

**INTERNATIONAL  
HUMAN RIGHTS STANDARDS  
AND CONSTITUTIONAL GUARANTEES  
IN MONTENEGRO**

**Human Rights Action  
Podgorica  
2008**

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**Jan Helgesen**

*President of the Venice Commission,*

*Professor Faculty of Law, University of Oslo*

## **Foreword**

During the last years the Montenegrin authorities have undertaken considerable efforts to bring Montenegro's legal system into line with European standards. During the course of this process the authorities requested the Venice Commission's assistance on several occasions. The resulting opinions bear witness to the close and fruitful co-operation between the Commission and the Montenegrin authorities. A particularly important matter was the adoption of the new constitution on 19 October 2007 and the Venice Commission's opinions in this respect. In its assessment of the final text the Commission gave generally favourable comments on the constitution.

The Commission concluded its assessment by pointing out that the constitution's timely implementation is of utmost importance for Montenegro. It is crucial for ensuring a successful democratic consolidation. Furthermore, it is essential for creating an environment conducive to the respect for human rights and fundamental freedoms.

In order to achieve this, efforts will have to be made to enable lawyers, especially judges, to gain an understanding of the constitution's human rights provisions and to interpret them in compliance with the standards set by the European Convention on Human Rights.

Therefore, I welcome and commend initiatives such as the roundtable "International human rights standards and constitutional guarantees" organised by Human Rights Action on 28 February 2008 which led to the publication of this book. It will be of great help to legal professionals seeking advice on the interpretation of the human rights provisions in the new constitution.

I can only encourage further efforts to raise awareness for these issues and to provide effective training for the entire legal profession. In this respect I would like to stress the importance of continued co-operation between the Montenegrin authorities and international bodies which can provide valuable help on this matter.

At this occasion I would like to take the opportunity to re-affirm the Venice Commission's readiness to assist the Montenegrin authorities in implementing the constitution.



**Round Table**

**International Human Rights Standards and  
Constitutional Guarantees in Montenegro**

Podgorica, 28 February 2008

**Introduction**



## Tea Gorjanc Prelević, LL.M.<sup>1</sup>

Ladies and Gentlemen,

I would like to welcome you on behalf of the non-governmental organization Human Rights Action, and especially on behalf of the members of its working group who prepared the comment on the provisions of the Constitution of Montenegro on human rights and independence of judiciary: Emilija Durutović, LL.M., judge of the Supreme Court of Montenegro and of the Court of Serbia and Montenegro in retirement, Nebojša Vučinić, Ph.D., professor of the international law and human rights at the Law School of the University of Montenegro, Radomir Prelević, Ph.D., Attorney at Law and on my own behalf. This project and today's gathering has been assisted by the *Foundation Open Society Institute - Montenegro Office* and supported by the Venice Commission (*European Commission for Democracy through Law*) of the Council of Europe.

I would like extend my special greetings to our guest, Mr. Anthony Bradley, deputy member of the Venice Commission from the United Kingdom and a member of the expert team of the Commission for the drafting of the observations on the Constitution of Montenegro, who without special persuasion accepted our invitation to participate in this meeting thus continuing to invest his time and effort in Montenegro.

In November 2006, thanks to the Foundation Open Society Institute - Montenegro Office and to the Centre for Development of Non-governmental Sector, the first round table debate was organized on the first, expert text of the Draft Constitution. The Human Rights Action (HRA) was invited to contribute to the debate, which in some ways obliged us to continue to influence the improvement of the text of the Constitution with regard to guarantees of Human Rights and independence of judiciary.

*The Human Rights Action* (HRA) tried to contribute to the drafting of the constitutional human rights guarantees by means of the comments to the first expert text of the Constitution, the Draft and the Proposal of the same, and, finally, by means of the comments to the Constitution.<sup>2</sup> Our attempt was to point out to the complexity of international human rights standards and advocate their appropriately precise inclusion in the Constitution. We

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1 Editor of the project „International human rights standards and constitutional guarantees in Montenegro“, Human Rights Action program editor.

2 Those commentaries are available in Montenegrin/Serbian language at: [http://www.hraction.org/wp-content/uploads/komentari\\_na\\_ustav\\_cg\\_2007.pdf](http://www.hraction.org/wp-content/uploads/komentari_na_ustav_cg_2007.pdf), while the comments of the Constitution human rights provisions are published together with the comments of the Venice Commission in Chapter IV -Comparative Analysis.

have taken into account that the International Human Rights law is a law of precedents, whose definitions of rights from major treaties adopted in the mid last century evolved in the jurisprudence of the European Court of Human Rights, Human Rights Committee and other bodies entrusted with monitoring of the implementation of those treaties. By adopting constitution in the XXI century, Montenegro has had a chance to adopt a contemporary Human Rights guarantees that would frame not only the rights as stipulated in the texts of international treaties that are binding for Montenegro<sup>3</sup>, but also equally binding guarantees stemming out from the practice of the stated international bodies. In such a way, the Constitution would have presented a thorough basis for *understanding* of international human rights standards that the state is obliged to provide.

Initially, we were suggesting the most practical solution, to include in the constitutional text the Charter on Human and Minority Rights of the former state union<sup>4</sup> (so called „Small Charter“), within which this responsible and professional task had been very well done, as it has been confirmed by the experts of the international organizations competent for human rights issues. Moreover, the Small Charter had been adopted by the Montenegrin National Assembly in 2003 and the Council of Europe requested that the level of Human Rights guarantees in the new Constitution should not be below the level guaranteed by the Charter. Instead of that, a new activity commenced to include the international standards in the Constitution, on the basis of the Constitution from 1992. The first attempt of the expert group did not receive good marks from either experts or politicians and this work was given up completely.<sup>5</sup> The attempt of politicians of the Constitutional Committee in the Draft Constitution received bad marks by domestic expert public as well as the Venice Commission („Commission“).<sup>6</sup>

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3 International Covenant of Civic and Political Rights has been binding for Montenegro since 1976: see *Official Gazette SFRY (International treaties)*, no. 7/1971, the European Convention on Human Rights from early 2004, see Law on Ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms and accompanying protocols, *Official Gazette of Serbia and Montenegro - International treaties*, no. 9/2003.

4 Charter on Human and Minority Rights and Civic Freedoms of Serbia and Montenegro, *Official Gazette of Serbia and Montenegro*, no. 6/03.

5 For the criticism of the expert draft of the Constitution, see the publication „Novi Ustav - karakter, principi i rješenja u oblasti demokratije i ljudskih prava“ („New Constitution - Character, Principles and Solutions in the Area of Democracy and Human Rights“), Center for Development of the Non-Profit Sector, Foundation Open Society Institute -representative office in Montenegro, 2 November 2006, [http://213.149.103.11/download/novi\\_ustav\\_inicijativa06.pdf](http://213.149.103.11/download/novi_ustav_inicijativa06.pdf).

6 According to the president of the Constitutional Committee, 120 individuals and NGOs submitted more than 400 comments on the Draft constitution. The comments by HRA as well as joint comments of several Montenegrin NGOs may be seen at: [http://www.hracion.org/wp-content/uploads/joint\\_ngo\\_comments\\_on\\_the\\_draft\\_constitution.pdf](http://www.hracion.org/wp-content/uploads/joint_ngo_comments_on_the_draft_constitution.pdf). The comments of the Venice Commission on the Draft constitution (the Commission's Preliminary Opinion) may be seen at: [http://www.venice.coe.int/docs/2007/CDL\(2007\)052-e.asp](http://www.venice.coe.int/docs/2007/CDL(2007)052-e.asp), and, to a certain extent, in comparative analysis of the constitutional provisions at page 101.

Despite detailed recommendations offered by the Commission (there are no data that the Constitutional Committee considered the observations of the HRA or any other Montenegrin NGO), the Constitution was adopted with the omissions which have to be considered by all those who will be applying the Constitution, in order to provide for implementation of minimal human rights standards and prevent the loss of precious years in expecting the instructions from the judgments of the European Court of Human Rights (hereinafter referred to as the „European Court“) against Montenegro.

Although the criticized text of the Draft Constitution was considerably improved, the ultimate result did not reach the level of the Small Charter, as had been requested by the Council of Europe. The Constitution does not contain some important guarantees with regard to the right to life, right to a judicial appeal in every case of deprivation of liberty (*habeas corpus*), prohibition of humiliating and inhumane punishment, prohibition of detention for debt, right to effective legal remedy and sufficient guarantees of fair trial, etc. On the other hand, contrary to the international standard of the freedom of expression and the provisions of the national Law on Obligations, there is a guarantee of the right to damage compensation for publishing false information, and not, for example, a *guarantee* of the right to damage compensation due to torture, which is an internationally recognized right.

The Constitution prescribes that the international human rights treaties would apply directly in Montenegro, but it made such an application unjustifiably difficult, since the supremacy has been emphasized over the „legislation“, and not over the Constitution, „law“, and that they will be applied directly solely if it is proved that „they regulate relations differently from the national legislation“ (Article 9). There is a very important instruction missing, as well, which was contained in the Small Charter (Article 10), that these treaties will be applied in line with their interpretation by the international bodies competent for the supervision of their application. Missing is also a promise by the state not to lower the attained level of human and minority rights (Small Charter, „Guarantees of acquired rights“, Art. 57).

The Constitution does not offer satisfactory guarantees as to the independence of judiciary and state prosecutors, which was confirmed by the Venice Commission as well, but the additional discussion on the issue deserves a special occasion.<sup>7</sup>

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<sup>7</sup> The observations of the Commission related to these constitutional provisions have been published in the Addendum, pages 159, 162, 169. *Human Rights Action* organized a debate on the constitutional guarantees related to the independence of judiciary on 12<sup>th</sup> July 2007, after the Draft Constitution was agreed upon, on the occasion of presentation of HRA's proposal for the reform of the appointment of judges in Montenegro. For more details please see *Reform Proposal for the Appointment of Judges in Montenegro*, HRA working group, Podgorica, 2007 ([http://www.hraction.org/wp-content/uploads/hra\\_reform\\_proposal\\_eng.pdf](http://www.hraction.org/wp-content/uploads/hra_reform_proposal_eng.pdf)). HRA's

Following the adoption and publication of the Constitution, HRA sent the initiative for the amendment of the Constitution to the President of the State, the Prime Minister and to all parliamentary political parties, although it was clear that this initiative will have to wait some other time. In the meantime, this round table and the publication which is to follow have been prepared with the goal of assisting the constitutional guarantees to be understood and applied in conformity with the international human rights standards, primarily from the European Human Rights Convention and the case law of the European Court of Human Rights which offers its interpretation. Therefore, I am especially grateful to Mr. Petar Stojanović, judge of the Supreme Court of Montenegro and the president of the Coordinating Board of the Centre for Education of Bearers of Judicial Functions in Montenegro for participation in today's debate, as well as to the present judges of the Constitutional Court of Montenegro, representative of the state prosecutor's office and attorneys at law.

\* \* \*

The organization of this round table was supported by the Venice Commission of the Council of Europe, which has considerably contributed to the quality of the Constitution of Montenegro. I would now like to greet Mr. Srdjan Darmanović, member of the Venice Commission from Montenegro and Dean of the Faculty of Political Sciences of the University of Montenegro and invite him to take the floor. Apart from what I have already said, Srdjan Darmanović is the founder of the NGO Centre for Democracy and Human Rights (CEDEM), which for years now has been offering trainings to Montenegrin jurists on the issue of human rights standards from the European Convention on Human Rights.

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initiative for the amendment of the Constitution also contains criticism regarding constitutional provisions regulating judiciary, especially regarding the composition of the Judicial Council, the appointment of the president of the Supreme Court and Judicial Council, president and judges of the Constitutional Court. For more details please consult: [http://www.hraction.org/wp-content/uploads/hra\\_opinion\\_november\\_2007.pdf](http://www.hrraction.org/wp-content/uploads/hra_opinion_november_2007.pdf).



**Professor Srdjan Darmanović, Ph.D.**<sup>8</sup>

Dear Colleagues,

The Constitution of Montenegro was adopted following quite a lengthy process of negotiation and harmonization of our political parties represented in the Parliament. Such practice is not known either in the societies in which democracy is older and more firmly rooted than it is with us. Contemporary democracy today is, more or less everywhere in the world, mostly and above all, the democracy of political parties that is why there is such role of theirs in the constitutional process. Still, the manner in which our political parties dominated during the drafting of the first constitution of Montenegro as an independent state, by many things was a unique one.

Above all this is related to almost complete exclusion or marginal role of profession in the process of the adoption of the new constitution. The attempt for profession to be involved in her adoption of the Constitution through the work of the Constitutional Council of the Parliament of Montenegro gave no result, for the simple reason that the political parties, through their representatives in the Parliamentary Constitutional Committee, rejected the draft constitution offered by the Council, and reopened a completely new process of political negotiations on the Constitution. In this process of negotiations there was no room for profession, so that not a single representative of legal, political or other relevant sciences got included in the work of the Constitutional Committee. The politicians considered, apart from having the legitimate role of passing the Constitution, that they are also competent enough to write it themselves. This was a misconception, which should not be repeated in the future in the process of drafting important legal documents.

The negotiation process that involved parties also had some good things. Tiresome and long-lasting political negotiations during the work on the new Constitution, which sometimes looked like it would be brought into a stalemate, still, in the end, resulted in a rather broad consensus regarding the text of the Constitution, which, for still a very much divided Montenegrin society, was a considerable achievement. Nevertheless, the said shortcoming of professional participation was visible, both in legal-technical, and in substantial sense, and this gap had to be filled.

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<sup>8</sup> Member of the Venice Commission from Montenegro, Dean of the Faculty of Political Science of the University of Montenegro, President of the Managing Board of the Centre for Democracy and Human Rights (CEDEM).

This role was played, in the best possible way, by the Venice Commission of the Council of Europe and it needs to be greatly thanked for having a relatively good text of the new Constitution, for its shortcomings being less significant than its advantages. By consistent participation in all the stages of our constitution drafting process, and especially by the comments which significantly improved the Draft Constitution, the Venice Commission made a decisive contribution to the quality of the ultimate quality of the constitutional text. On the other hand, having omitted to include to a greater degree domestic expert knowledge in the process of passing the Constitution, our party politicians showed sufficient readiness to cooperate with this respectable European expert body, which, in the end, led to the result.

The Constitution is now before us and it represents a legal act of the highest order in the country. But, the Constitution is not the Holy Bible, but a living organism subject to interpretations, as well as strivings or the same to be changed improved and be better. Because of that it is very important, although the Constitution has been only recently passed, to deal with it in the future as well. In that sense, even this meeting, the task of which is to establish to what degree, or how successfully the international human right standards are involved and guaranteed by the new Constitution of Montenegro, represents a good, I would say, real beginning of dealing with the Constitution.

With the gratitude for the invitation to say something in the capacity of the Venice Commission member in the introduction of today's round table, I am convinced that we will have an interesting and useful discussion.

Thank you.

**Sanja Elezović<sup>9</sup>**

Dear participants of the round table,

It is my pleasure to greet you on behalf of the Foundation Open Society Institute. As Mrs. Gorjanc-Prelevic has already mentioned, today's round table is a part of our broader project which started almost two years ago with the purpose of stimulating the participation of civil sector in the creation of crucial policies for the development of democracy and the rule of law in Montenegro.

Let me remind you that, immediately upon the declaration of independence, some twenty NGOs sent the Initiative to the representatives of the legislative, executive and judicial authorities, political parties, the University, trade unions, media and other civil society organizations, business sector and total public in Montenegro to undertake certain measures in the field of State building, adoption of the Constitution, development of democracy and the rule of law, protection of human and minority rights, good governance and sustainable development. After the Initiative, there was a series of round tables, expert and public discussions, which resulted in concrete proposals for the establishment of principles and standards in the stated areas, which in turn were sent by the civil society to decision makers in Montenegro, as well as to international organizations and institutions.

During the last year, civil society invested special effort in the transparency and participative character of the process of the adoption of the new Constitution. During a series of round tables dedicated to this legal act of the highest order, NGOs especially committed themselves to defining principles and standards in the field of human rights. They insisted on the text of the Constitution containing previously acquired rights, as well as the international regimes of human rights protection, which Montenegro has undertaken to respect with the very act of the accession to the Council of Europe, the UN and other international organizations. The proposals from the round tables, including the one made by the Human Rights Action, were sent to the Constitutional Committee and the Venice Commission, and the same were communicated to the expert and ordinary public in Montenegro.

