

**REMARKS ON THE DRAFT CONSTITUTION**  
**OF THE REPUBLIC OF MONTENEGRO**  
**BY MONTENEGRIN NGOS<sup>1</sup>**

**Principal Remarks:**

1. The rights have not been guaranteed on the level of the Charter on Human and Minority Rights and Liberties of the State Union Serbia and Montenegro, adopted by the Parliament of the Republic of Montenegro on 26 February 2003 (hereinafter „Small Charter“), as promised to the Council of Europe in the letter of the presidents of the Parliament, Government and State of 23 March 2007 regarding acceptance of the principle no. 4.
2. Provisions guiding the government bodies, particularly the courts, to the appropriate implementation of Human Rights, particularly regarding interpretation of allowed limitations of human rights, that the Small Charter also contained, have been omitted.
3. Efficient mechanism for human rights protection according to the standard of the right to efficient legal remedy from the article 13 of the European Convention on Human Rights<sup>2</sup> has not been provided as promised to the Council of Europe: the right to efficient legal remedy in case of human rights violations has not been envisaged, there has not been any improvement in the formulation of the constitutional appeal from the one of the present 1992 Constitution, which rendered it totally non-efficient instrument of protection of the constitutionally guaranteed rights; the right for compensation of damage by the state has only been provided for cases of unfounded deprivation of liberty and not in every case of illegal state action, i.e. human rights violation.
4. The Draft lacks a transitional provision providing for the continuity of validity of international treaties ratified by the states whose part had been the Republic of Montenegro, i.e. those that were valid in the last state union, as envisaged by the article 3 and 4 of the Decision on the Proclamation of Independence of the Republic of Montenegro, as was also promised to the Council of Europe (principle no. 6). Such provision should actually guarantee previously acquired rights.

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<sup>1</sup> The majority of comments are by the Human Rights Action (HRA), prepared by Tea Gorjanc Prelevic, LL.M. in cooperation with Emilija Durutović, LL.M., retired judge of the Supreme Court of the Republic of Montenegro and former judge of the Court of the State Union of Serbia and Montenegro and Radomir Prelević, Ph.D., Attorney at Law; Specific comments have been prepared by Stevo Muk, director of the *Center for Development of Non-Governmental Organizations* (CRNVO) and Stana Scepanovic, Attorney at Law, *Network of Women NGOs* (18 organisations). Specific comments by the CRNVO and the Network have been especially emphasized in the text. The HRA supports comments stated by all organizations.

<sup>2</sup> Convention for the Protection of Human Rights and Basic Freedoms, *Official Gazette of Serbia and Montenegro – International Agreements*, No 9/2003.

5. The independence of the judiciary has not been regulated in an appropriate manner. The possibility of Parliament making decisions on election of judges has not been excluded, and the provided alternative is inadequate. The provision on the Public Prosecutor is also inadequate as the manner of election has not been envisaged, and the competence not precisely defined in order to exclude representation of state in civil law matters, and the application of extraordinary legal remedies, as promised to the Council of Europe (principles nos. 2 and 3).

### **Proposals with regard to particular articles of the Draft:**

#### **Preamble**

**A)** Only the alternative “Starting from ... a historical right of Montenegrin citizens to their own State ...“ (of the Socialist Peoples Party - SNP) meets the description of a civic state, and fulfills the promise given to the Council of Europe in the appropriate form of acceptance of the principle no. 1.

The issue of a civic state, i.e. of the existence of the constituent peoples is very important for the issue of existence of minorities and their rights. Preamble should be organized in such a way as to maintain the civic state concept, based on the principle of the rule of law and respect for human and minority rights.

**B)** The Network of Women NGOs suggests that the paragraph 3 of the preamble should be extended to include “**gender equality**” after the words “respect for human rights and freedoms”, for the following reasons:

- gender equality is considered a basic value of the European Union and in the process of European integrations this dimension of respect for human rights will be given significant attention;
- Montenegro does not have a law on gender equality, nor has it adopted efficient laws protecting women from discrimination and male violence, that are the most frequent examples of violation of the human rights of women;
- Montenegro is a state where the murders committed by husbands, partners or relatives are at among the top causes of violent deaths of women;
- An emphasis of gender equality in the preamble among the basic values of the state and citizens of Montenegro is important for the process of change of the patriarchal state of mind of the Montenegrin society.

