the Republic of Croatia, Article 118).

Serbia: The president of the Supreme Court of Appeals is elected by the National Assembly upon the proposal of the High Judiciary Council, based on a prior opinion of the general meeting of the Supreme Court of Appeals and the competent board of the National Assembly (Constitution of the Republic of Serbia, Article 144).

Macedonia: The president of the Supreme Court of Macedonia is elected by the Judicial Council (Constitution of the Republic of Macedonia, Article 105).

33. **Article 127, Composition of the Judicial Council:** Election of members of the Council other than from among judges, does not provide for the avoidance of political influence, nor it ensures independence and autonomy of this body as Article 126 wishes to imply. Furthermore, characteristics of the Council's membership other than from among judges, particularly the presence of peoples' deputies, does not necessarily mean that this body with serious commitments and competencies will work in a genuinely effective manner. There is also another option according to which the president of the Supreme Court (who is already elected on the political basis) would be ex officio president of the Judicial Council; this option is not an appropriate one, primarily due to the fact that the work of the Supreme Court is subject to appraisal of the Judicial Council (pursuant to Article 128, par. 1, item 4 of the Constitution of Montenegro. The Venice Commission has also recommended that the president of the Supreme Court should not be the president ex officio of the Council (V.C. Opinion, item 169). For a proposal of a different composition of the Council and more elaborate criticism, please see Reform Proposal for the Appointment of Judges in Montenegro, NGO Human Rights Action Working Group, Podgorica, February-July 2007, http://www.hraction.org/wp-content/uploads/hra_reform_proposal_eng.pdf.

34. Article 128, par. 1, item 8, Competencies of the Judicial Council: The Judicial Council proposes to the Government the amount of funds to be apportioned to the courts, meaning that judiciary has not a separate fund of its own and also that the Judicial Council is not entitled to defend the budget proposal before the Parliament, in the event of any disagreement with the Government. We are of the opinion that it is only the independence of the judicial budget that could adequately provide for independence of judiciary.

The provision that the Judicial Council shall decide by majority of its members, with the solution that the Council is composed of an even number of members, suggests that the work of its body may easily be paralyzed.

35. No Legal Remedies Against the Council's Decisions: Lacking such remedies is unreasonable, as well. The right to complaint to the administrative court against decisions on appointment to judicial functions, and to the Constitutional Court against decisions on dismissal from judicial functions (as adopted, for example, in Croatia or Macedonia) should have been expressly laid down.

CONSTITUTIONAL COURT OF MONTENEGRO

36. Article 153, Composition and Election & Article 81, Competencies (Parliament of Montenegro), Article 91, Decision Making (Parliament), Article 95, Competencies (President of Montenegro): The Parliament elects judges and the president of the Constitutional Court by majority votes of all deputies upon a proposal of the President of the Republic, *ensuring thus solely the influence of politics* in the election of justices and president of the Constitutional Court. Regardless of the fact that the Constitutional Court is not a regular court, the importance of its decisions for the exercise of human rights in the final instance, imposes the need of implementation of the principle of avoidance of the predominant influence of politics in the election of the justices of the Constitutional Court. None of three recommendations of the Venice Commission has been adopted with respect to the election of justices of the Constitutional Court. The following has been requested by the Venice Commission:

- a) that the power to nominate candidates for the justices of the Constitutional Court should be given to the Judicial Council, the Parliament and the President of the Republic,
- b) that the justices should be elected in the Parliament by qualified majority (that would provide for participation of opposition in the decision-making procedure),
- c) that the president of the Constitutional Court is to be elected from among judges (V.C. Opinion, items 183-186).

The election should be amended in such a manner as to include the Judicial Council in the procedure of nomination of justices of the Constitutional Court, as well as to lay down that the justices shall be elected by a qualified 2/3 majority which would also ensure the participation of the opposition in the decision-making procedure. The president of the Constitutional Court should be elected from among the justices of the Constitutional Court. There is no other justification for the election of the president of the Constitutional Court upon a proposal of the President of the Republic or the Parliament itself, except the need to demonstrate the political control, what is unacceptable if the aim is to establish a professional and independent court, without any kind of political domination.

Justices of the Constitutional Court, same as all other judges, should be allowed to perform other activities stipulated by law (to state precisely which activities are compatible with the performance of judicial functions and which are not).

Emilija Durutovic, LL.M., retired judge of the Supreme Court of the Republic of Montenegro and of the Court of the State Union of Serbia and Montenegro

Prof. Nebojsa Vucinic, Ph.D., professor of International Public Law and Human Rights, Faculty of Law, University of Montenegro

Radomir Prelević, Ph.D., Attorney at Law

Tea Gorjanc-Prelević, LL.M. (International Law/Human Rights, American University Washington College of Law, 1999), *Human Rights Action*

Footnotes

¹ *Adopted on 19 October 2007 and publicized in the Official Gazette of the Republic of Montenegro No. 1/2007, on 1 November 2007.*

² *"The Republic of Serbia is the state ... established on the principles of the rule of law ... respect for human and minority rights and freedoms" (Article 1 of the Constitution of the Republic of Serbia). "The rule of law is a basic presumption of the Constitution and it is founded on the unalienable human rights. The rule of law shall be achieved through free and direct elections, constitutional guarantees of human and minority rights ..." (Article 3 of the Constitution of the Republic of Serbia).*

³ *Official Gazette of SCG, International Treaties, 9/2003.*

⁴ *Official Gazette of SCG, No. 6/03.*

⁵ *Binding for Montenegro since 1976; published in the Official Gazette of the SFRY (International Treaties), No. 7/1791.*