Following the proclamation of the new Constitution in the Parliament of Montenegro, civil society, dissatisfied with certain solutions in the area of human rights protection, continues to fight for the improvement of the legal

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<sup>9</sup> Executive Director of the Foundation Open Society Institute -Representative Office in Montenegro.

framework in this field. The Human Rights Action once again gathered experts and prepared comprehensive observations of the Constitution, which are the topic of today's round table. We have with us today the representatives of the legislative, executive and judicial authorities, civil society and international organizations, and the discussions aim to analyze additional opportunities and restrictions of the constitutional solutions in the area of human rights. As Professor Darmanović has already said, the Constitution is a living matter, subject to changes and diverse interpretations, and we do hope that this discussion will also point out to the need for constant dialogue not only with regards to the interpretation of certain provisions of the Constitution, but also its improvement in the future period.

# Presentations



Anthony Bradley<sup>10</sup>

## **The Human Rights Provisions of the Constitution of Montenegro - Key Observations of the Venice Commission**

### *Introduction*

1. In December 2007, the Venice Commission (the Council of Europe's 'Commission for Democracy through Law') gave its opinion on the Constitution adopted by the Parliament of Montenegro on 19 October 2007. Members of the Commission had met several times with representatives of the Parliament as the Constitution was being drafted. The Commission concluded that the Constitution 'deserves a generally positive assessment'; the text had been substantially improved during the process of consultation, but not all suggestions made by the Commission in its interim opinion in June 2007 had been adopted. The Commission said that implementation of the Constitution was of crucial importance; in particular, the courts and legal profession must develop a good understanding of the human rights provisions, so that they may be applied in conformity with the minimum standards set by the European Convention on Human Rights.<sup>10</sup>

2. This paper deals with some key provisions in the December opinion. It addresses difficulties that may arise because the human rights articles in Part II of the Constitution are presented differently from the way they are in the Convention. The two analytical tables prepared for this seminar provide help in comparing the Constitution with the Convention.<sup>11</sup> They may also be a pointer to issues that could arise in implementing the Constitution.<sup>12</sup>

3. The Constitution rightly gives effect in the law of Montenegro to the norms set by treaties and by accepted rules of international law [CM 9]. This is of particular importance for protection of human rights. European states can no longer claim that their 'sovereignty' as independent states gives them absolute power to deal with human rights issues as they think fit. Today, such states must observe the standards set by a wide variety of international treaties. Conventions such as the Convention against Genocide, the Convention on Racial Discrimination and the Convention on Rights of the Child are in

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10 In further text, Articles of the Constitution of Montenegro adopted on 19 October 2007 are shown as [CM], and Articles of the European Convention on Human Rights as [EC].

11 For the tables please see pg. 125

12 Where this paper contains statements that are not found in the Venice Commission's Opinions, responsibility for them is that of the author alone and is not to be attributed to the Commission.

force worldwide. In Europe, the European Convention on Human Rights has a special significance. This is because the European Court of Human Rights at Strasbourg has the ultimate judicial task of deciding whether states are observing the Convention when complaints are brought against them. Everyone within the jurisdiction of Montenegro, regardless of nationality, may apply to Strasbourg if they claim that their Convention rights have been infringed, and if they have exhausted their remedies in Montenegro [EC 34; CM 56]. This system of protecting human rights emphasises that national courts have the primary responsibility of giving effect to those rights.

4. During the consultations that took place while the new Constitution was being prepared, the Venice Commission would have preferred it if Part 2 of the Constitution had been closely modelled on the Convention. In February 2007, the political authorities in Montenegro agreed to provide the same level of protection for human rights as that in the Charter on Human and Minority Rights of the State Union of Serbia and Montenegro in 2002.<sup>13</sup> That document had been drafted in close co-operation with the Venice Commission. In the event, it was the 1992 Constitution of Montenegro that was used as the basis for drafting the new scheme for human rights. This earlier text had not been based on the European Convention and it required many amendments to match the relevant standards.

### *European Convention rights and national law*

5. The Convention permits a state to decide what constitutional form to give to its laws on human rights.<sup>14</sup> In Austria, for instance, the Convention is given the force of a constitutional provision. Many states give the Convention the status of an ordinary law, or in some cases an enhanced status as a law. However, the freedom of a state to make such decisions does not entitle a state to ‘pick and choose’ the rights that are protected. A state cannot justify a violation of a Convention right by saying that there is nothing in its Constitution or in national legislation to protect the right. It remains necessary for the state to ensure that the essential substance of the rights protected complies with the Convention, whether by articles in the

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<sup>13</sup> This had been one of the seven minimal principles set by the Council of Europe for Montenegro to incorporate in its new Constitution. Presidents of the State, Government and Parliament of Montenegro informed the president of the Parliamentary Assembly of the Council of Europe on 26 March 2007 of the willingness of Montenegro to implement those principles in its Constitution and fulfill other commitments to the Council of Europe following the accession of Montenegro to this organization. This document appears as an Addendum to the report *Accession of the Republic of Montenegro to the Council of Europe*, Doc. 11204, adopted by the PACE on 17 April 2007: <http://assembly.coe.int/Main.asp?link=http://assembly.coe.int/Documents/WorkingDocs/Doc07/edoc11204add.htm>.

<sup>14</sup> See e.g. *Swedish Engine Drivers Union v Sweden*, 6 February 1976; *Ireland v United Kingdom*, 18 January 1978.



Constitution or by other legislation. When the protected rights are violated, the individual concerned is entitled to have ‘an effective remedy’ in national law, ‘notwithstanding that the violation has been committed by persons acting in an official capacity’ [EC 13]. During the process of consultation over the text of a new constitution for Montenegro, much detailed analysis was necessary to ensure that the main Convention rights were covered in the Constitution. This explains why the Commission’s opinion on the Constitution in December 2007 was itself rather detailed. That report indicates both many changes made to bring the Constitution closer to the Convention and also matters on which (in the opinion of the Commission) gaps still remained. Overall, as already stated, Part II of the Constitution (Human Rights and Liberties) was considered to deserve ‘a generally positive assessment’. However, the Commission’s opinion contained some detailed points of criticism and stressed the importance of implementing the human rights in a manner that complies with the Convention.

6. When the two texts are compared, it will be seen that some Convention rights correspond very closely to the rights protected in the Constitution. An example of this is the protection for freedom of thought, conscience and religion: see [EC 9] and [CM 46]. But other rights in the Constitution diverge to a greater or lesser extent from the Convention. Many Convention rights are (in effect) divided between several articles of the Constitution: for examples, see the right to liberty and security [EC 5], the right to a fair trial [EC 6], the right to respect for private and family life [EC 8] and freedom of expression [EC 10]. Certain rights are protected in Part II of the Constitution but are not found in the Convention at all: these include the right to a sound environment [CM 23], rights of the employed [CM 64] and consumer protection [CM 70]. In the case of these rights, the individuals affected by a breach have no right of recourse to Strasbourg, unless their complaint can be formulated with direct reference to a right or rights protected by the Convention. For instance, severe environmental pollution that injures the health of persons living in their homes near to a chemical plant or power station may be a breach of their right to respect for their ‘private and family life’, and thus be a breach of Article 8 [EC].<sup>15</sup>

7. The purpose of the two analytical tables is to make it easier to compare the rights in the Convention with the rights in the Constitution. The first table starts with the Convention right and the next column shows articles in the Constitution that correspond to the Convention right. The second table starts with the rights protected by the Constitution and then shows the corresponding articles in the Convention. However, for reasons already

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<sup>15</sup> See *Guerra v Italy*, 19 February 1998; and cf. *Hatton v United Kingdom*, 8 July 2003.

given, it cannot be assumed from the tables that articles in the Constitution have the same content as the corresponding article in the Convention.

### *Limitation of rights*

8. Under the Convention, and under national constitutions, there are few 'absolute' rights, in the sense that they exist in an absolute form that cannot be subject to any limitation or restriction. One such right is the prohibition of torture: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment' [EC 3]. In the Constitution, Article 28 [CM] includes the statement: 'No one can be subjected to torture or inhuman or degrading treatment'. This also is written in absolute terms. The only difference is that Article 28 [CM] does not include the words 'or punishment'. Is this a serious omission? Article 28 [CM] also protects the individual's dignity, security and inviolability of physical and mental integrity. Article 31 [CM] guarantees respect of human personality and dignity in criminal procedure, in case of deprivation of liberty and during imprisonment. Article 31 also prohibits any form of violence, inhuman or degrading behaviour against a person in detention; and it excludes any extortion of confession or statement. Taking these Articles together, it would be difficult to present a convincing argument in a national court that they do not apply to a form of punishment that is inhuman and degrading. Even if such an argument could be made, it is not an argument that deserves to succeed. If the aim of this right is to protect vulnerable individuals against being exposed to inhuman or degrading conduct at the hands of state officials, the single word 'treatment' can, at least in the English language, be interpreted as including punishment, and it should be given a broad meaning, rather than a restrictive meaning. As to what may constitute torture, or what form of treatment must be considered inhuman and degrading, the best guidance on this can be obtained from the decisions made by the Strasbourg Court.<sup>16</sup>

9. By contrast with prohibition of torture, many Convention rights are not absolute but are stated to be subject to limitation or restriction for particular purposes. For instance, Article 9 [EC] deals with freedom of thought, conscience and religion. An individual's freedom of thought, conscience and religion is not itself subject to limitation, but Article 9(2) provides this qualification on the freedom of religion:

"Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a

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<sup>16</sup> See *Ireland v United Kingdom*, 18 January 1978; *Selmouni v France*, 28 July 1999; *Peers v Greece*, 19 April 2001.

democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others”.

The Strasbourg Court interprets such a clause by imposing a series of tests on any limitation of the freedom:

- (1) the limitation must be ‘prescribed by law’;
- (2) the limitation must be intended for one of the purposes specified (e.g. protection of the rights of others);
- (3) the limitation must be considered to be ‘necessary in a democratic society’; and
- (4) the limitation on the freedom must not be disproportionate to the benefit gained from the limitation (the test of proportionality).

The issue of ‘proportionality’ is central to many decisions of the Strasbourg Court. On a complaint of torture, there is no test of proportionality: the individual has to establish that conduct to which he/she has been exposed is serious enough to constitute ‘torture or inhuman or degrading treatment or punishment’. By contrast, where an individual challenges a restriction on his freedom to manifest religious belief (say, by wishing to say prayers in a public place), and establishes that a law or regulation is such a restriction, it is for the state to justify the restriction: and the state must satisfy the court that the restriction meets the four criteria mentioned.

10. A different structure for the limitation of rights is taken in the Constitution. Particular rights are not separately subject to limitation. Instead, Article 24 [CM] contains a general limitation that in principle applies to all protected rights. It provides:

“Guaranteed human rights and freedoms may be limited only by the law, within the scope permitted by the Constitution and to such an extent which is necessary to meet the purpose for which the limitation is allowed, in an open and democratic society.

Limitations shall not be introduced for other purposes except for those for which they have been provided for.”

This means, for instance, that Article 46 [CM] (Freedom of thought, conscience and religion) must be read together with Article 24 [CM]. If a court in Montenegro has to decide whether a limitation on the freedom to manifest one’s religion under Article 46 [CM] is justified, it will need to consider the following series of criteria.

- (a) Is the limitation provided by a law?

(b) Is the limitation for a purpose within the scope permitted by the Constitution, or is it for some other purpose?

(c) Is the limitation only to an extent necessary (in an open and democratic society) to meet the purpose of the limitation?

It will be evident that the Strasbourg Court's case-law on proportionality will be relevant, since it comes within the text in Article 24 [CM]: 'only to such an extent as is necessary to meet the purpose for which the limitation is allowed'. Also, as under the Convention where the applicant has established that a protected right has been affected, where under the Constitution a protected right has been limited by law, it must be for the state to establish that the limitation is justified.

11. Since Article 24 [CM] applies generally to the rights in Part II of the Constitution, one question is whether Article 24 permits a law to be made that (for instance) permits torture, or that tries to force an individual to change his or her conscience or religious belief. In view of Article 9 [CM], it will be relevant to consider both the text of the Convention and the manner in which it has been interpreted by the Strasbourg Court. In approaching this question, the Strasbourg Court would base its decision directly on the Convention, not on the precise terms of the Constitution. It would not uphold a law in Montenegro that tried to limit a right protected by the Constitution that the Convention treats as 'absolute'. The same view should be taken by the courts in Montenegro.

### *Right of recourse to international institutions*

12. By Article 56 [CM], "Everyone shall have the right of recourse to international institutions for the protection of rights and freedoms guaranteed by the Constitution". This is an important recognition of the right of all persons within Montenegro to apply to an international court or tribunal that has jurisdiction over a particular matter, where one exists. The most important application of this right is, as already mentioned, the right of recourse to the European Court of Human Rights if individuals claim that their rights have been violated and the violation has not been remedied. Article 56 [CM] protects such a person from being abused or intimidated by any official in Montenegro for having made an application to Strasbourg. However, the wording of Article 56 [CM] may be misleading. It refers to the rights and freedoms guaranteed by the Constitution. However, when an individual applies to the Strasbourg Court, that Court will not be concerned with whether a guarantee in the Constitution of Montenegro has been breached, but with whether a right guaranteed by the Convention has been breached.

## *Rights during times of emergency*

13. Despite the importance of protecting fundamental human rights, it is recognised in the Convention and in all modern constitutions that there may be times of emergency in which the state needs additional powers to deal with the emergency and restore 'law and order'. By Article 15 [EC], a state may derogate from many (but not all) of the Convention rights 'in time of war or other public emergency threatening the life of the nation'. When a state wishes to derogate under Article 15, it must inform the Secretary General of the Council of Europe. Measures taken under such derogation are limited to 'the extent strictly required by the exigencies of the situation' and such measures must be consistent with the state's other obligations under international law. No derogation is permitted from several key Convention rights, including the right not to be tortured. Whether emergency measures comply with the Convention is a question that may be decided by the European Court of Human Rights.<sup>17</sup>

14. By Article 25 [CM], provision is made for temporary limitation of rights and liberties, at times when a state of war or emergency has been proclaimed and while the state of war or emergency exists. But emergency measures may not introduce limitations based on grounds of sex, nationality, race, religion, language, ethnic or social origin etc. No limitations may be imposed on specified rights. This is a longer list than is found in Article 15 [EC] and it includes right to life, dignity and respect of a person, fair and public trial, freedom of thought, conscience and religion, entry into marriage etc. And emergency measures may not introduce discriminatory measures, double trial for the same offence etc.

15. On emergency measures, as in many other human rights matters, important guidance may be found in the case-law of the European Court of Human Rights. As already stated, the Constitution goes further than the European Convention in specifying the rights that are not to be limited even in times of emergency.

### *Other aspects of the Venice Commission's Opinion*

16. The rest of this paper contains, in summary, a note of some significant aspects of the December 2007 Opinion of the Venice Commission. The aim is to indicate issues on which it will be necessary in interpreting the Constitution to apply it in a way which will comply both with the Constitution and with the Convention rights. The notes follow the order in which the Articles appear in the Constitution.

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<sup>17</sup> See *Lawless v Republic of Ireland*, (1 July 1961; *Brannigan v United Kingdom*, 26 May 1993); *Aksoy v Turkey*, 18 December 1996.

Article 20 [CM]: Legal remedy. The right to a legal remedy is formulated in rather vague terms, and it will need to be applied in a manner that is equivalent to the ‘right to an effective remedy’ stipulated by Article 13 [EC].<sup>18</sup>

Article 26 [CM]: Prohibition of the death penalty. The effect of this article is distinctly narrower than Article 2 [EC], Right to life. The Convention right to life has been held by the Strasbourg Court to impose a weighty obligation on state authorities to hold a full inquiry into the reasons for the loss of life, particularly when state officials have been involved.<sup>19</sup> Also, Article 26 [CM] does not specify situations in which it may be necessary for force to be used even if this results in loss of life, for instance to protect the life of another individual who is threatened with violence.