#### **Human Rights and Freedoms (Article 6)**

In the paragraph 5, a provision explicitly allowing for *positive discrimination* should be added, as was the case with the article 3, paragraph 4 of the Charter on Human and Minority Rights and citizens’ freedoms of the state union Serbia and Montenegro (hereinafter „Small Charter“): **Temporary introduction of special measures necessary for realization of equality is allowed, for special protection and improvement for persons or groups which are in the unequal position, in order to provide them full enjoyment of human rights under equal conditions.**

## **Minority rights (Article 7)**

Minority rights have not been guaranteed in an appropriate manner. The international standards that have been pointed out are mainly of a framework character and not self-executive. Therefore it is important to envisage the concrete rights by the Constitution such as participation at decision-making process, rights for perseverance of uniqueness (as in article 52 of the Small Charter), right to appointment of national councils and other representative bodies and the like. For the purpose of comparison, the Small Charter dedicated an entire chapter to members of the national minorities (III) i.e. 11 articles and the 1992 Constitution provided significant provisions as well. Finally, it has also been promised to the Council of Europe that the Constitution will ensure at least the same level of protection of human and minority rights as the one provided for in the Small Charter (principle no. 4). Additionally, either a particular institution, for example, a minority rights Ombudsman or a representative body to whom the representatives of the minority groups could send complaints should be envisaged.

## **Legal Order (Article 8)**

Paragraph 2 should be amended according to the article 16 of the Constitutional Charter of the State Union of Serbia and Montenegro: “and have priority over **domestic law** and are directly applicable. “

The formulation “priority over domestic law“, unlike „domestic legislation“, would allow for constitutional provisions to be interpreted according to international standards, as well, which is particularly important for saving time in the proceedings of human rights protection, particularly if the catalogue of human rights remains deficient, as offered by the Draft. Namely, the European Court for Human Rights in Strasbourg would not accept an argument excusing the State for the breach of rights guaranteed by the European Convention on Human Rights because the particular action or omission had been demanded by its own Constitution. For that reason, there should be no excuse for explicit envisaging of priority of ratified international agreements, particularly human rights conventions over the constitutional provisions.

One should finish the sentence after the word “applicable“, because it is unnecessary and hazardous to emphasize that the accepted international law will be applied only “when the relations are regulated differently by the domestic legislation“, because it is not in accordance with a coherent implementation of the principle of direct application: when the internal laws do not regulate any kind of relations and rights that are being protected on the international level, this kind of constitutional formulation may well lead to an interpretation that will not provide the necessary protection.

**The provision on interpretation of human rights should be added either in the articles 8, or 16, or envisaged as a separate provision entailing the amended rule on restrictions of human rights from the article 21 of the Draft**

Provision such as the article 10 of the Small Charter: “**Human and minority rights guaranteed by this charter should be interpreted with the aim of advancement of the**

values of an open and free democratic society according to existing international standards of human and minority rights and the practice of international bodies supervising their enforcement“ is precious for effective protection of human rights in practice, and corresponds to the undertaken obligation towards the Council of Europe that the implementation of the case law of the European Court for Human Rights will be ensured by the local courts.

The rule on restrictions of human rights and liberties from the article 21 is not complete, which provides for arbitrary restrictions. It is necessary to broaden it at least in the following way:

... in the scope that is allowed by the Constitution and that is necessary in the free, democratic society.

This provision on the restrictions should be envisaged according to the article 5 of the Small Charter, because one must not neglect the fact that the application of the European Convention on Human Rights in a novelty for Montenegro, and that therefore it would be necessary to appropriately direct the government bodies to the ways of its proper implementation – otherwise, the burden will fall on the citizens and the European Court for Human Rights.

### **Division of State Powers (Article 10, paragraph 2)**

The judicial authority is enforced by the “courts“, (and not “the court“), in accordance with the Law on Courts, currently in force. Also the 1992 Constitution speaks of the “courts”.

After article 10, a paragraph 4 should be added “Judiciary is independent“– the same provision exists in the Constitution of Serbia – the executive power and the assembly can control the court authority only to a very limited scope.

## **PART TWO**

### **Human Rights and Freedoms**

#### **Ground and Equality (Article 16)**

After paragraph 1 it should be added:

“Human and minority rights guaranteed by generally accepted rights of the international law as well as ratified international treaties Montenegro became part of during Kingdom of Montenegro, Kingdom of Yugoslavia, SFRJ, SRJ or state union Serbia and Montenegro are guaranteed by this Constitution and directly applicable.

The achieved level of human and minority rights, individual and collective, cannot be lowered.

By this Constitution human rights, or the rights or national minority representatives, previously acquired under the regulations applicable prior to its enforcement, including the rights acquired based on the international contracts in force in the state union Serbia and Montenegro are neither abolished nor amended.“

This amendment is based on: 1) the obligation undertaken with regard to the Council of Europe regarding transitional provisions including guaranties of previously acquired rights and the continuity of application of the European Convention on Human Rights; 2) articles 3 and 4 of the Decision on Proclamation of the Independence of the Republic of Montenegro, as well as 3) on the article 7 of the Small Charter.

### **Right to Appeal (Article 18)**

Everyone has the right to an **effective** appeal and other legal remedy against the decision deciding on the one's right **or obligation, or** legally based interest.

Regarding the right to an effective remedy for violation of human rights it is necessary to envisage that:

„Everyone has the right to effective court protection in case any of his human or minority rights, guaranteed by this charter, is violated or denied, as well as the right to compensation, i.e. removing the consequences of such violation“, as was envisaged in the article 9 of the Small Charter, which had also, separately, provided for the right to appeal and other legal remedy.

Further more, it would be necessary to extend the competence of the Constitutional court in relation to the constitutional appeal (article 132, paragraph 1, point 3) in the following way:

The Constitutional court decides ... on the constitutional appeal for violation **or denial** of human rights and freedoms guaranteed by the Constitution **and ratified international treaties by a separate decision or action of the government bodies or organizations performing public duties, when other legal instruments have been exhausted or** when other ways of court protection have not been envisaged;

If the formulation of the constitutional appeal from the 1992 Constitution remains, this appeal will continue to be an inefficient legal instrument for the human rights protection, which will not be difficult to prove before the European Court for Human Rights having in mind the relevant practice of the Constitutional Court of Republic of Montenegro, and thus the European Court will become burdened with complaints for which the Constitutional Court will continue to proclaim its lack of competence.

Apart from the experiences from domestic practice, legal solutions and the practice of the European Court for Human Rights particularly regarding applications from the Republic of Croatia, which led to the reform of the competence of the Croatian Constitutional Court, we have also taken applied suggestions of the two authors who had recently written about this topic in the local language: Dražen Cerović, LL.M., “Administrative cases and the Constitutional Appeal”, published by the Faculty of Law of University of

Montenegro and Official Gazette of Montenegro, Podgorica, 2004 and Vladimir Đurić “Constitutional Appeal”, published by the Belgrade Centre for Human Rights, Belgrade, 2000.

### **Legal Aid (Article 19)**

In paragraph 2 it should be added: [Legal aid is provided by the Bar Association and the legal aid offices established according to the law.](#)

Paragraph 3: [The Law determines when the free legal aid will be provided.](#)

### **Restrictions of Human Rights and Freedoms (Article 21)**

The provision should necessarily be amended in accordance with the article 5 of the Small Charter and completed with the general provision on interpretation of human rights provisions from the article 10 of the Small Charter, as above mentioned.

### **Temporary Restrictions (Article 22)**

It is common to envisage the possibility of derogation of human rights during war or state of emergency, to the extent necessary. The term “restriction” is used for regular, common restrictions of human rights that are not of the absolute character. In this regard it is advisable to consult the article 6 of the Small Charter.

The paragraph 3 should be extended to include the prohibition of slavery and the positions similar to slavery, the right to liberty of person, in accordance with the last paragraph of the article 6 of the Small Charter.

The paragraph 3 envisages a prohibition of derogation of some absolute rights that may not be limited, but that are not guaranteed at all by the Constitution (prohibition of forced assimilation, instigation of hatred, prohibition of forced labor)!

### **Inviolability of Life should be changed to Right to Life (Article 23)**

After paragraph 1 it should be added:

[„Right to life is protected by law.](#)

[The State undertakes all necessary measures for the protection of life.](#)

[The right to termination of pregnancy is guaranteed, according to the law. “](#)

The article should be integrated with article 24 (Cloning).

### **Dignity and Inviolability of Person (Article 25) and Respect of Person (Article 28)**

Instead of the term „safety“ from the article 25, paragraph 1, the term „security“ should be used, because it is the official translation of the right called „*security of person*“ from the article 5 of the European Convention on Human Rights (Official Gazette of Serbia and Montenegro, International Treaties, No 9/03) and International Covenant on Civil

and Political Rights (Official Gazette of SFRJ, No 7/71), and that was also the formulation used in the article 14 of the Small Charter.