Article 29 [CM] Deprivation of liberty. This article, and related articles, is rather different from Article 5 [EC], Right to liberty and security. Article 5 [EC] sets out the list of situations in which an individual may lose his or her liberty - including the lawful arrest of a person for non-compliance with an order of the court, detention of children for educational supervision, detention of persons of unsound mind, detention in connection with the control of immigration etc. Article 29 [CM] merely refers to the need for any deprivation of liberty to be for reasons and in accordance with a procedure provided for by law. It is doubtful whether this would justify a law that provided for an individual to be detained in circumstances that would not justify detention under Article 5 [EC]. A serious omission from Article 29 [CM] is a provision equivalent to the ‘habeas corpus’ clause in Article 5(4) [EC], by which any detained or arrested person is ‘entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful’.

Article 32 [CM] Fair and public trial. Unlike Article 6 [EC], this does not deal expressly with both matters of criminal law and matters of civil right and obligation. The ‘right to a fair and public trial’ does not exist in a vacuum but it arises only in certain situations, such as the bringing of a criminal charge against someone, or when litigation about matters of civil right and obligation is in prospect. It may also arise in many situations that involve the exercise of a public authority’s powers under public (administrative) law.<sup>20</sup> It would be unfortunate if Article 32 [CM] were interpreted as being restricted to the right to be tried on a criminal charge. The Strasbourg Court has interpreted Article 6 [EC] as giving a convicted prisoner the right of access to legal advice with regard to a possible right of civil action that he had.<sup>21</sup>

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18 See *Silver v United Kingdom*, 25 March 1983.

19 See *Gul v Turkey*, 14 December 2000.

20 See e.g. *Feldbrugge v Netherlands*, 29 May 1986, *Eskelinen v Finland*, 19 April 2007.

21 *Golder v United Kingdom*, 21 February 1975.



In other words, to give a full meaning to Article 32 [CM], it is necessary to have knowledge of the main features of the case-law under Article 6 [EC].

Article 37 [CM] Right to defence. This article contains some important features of 'due process of law' in respect of criminal procedure. It does not however contain all the procedural rights that are specified in Article 6(3) [EC] - in particular, it omits rights in respect of attendance and examination of witnesses, and the right to have the free assistance of an interpreter. It is however possible for these omissions to be fulfilled by interpreting Article 32 [CM] as requiring these matters to be observed: because if they are not, the trial will not be fair. Similarly, Article 37 [CM] can be interpreted in the same way, because otherwise the 'right to defence' will be violated.

Article 47 [CM] Freedom of expression and Article 49 [CM] Freedom of the press. While these Articles give effect to many aspects of Article 10 [EC], they are set out in a way that does not closely follow the structure of Article 10. The emphasis in Article 49 [CM] on the right to a response, the right to a correction, and the right to compensation for damage caused by the publication of untruthful data does not necessarily represent the Strasbourg Court's approach to Article 10 [EC]. For instance, undue emphasis on the right to compensation whenever incorrect statements are made could have the effect of restricting the freedom of the press to comment on legitimate matters of public concern.

Article 57 [CM] Right of recourse. This statement of the right of recourse is to be welcomed, but it is unfortunate that the statement is qualified by the phrase, 'unless having committed a crime in doing so'. A stringent enforcement of the criminal law might well be inconsistent with the individual's right of recourse: for instance, a threat by someone in a position of authority to punish an individual for complaining to a state organisation could have the effect of discouraging such complaints, even where they might be justified.

Article 81 [CM] Protection of human rights and liberties. It is important that the Protector of human rights and liberties (Ombudsman) should be mentioned in the Constitution. Such an Ombudsman can play a valuable role in protecting individuals against abusive or mistaken action by public officials, and this role may make it unnecessary for those concerned to take the more expensive and lengthy case of bringing the matter to the courts. But the terms of Article 81 are very general, and much will therefore depend on the contents of the law on the Ombudsman.

Article 149 [CM] Constitutional Court - Responsibility. Paragraph (3) provides that the Constitutional Court shall decide 'constitutional appeal due to the violation of human rights and liberties granted by the Constitution, after all other efficient legal remedies have been exhausted'. This competence

of the Court is to be welcomed. If this is to become an important aspect of the protection of human rights and liberties, it is to be hoped that the Court will take a realistic view in deciding whether 'all other efficient legal remedies have been exhausted'. There may be a question as to the meaning of 'efficient' (in translation). It will be necessary in this respect for the Constitutional Court to take into account the practical difficulties that may prevent individuals or groups from exhausting the remedies that are theoretically available in law. In other words, the Court should be prepared to reject a complaint only when the applicant has failed to make use of an effective remedy that was in fact available to him to take. A related question is whether individuals should ever be required by the Constitutional Court to take their problems, in sequence, to the courts (whether civil, criminal or administrative), to Parliament, and to the Ombudsman. It is not clear that Parliament and the Ombudsman can provide a remedy with sufficient certainty, even for improper official behaviour. It may be that the development of its practice by the Constitutional Court will depend on how readily complaints of violations of rights can be heard effectively by other courts. But it would be unfortunate if violations of rights were not dealt with on their merits by reason of a conflict of approaches between the different courts and other agencies concerned. As one legal scholar commented many years ago on procedural rules that might be thought to bar access to a court, the worst that can happen if the Constitutional Court take a broad view of its jurisdiction is that the Court will decide the merits of the case!

### *Conclusion*

17. The Venice Commission's opinion in December 2007 concluded with the observation that 'every possible attempt will need to be made to enable the Montenegrin courts and legal profession to have a good understanding of the manner in which the Human Rights provisions must be read and applied if they are to comply with the standards set out by the Convention'. The seminar for which this paper was prepared will surely enable progress to be made towards that objective. The objective will not be achieved solely by reading the texts of the Constitution and the Convention. The texts themselves are of course important, but in reality they are no more than a skeleton, a starting-point. The Strasbourg Court has often referred to the Convention as a 'living instrument'. Knowledge of the rich jurisprudence of that Court is required if we are to understand the flesh and substance that must be given to the articles protecting human rights that can be read in the Constitution and the Convention.



## **Human Rights Guarantees in the New Constitution of Montenegro - Relationship between National and International Law**

Notwithstanding certain improvements of the Draft Constitution text and the adoption of certain, not all, suggestions of the Venice Commission, new Montenegrin Constitution has essentially not been freed from considerable deficits of legitimacy we had pointed at on the occasion of the debate on the Draft Constitution in the organization of the Association of Jurists of Montenegro and the Montenegrin Academy of Sciences and Arts. The process of drafting and adoption - unprincipled partitocracy compromises of the leading structures of the ruling coalition and the opposition, and even more so - the content of the most important constitutional solutions - undoubtedly, point out to yet another *façade constitution*, and not a *constitution in substantive sense or social agreement among free citizens on the rules and procedures of exercising, control, limitation and periodic changing of authorities*.

A constitution cannot be considered a constitution in substantive sense if it does not enable the realization of certain functions and objectives. It establishes the frameworks, boundaries of the system of authorities, legal and political order within a country and society, relations between the state and individuals and their innate freedoms as original sources of the system of authorities and governance, wider politico-cultural context of relations between the state and the society. Constitution serves concurrently as an instrument of governance, realization and reproduction of the process of exercising the authority and governing, as well as an instrument of restriction, control and periodical change of authorities, *means of exercising the authority within the extent of the law*. Unless there is an adequate balance between these two contrasted functions of a constitution, one cannot speak about constitution in substantive sense - social agreement, or democratic community - state based on the rule of law and freely expressed assent of sovereign and free individuals - citizens.

A constitution that does not restrict and control the authorities is not a constitution in its original - substantive sense, but a constitutional *façade*, and the community which is constituted by means of such a „constitution“

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represents essentially *façade* democracy, i.e. authoritarian despotism, most often in a hidden - camouflaged democratic - liberal form. Each constitution represents, in the substantive sense, recognition of the existing political and social condition, but also the projection of the future development of a community, thus being an important instrument of positive social engineering. In broader terms, a constitution consists not only of constitutional norms, institutions, procedures, but also the entire political process carried out on the basis of them.

Regardless of certain improvements in relation to the Draft, the wording of the new Constitution is essentially *pale and functionalized copy* of the constitutional façade from 1992. Therefore, it does not establish *the authority within the extent of the law*, it opens new areas for *arbitrariness and self-will*, does not enable *effective application and protection of fundamental human and minority rights* prescribed in the international human rights standards, does not provide for *factual and effective division of power*. The Constitution drafters, obviously due to the realization of the narrowest partial interests, did not take into account the deficits of the 1992 Constitution of the Republic of Montenegro<sup>23</sup> and especially very much negative effects and consequences of the „functioning and application“ of that act in political, legal, social, economic realities of Montenegro within the last fifteen years or so. Through a partitocratic agreement between the heads of the ruling and opposition parties, the Constitution has mechanically taken over all the solutions from the former constitution that enable unrestricted and uncontrolled power, and all those which enable some kind of control of the authorities and the application of human and minority rights have been omitted.

More concretely, the following reasons, or rather groups of reasons, point out to the façade character of the Constitution: the existence of deficit of legitimacy with regards to the fundamental prerequisites for the constitutionality of the community - state; the existence of the essential contradiction - contrast between substantive and formal sources of Constitution, i.e. governing social forces and their most narrow interests and formal-legal determinations in the text of the Constitution; inconsistent and contradictory solutions related to human rights; non-existence of the effective division of power, since pursuant to the article 100, the Government conducts domestic and foreign policy without any restriction.<sup>24</sup>

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23 Constitution of the Republic of Montenegro, *Official Gazette of the Republic of Montenegro*, no. 48/1992, dated 12<sup>th</sup> October 1992.

24 N.B. Vučinić, *Osvert na tekst Nacrta ustava Crne Gore -dio o ljudskim pravima i slobodama (Review on the Draft Constitution of Montenegro -Human Rights and Freedoms Section)*, CANU, Prilog javnoj raspravi o Nacrtu ustava Crne Gore, Podgorica 2007, p. 57-75.

Beside certain improvements and acceptance of some suggestions of the Council of Europe and the Venice Commission, the text of the Constitution on human and minority rights has remained considerably *incoherent and inconsistent* in comparison to the provisions of the *Small Charter*<sup>25</sup>, and even to the 1992 Constitution.<sup>26</sup> Certain solutions are partial, and some are even contradictory in relation to the Small Charter and especially to the European Convention on Human Rights and Fundamental Freedoms (ECHR)<sup>27</sup>. In some cases, rights and guarantees are insufficiently and inadequately prescribed, in others again in too much detail and excessively, certain rights are contained within the Constitution, others are not, which is the unambiguous result of the analysis of the group of legal experts from within the project of the NGO Human Rights Action.

Above all, the Constitution does not adopt the concept of *innate - natural rights of individuals as primary restrictions of the public authority and any other uncontrolled and arbitrary power*. Also, the Constitution does not contain clear obligations of the state which result from such a concept of human rights that are contained in the most important international legal human rights instruments, *to respect, to protect, to create conditions for exercising human rights*. Therefore, the obligations of the state are complex and they range from *classical negative ones (minimum liberal state)*, through *more modern positive ones (modern liberal, constitutional democracy and rule of law)*, to the most recent ones, *double positive (liberal - social and ecological state, social - market economy and the state of increased social care - „social welfare state“)*.

In this context, only partially, the Constitution expresses the obligations taken in relations to the Council of Europe and the Venice Commission that this part of the Constitution will enable direct application of the ECHR, which includes not only the application of the provisions from the Convention, but also of the standards on human rights contained in the rich jurisprudence of the European Court of Human Rights. What is more, from the provisions of the Constitution it is hard to establish the essential, direct link between the Constitution and the ECHR. It is unclear and legally - politically very symptomatic why the Constitution drafters did not simply incorporate into the text of the Constitution the adjusted provisions of the text on human and minority rights of the Small Charter, Constitutional Charter of Serbia and Montenegro, beside repetitive and substantiated proposals of the national

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25 Charter on Human and Minority Rights and Fundamental Freedoms, *Official Gazette of Serbia and Montenegro*, no. 6/2003.

26 Constitution of the Federal Republic of Yugoslavia, *Official Gazette of FRY*, no. 1/1992.

27 Law on Ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms, *Official Gazette of Serbia and Montenegro -international treaties*, no. 9/2003.

expert public and experts of the Venice Commission. In that sense, human rights guarantees in the Constitution are *below the level of the Small Charter, which is contrary to the obligation taken in relation to the Council of Europe that the level of guarantees would not be reduced.*<sup>28</sup>

The essential provision of the Constitution in this context, the article 9, which deals with the primacy of the international order over national legislation, is a very contradictory and ambivalent one, enabling different interpretations and application, especially in relation to the ECHR. In practice, this can result in the decisions of the public authorities violating the Convention and in the obligations of the state to pay to the victims of the violation fair, most often pecuniary compensation, following the ruling of the European Court of Human Rights confirming the violation, i.e. breaching of the Convention.

First of all, the said provision of the article 9 provides for the “ratified and published international treaties and generally accepted rules of the international law to be integral part of the internal legal order and to have the primacy over the national *legislation* and to be applied directly *when they regulate the relations differently from the national legislation*”. Therefore, the primacy of the international law has been envisaged solely in relation to the *national legislation*, not the *law*, as it was the case with the article 16 of the Constitutional Charter of Serbia and Montenegro<sup>29</sup>, which in practice can cause different interpretations with regards to the primacy of the international standards in relation to the Constitutional provisions. What if the standard from the ruling of the European Court of Human Rights is contrary to the provisions of the Constitution of Montenegro? *Stricto sensu* interpretation of this provision imposes to the national court or some other authority to apply the Constitution, and not the standard from the ruling of the European Court of Human Rights, although this can result in the responsibility of the

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28 The Parliament of the Republic of Montenegro adopted on 7<sup>th</sup> February 2007 the Declaration on accepting the inclusion of seven minimum principles in the Constitution which were proposed by the Council of Europe, amongst others, even the principle that the new Constitution would not prescribe human rights guarantees of the order which is lower than the one provided for in the Small Charter of Serbia and Montenegro. In the letter sent to the President of the Parliamentary Assembly of the Council of Europe dated 23<sup>rd</sup> March 2007, the President of the state, the Prime Minister and the Speaker of the Parliament of the Republic of Montenegro expressly accepted this obligation as well: <http://assembly.coe.int//Main.asp?link=http://assembly.coe.int/Documents/WorkingDocs/Doc07/edoc11204add.htm>.

29 “Ratified international treaties and generally accepted rules of international law have the supremacy over the law of Serbia and Montenegro and the law of the member states”, article 16, the Constitutional Charter of the State Union Serbia and Montenegro, article 16, *Official Gazette of Serbia and Montenegro*, no. 1/2003. The Law for the implementation of the Constitutional Charter prescribed the obligation of the member states to harmonize *their constitutions* with the Constitutional Charter and the *ratified international treaties*, within six months as of the day of coming into effect of the Constitutional Charter, article 20, the Constitutional law for the implementation of the Constitutional Charter of Serbia and Montenegro, *Official Gazette of Serbia and Montenegro*, no. 1/2003.

state of Montenegro for the violation of the ECHR. The term „national law” is both conceptually and content-wise broader and more comprehensive, since beside the „legislation“ it covers the Constitution, bylaws, jurisprudence of courts and other public authorities and since it is fully compliant with the international legal obligation of Montenegro to ensure direct application of international human rights standards, irrespective of the fact whether and in what way, human rights, are prescribed in the Constitution. The Council of Europe member state is accountable for the violation of the ECHR in case this is established by the European Court of Human Rights, independent from the fact that its Constitution does not prescribe certain guarantee or if it prescribes it differently from the ECHR. It is obvious that the Constitution drafters in the formulation of this provision mixed the *hierarchy of orders with the hierarchy of legal acts from these orders*; in the domain of human rights the priority is given to the international law and the acts from this legal order have got the priority in relation to the acts of the national law, including the Constitution. The decision of the national authorities based upon the national law by means of which rights and standards from the ECHR are violated results in *the responsibility of the state and the obligation of the same to compensate the victim of the violation for the damage caused*.

Furthermore, the last part of the sentence of the article 9, that the international standards are applied directly solely „when they regulate relations differently from the national legislation“, leaves the room for different, even arbitrary interpretation in cases when national laws do not regulate certain relation at all, or some issue from the comprehensive domain of human rights. The Constitutional Charter of the former state union used to prescribe in the article 10 that the international standards *are applied directly*, without any restriction. Beside that, the article 10 of the Small Charter on human and minority rights provided for the rights to be *interpreted in the manner by means of which the values are improved of the open and free democratic society, in accordance with the valid international guarantees of human and minority rights and the practice of the international bodies which supervise the exercising of the same*.