The text of the article should be extended, for example, by adding a paragraph no. 3, according to the article 12 of the Small Charter:

“Nobody should be subject to torture, inhuman or degrading treatment or punishment,” and perhaps further emphasize “particularly persons deprived of liberty, or persons whose liberty has been restricted.”

The terms „torture“, “inhuman treatment and punishment“, “degrading treatment and punishment“ are all standards developed in the practice of the European Court for Human Rights. As Montenegro has already been obliged to directly apply the practice of this court, there is no excuse to paraphrase these words as “dignity“ or “inviolability of integrity“, which are terms used in the 1992 Constitution from 1992, when the application of the European Convention on Human Rights was out of sight.

The international standard “prohibition of torture, inhuman and degrading treatment“ does not entail only the situations such as deprivation of liberty or is necessarily connected with the court or other proceedings (for example, “inhuman and degrading“ is also the treatment of the Government towards the families of victims of a forced disappearance, who are continuously being deprived of information while the efficient investigation is not being conducted – this interpretation was established by the European Court for Human Rights in the case *Cypress against Turkey* in 2001 and in the other cases against Turkey). Because of the fact that “torture“, “inhuman“ and “degrading treatment“ in detail establish standards in the European Court for Human Rights practice and other international bodies for human rights protection, we believe that it would be necessary to include the article 3 of the European Convention in the integral form, with a possible emphasis on the particular vulnerability of those who were deprived of their liberty i.e. those whose liberty is being restricted.

The term “personal rights“ from the article 25, paragraph 2 is not clear.

Guarantees regarding prohibition of torture ought to be grouped in one article, and the guarantees for respect of privacy should be related to the right for protection of privacy, family, home and correspondence, as well as in the article 8 of the European Convention on Human Rights and article 24 of the Small Charter.

\* The network of 18 women organizations suggested avoiding reference to the right of *men* from this article, as has been done in all other articles, for the benefit of a gender neutral wording, used in the constitutions of the majority of European states. The proposal is to begin the sentences with the word “**everyone** ...”.

### **Deprivation of Liberty (Article 26)**

Compared to the articles 14 and 16 of the Small Charter that thoroughly presented the guarantees from the ECHR and the ICCPR, this article has been shortened, without justification. The following is missing:

- Prohibition of arbitrary arrest and detention (article 14, paragraph 2 of the Small Charter);
- Deprivation of liberty should only be allowed for the reasons, and in the manner, defined by law (article 14, paragraph 2 of the Small Charter);
- The right of every person deprived of liberty is to **initiate a proceeding in which the court will examine the lawfulness of deprivation of liberty and order liberation, if established that deprivation has been unlawful**, according to the article 5, paragraph 4 of the ECHR and article 9, paragraph 4 of the ICCPR and article 14, paragraph 6 of the Small Charter;
- Article 26, paragraph 2, right to be informed of reasons for arrest **or on the charge**;
- The right to the assistance of interpreter should be added, from article 16, paragraph 4;
- In relation to article 27, it is necessary to provide for the exact maximum duration of police detention until mandatory surrender of the detained person to the court.

### **Fair and Public Trial (Article 29)**

Each person has the right to a fair and public trial **before an independent and impartial court** within reasonable time.

It is important to guarantee the right to trial before independent and, especially, *impartial* court.

### **Principle of Lawfulness (Article 30)**

The title should be rephrased into “prohibition of retroactivity, punishment only on the basis of law”, since it represents the true meaning of this provision.

The statement “**or by regulation based upon law**” **should be removed** as an act liable to punishment.

### **More Lenient Law (Article 31)**

Also remove “regulation based upon law”.

### ***Ne bis in idem* (Article 33)**

The principle has not been thoroughly envisaged, since the repeated punishment is only one of its elements, while the emphasis should be placed on the prohibition of a re-trial against the same accused person against whom the proceeding has previously already been effectively terminated for the same criminal act, as well as upon the prohibition of a simultaneous prosecution of the two criminal proceedings for the same criminal act. In short, this provision should be harmonized with the Protocol No. 7, Article 4 of the ECHR entitled “Right not to stand trial or be punished twice for the same act”.



### **Right to Defense (Article 34)**

It is necessary to supplement the first paragraph in the following way: "...of the defense lawyer **on own choice...**, **to communicate without disturbance with his/her defense lawyer and to be granted enough time and conditions for the preparation of defense.**" This is the essence of the right to defense, as guaranteed by the international standards (Article 6, Paragraph 3, b) and c) of the ECHR) and by the practice of the European Court in Strasbourg.

A new paragraph should as well be added: "**the law defines cases in which the interest of fairness demands that the accused gets a defense lawyer *ex officio* (free of charge)**".

### **Indemnification due to illegal acting (Article 35)**

Each person unreasonably deprived of liberty or sentenced is entitled to **rehabilitation** and indemnification from the state. The right to rehabilitation was explicitly guaranteed in the Article 22 of the Small Charter.

To add the following paragraph: "**Each person who is damaged by unlawful or irregular acting of state body or organization performing public office is entitled to right to indemnification from the state.**" Such provision should amend the unreasonably exclusive treatment of unfounded deprivation of liberty as a sole example of irregular acting of state bodies envisaged to be subject to indemnification. Such provision exists for example in the new Constitution of Serbia.

### **Movement and Residence (Article 36)**

To add after paragraph 1: "**Each person has the right to leave the territory of Montenegro and to return to it.**" (as in the Small Charter, Article 37, paragraph 1). The right of leaving any country, including own country, is explicitly envisaged also in Article 12, paragraph 2 of the ICCPR and in Article 2, Protocol 4 of the ECHR.

The paragraph no. 2 should also be adequately amended: "The liberty of movement and residence **and the right of exit or entrance in Montenegro** may be limited by **the law**, only if...".

### **Inviolability of Dwelling (Article 37)**

Bearing in mind that the right to be guaranteed here is the right to inviolability of home/dwelling or other premises of the holder, and not the right of the state officers to enter these premises, the paragraphs 2 and 4 should be rephrased into a negative form, such as in Article 24, paragraph 2 of the Small Charter or in Article 8 of the European Convention on Human Rights: "**No person should enter other person's dwelling... unless so decided by the court. The entrance ... without the court decision is allowed only if necessary for the purpose of an immediate arrest of a perpetrator of a criminal act or for the purpose of removing immediate and serious danger for people and property, in a manner prescribed by law.**"

## **Inviolability of Dwelling, Secrecy of Letters and Personal Data (Article 37, 38 and 39)**

These three articles represent various aspects of the right to respect of private and family life, which are guaranteed in the Small Charter in one Article 24 according to the Article 8 of the ECHR. In division into the three articles of the Draft, **“the right to respect for family life”** has been left out, which is yet another special standard established by the jurisprudence of the European Court for Human Rights. We believe that a special protection of family in Article 64, paragraph 1 is not an appropriate substitute for this deficiency.

## **Right to Asylum (Article 40)**

In paragraph 3, after “the court decision” the reference to the particular court procedure should be added: **“in line with the procedure prescribed by law”**. This is due to the fact that the court should examine in a special procedure whether the conditions for extradition were met or whether there is any danger of torture or serious breach of human rights.

## **Gender Equality (Article 42)**

\* Network of women NGOs suggested that Art. 42, para. 1 should be amended to firmly oblige the state to develop the policy of equal opportunities and a paragraph no. 2 added to explicitly provide for a possibility of affirmative action: **“The state may adopt special temporary measures directed towards acceleration of the process of achievement of *de facto* equality between men and women.”**

The basis is found in CEDAW. The state of Montenegro adopted some institutional mechanisms for the achievement of gender equality. In order to really advance to achieve gender equality, a law on non-discrimination is needed, special measures for the promotion of women, action programs, social dialogue and a dialogue with the civil society. Such article in the Constitution would provide with a sound basis for all further action to the end of achievement of equality.

## **Freedom of Thought and Belief, Freedom of Expression and Speech (Article 43, 45 and 49)**

The mentioned three articles should be merged into one, as it was done in the Small Charter in Article 29 and Article 10 of the ECHR. Also, there is an unfounded lack of **the right to access information in possession of the state bodies**. This is also emphasized by Center for Development of the Non-Governmental Organizations with reference to the constitution of the Kingdom of Belgium (art. 32) and others.

## **Prohibition of censorship (Article 48)**

\* Network of Women NGOs suggests that in the second paragraph reference to **“gender hatred and discrimination”** should be added, for the media are often being used for transmission of information or statements explicitly arguing for gender discrimination

and the prohibition of such behavior for 50% of population in Montenegro is no less important than prohibition of promotion of racial, ethnic, religious hatred or discrimination. Also, the article 6 of the Draft explicitly includes gender among the basis of prohibited discrimination.