The stated provisions briefly, concisely, crystal clear and unambiguously prescribed the priorities of the international law in relation to the national one in the domain of human and minority rights, focusing on the concept of *unconditional adoption*. It is unclear and scientifically inexplicable what reasons motivated the authors of the Constitution of Montenegro not to accept such a manner of regulating the relations between the international and national law in the field of human rights.

Ultimately, although not least important, notwithstanding the fact that the article 9 conditionally provides for the primacy of the international law in relation to the national one, no procedures and instruments of direct application of the international law were envisaged, which is particularly significant for human rights. This additionally confirms the view that it is the issue of the façade, rhetorical and blank norm. Former article 210 of the Constitution of the SFRY<sup>30</sup> envisaged that, in case when some issues are regulated differently by the international law, courts were obliged to apply the international law. In practice there has been no such case, although many issues from the domain of human rights were then regulated differently by the national law in relation to the international one.

Recently, the President of the High Court from Podgorica, judge Ivica Stanković, passed the decision on excluding certain minutes from the case file referring to the provisions of articles 5 and 6 of the ECHR, but the Court of Appeals annulled such decision, giving the primacy to the provisions of the Criminal Procedure Code, whilst the Supreme Court of Montenegro, at the general session refused to consider the request in a meritorious manner, with the explanation *that it was not the issue of general significance*.

In order for the norm from the article 9 of the Constitution not to be a mere *façade*, it should be amended by legal authorities of the Constitutional or Supreme Court, so that in such cases, courts and other public authorities are *ordered* to apply the international law, irrespective of the fact whether it is the issue of an international treaty, custom, general legal principle or a standard from the judicial or quasi-judicial practice of international bodies for monitoring the application of human rights.

The provision of the article 17 of the Constitution, which clearly and unambiguously provides for „the rights and freedoms to be exercised on the basis of the *Constitution* and ratified international agreements“, proves that the said provision from the article 9 of the Constitution is not accidentally contradictory and ambivalent. Thus, unmistakably and formally-legally gives the priority to the national law, and reduces the international law solely to international agreement, disregarding customs, general principles of law, and especially jurisprudence and quasi-jurisprudence of international courts and other bodies, which beyond any doubt is extremely important for human rights issues.<sup>31</sup>

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30 „Courts apply directly published international treaties“, article 210, paragraph 2, Constitution of the Socialist Federative Republic of Yugoslavia, Official Gazette of SFRY, year XXX, number 9, Belgrade, 21<sup>st</sup> February 1974.

31 Even the 1992 Constitution of FRY, envisaged in its article 10: „The federal Republic of Yugoslavia recognizes and guarantees the freedoms and rights of human beings and citizens recognized by the international law.“



As it has already been emphasized, in the Constitution there are no certain rights and their guarantees, envisaged by the ECHR, some of them are prescribed insufficiently precisely and insufficiently clear, whilst others are too detailed and unnecessarily regulated, which, together with all the abovementioned, can create significant difficulties in their direct application and protection, and cause disproportionately big number of applications before the Court in Strasbourg.

The missing ones are: *habeas corpus right, prohibition of detention for failure to discharge contractual obligation, prohibition of inhumane and degrading punishment, explicit guarantee of the right to life, full guarantees of the right to defence and fair trial, guarantee to an arrested person of appearing before a court within 48 hours, right to an effective remedy due to the violation of human rights and the right to the elimination of consequences of such violation*, whilst contrary to the international standard of the freedom of expression and the provisions of national Law on obligations, the *right is guaranteed to compensation for damages caused by publishing false information*. For instance, in relation to the right to life, capital penalty and the cloning of human beings are forbidden, but one of the most significant segments of this right, *duty to conduct expedient, effective and impartial investigation in the cases of the loss of human life, especially in the cases of lawful use of force by public authorities*, has not been envisaged by the Constitution of Montenegro. The same duty has also not been envisaged with regards to the prohibition of torture, inhumane and degrading treatment and punishment. Generally speaking, the so called *positive obligations of the state*, which result from the jurisprudence of the European Court of Human Rights and the interpretation of the ECHR as a living instrument, are rarely and insufficiently contained in the text of the Constitution. The provisions of the Constitution on human rights restrictions are also imprecise and vague, both those of general character and those in the so called state of emergency. There is no clear provision stating that the restrictions must be *prescribed by law, proportional and necessary in democratic society*.

Due to all that and the significance of the application of the ECHR in Montenegro, it might be worthwhile to think about the adoption of a special constitutional law, which would be exclusively related to the direct application of the Convention and related standards developed in the rich jurisprudence of the European Court of Human Rights. This is important because of the fact that the courts and other authorities in Montenegro interpret the law mostly using linguistic method, meaning that what is not expressly written in a legal norm, like for instance the obligation to conduct impartial, expedient and effective investigation in the case of the loss of human life, in principle and as a rule, does not exist.





**Petar Stojanović**<sup>32</sup>

in cooperation with **Ana Grgurević, LL.M.**<sup>33</sup>

## **Conditions for Application of International Human Rights Standards in Montenegro**

*(especially of the European Convention on Human Rights and  
the case-law of the European Court of Human Rights)*

Dear Colleagues,

It is my pleasure to greet you on behalf of the Centre for the Education of Judicial Function Holders of Montenegro and on my own behalf.

At the beginning I have to emphasize that the topic of today's meeting is important and appropriate for the moment which Montenegrin society is in. One need not talk about the general civilization and any other importance associated with the respect of human rights. That requirement is an essential condition for the accession of Montenegro to the democratic European states, and the increase of the degree of the respect of human rights is one of the basic „tasks“ of Montenegro on its road towards European integrations. It can be freely said that the role of judiciary in this context is of the utmost significance.

When speaking about judiciary in the context of human rights, the issues is imposed of the necessary recognition of standards and principles of the European Convention on Human Rights (Convention) and the case law of the European Court of Human Rights (Court), i.e. as well as whether Montenegrin judges have sufficiently mastered the matter in this area and whether in fact they are offered and secured conditions to continuously expand and improve their knowledge in this field?

It must be noted that in recent years there has been a visible progress in this area. First of all, through the activity of the former Centre for the Training of Judges (now Centre for the Education of Judiciary Function Holders of Montenegro - Centre), as well as through the activity of a large number of other organizations and institutions, Montenegrin judges have got the possibility to be regularly familiarized with the work and practice of the Court and various members of the Convention. The Centre has developed

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33 Executive Director of the Centre for Education of Judiciary Function Holders in Montenegro.

continuous and high quality cooperation with the Council of Europe in this sense. This cooperation was established during the first years of its operation and it has ever since been realized on a regular basis. Through its activities, the Centre offers large number of activities dedicated to certain articles of the Convention and to the entire Convention. One should particularly emphasize that during the last two years intensive training of judges has been implemented in relation to the Articles 5 and 6 of the Convention. The training has been organized in the regional principle through a larger number of seminars; so that the majority of judges in Montenegro have had the possibility to become familiar with these articles (around 60% of Montenegrin judges have taken part in this series of seminars). Also, the Centre organizes study visits for Montenegrin judges to the Council of Europe and the Court with the possibility of their participating in oral hearings before the Court. Beside that, with the time lapse even the number of national lectures in this area has increased, so that there are now ten of them altogether (5 judges and 5 prosecutors). For national lecturers there are also special regular activities, also with the support of the Council of Europe, „trainings for lecturers“ (so called „train the trainers“ activities). As an illustration of the abovementioned, for example, in May this year, the Centre starts with the seminar for lecturers in Podgorica, then, in June there is going to be a study visit for the same group which will include several days' long visit to the Court and the participation in the oral hearing, and in the second half of the year several activities will be organized for Montenegrin judges and prosecutors themselves which will be dedicated to individual articles of the Convention. Within the framework of all such activities, the Centre is preparing a very useful material in the form of guidebook, manual, papers and so on. Together with all that has been mentioned so far, it is worth mentioning that this institution is actively included in all relevant Council of Europe programmes related to the training of judges and prosecutors in the area of human rights, either through active participation of the persons from the Centre and from its management bodies themselves, or through active participation of Montenegrin judges. I certainly must emphasize again that our Centre is not the only institution which offers this kind of activities

There are also NGOs which the Centre itself often cooperates with, including the Centre for democracy and human rights - CEDEM, AIRE Centre from London-Centre for Extending legal Aid in the Area of Human Rights in Europe, Human Rights Action through the participation of Montenegrin judges and prosecutors in regional seminars, and so on. Therefore, it can be concluded that judges have sufficient opportunities for improving their knowledge in this field. The non-existence of a strictly formulated legal obligation for participation in training activities is not an obstacle for the

training of judges. The research of the Centre in this respect has shown that irrespective of this, great number of Montenegrin judges, around 90%, participated in the work of the Centre.

However, what remains problematic in the context of the abovementioned is the following:

- a. Almost complete non-existence of the translations of judgements the European Court of Human Rights into Montenegrin language, and
- b. Even in case the translations of key judgments of the European Court are provided, for example in electronic format, the non-existence of satisfactory technical conditions for their possible utilization via Internet in courts.

a. *Explanation:*

When we speak about the translation of the judgements of the Court into Montenegrin, I would underline that the Centre for the Education of Judicial Function Holders through its activities tried to secure, as much as it is possible, the translations of the most significant judgments or summaries of the Court judgements. First of all, the Centre presented to the library of the Supreme Court, Court of Appeals, Administrative Court, Podgorica High Court, Bijelo Polje High Court and the Constitutional Court the first and second volume of the book „Selection of case law of the European Court of Human Rights“ from 2001. This is a book prepared by the Council of Europe Office from Sarajevo with the support of the Open Society Fund of Bosnia and Herzegovina and the Constitutional and Legal Policy Institute - COLPI. It gives, by articles of the Convention, in details elaborated relevant judgments of the Court and it represents really significant means for the familiarization of judges with these issues. I express the hope that the judges of these courts are using these volumes.

Beside that, in all these years of its existence, with occasional interruptions caused because of financial reasons, the Centre provided the Bulletin of the abovementioned AIRE Centre for all judges and prosecutors in Montenegro. This bulletin is issued monthly and it contains summaries of the most important judgments of the Court. This activity of the Centre has been continuously supported by the Foundation Open Society Institute - Soros, and I am taking this opportunity to mention that the bulletins were regularly distributed during the year 2007, as well as they are now, during 2008.

However, one must emphasize that all the abovementioned is really not sufficient in order for the judges in Montenegro to be able to apply the case law of the Court in a valid manner. It is necessary to organize the translation of the most significant judgments of the Court at least once every three months, or if this is not possible, then at least make annual selections of the most important decisions, translate them, publish and distribute to each judge in Montenegro. This really almost a necessity in case we wish for our judges to make decisions in accordance with the existing standards in the field of human rights. All the more so, as we all know, the international law in Montenegro has got then primacy over the national law. The Article 9 of the Constitution reads:

*„Ratified and published international treaties and generally accepted rules of international law make the integral part of the internal legal order, shall have primacy over the national legislation and they are applied directly when they regulate relations differently from the national legislation.“*

Additionally, it is necessary to underline that certain number of laws in Montenegro expressly refer to the application of standards and practice of the European Court of Human Rights, and it is certain that there will be more such laws in the future. These are:

- Law on media („Official Gazette of the Republic of Montenegro“, No. 51 dated 23<sup>rd</sup> September 2002) Article 1, paragraphs 3 and 4: *The Republic of Montenegro ensures and guarantees freedom of information at the level of standards contained in international documents on human rights and freedoms (UN, OSCE, Council of Europe, EU). This law should be interpreted and applied in accordance with the principles of the European Convention for the Protection of Human Rights and Fundamental Freedoms, with the utilization of the practice of the European Court of Human Rights precedent law.*
- Law on Police („Official Gazette of the Republic of Montenegro“, No. 28/05 dated 5<sup>th</sup> May 2005), Article 2: *protection and security of citizens and constitutionally established freedoms and rights, are carried out in accordance with the law, respecting international standards and regulations which protect personal dignity, freedoms and rights of citizens.*
- Law on State Prosecutor („Official Gazette of the Republic of Montenegro“, No. 69/03 dated 25<sup>th</sup> December 2003), Article 2: *the function is carried out on the basis of ratified international treaties).*
- Law on the Protection of Right to Trial within Reasonable Time („Official Gazette of the Republic of Montenegro“, No. 11/07 dated 13<sup>th</sup> December 2007), Article 2: *right to protection is related to the procedures which „refer to the protection of their rights in the sense*

*of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The right from the paragraph 1 and the length of reasonable time are established in accordance with the case law of the European Court of Human Rights“.*

We know that the costs of translation are really high and they would represent a true burden for the budget of the judiciary. This leads us to start thinking about the abovementioned translation of the decisions of the Court at the annual or even biennial level. Also, I am taking this opportunity to emphasize that each donor support to relevant institutions and organizations in Montenegro in this respect would represent great assistance to Montenegrin judiciary. Perhaps in this sense one should also think about the regional cooperation, with the countries and institutions of the countries in which the official languages are Serbian, Croatian, Bosnian, which are completely understandable to Montenegrin judges.

When speaking about the lack of translations of the Court judgments into Montenegrin, one should also emphasize that there is a general shortage of the translated literature from this area. In the library of the centre there is a considerable number of editions in our language which deal with these issues. Particularly important is one part of these books which are the editions of the Belgrade Human Rights Centre. Also, the library has got quite a few editions of this kind in English. Although this literature is at the disposal of all judges and prosecutors of Montenegro, it is clear that simply speaking this is not sufficient to satisfy the needs of all potential users.

The entire problem is even more topical when one takes into account the fact that these days a Montenegrin judge will be appointed to the European Court of Human Rights, when the Court will in fact start dealing with Montenegrin cases. Therefore, this is the beginning of a very important period when good knowledge of the case law of the Court becomes practically indispensable and when, due to the lack of knowledge of this practice by Montenegrin judges, Montenegro, as a state, bears concrete consequences.

What in some ways represents an advantage of Montenegro when speaking about this issue is the fact that we have a small number of judges and prosecutors (240 judges and 82 prosecutors), so that each material can physically be provided and distributed to all.

b. *Explanation:*

Physical distribution of books and any other material to judges brings us to the following problem. Namely, the provision of Montenegrin

translations of the Court judgments and other useful material is certainly a lot easier and accessible in electronic format. If the said translated material were to be provided in the electronic format, even the Centre itself would be pleased to carry out regular distribution to all the judges in Montenegro via electronic mail, without any problem whatsoever. However, the use of Internet by Montenegrin judges is in an unenviable level. The reason for this is also the non-existence of the installed Internet access in all the courts as well as e-mail addresses. The improvement of technical equipment in courts is, thus also very important and it would certainly contribute to greater degree of IT literacy among judges and prosecutors. In this way, as a consequence, very simple electronic distribution of the relevant material from the field of human rights will be enabled. Higher level of technical equipment in courts would most certainly mean a step forward as regards the improvement of general working conditions of judges, which in some courts are still at a very low level.

Therefore, we can conclude that the translations of relevant Court judgments into Montenegrin and the distribution of the same, primarily now in printed format, but also in the favourable electronic one, would represent a significant contribution to the increase of the quality of work of judges and it would be of exceptional assistance in the process of the necessary permanent improvement of the knowledge of judges with regards to the standards of the Convention and the case law of the Court.

Finally, allow me to refer to some other questions of great importance for efficient and proper work of courts, and with that for the respect towards the principles of the Convention, especially with regards to the right to fair trial by an impartial and independent court.

The new Constitution envisages for the appointment of judges to be displaced from the Parliament, that MPs, or rather politics, no longer decide upon that, but an expert and independent body, like Judicial Council. The adoption of the Constitution and the appropriate Law on Judicial Council should finally ensure for the members of the Judicial Council to be appointed and for this body, after a break of more than one year, to continue its work. Due to the inactivity of the Judicial Council it has been impossible to resolve, i.e. appoint new judges (20 judicial positions is vacant), which has all significantly influenced the capacities of courts and made their efficient work impossible, especially in the circumstances of the constant increase of the number of new cases, especially in the courts which face greatest pressure, like the courts in Podgorica.