### **Freedom of Association, limitation of organizing and prohibition of operating and establishing (Article 51, 52 and 53)**

In Article 51, paragraph 1 **the right to form trade union organizations**, should be added, among other reasons also since the right to form trade unions was explicitly guaranteed by the Constitution of the Republic of Montenegro in force, as well as in the Small Charter, and also since it was explicitly envisaged in Article 11 of the ECHR and Article 22 of the ICCPR and Article 8 of the International Pact on Economic and Social Rights, which all continue to apply also in the Republic of Montenegro.

Article 51, paragraph 1 should be split into the provision on the right to freedom of assembly or the right not to be member of association, as envisaged in Article 51, paragraph 2 and a paragraph stipulating that the organizations are established without prior approval, with registration at the competent body, as in Article 32 of the Small Charter.

\* The CRNVO argued that the ECHR guarantees freedom of association not only with regard to organization registered as legal persons, but also regarding informal organization and hence recommended a paragraph no. 1 to state: **Freedom of trade union, political and other association is guaranteed**”.

The articles 52, 52 and 53 mention “political associations” and “political organizations”, which are unclear terms. We suppose that the intended reference was to **“political parties”**, as this is terminology used by law in Montenegro (*Law on Political Parties* from 2004) and hence we emphasize that the Draft should also be rephrased accordingly. Otherwise, a wide interpretation of what a “political organization” may prove detrimental to the freedom of expression, freedom of association, for example of judges and others.

\* Also, the CRNVO emphasized that the present formulation of art. 52, para. 3 would prohibit the activities of the US National Democratic Institute (NDI) on various programs of education of political parties in Montenegro as NDI is a foreign political organization and proposed the following version: **“Organization and activity of political parties having a seat outside Montenegro as well as of foreigners is prohibited”**.

\* The CRNVO stated that there is no valid reason for a special treatment of political associations and hence suggested a relaxed formulation of art. 51, para. 3: **“The state assists (provides financial aid to) associations in case of public interest.”**

It is necessary to provide that prohibition of operation of associations may only be **upon a decision of the competent court**.

\* The CRNVO proposed that a formulation of art. 53, para. 1 be based on the text of the ECHR.

### **Right to Address (State Bodies) (Article 55)**

The right is incompletely regulated, especially in comparison to the standard of the Small Charter which in Article 34 envisaged that each person is entitled to right “**individually or in association with others**” to appeal to state bodies, “**to submit petitions and other proposals to them**” and to receive responses from them.

\* The above is also supported by the NGO Center for Development of the Non-Governmental Organizations and the Network of women NGOs that also asked for the title to be amended to “**Right to petition**”, according to the terminology used in the majority of constitutions of the European states (CRNVO made reference to the constitutions of Germany, art. 17, Kingdom of Belgium, art. 28, Switzerland, art. 33, Estonia, art. 46, Slovenia, etc.).

### **Rights of employees (Article 57)**

\* The Network of women NGOs asked that two new paragraphs be added: one guaranteeing equal pay for men and women and another, following paragraph no. 4 providing for “**the right of everyone to a protection from lay off related to maternity and exercise of a parenthood right following childbirth**”.

This request is based on CEDAW and the EU Council directives 75/117/EEC and 92/85. Also, the practice in Montenegro shows that the right to work of women is particularly breached in relation to pregnancy, maternity leave or marital status, as well as that there are significant discrepancies to a detriment of women regarding the level of salaries for the same type of work. Therefore, these rights should be guaranteed by the Constitution.

### **Strike (Article 58)**

The paragraph 3 should be rearranged so that the right to strike is envisaged with the provision of minimum functions.

### **Marriage (Article 63)**

\* The Network of Women NGOs suggested that the provision be amended to emphasize equal rights of both **parties** in marriage and in the occasion of divorce, in line with the international conventions and standards:

“Marriage may be concluded upon free consent of both parties. The spouses have equal rights with regard to conclusion of marriage, duration of marriage as well as regarding divorce” *or* “Marriage is based on equal rights of spouses and is concluded upon free consent of both parties”.

The amendment of the words “men and women”, that are being used only in this article of the entire Draft, into “**parties**” allowing for respect of human rights of persons who are not heterosexuals is particularly recommended.

### **Protection of Mother and Child (Article 65)**

\* The Network of Women NGOs proposes this article to be amended to provide for the right of women to freely decide on birth, by changing the title to “**Freedom of decision on birth**” and by adding a paragraph no. 1: “**Woman has the right to freely decide on childbirth**”. This has also been proposed by the HRA as the right to termination of pregnancy in the article 23 on the right to life.

### **Rights of the Child (Article 66)**

Children are all persons below 18 years and exercise all children rights in line with the International Convention on Children’s Rights.

### **Right to Schooling (Article 67)**

The right needs to be rephrased into the right to “**education**”, since it represents a more comprehensive term than schooling, and also represents the official translation of the phrase *right to education* from ratified international treaties providing for this right.

### **Possession (Article 80)**

The right to a peaceful enjoyment of property, protected by Article 1 of Protocol I of the European Convention on Human Rights, was more thoroughly protected in Article 23 of the Small Charter. However, even the phrasing in the Charter is not in itself clear – the ECHR protects the right to property, which is a broader term than what is here called possession and includes also “legitimate expectations” to gain property, etc. It should be taken into consideration that along with disowning it is also necessary to regulate the limitation of property that also deserves the right to remuneration (see European Court for Human Rights, *Sporrong and Lonroth against Sweden*, 1982).

To supplement article 83 in the following manner: “A foreigner may have property title **in line with law**”, to link it with Article 80 and Article 82 and include also in part of the Constitution regarding human rights and freedoms.

### **Composition of the Parliament (Article 88)**

\* The Network of women NGOs suggests that the following paragraph no. 2 should be added: “**The composition of the Parliament ensures gender equality and representation of sexes in accordance with the law**” in order to facilitate adoption of laws stipulating quotas for women participation in the parliament and other decision-making positions. Montenegro has less than 10% of women in the Parliament and is among European states with the lowest percentage of women parliamentarians. The reference is also made to the resolution of the EU Council 95/C 168/2 of 27 March 1992 emphasizing equal participation as the condition for gender equality.

### **Right to Propose Laws (Article 98, paragraph 2)**

The additional obligation of citizens to submit draft laws to the Parliament through a Member of the Parliament unfoundedly limits and aggravates the right of citizens to

propose laws, which the Constitution in force envisaged in Article 85 as a right to directly propose laws to the Parliament, upon securing 6.000 signatures of citizens in support of the proposal. This solution is also contrary to Article 25, item a) of the ICCPR (“Each citizen is entitled to the right and possibility, without any discrimination mentioned in Article 2 *and without unfounded limitations* to take part in the conduct of public affairs, whether *directly*, or through freely elected representatives”). Namely, if one right has previously been acquired and is now limited without justification, such action may only be considered as unfounded limitation.

\* The CRNVO also emphasizes that should the Draft provision remain, the essence of the direct civic initiative to the parliament would become senseless, direct communication of citizens and the parliament aggravated and constitutional pressure directed towards the citizens to profile their initiative as a political one. The Constitution should guarantee the right to a *Citizens’ Initiative* in the following way: **“The right to propose laws and other acts belongs to six thousand voters. The citizens’ initiative has the same status as the initiatives coming from other authorized persons. Authorized representative of a citizens’ initiative, on the course of a debate in the parliament has the same rights as other authorized representatives proposing laws or other acts”**. The reference has been made to the Constitution of Slovenia (art. 88), where five thousand voters may propose a law to the parliament. It was finally emphasized that the proposed solution that citizens need to select an MP who would propose their proposal is a demolition of a direct democracy institute.

## **JUDICIARY (Article 129, 130 and 131)**

We strongly believe that the alternative of the Constitutional board for articles 129 and 130, should be adopted and Article 130 reformulated in the following manner:

The judicial council decides upon the election, disciplinary responsibility, immunity and dismissal of judges, presidents of courts and lay judges on the basis of the criteria and under procedure envisaged by law.<sup>3</sup>

The judicial council defines the number of judges in each court in the Republic, submits to the Parliament the proposal of the courts budget and performs other duties defined by law.

The judicial council has eleven members who are judges, attorneys at law, university professors and other prominent lawyers, elected by the Parliament on the basis of a two-third majority and according to criteria and procedure envisaged by law.

The seven members of the judicial council are judges elected by the judiciary.

*or*

The judicial council has an odd number of members, the majority of which are judges, nominated on the extended session of the Supreme Court in line with law.

The candidates for the remaining four members of the judicial council are nominated by the Bar Association, Faculty of Law and Non-Government Organizations

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<sup>3</sup> The HRA working group’s proposal has been based on the legal provision of precise, impersonal criteria for election of judges and the rules of transparent procedure in which the decisions would be reached on the basis of an appropriate reasoning.

with at least two-year experience in the areas of human rights protection, democracy improvement, rule of law and fight against corruption, in accordance with law.