The general meeting of the Supreme Court judges, as well as the Association of judges, have tried to influence on the provisions on judiciary

in the new Constitution, and we are partly satisfied with the final result. With regards to immunity, we think that it is not principled for judges to enjoy lower level of immunity than the MPs or the judges of the Constitutional Court, the President of the Supreme Court or the Supreme State Prosecutor.

With regards to the composition of the Judicial Council, one half of its members are the judges elected at the Conference of all judges, whilst the President of the Council is the President of the Supreme Court *ex officio*, and apart from him/her two MPs, two respectable lawyers, appointed by the President of the state and the Minister of Justice, participate in the work of the Council. Judges proposed that judges make the majority in the Council, as well as that it is not a good solution for the MPs to participate in the work of the Council, but that it was sufficient for them to elect respectable lawyers, who would not be politicians but independent experts.

On the other hand, by providing for the Judicial Council in the Constitution, considerable progress has been made. The competence of this institution has been increased and the Council has got great responsibility, with great possibilities related to its control function for the improvement of expertise, responsibility/accountability and efficiency of Montenegrin judiciary.

Currently, there is the ongoing reform of criminal procedural legislation and other laws of importance for the work of judiciary, like the Law on Courts and the Law on State Prosecutor. The Law was adopted on the protection of right to trial within reasonable time, where the Supreme Court decides upon complaint, which for this court represents a new competence. I express my expectation that these reforms will contribute to the improvement of conditions for fair and efficient adjudication, in accordance with international standards in Montenegro.

Thank you for your attention.





Emilija Durutović, LL.M.<sup>34</sup>

## **Review of the Provisions of the Constitution of Montenegro: Protection, Right to Legal Remedy and Right to Damage Compensation for Illegal Performance in Light of the Right to Effective Legal Remedy from the Article 13 of the European Convention on Human Rights**

### *Introductory notes*

Leaving aside the issue how realistic it is in this moment in time or in the foreseeable future to count on the amendments of the recently adopted Constitution of Montenegro, I am going to limit the review and comment on the constitutional provisions which guarantee the »right to equal protection of rights and freedoms« (Art. 19), right to legal remedy (Art. 20) and concrete legal remedy, like damage compensation for persons illegally or unjustifiably convicted (Art. 38), in the light of the European human rights standard on effective legal remedy, provided for in the Article 13 of the European Convention on Human Rights and Fundamental Freedoms (hereinafter referred to as the «Convention«).

First of all, it should be underlined that the manner in which this one and other rights are regulated in the Constitution will hinder the comparisons with the Convention, especially with regards to the constitutional restriction that the direct application of the Convention and other international documents can be taken into consideration solely when »relations are arranged differently than in the national legislation« (Art. 9). Since literal application of such a solution is inappropriate and aggravating for the efficient fulfilment of international obligations of Montenegro, especially in case of the protection of human rights, the Constitutional Court of Montenegro should in its jurisprudence insist on the fact that constitutionally guaranteed rights and freedoms are interpreted in the manner which improves the values of an open and free democratic society, in line with the international guarantees of human and minority rights and the practice of the international bodies which monitor their implementation. A paragraph from the Article 10 of the so called Small Charter of the former state union Serbia and Montenegro

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<sup>34</sup> Retired judge of the Supreme Court of Montenegro and former judge of the Court of the State Union of Serbia and Montenegro.

used to explicitly state such obligation that was not, unfortunately, included in the new Montenegrin Constitution. The content of this provision of the Small Charter, instead of the stated restriction in the Constitution, should be a starting point on which the Constitutional Court should insist upon when deciding on the constitutional complaint, since this is the only proper way for the establishment of the rule of law in accordance with the international, i.e. European standards. In the same sense, the Venice Commission gave the recommendation to the Article 20 of the Constitution (*Right to legal remedy*): »It is of essential importance for this provision to be interpreted by the Montenegrin courts in the manner which will fully respect the conditions of the Convention«<sup>35</sup>. Mere formal existence of legal remedy, therefore, does not suffice, but its effectiveness, in order for the legal protection in practice to be appropriate, and not often discouraging and illusory.

The Article 17, paragraph 1 of the Constitution, refers to the direct application of the provisions on human rights and freedoms with the formulation »*That (human) rights and freedoms are exercised directly in accordance with the Constitution and ratified international treaties*«, which in itself brings in the question the issue of the sustainability of the mentioned restriction from the Article 9 of the Constitution that the direct application is taken into consideration when relations are regulated *differently than in the national legislation*.

In principle, although it is not expressly written in the Constitution, the object of legal regulation can solely be the manner of the exercising human rights and freedoms guaranteed by the Constitution and ratified international documents. The Article 18, paragraph 1 of the Constitution of the Republic of Serbia is instructive in this sense, since, apart from the direct application of human and minority rights, it provides that »law can prescribe the manner of exercising these rights, solely in case the Constitution expressly prescribes it or if this is necessary for exercising certain right due to its nature, at which the law must in no way influence the essence of the guaranteed right«. Similarly, and even more detailed, it was secured in the Small Charter in its articles 4 and 5, as well as in the Constitution of the Republic of Montenegro from 1992, according to which »law, in line with the Constitution regulates the manner of exercising freedoms and rights in case this is necessary for exercising the same« (article 12, item 1).

Such a limitation is indispensable since it represents a clear and undisputed basis for the assessment whether through legal prescription of the manner of exercising some human right and freedom it is essentially

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<sup>35</sup> Opinion of the Venice Commission on the Constitution of Montenegro, item 17, number 392/2006, Strasbourg, 20<sup>th</sup> December 2007.

narrowed down beyond the constitutional framework, which is not a rare case in practice. The stated limitation facilitates the assessment of the concord between law and the Constitution, but it is also a prerequisite for effective judicial protection or, more narrowly defined, for »effective legal remedy« as a legal means in the function of the judicial protection of human rights and freedoms, as the Article 13 of the Convention is interpreted in the jurisprudence of the European Court of Human Rights.

### *Legal and judicial protection and right to legal remedy*

It is of fundamental importance to point out that the Constitution does not sufficiently successfully, or thoroughly, limit the forms and legal means of the protection of human rights. Very system of the Article 19, according to which »everyone is entitled to equal protection of their respective rights and freedoms«, makes it unclear that this provision together with the Article 17, paragraph 2 »that everyone is equal before law, irrespective of any particularity or personal capacity«, essentially constitutes an entity with the principle of the *prohibition of discrimination*, provided for in the Article 8 of the Constitution. The Article 17, paragraph 2 refers to equal legal protection, and the Article 19 to judicial protection and the protection before other public authorities, i.e. the protection in the proceedings of the application of rights which must not be a discriminatory one. However, seen from the point of view of the effectiveness of legal and judicial protection, this seems insufficient.

Clearly proclaimed and guaranteed right of everyone to effective judicial protection if some human or minority right has been violated or denied, comprises the obligation of all courts, from the first to the last instance, to protect human rights and freedoms, the violations of which are addressed in the proceedings. Very important thing to bear in mind is that the Constitution should guarantee this right by means of the correlative *right to elimination of consequences* occurred due to the violation. In relation to the right to the elimination of the consequences of violation, the Small Charter even in this case, contrary to the new Constitution of Montenegro, contained an appropriate solution in such a way that in the Article 9, paragraph 1, it prescribed not only the right of everyone to effective judicial protection in case of the violation or denial of some human or minority right guaranteed by the Charter, but also the right to the elimination of the consequences of such violation.

In the Article 20 (*Right to legal remedy*), the Constitution prescribes: »Everyone is entitled to legal remedy against the decision which decides

upon his/her right or to a legally based interest«. What is missing is »and obligation«, although in former constitutional solution it used to be usual form of protection of any subjective right which also includes the rights related to individuals (»individual rights«).<sup>36</sup>

Probably due to the systemic nature of this article (immediately after the right to non-discriminatory protection of rights and freedoms), as well as the lack of an expressive provision on effective judicial protection in the abovementioned sense, Montenegro got the advice to include the term “effective” before the syntagm “legal remedy” in the Article 20 (Article 18 of the Draft Constitution) as well as to indicate that it is applied with regards to the alleged rights and freedoms envisaged in the second part of the Constitution, in order for this provision to be in accordance with the Article 13 of the Convention.<sup>37</sup>

Obviously, this is the issue of a conceptual discord between the Article 20 of the Constitution of Montenegro and the Article 13 of the Convention. The Article 20 of the Constitution affirms the principle of a two-instance proceedings by means of a legal remedy, as a regular legal means of protection of all subjective rights - of property, personal property or only personal nature, so called »individual rights« (Articles 199 and 200 of the Law on Obligations). Implicitly, this means that through two-instance decision making process effective legal protection is achieved, irrespective of the type and nature of violated subjective right on which decision is to be reached in the proceedings. Even the competency of the deciding authority is assumed, and when courts are concerned, their independence and impartiality as well. Contrary to that, the Article 13 of the Convention, depending on the way how it is interpreted in the jurisprudence of the European Court of Human Right, the focus is put on numerous procedural guarantees. It results that legal remedy is really effective if there is a satisfactory practice in decision making proceedings and their enforcement in the manner that the elimination is secured of the consequences of violation of rights, either through the return in previous state and/or compensation for incurred damage.<sup>38</sup>

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36 Rights that are taken into consideration are those that were developed by civil law from the corpus of human rights, like honour, respect, dignity, freedom, but also the right to personal and family peace, right to name, own picture, confidentiality of correspondence, freedom of religion, right to healthy environment and other rights. All of these in addition to the fundamental right to life and inviolability of physical integrity.

37 See the Opinion of the Parliamentary Assembly of the Council of Europe on the accession of the Republic of Montenegro to the Council of Europe, No. 261/2007, item 19.2.2.2, in order for this provision to be in accordance with the Article 13 of the Convention.

38 For the interpretation of the standard »effective legal remedy« in the jurisprudence of the European Court of Human Rights, see the review of the jurisprudence of the European Court in the closing section of this paper, as well as *Međunarodno pravo ljudskih prava (International Human Rights Law)*, V. Dimitrijević, D. Popović, T. Papić, V. Petrović, Beogradski centar za ljudska prava (Belgrade Human Rights Centre), 2006, pages 85-89

## *Effective protection and constitutional complaint*

The term »effective« is incorporated in the Article 149, paragraph 1, item 3 of the Constitution, according to which the Constitutional Court »deliberates upon the constitutional complaint for the violation of human rights and freedoms guaranteed by the Constitution (*why not also by an international treaty which is integral part of legal order?!*), following the exhaustion of all effective legal remedies«. Objectively, the Supreme Court should be a key institution which will sanction the violation of human rights, as well as ensure effective legal protection. The very constitutional-judicial protection of human rights and freedoms by means of the constitutional complaint, as exceptional, is also totally unregulated. It would be more appropriate if the constitutional complaint was thoroughly prescribed as a specific legal means of protection, and not only as one of the functions of the Constitutional Court, which is exactly the case.

Serious shortcoming is seen in the fact that the prescribing was omitted of the constitutional complaint to be submitted *even in the case when no other means of legal protection are envisaged*, and not only when other legal remedies are exhausted. This is a serious legal gap.

At the drafting stage of the Constitution, amongst other things, it was envisaged for the Constitutional Court to decide »upon complaints to the decisions on the dismissal of Ombudsman and his/her deputies, judges and presidents of courts, public prosecutors and their deputies«.

Since the competence of the Constitutional Court is established solely by the Constitution (Article 149, paragraph 1, item 9), according to which the Constitutional Court »carries out even other activities provided for in the Constitution, «in case when no other legal means are envisaged, the complaint leaves this issue open«. Any other solution, especially if the deciding was to be transferred by law onto the Administrative Court, would represent ineffective protection, for it is an authority of lower order in relation to the one which deliberates on dismissal.

With regards to the fact that the poor definition of the constitutional complaint in the Constitution, as one of the functions of the Constitutional Court, does not point to other essential features of this complaint - that it is directed against individual acts and actions of public authorities, as well as the bodies which carry out public functions, this can and must be eliminated in the new Law on Constitutional Court of Montenegro which is about to be adopted. The stated elements were contained in the description of the complaint for the violation of human or minority rights before the Court of Serbia and Montenegro, in the Article 9, paragraph 2, of the Small Charter.

In regulating the proceedings of deliberation upon the constitutional complaint, the right should be incorporated to the elimination of consequences of determined violation or infringement of some human right. Another thing which should not be missing, as it is currently the case with the constitutional complaint, is regulating the proceedings of execution or monitoring the execution of the decisions reached. On the basis of the Article 46 of the Convention, in the procedure of monitoring the executions of judgments of the European Court of Human Rights, alongside with the assessment of the effectiveness of the legal remedy, when the violations of the same kind are repeated, concrete legal measures are recommended depending on specific circumstances of a case, but also general measures, including the amendment of the law, introduction of measures which in principle are appropriate for redressing certain violation.

### *Damage compensation for illegal treatment by public authorities*

The Constitution in its Article 38 (*Damage compensation for illegal treatment*) does not establish a real relation between the title and the content. Namely, it does not provide for the general right to damage compensation for illegal treatment by public authorities, which would be justified, but it solely underlines the right to compensation in case of the unfounded deprivation of liberty and unfounded judgment. The Constitution of the Republic of Serbia went considerably further by prescribing in its Article 35, paragraph 2 that »everyone is entitled to the compensation of pecuniary or non-pecuniary damage caused by illegal or improper work of a public authority, holder of public function or local self-government authority«. Even here, the Constitution of Montenegro provides for a lower level of guarantees than the Small Charter did, which in its Article 22 guaranteed also the right to rehabilitation to an unfoundedly convicted person.

Serious shortcoming is seen in the fact that neither the Constitution nor the law, within the framework of the guarantees related to the right to life, expressly provide for the obligation of the state to initiate efficient and impartial investigation into death for which there is a justified suspicion that it did not occur in a natural way, not even an appropriate legal remedy for the violation of this right.<sup>39</sup>

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39 Special obligations aimed at securing the compliance with and application of international human rights law and international humanitarian law were established by the Resolution of the UN no. 60/147 of 16<sup>th</sup> December 2005 entitled „Basic principles and guidelines for exercising the right to legal remedy and reparation of the victims of severe violations of the international human rights law and serious infringements of the international humanitarian law. Amongst other things, the obligation was established to „investigate violations effectively, expeditiously, exhaustively and impartially and, where appropriate, to undertake measures against those who are allegedly responsible in accordance with national and international law. There is also insistence on securing equal and effective access to court to those who consider themselves victims, as well as on ensuring effective legal remedies for victims, including also various forms of reparation.



The Constitution guarantees the right to correction, response and damage compensation for the publication of untrue information (Article 49, paragraph 3), and in that way also the right to the protection of reputation and honour is put above other constitutional rights, for which there is no justification, especially because such a protection is not recognized by any international treaty on human rights protection. It is not in accordance with the provisions of the Law on obligations either, or with the jurisprudence of the European Court of Human Rights with regards to the protection of freedom of expression from the Article 10 of the Convention.<sup>40</sup> On the other hand, the Constitution lacks the right to damage compensation for suffered torture, inhuman and degrading treatment, which in fact represents the description of effective legal remedy in case of torture, which in turn is expressly guaranteed by the Articles 14 and 16 of the UN Convention against torture and other cruel, inhuman or degrading treatment or punishment.<sup>41</sup> All this is particularly important for Montenegro, since in 2002 the Committee against torture, in case *Hajrizi v. FR Yugoslavia*, established that the Republic of Montenegro had violated this Convention since, amongst other things, it had not ensured the effective legal remedy in the form of the »satisfaction, as well as fair and appropriate compensation to the victims of brutal, inhuman and degrading behaviour of the officials of the Republic of Montenegro in this case of the burning of the Roma settlement in Danilovgrad.<sup>42</sup>

The constitutional rank should have been ensured for the principle of the responsibility of the state for illegal behaviour of public authorities, and the responsibility for damaged caused to some person by illegal or improper work of a public authority, the holder of a public function or a local self-government body. Until now, this has always been a constitutional norm, which nowadays gains significance in the context of the jurisprudence of international courts, with regards to the protection of human rights, to assess whether public authorities perform their functions legally, timely, efficiently in accordance with the set standards. From the formal point of view, little is changed with regards to the fact that the pecuniary responsibility for damage in our legal order has been prescribed as a principle, instead by the Constitution, by the Law on Public Administration (Article 7), according

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40 See, for instance, judgment *Thorgeirson v. Iceland*, 1992, which emphasizes that a journalist who publishes a story, investigated in accordance with the principles of professional ethics, which is later proven to be false, cannot be responsible for damage compensation since it would constitute the violation of the freedom of expression.