**The Constitution should also provide for the Right to Appeal against the Decisions of the Judicial Council:**

The administrative law suit may be instituted against the decision of the Council on the selection of candidates for the posts of judges.

A judge is entitled to right to file a constitutional appeal against the decision removing the judge from office within 30 days to the Constitutional Court which decides upon the complaint under procedure and within time frame defined by law.

The HRA disagrees with a proposal that the President of the State should finally appoint judges for the following reasons:<sup>4</sup>

1. The president of the state is a political figure “par excellence”, always strongly affiliated with his political party. We do not see how would then the approval of the president be in line with the goal of avoiding political influence in the process of judicial appointment. This argument also applies to the proposal that the representatives of the Parliament, i.e. political party members also be members of the Judicial Council.

2. The HRA proposal considers adoption of detailed criteria for appointment, as well as judicial, i.e. constitutional court’s review of the decisions of the Judicial Council, as ultimate ways of control of the Council’s operation. With the proposal of the president of the state finally appointing and dismissing judges one needs to bear in mind that one may not appeal the president’s decisions before the administrative court, as above proposed for all decisions on appointment, but we would then insist on his decisions being subject to constitutional appeal that would need to be explicitly provided for by the Constitution.

\* The CRNVO also proposed that a Constitution should provide for an obligation for all state bodies and other public institutions appointed by the parliament to regularly report to the Parliament on their work, at least once a year. This obligation would include also the Judicial Council. The HRA argues for a transparent operation of a reformed Judicial Council that would entail regular reporting to the public as well, published on the web site of the institution, in accordance with the particular Law on Judicial council.

**Assets for Work of Courts (Article 131)**

The paragraph 2 should be amended so that the proposal for provision of assets for the work of courts is submitted **to the Parliament** by the judicial council, and perhaps add “on the basis of prior consultations with the Government”.

Another paragraph 3 should be added stating that “**the wages of judges are paid out of the judicial budget and defined by a special law.**”

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<sup>4</sup> The comment against the president’s involvement in the process of appointment of judges is the only one that has been included only in the document directed to the members of the Venice Commission and not to the document delivered to members of the Constitutional Board of the Montenegrin Parliament.

## **PUBLIC PROSECUTOR (Article 132)**

- to envisage election procedure by a Prosecution council;
- To precisely define competences and envisage a body (public defense lawyer?) to take over the competence of representing the state in civil law disputes.

## **PROTECTOR OF HUMAN RIGHTS AND FREEDOMS (Article 76)**

Election procedure should be envisaged.

### **Human Rights guarantees missing from the Draft:**

- Prohibition of slavery, status akin to slavery and forced labor. To prohibit trafficking of human beings in all forms... (Article 13 of the Small Charter);
- Prohibition of instigation and incitement of national, racial, religious and other inequality, as well as instigation and incitement of national, racial, religious and other hatred and animosity (present in Article 43 of Constitution in effect and in Article 51 of the Small Charter);
- Explicit prohibition of torture, inhuman and degrading treatment and punishment, as above stated regarding articles 25 and 28 (Article 12 of the Small Charter);
- Right to home or residence for the homeless, provided for in Article 11, paragraph 1 of the International Pact on Economic, Social and Cultural Rights;
- Right to protection of family life, as above stated regarding articles 37, 38 and 39;
- Right of citizens to a public broadcasting radio and television service (request by the NGO Center for Development of the Non-Profit Sector supported by the HRA);
- Right to access to information, see above the remark related to articles 43, 45 and 49 (guaranteed in Article 29, paragraph 2 of the Small Charter);
- Explicit right to form trade union organizations (see comment on articles 51, 52 and 53), (envisaged in Article 32, paragraph 2 of the Small Charter);
- Rights of members of ethnical minorities' members (as in Article 47-55 of the Small Charter);
- Guarantee of acquired rights (similar to Article 57 of the Charter);
- Prohibition of deprivation of freedom due to a contractual obligation (Article 14, paragraph 3);
- Right to complaint against the decisions of the Judicial council;
- Right to indemnification from the state inflicted by illegal or irregular acting of state bodies or public employees.

There is a lack of explicit regulation of a legal age, i.e. that persons are considered children up to 18 years when they become of age, as there are numerous legal consequences attached to this fact apart from the right to vote.

The provision on "development of the spirit of tolerance" (Article 56) from the Small Charter should also be adopted in the Constitution of Montenegro.