41 This Convention was ratified by former SFRY in 1991 (*Official Gazette of the SFRY -International treaties*, no. 9/91).

42 *Danilovgrad: Decision of the Committee against Torture in the case Hajrizi Džemajl and others v. FRY*, Edition: Dokumenta, Fond za humanitarno pravo, Beograd, 2003. Internet edition: <http://www.hlc-rdc.org/uploads/editor/Danilovgrad-srp.pdf>.

to which state is responsible for the damage caused by means of illegal or improper work of a public authority, at which there are no restrictions for the type of damage being compensated for.<sup>43</sup> The Constitution of the Republic of Serbia went considerably further, by prescribing in the Article 35, paragraph 2, that »everyone is entitled to the compensation of pecuniary and non-pecuniary damage caused by illegal and improper work of a public authority, holder of a public function or local self-government body«.

The responsibility of the state for damage compensation, pecuniary and non-pecuniary, within the framework of the special protection of certain human rights, is made concrete in the Law on Police (Art. 9)<sup>44</sup> and the Law on Criminal Procedure (Chapter XXXIII)<sup>45</sup>.

Special significance is associated with the Law on Protection of the Right to Trial within Reasonable Time<sup>46</sup> which explicitly prescribes the responsibility of the state for non-pecuniary damage, guided by the jurisprudence of the European Court of Human Rights based on the Article 6, paragraph 1, and the Article 13 of the Convention, as well as on the recommendations based upon the Article 46 of the Convention and prescribes legal remedies for the protection of that right.

In the year 2005, the Bill was prepared on the Protection of Equality of Citizens which prohibits various forms of discrimination, and within the framework of the »mechanisms of protection« it precisely states civic-legal responsibility, i.e. the right to the initiation of urgent civil proceedings by means of appropriate charges for damage compensation and requesting for the temporary measure of the ban of discriminatory behaviour to be pronounced (Arts. 27-29). It is not clear why this Bill has not yet found its place at the Parliamentary agenda.

Although the responsibility for the damage caused by public authorities prescribed by certain laws is wider than the framework of the content of the Article 38 of the Constitution, it can be concluded that there is no justification for the principled basis for effective human rights protection, which also includes the right to return to the former state, i.e. damage compensation, not to be contained within the Constitution, since in such a way the basis would be secured for effective protection of all, different human rights, in line with the international treaties which bind Montenegro.

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43 »The State is responsible for the damage caused by a public administration body through its illegal or improper work.« The Law on public administration, *Official Gazette of the Republic of Montenegro*, no. 38/2003.

44 »The person who considers his/her freedoms and rights violated by police activity or who incurred damages, is entitled to judicial protection and damage compensation.« Law on Police, *Official Gazette of the Republic of Montenegro*, no. 28/2005.

45 Criminal Proceedings Code, *Official Gazette of the Republic of Montenegro*, no. 71/03, 07/04, 47/06.

46 *Official Gazette of the Republic of Montenegro*, no. 11/2007 dated 13<sup>th</sup> December 2007.



## *Law on obligations and protection of individual rights*

Within the scope of legal protection, it should be pointed out, in a general sense, that the provisions of the Law on Obligations (“ZOO”) from 1978, which was taken over as a law of the state of Montenegro, ensures the protection of »individual rights«, which, as we have already pointed out, are mostly from the domain of guaranteed human rights and freedoms. According to the Article 199 of “ZOO” the violation of any individual right in itself is protected by means of forms which do not have the character of pecuniary satisfaction. The Article 200 enables pecuniary satisfaction both because of the violation of physical integrity of an individual and because of the infringement upon psychic sphere by causing emotional distress due to the violation of individual rights, i.e. human rights. The Court decides on this compensation at its free estimate starting from the significance of the violated property, as well as the intensity and duration of distress.<sup>47</sup>

However, such an approach in the jurisprudence of Montenegrin courts has not received adequate protection, since, amongst other things, instead of the free judicial estimate in determining the compensation, courts mostly rely on the findings of experts, who should be engaged solely with the scope of determining physical pains. At the former joint session of the Federal Court, Republic Courts and Provincial Courts and the Supreme Court Marshall of 17<sup>th</sup> May 1979, the following view was taken: »Determining pecuniary compensation for non-pecuniary damage (satisfaction) represents the application of substantive law«, as well as that: »The Court establishes the extent of pecuniary compensation for non-pecuniary damage in the sense of the Article 200, paragraph 2 of the “ZOO” by assessing the significance of the violated property and the purpose of compensation, taking care not to favour the strivings which cannot be joined with its nature and social purpose, starting from the criteria which influence the extent of that compensation, as well as from the principles of fairness, applicability and solidarity«. <sup>48</sup>

It was to be expected that the category of emotional distress was going to be abandoned in the coming Law on Obligations of Montenegro, since

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47 The Articles 199 and 200 of the “ZOO” were retained in the Draft “ZOO” of Montenegro, as the Articles 205 and 206. Since the Article 49, paragraph 3 of the Constitution of Montenegro guarantees the right to damage compensation, pecuniary and non-pecuniary, for the publishing of false information or notifications, there is question raised of the constitutionality of the provisions of the “ZOO”, although according to our opinion the constitutional provision of the Article 49, paragraph 3 cannot be sustained, i.e. contrary to the Article 10 of the European Convention on Human Rights, and the jurisprudence of the European Court of Human Rights. The Article 206, paragraph 3 regulates the responsibility for the violation of individual rights of a legal entity in such a way that it puts these entities in a more favourable position in relation to the physical ones.

48 *Principled views and conclusions of the Federal Court, Supreme Courts and Supreme Court Marshall*, Belgrade, 1996.

factual referring to the violation of psychological balance, psychological disturbance, strain, frustration and similar conditions based on realistic grounds is more appropriate. Emotional distress, established to match physical pains, with the ever increasing need for the protection of a wider circle of human rights has become, with an inappropriate manner of measuring, a disturbance for sanctioning and other individual rights, and not only freedom considered in a narrow sense of the word, as well as the honour and dignity, stated in the paragraph 1 of the Article 200 of the “ZOO”.

Draft Law on Obligations and Agreements from 1969<sup>49</sup> contained more progressive and simpler solution by prescribing in the Article 124 that the damage for which there is a need for compensation, comprises the violation of individual rights: freedom, honour, dignity, shame, personal and family peace and *other personal properties* (moral or non-property damage), not referring to emotional distress as a form of expression and a consequence of the violation of the stated individual rights.

Because of that, the jurisprudence of courts with regards to emotional distress related to the violation of individual rights must be more flexible, but also more comprehensive. Courts must not disregard the fact that “individual rights”, according to the provisions of the “ZOO” on responsibility for non-property damage, are rights and freedoms guaranteed concurrently by the Constitution and international treaties.

### *Effectiveness of protection in jurisprudence of the European Court of Human Rights*

The State as a guarantor of rights and freedoms (Article 6 of the Constitution) with the proclamation of the right to legal remedy for the violation of any subjective right or interest, in relation to constitutionally guaranteed human rights and freedoms ensures special protection by means of the constitutional complaint. Subjecting itself to the international jurisdiction through an explicit right of everyone to address also the international organizations (and institutions) for protection (Article 56 of the Constitution) when the stated rights find their basis in the international treaties, the state shares civilization and democratic values with other signatories which concern the rule of law.

Legal and constitutional protection, except for legal means and procedural guarantees, has to be ensured even through permanent raising of standards

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<sup>49</sup> Mihailo Konstantinović, *Obligacije i ugovori -Skica za Zakonik o obligacijama i ugovorima (Obligations and Agreements -Draft Law on Obligations and Agreements)*, Belgrade, 1969.

and protection in order to be of a certain quality and effective. The essential condition is a good knowledge of and keeping up with the jurisprudence of the European Court of Human Rights in the procedure of interpretation, which the Article 10 of the Small Charter also used to refer to. In that sense, even the provision of the Article 13 of the Convention, according to which »everyone whose rights and freedoms under this Convention are violated is entitled to an effective legal remedy before national authorities« and its application in the jurisprudence of the European Court, are a good indication for ensuring the protection of appropriate rights and freedom in the internal legal order.

The Article 13 of the Convention is not directly applicable. It points out to the need for the existence of legal means and mechanisms of protection in the internal legal order. Its application comprises the existence of the violation of some of substantive legal provisions of the Convention appropriately incorporated in the Constitution as well. In the jurisprudence of the European Court the starting attitude that an effective legal remedy in the member state must be guaranteed to each person which claims that some of his/her human rights and freedoms was violated. In cases where it is possible to apply special procedural guarantees, as it is the case with the Article 6 of the Convention (right to fair trial) or the Article 5 paragraph 4 (expedience of examination of the legality of detention), the application of the Article 13 is excluded. Exceptionally, in cases which are related to excessive duration of the proceedings, starting from the year 2000 (from the judgment in the case *Kudla v. Poland*), the member states have been instructed to establish special legal remedies for the elimination of the dragging out of proceedings independent from any violation of any guaranteed human right. (In relation to the former member states of the SFRY, in the same sense, we refer to the cases *Mikulić v. Croatia*, *Lukenda v. Slovenia*, *V.A.M. v. Serbia*, *Tomić v. Serbia* and others).<sup>50</sup> The above attitude of the European Court conditioned the adoption of the special Law on the protection of right to fair trial of Montenegro.

It is of special significance to pay attention to the jurisprudence of the European Court on the basis of the Articles 2 and 3 of the Convention related to the treatment and the protection of rights of persons who stay within penitentiaries and who are subjected to torture and mistreatment, often with deadly consequences. The lack of effective investigation in these cases, especially if it is conducted by the body of the same institution, which

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<sup>50</sup> The summaries of these judgments were published in the Legal Bulletin of the AIRE Centre, London, which is submitted to all the judges in Montenegro ("Bulletin" in further text). The translated texts of the judgments against Serbia are published on the Internet site of the Supreme Court of Serbia, <http://www.vrhovni.sud.srbija.yu/>.

does not have the quality of being independent, hinders the establishment of responsibility and does not ensure the possibility and right of requiring compensation of non-pecuniary damages of a directly damaged person or his/her next of kin. In these cases, effective legal remedy is also defined as effective access to investigation to the degree necessary for securing damage persons' interests (see the judgments *Keenan v. United Kingdom*, Bulletin no. 17; *Ilhon v. Turkey*, Bulletin no. 7; *Antas v. Turkey*, Bulletin no. 41; *Paul and Audrey Edwards v. United Kingdom*, Bulletin no. 28 and others). In the last case, for instance, there is the repetition of the view that except for the case that "they had no access to appropriate means for acquiring the decision with regards to their claims that the authorities did not protect the right to life of their son", that they also did not have "the possibility to obtain enforceable compensation for damage they had suffered, which is the essential element of legal remedy according to the Article 13 of the Convention". In the case *Aksoy v. Turkey*, the Court even established that the Article 13 requires from the authorities to conduct detailed and effective investigation which might lead to the identification and punishment of those responsible ones, including the effective access of the victim or private plaintiff to investigative procedure, similarly to the previously stated one.<sup>51</sup>

There are numerous and significant decisions of the European Court in relation to the Article 13 in connection with the Article 8 of the Convention (*right to respect of private and family life*). In the judgment of the minors *D.P. and J.C. v. United Kingdom* (Bulletin no. 35) the European Court expressed the attitude that it was the positive obligation of the state to protect the applicants from mistreatment, since "they did not have at their disposal appropriate means to obtain the decision in relation to the claims that local authorities had failed to protect them from seriously bad treatment (mistreatment in family) or with regards to the possibility of receiving the compensation for damage suffered as a result of that". In principle, it is pointed out that "positive obligations related to parental responsibility comprise the undertaking all the steps which are reasonably expected to be undertaken".

The timeliness and purposefulness of the proceedings in family relations have got special wight since the consequences are irreparable with the lapse of time, and the establishment of rights does not stand delays. Therefore, on the basis of the Article 46, it stretches even further (for instance, the case *Tomić v. Serbia*, Bulletin no. 88) and points out to the fact that »in family relations civil proceedings can be considered as brought to an end not only by the payment of the compensation, but also by undertaking appropriate measures

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51 *Karen Rid, Vodič kroz Evropsku konvenciju o ljudskim pravima 1 i 2 (Guide through the European Convention on Human Rights 1 and 2)*, Belgrade Centre for Human Rights, Belgrade, 2007, page 559.

for the order to be implemented on the contact of parents with their child«. It is similar when it comes to the decisions which are challenged because of the failure to enforce effective judgments on determining guardianship over children.

In the judgement *Allan v. United Kingdom* (judgment dated 5<sup>th</sup> November 2002) the European Court established, with the violation of right to privacy, also the violation of the Article 13 of the Convention, since at a relevant time the applicant had not had the effective legal remedy against recording as a measure of secret surveillance, by means of which legally prescribed rules related to this proceedings are overstepped.

In the judgment *Baczowski v. Poland* (Bulletin no. 90) the violation of the Article 13 was established in connection to the Article 11 of the Convention (freedom of assembly and association), since the freedom of assembly - if its timely enjoyment was prevented with the acquisition of permit prior to the day of the event, i.e. it can be made timely senseless. The notion of the effective legal remedy comprises therefore, the right to obtain the decision prior to the day of the planned events.

Finally, without quoting special cases, it should be underlined that the effectiveness is also stated through the accessibility of a legal remedy in the sense that it does not require big expenses, when there is the obligation of the state to extend free legal aid.

In the jurisprudence of our courts, until the most recent amendments of the procedural laws, an issue could be the non-existence of effective legal remedies in the cases of indefinite postponing of hearings, multiple revoking of judgments and sending them back to repeated trial, prolongation of expertise and so on. More serious form of ineffectiveness, especially with regards to the difficulty in establishing evidence, exists also when a party has a formal right to a legal remedy, but, practically, it complains in vain. These are the cases when court follows the line of non-confrontation towards influential persons, susceptible to political pressures, corruption, i.e. when it is not independent. The consequence then is that the citizens become helpless and apathetic, and give up legal remedies in order not to spend their time and money on hopeless proceedings.



## **Comment on Constitutional Guarantees: Dignity and Inviolability of Person, Deprivation of Liberty, Detention and Right to Defence**

### *Dignity and Inviolability of Person - Article 28*

Former Constitution of the Republic of Montenegro from 1992, in its Article 20, protected personal dignity with the wording: “human dignity and security is warranted“.

In its title, the current provision contains the term „dignity“, then goes on to directly copy those two paragraphs of the former Constitution of the Republic of Montenegro, in reverse order, followed by two new paragraphs, one of which is related to torture, inhumane and degrading treatment, and the other one to slavery, i.e. slave like position. The key shortcoming of this provision consists in the fact that it does not contain the expressive prohibition of inhumane and degrading punishment. That prohibition is expressly stated in the Article 3 of the European Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the „European Convention“), the Article 7 of the International Covenant on Civil and Political Rights (hereinafter referred to as the „Covenant“), the Article 5 of the Universal Declaration of Human Rights and the Convention against Torture, Cruel, Inhumane and Degrading Punishment and Treatment<sup>53</sup>, and it also existed in the Small Charter of Serbia and Montenegro.

Also, this article does not contain the explicit prohibition of slavery and slave like relation, but only indirectly communicates that no one “shall be held” in such position, which is a lower level of the protection of human rights and a dissatisfactory one, due to the fact that it is lower than in the Article 8 of the Covenant.<sup>54</sup> Namely, having in mind the entire Constitution, it proves that it is, first of all, necessary to expressly prohibit slavery as a

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52 Attorney at Law

53 SFRY ratified this Convention in 1991 (*Official Gazette of the SFRY- International Treaties*, number 9/91).

54 International Covenant on Civil and Political Rights in its article 8 envisages that: „No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited“. The European Convention on Human Rights, Article 4: „No one shall be held in slavery or servitude“.

phenomenon as well as an action of subjecting someone to slavery and bringing someone to a slave like position, and then specifically prohibit the existence and continuation of slave like relation, which in our language is termed as „held in slavery or slave like position“. We can see that this provision contains only the latter requirement, but not the former, primary requirement that it is prohibited to establish a slavery relation.

In this connection, the prohibition of forced labour from the Article 63 of the Constitution cannot substitute the missing prohibition of slavery and slave like relation, because the Article 63 extends solely to the field of labour relations, i.e. to the right to work, free choice of occupation and employment, fair and humane working conditions and so on, therefore to a relatively narrow field of human rights and freedoms.

This provision uses the term „personal security“ which is not focused primarily on physical security, but has a wider meaning, like the one related to material security, even having the indefinite meaning. Because of that, this term needs to be substituted with the word „security“ as it reads in the laws of the ratification of the European Convention (Article 5, paragraph 1)<sup>55</sup> and of the Covenant (Article 9, paragraph 1)<sup>56</sup>. Here, one should have in mind the fact that the Montenegrin Law on Police in its Article 2 in an appropriate way uses the wording „protection of the security of citizens“.

It is particularly noted that the incomplete regulation of dignity also originates from the fact that the Constitution does not link that right to a person understood as a „citizen“, but for a man who is functionally determined as a „citizenship holder, voter and so on“, i.e. this Constitution understands the term „man“ primarily through stable links with the state, like citizenship, residence, domicile. In the normative part of the Constitution, the term „citizen“ does not even exist in a single place except in the Article 2, which prescribes that the citizen, who is a holder of the Montenegrin citizenship, is a holder of sovereignty. It seems that such a defined notion of „dignity“ in the Constitution, loses considerably on its content. Since, according to its nature, dignity is linked with a human being, its personality, and not with the citizenship holder, voter and other functional capacities of a human being. Also, on the basis of the international ratified human rights treaties, Montenegro is obliged to guarantee human rights to each person found within the competence of its bodies, and not only to its citizenship holders, i.e. citizens.

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55 Law on ratification of the European Convention on Protection of Human Rights and Fundamental Freedoms and accompanying protocols, *Official Gazette of Serbia and Montenegro -International treaties*, number 9/2003.

56 Law on ratification of the International Covenant on Civil and Political Rights, *Official Gazette of the SFRY*, no. 7/71.



It results from the abovementioned that in this constitutional provision the term „man“ should be substituted in an appropriate manner with the expression „human being“ or, even better, with the wording „everyone, to every one“, in order to exclude the possibility for possible interpretation that this right is guaranteed solely to men, and not to women.<sup>57</sup> Namely, in our language the term „čovjek“ is of masculine gender and it is often used in the sense of man - for instance, čovjek and woman, then, when a special human quality of a woman is to be expressed in Montenegro it is said „a man - woman“ meaning that such a woman is as virtuous as a man. One should also not forget that the Law on Gender Equality imposes the use of nouns in both genders. Along with that, even when translating the word „čovjek“ into English and French you get the meaning „man“, because of which even the Universal Declaration of Human Rights changed the words in its title which gave it narrower meaning, like the „rights of man“.

### *Deprivation of Liberty - Article 29*

This provision contains *ad literam* copied Article 22 of the Constitution of the Republic of Montenegro from 1992, which means that it also retained all the shortcomings which had previously been being pointed out on several occasions. This provision regulated in a totally inappropriate manner the matter from the Article 5 of the European Convention, thus the main objection is that instead of the existing text, this constitutional provision should copy the entire text of the Article 5 of the European Convention. This would be the best solution.

The paragraph 2 leaves it to the law, as the act of lower legal order, to completely, without any restrictions, provide for *reasons for the deprivation of liberty*, as well as the procedure according to which the deprivation of liberty is executed. Such a competence must not be delegated to the legislator, but reasons for and the procedure according to which the deprivation of liberty is executed must strictly be determined in the Constitution. Even the diction of this provision is typical of an act of lower legal order, implemental legal document, and it is not typical of constitution as a document of the highest order.

The said imprecision of this provision resulted, amongst other things, even in confused and contradictory provisions of the Articles 264 and 265 of the Draft Law on Criminal Procedure of Montenegro. The Article 264 of that Draft authorizes the police to deprive some person of liberty if there

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<sup>57</sup> For instance: „Human dignity is sacred. Everyone has got the obligation to protect it. Everyone is entitled to free development of one’s personality...“ Small Charter of Serbia and Montenegro, Article 1.

is any reason for determining detention from the Article 175 of the Draft, and this means solely in case there is a danger of escape, danger of exerting influence on witnesses and tempering other evidence, danger of repeated crime or of committing a new one being threatened, as well as in the case of particularly serious circumstances of an act for which there is otherwise prescribed imprisonment term of 10 years or more.

Contrary from the police, which as we have seen, has to pay attention to legally provided reasons for detention, the Draft in its Article 265 gives the opportunity for an indefinite number of unauthorized persons to carry out the activity related to the deprivation of liberty. According to that provision: „a person caught in the committal of a criminal act prosecuted ex officio may be deprived of liberty by anyone“. This contradiction and weakness of the Draft Law proves the thesis that it is necessary for the deprivation of liberty to be precisely provided for in the Constitution, in order to avoid legal insecurity in this specific area which does not bear any arbitrariness, i.e. imprecision. The Constitution should disable the existence of legal norms like the Article 265<sup>58</sup> of the Draft Law on Criminal Procedure, for the simple reason that the Article 255<sup>59</sup> of the same Draft regulates „reporting of criminal acts by citizens“, and the Penal Code in its Article 385<sup>60</sup> imposes sanctions for non-reporting the preparation of a criminal act in the Article 386 „non-reporting of criminal act and perpetrator“. That is why the Article 265 should be deleted from the Draft.

Completely missing is the right to efficient examination of the legality of the deprivation of liberty by a competent court, i.e. right to efficient remedy and contradictory proceedings of deliberating on the same, as it is envisaged in the Article 5, paragraph 4 of the European Convention - Habeas corpus. In the existing legislation of Montenegro the Article 28 of the Law on Police gives an example for the shortage of this legal remedy, according

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58 Article 265 of the Draft Law on Criminal Procedure.

„a person caught in the committal of a criminal act prosecuted ex officio *may be deprived of liberty by anyone*. A person deprived of liberty must be immediately handed over to the state prosecutor or the police, and if this is not possible, one of these bodies must be informed immediately. The police will act in line with the Article 264 of this Law“.

59 Article 255 of the Draft Law on Criminal Procedure -*Reporting of criminal acts by citizens*

„(1) Everyone should report a criminal act which is prosecuted ex officio, and there is a duty to report a criminal act the committal of which causes damages to a juvenile.

(2) The Penal Code determines the cases in which the non-reporting of a criminal act represents a criminal act.

(3) When a court assesses, during a criminal proceedings that there is a justified suspicion that certain person failed to carry out his/her duty from the paragraph 1 of this article and that this results with the justified suspicion that by doing that a criminal act was committed from the Article 219 of the Penal Code, it will advise the competent state prosecutor in relation to that“.

60 „Official Gazette of the Republic of Montenegro“, no. 70/03, 13/04 and 47/06.

to which article the deprivation of liberty from the Article 27<sup>61</sup> of this law is determined by means of the Decision on detention which is passed by the head of an organizational police unit, against which Decision it is possible to lodge an appeal to the Ministry of Interior, which is a classical administrative procedure. The same provision prohibits the conducting of an administrative dispute against the decision of the Ministry upon the appeal. Therefore, this completely excludes a court from deliberating on police custody, which is contrary both to the Constitution, and to the Article 5 of the European Convention.

Similar provisions are contained within the Law on Protection of Population from Communicable Diseases.<sup>62</sup>

Also, there is a missing obligation to immediately set free a person who has been unjustifiably deprived of liberty.

Another missing thing is determining the treatment of a person being deprived of liberty: it must be prescribed that he/she must be brought before a judge immediately, as it reads in the Article 5, paragraph 3 of the European Convention, likewise, the duration of the police custody must be limited; currently, it lasts for 48 hours.

Paragraph 6 erroneously entitles the person who is deprived of liberty to the presence of a defence council chosen by him/her during his/her „interrogation“, and makes a severe violation of the right to defence. Therefore, it is contrary to the Article 37 of the Constitution. A person who is deprived

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61 Article 27 of the Law on Police (Official Gazette of the Republic of Montenegro, no. 28/05)  
“A police officer may, exceptionally, deprive of liberty a person who violates public order and peace or endangers traffic safety, if public order and peace or traffic safety may not be otherwise established.  
The deprivation of liberty in the cases from the paragraph 1 of this article may not last longer than 6 hours  
Exceptionally, the deprivation of liberty may last up to 12 hours, if:  
It is necessary to establish the identity of persons, and if this is not possible without the deprivation of liberty;  
A person was extradited by a foreign authority in order to be handed over to a competent body;  
A person endangers the security of another person by seriously threatening that he/she will attack his/her life or body“.

62 The Law on Protecting Population from Communicable Diseases (Official Gazette of the Republic of Montenegro, 32/05) provides for the possibility of factual deprivation of liberty in the sense of a quarantine and mandatory or strict isolation of infected persons, persons who were or who are suspected of having been in contact with the infected or with those who are suspected of taking ill from quarantine diseases (arts. 21 and 25). A person, to whom measure has been pronounced of placing into quarantine, is obliged to follow the orders of a competent public administration body, under the threat of being forcefully placed into the quarantine (art. 21, para. 4). The measure of quarantine is carried out in the facilities prescribed by the competent administrative body, which, upon the proposal of the Public Health Institute, organizes and implements the quarantine (art. 21, para. 3). The duration of quarantine is determined in accordance with the duration of the maximum incubation of the communicable disease because of which it is conducted (art. 21, para. 2). Therefore, the duration of the factual deprivation of liberty in this case is not negligible and it certainly requires the right to appeal to the court, which has not been envisaged by this law. Due to the fact that the measure is pronounced by an administrative body, it is possible to conduct an administrative dispute only against a second instance decision, which international standard does not allow.

of liberty must have his/her defence council as of the moment of his/her being deprived of liberty, i.e. as of the moment of his/her becoming aware of the existence of „criminal charges“<sup>63</sup> (autonomous concept from the case law of the European Court), as it is prescribed by the Article 6, paragraph 3, item c of the European Convention. Therefore, the right to defence council must exist from the moment of *criminal charges being brought, i.e. as of the moment of the deprivation of liberty, and not solely from the moment of the interrogation of the person who is deprived of liberty*. According to this provision of the Constitution, a person who is deprived of liberty could be detained in the police custody, without having the right to defence council, if he/she refuses to give a statement, and to be interrogated, and at any rate he/she would be deprived of this right throughout the time between his/her being deprived of liberty and the moment of the beginning of his/her interrogation.

### *Detention - Article 30*

This provision entirely relates to the case when detention is determined by a court. However, even in this case the provision is missing on restricting the duration of the detention following the indictment.

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63 The European Court of Human Rights determined these provisions in the following manner:

#### *Criminal proceedings*

“Criminal charges for a criminal act” can be brought against someone or proceedings may be characterized as „criminal“ for the sake of invoking the protection offered by the Article 6 (right to fair trial) even in the case when before a national court no criminal proceedings were initiated. While determining the existence of „criminal charges for a criminal act“, case *Engel v. Holland* (judgment dated 8<sup>th</sup> July 1976) the Court established three criteria which should be read in the light of autonomy of the concept according to the provisions of the Convention. The Convention institutes take into consideration the categorization of offences according to the national law, the nature of offences and the severity of the punishment. It is clear that the categorization in the national law is not decisive for determining whether some charges are criminal or not (see *Ozturk v. Germany*, judgment dated 21<sup>st</sup> February 1984). *The Convention does not require for criminal proceedings to be formally initiated in each case which, according to the provisions of the Convention, is considered criminal one. However, the Convention requires for procedural protection measures from the Article 6 to be present.* The Regulation which deals with family law will have to pay particular attention to this when certain steps are undertaken or when orders are issued on the basis of a conduct which could have been (or could be) the subject matter of criminal proceedings according to the national law and where criminal charges could be brought for a criminal act in the sense given to that expression within the framework of the Convention.

#### *Charges*

„Official notice sent to an individual by a competent authority about the fact that there is a claim that this person has committed a crime“ or some other act which carries the „implications of such a claim and which in the same way considerably affects the position of the accused“ (*Corigliano v. Italy*, judgment from 1982). In the case *Deweert v. Belgium*, the Court established that the charges for a criminal act existed when a shop was closed down during the investigation, although no criminal proceedings had ever been initiated“.

Therefore, an appropriate solution would be to use the term “accused” in the Code throughout the duration of criminal proceedings regardless of the stage of the same, and after the pronouncing of a convicting verdict the term „convicted“.

The most significant shortcoming of this provision consists in the fact that there are no rules on determining detention by other public authorities. As we have seen, Article 27 of the Law on Police authorizes police to determine detention lasting up to 12 hours, and the Article 234 of the effective Criminal Proceedings Code (CPC)<sup>64</sup> authorizes police to detain a person deprived of liberty (police custody) not more than 48 hours. The Draft of the new CPC leaves the concept of detention in police custody from the Article 234 of the current CPC and entrust state prosecutor with this competence. Thus, according to the Article 267<sup>65</sup> of the Draft state prosecutor determines for a person deprived of liberty the detention of not more than 48 hours as of the moment of him/her being deprived of liberty. But, state prosecutor will not be competent for determining detention to a person deprived of liberty following this two-day detention, rather the Article 268<sup>66</sup> of the Draft entrust courts with this competence.

We think that the Constitution should also contain the provision on guarantee which will oblige the legislator for a wider application of that measure for securing the presence of an accused and undisturbed conducting of proceedings. Namely, the Article 170<sup>67</sup> of the Draft CPC leaves completely narrowed down area for determining guarantee by prescribing that the guarantee may be determined solely in the case when detention would be determined due to the danger of possible escape. It would be reasonable for the guarantee to be enabled even with the existence of some other reasons for determining detention, which would naturally and in any case depend on the assessment of the factual state by the court. Thus, the European Convention law, on the basis of the Article 5, paragraph 3<sup>68</sup> represents a strong assumption in favour

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64 „Official Gazette of the Republic of Montenegro“, no. 71/03, 47/06.

65 Article 267, paragraph 1 of the Draft CPC

„A suspect who is deprived of liberty may exceptionally be detained by the state prosecutor, but not more than 48 hours as of the moment of him/her being deprived of liberty, in case he/she assesses that there is some of the reasons from the Article 175, paragraph 1 of this code“.

66 Article 268 of the Draft CPC

„(1) When the state prosecutor passes a decision on detention, and estimates that there are still reasons for determining detention, he/she will suggest to an investigative judge for detention to be determined to the suspect.

(2) The investigative judge will, in the presence of the state prosecutor, interrogate the person from the paragraph 1 with regards to all the circumstances significant for the decision on determining detention and immediately upon the interrogation, and not later than the expiry of the detention period, and decide whether a person deprived of liberty will be set free or detained“.

67 „The accused who should be detained and the accused who is already detained solely because of the circumstances which indicate that he/she will escape or for the reasons prescribed in the Article 175, paragraph 1, item 5 of this code, may be left at liberty or set free, if he/she personally or somebody else on his/her behalf offers a guarantee that until the end of the criminal proceedings he/she will not escape, and if the accused himself/herself promises that he/she will not hide and that he will not leave his/her domicile without a prior consent“.

68 Article 5, paragraph 3, the last sentence: „...Setting someone free can be conditioned by guarantees that the person will appear at the trial.“

of determining other measures, beside detention (like guarantee, seizure of travel document and so on) for securing the presence of an accused during the proceedings, which is based on the basic assumption that the right to freedom is a rule, and the deprivation of liberty and exception which must be interpreted narrowly and be seriously re-examined.<sup>69</sup> Although the current Criminal Proceedings Code states that a competent court will observe for the stricter measure for securing the presence of an accused not to be applied, in case the same purpose can be achieved by a lenient measure (Article 136), guarantee with us is still applied to a negligible extent.

The reasons for determining detention must be more explicit, and we are strongly on favour of this to be done in the manner envisaged in the Article 5, paragraph 1 of the European Convention.

### *Right to Defence - Article 37*

There is a chronic lack of understanding of the essence of the right to defence, which is best illustrated by the valid Criminal Procedure Code, as well as the Draft of the new Criminal Procedure Code. Thus, the Draft of the CPC gives different dimensions of this right depending on the stage of the criminal proceedings.

Throughout the Draft, systematically, starting from the Article 4, a person against whom proceedings is conducted is termed differently depending on the stage of the proceedings: suspect, charged, accused.

In itself, this difference in naming the same person should not produce negative consequences, rather such effects are produced by different dimensioning of the right to defence and other rights of such person, depending on how it is termed by the Draft. For instance, the Article 1 dimensions differently the right to defence for an accused and for a suspect, and in Article 66, paragraph 1 this difference is even more noticeable and equally unacceptable: „(1) *An accused*<sup>70</sup> may have a defence council throughout a criminal proceedings, and prior to it when it is prescribed by this law.“

The stated different dimensioning of the right to defence is in the best tradition of the national laws from the socialist times, but now, following the acquisition of membership in the Council of Europe this difference is totally

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69 See „Right to freedom and security of persons -guide for the application of the Article 5 of the European Convention“ Monica Macovei, Council of Europe, Belgrade, 2002, page

70 According to the Article 22 of the Draft, the term “accused” is reserved for a person against whom the decision was passed on conducting investigation, and the same person is termed “suspect” *prior to that decision*. Therefore, this provision reduces the right to defence of a suspect in relation to an accused.

senseless since Montenegro must directly apply the European Convention for Protection of Human Rights and Fundamental Freedoms<sup>71</sup>.

The European Convention persistently terms this person from the Draft - suspect, charged, accused - „accused of a criminal act“, irrespective of the stage of the criminal proceedings. At that, one should have in mind the fact that this is the so called *autonomous concept* for which the European Court has adopted a concrete meaning in the sense of the Convention, i.e. the meaning which is often different from the one we can find both in the national laws, and in the expression of laymen.

The Draft Law on Criminal Procedure, in its Article 282, means a step backward in relation to the valid Code by prescribing that at the stage of investigation which will be conducted by state prosecutor, a charged person and his/her defence council are not entitled to directly interrogate witnesses, experts and other participants in the procedure, but only they are only entitled to propose to the state prosecutor to ask certain questions to these participants, and they may ask direct questions only upon the permission of the state prosecutor. This is a surprising affirmation of the overcome inquisitorial procedure, and apart from that this provision is in total disagreement with the Article 6, paragraph 3, item d of the European Convention.<sup>72</sup>

The Constitution should contain the principle from the Article 6, paragraph 3, item b of the European Convention according to which an accused is entitled „to have sufficient time and possibilities to prepare his/her defence“, which would represent the basis for adequate legal regulations.

The Constitution must clearly express the principle from the Article 6, paragraph 3, item c of the European Convention on equal and thorough right to defence<sup>73</sup>, i.e. the right to defence council in all stages of the criminal procedure, starting from the knowledge about „criminal charges“, i.e. as of

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71 Article 8 of the Constitution of Montenegro. Also, according to the case law of the European Court of Human Rights a member state may not successfully claim that it acted upon its own laws, rather the European Court always assesses *whether there was the violation of the European Convention*.

72 Each party in the procedure must have reasonable possibility to present its case, including its evidence, under the conditions which do not put it in an essentially unfavourable position *vis a vis* its adversary (see *Dombo Beeher v. Holland*, 1993, page 3 and *Kress v. France*, 2001, page 77, from „Evropska konvencija o ljudskim pravima - vodič za praktičare “, (Serbian edition), Karen Reed, Belgrade Centre for Human Rights, 2007, page 170. Original title: *A Practitioner's Guide to the European Convention on Human Rights*, 2006, Sweet&Maxwell Limited)

73 Article 6.3. c of the European Convention for the Protection of Human Rights and Fundamental Freedoms reads:

„Everyone charged with a criminal offence has the following minimum rights:

...

c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;



the moment of applying the same due to the existence of the suspicion that he/she committed a criminal act.

This provision has got two essential shortcomings. The first consists in the fact that the right to defence *ex officio* is not prescribed, as well as that the right to this defence be obtained free of charge, as it is prescribed by the Article 6, paragraph 3, item c of the European Convention. At that we should bear in mind the Article 21 of the Constitution does not refer to the right to defence, but to the legal assistance which is extended not only by lawyers but *also by other services*, thus the provision „that legal aid can be free in accordance with the law“, is primarily related to the cases when lawyers and other services extend legal aid without charge, which is completely different from the case of mandatory defence of an accused *ex officio*.

Besides, three other rights are missing which are expressly stated in the Article 6, paragraph 3 of the European Convention like: right of an accused to be present during the trial, to examine witnesses against him/her, right to free assistance of an interpreter, to free translation of indictment and the entire procedure before the court<sup>74</sup>, as well as to sufficient conditions for the preparation of defence.

### *Conclusion:*

1. It can be expected that the shortcoming of the above constitutional guarantees results in the violations of human rights and fundamental freedoms, and especially at the existence of the following circumstances:
  - i. The Article 8 of the Constitution is not sufficiently clear with regards to the direct application of the European Convention and other international treaties for the protection of human rights and fundamental freedoms. Because of that, there can be a situation where national authorities (police, state prosecutor, court) will directly apply the Constitution and the Criminal Procedure Code, i.e. national legislation, which offer lower level of protection compared to the said international convention.
  - ii. The process of drafting and adopting the new Criminal Procedure Code has been subjected to a strong inertia for keeping the solutions from the former legislation, which are contrary or insufficiently

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<sup>74</sup> Obligation of the state bodies is not restricted solely to securing an interpreter, but it extends to a certain degree of quality control of the secured interpretation, in order for this right to be effective (*Kamasinski, Ucak v. United Kingdom*, 2000; *Cuscani* - quoted from the “Evropska konvencija o ljudskim pravima - vodič za praktičare”, Karen Reed, *Belgrade Centre for Human Rights*, Belgrade, 2007; original title: *A Practitioner’s Guide to the European Convention on Human Rights*, 2006, Sweet&Maxwell Limited.



harmonized with the European Convention for the Protection of Human Rights and Fundamental Freedoms and other sources of international law in this area.

2. The need has been expressed for the Montenegrin legislator to understand the stated shortcomings of the Constitution and to compensate for the same by introducing onto the new Criminal Procedure Code appropriate guarantees of the right to fair trial and the right to personal freedom and security in accordance with the obligations of Montenegro from the international human rights treaties.



## **Guarantees of the Right to Life, Freedom of Expression, Right to Peaceful Enjoyment of Property and Derogation of Rights and Freedoms in the Constitution of Montenegro**

As a contribution to the discussion, I hereby underline the omissions in the text of the Constitution with regards to the guarantees of the right to life, freedom of expression, peaceful enjoyment of property and temporary restriction of rights and freedoms, which led to the fact that the Constitution does not provide for the adoption of international standards of these human rights in an appropriate way in Montenegrin legal order.

The European Court of Human Rights („European Court“), in its decades' long jurisprudence, interpreting the text of the European Convention for the Protection of Human Rights („ECHR, Convention“ in further text), established minimum standards for the right to life, freedom of expression, peaceful enjoyment of property and others which oblige Montenegro. The standards cannot be found by the very reading of the Convention, but it is necessary to have in mind the key judgments, which interpret concrete guarantees from the Convention in order to be able to really understand their meaning and what kind of obligations they set before the state. In this sense, there is no doubt that the European Court follows the Anglo-Saxon tradition of precedent law, where judgements are the source of law, which enabled the development of the Convention in accordance with the new tendencies in the development of democratic societies in Europe.

To us from the continental legal system, for the application of the Convention, it would have suited more if we had received for ratification some „amended edition“ of the Convention, where each article would be expanded by the standards established in the judgements of the European Court, in order for us not to be obliged to study numerous judgements (which, by the way, have not even been officially translated into our language). It is because of such circumstances that we strived for the Constitution to provide for an all encompassing, contemporary frame of human rights, that would include

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<sup>75</sup> Editor of the project “International Human Rights standards and constitutional guarantees in Montenegro” and HRA program director

rights “invisible” in the Convention text, but that are very much valid and oblige the state. Just because of that, professor Vučinić now suggests the adoption of a special law or a Human Rights charter, in order to facilitate and ensure appropriate application of these international standards, especially because it was omitted to do the same in the Constitution in an appropriate manner.

In other words, the Constitution is not of great assistance with regards to respecting human rights in accordance with the international legal obligations of Montenegro and one should in not rely on its text in that regard and at least in relation to the provisions emphasized in this publication.

### *Right to Life*

Logically and usually, right to life is considered a basic human right, since the enjoyment of this right is the prerequisite for the enjoyment of all others. This right may not be derogated and death penalty is prohibited at all times, including war time.<sup>76</sup>

Right to life is a complex right, which comprises different obligations for the state: negative obligations (failure to act, restraint), which in turn means *the prohibition of intentional taking of somebody's life*, and positive obligations (act, performing), which are multiple, and mean the application both of appropriate measures of *protecting life*, and the obligation of *effective investigation into the death* for which there is a justified suspicion of having occurred violently.<sup>77</sup>

The explicit provision guaranteeing the right to life does not exist in the Constitution of Montenegro. Under the title „Dignity and inviolability of person“, the inviolability is guaranteed of psychological and physical integrity of person (Article 28, para. 2), while there are explicit prohibitions of capital penalty (Article 26), cloning, medical interventions and experiments without permission (Article 27, paras. 2 and 3). In this way, there has been a deviation from the previous practice that the right to life be awarded a special article (Article 11 of the Small Charter), i.e. a provision which guarantees the right to life in a general way („life is inviolable“, Constitution of the Republic of Montenegro, Article 21, para. 1). Two most important international human

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76 The Convention allows derogation from the right of life (Article 2) only in respect of deaths resulting from lawful acts of war, i.e. in accordance with the international humanitarian law (see art. 15, para. 2 ECHR). Although the Convention used to allow for a death penalty, death penalty has been prohibited in all instances by protocols 6 and 13.

77 See „Right to life -guide for the application of the Article 2 of the European Convention on Human Rights“, Douwe Korff, Council of Europe - Office in Montenegro, 2007.

rights treaties which oblige Montenegro, the International Covenant on Civic and Political Rights (ICCPR) and the ECHR dedicate a special article to this right, the essence of which is exactly principled *prohibition of arbitrary taking of somebody's life* and appropriate *protection of life*.<sup>78</sup>

In the case law of the European Court of Human Rights and of the UN Human Rights Committee, full meaning has been established of the human right to life which covers both the positive obligations of the state to *undertake all reasonable life protection measures*, comprising enactment of appropriate laws aimed at the protection of life, as well as enforcement of measures to protect life of the person whose life is endangered. Notwithstanding preventive enactment of laws prohibiting arbitrary deprivation of life, the European Court in numerous cases found violations of the right to life because the state did not secure efficient enforcement of such laws in practice, i.e. did not provide for *effective investigations into deaths for which there was a justified suspicion of having occurred violently*. The state is obliged to provide for an effective and independent system capable of truthful and efficient determination of causes of death, and punish responsible executors as well as those who organized or ordered crimes, including army members, police officers, state security officers and other state agents, including employees in medical institutions, as well as other persons within the state's jurisdiction.

HRA argued for the right to life guarantee in the Constitution to be provided for in a comprehensive article on the right to life which would also envisage these two positive obligations of the state thus laying down the framework for all laws that would secure the protection of life and efficient investigation into violent deaths.<sup>79</sup> For example, one should have in mind that not a single legal text in Montenegro guarantees the right of the relatives of violent death victim to effective investigation into the murder, i.e. processing the crime in a manner suitable to include perpetrators and contractors.<sup>80</sup> The Law on Police provides for the obligation of the police to protect „Constitutionally established freedoms and rights“ and „find the

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78 ICCPR, Article 6, paragraph 1: „Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.“ (*Official Gazette of SFRY*, No. 7/71). Article 2 of ECHR may be seen in the Addendum.

79 The Human Rights Action underlined this request even in the objections to the expert text of the Constitution, to the Draft Constitution and, finally, in the Comments on the Constitution. Also, the Venice Commission (VC) in its opinion on the Constitution, in the Item 24 comments on the article on the prohibition of capital punishment and states: „...However, the right to life, explained in the Article 2 of the ECHR, the right which imposes upon the public authorities a difficult obligation related to reasons for the loss of life, is not stated.“

80 See judgments *Oğur v. Turkey*, 1999, paragraph 88; *Gongadze v. Ukraine*, 2005, paragraph 176: „...Each shortcoming in the investigation which reduces the chances for determining the cause of death or identity of responsible persons, either direct perpetrators or those who ordered or organized the crime, shall lead to the violation of this standard.“

whereabouts and arrest the perpetrators of criminal acts“, but just like the Law on State Prosecutor (which also in its Article 6 states that the function of the State Prosecutor is to ensure the respect and protection of human rights and freedoms), it does not provide for the obligation of *efficient, effective* investigation into violent deaths, i.e. the right of victims to such an investigation, as it is defined in the jurisprudence of the UN Human Rights Committee and of the European Court of Human Rights.<sup>81</sup>

This is particularly important for Montenegro because it has got the legacy of unresolved controversial murders, whilst the „effective answer of the competent public authorities can be generally considered key ones for the maintenance of public trust to their devotion to the rule of law, as well as for the elimination of suspicion into their involvement or tolerance of illegal actions“ (European Court in its numerous judgements with regards to the right to life, for instance *Gongadze v. Ukraine*, from 2005, paragraph 177).

With regards to the appropriate legal protection of the right to life, one should recall that no bylaws have been passed yet to the Law on Police which should regulate in details the use of firearms, i.e. deadly force by police officers, which is an example of the mandatory legal framework for the protection of the right to life, i.e. for regulating the exception from the prohibition of intentional deprivation of life, required by the ECHR on the basis of the Article 2.<sup>82</sup> Also, Law on Protection from Domestic Violence, that is still being prepared, is another example of the legal framework needed to protect lives of victims of this particular type of violence.

In any case, regardless of the fact that the right to life as such has not been expressly stated in the Constitution, one should have in mind the comprehensive meaning of this right in the international legal sense and ensure for the same to be secured in Montenegro by the appropriate legal framework and effective practice of the competent public authorities. The useful guide in that sense can be the publication of the Council of Europe

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81 For the jurisprudence of the European Court, see especially the judgements: *Kaya v. Turkey*, 1998, *İlhan v. Turkey*, 2000, *McKerr v. the United Kingdom*, 2001, *Gongadze v. Ukraine*, 2005, *Šilih v. Slovenia*, 2007. For the practice of the Human Rights Committee, see Bazilio Laureano n behalf of his granddaughter Anna Rozario Selis Laureano v. Peru (no. 540/1993), quoted from “Najvažniji slucajevi pred Komitetom za ljudska prava”, compiled by Raija Hanski and Martin Scheinin, Belgrade Centre for Human Rights, Belgrade 2007. (Original title: *Leading Cases of the Human Rights Committee*, Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 2007.)

82 Item, in the Item 24 of the Opinion on the Constitution of Montenegro of the VC: „This article also does not mention the possibility envisaged by the Article 2 of the ECHR, related to the deprivation of life resulting form the use of force which was necessary in the defence of any person from illegal violence; in order to conduct legal arrest or prevent the escape of a person legally deprived of liberty; for the suppression of rebellion or uprising in accordance with the law.“

„Right to life - guide for the application of the Article 2 of the European Convention on Human Rights“, by Douwe Forff, Professor of International Law from London, which has been translated into our language last year and published in Montenegro.<sup>83</sup>

### *Freedom of Expression*

Right to freedom of expression, guaranteed by the international treaties, means „freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.“<sup>84</sup> The Constitution of Montenegro does not specifically explain freedom of expression. It is guaranteed as freedom of expression through „speech, written word, image or in some other way“ (Article 47), freedom of press (Article 49), prohibition of censorship (Article 50) and access to information (Article 51).

The problem of disharmony with the international treaties appears with the prescribed restrictions. In relation to the international human rights treaties, the Constitution in one hand does not prescribe all kinds of restrictions permitted by the, say, European Convention, but it specifies the restriction of the „right of others to dignity, reputation and honour“ (Article 47, paragraph 2), contrary to the international treaties which allow the restriction for the reason of „respecting the rights or reputation of others“ (ICCPR, Article 19, para. 3, and EC, Article 10, para. 2).<sup>85</sup> The restriction due to the protection of the right of others to „dignity“, beside reputation and honour, can lead to too broad restriction of this right, contrary to the international standard, which imposes that the restrictions, allowed by the Convention, be interpreted narrowly.

That the Constitution drafters really intended to restrict the freedom of expression specifically with the purpose of the protection of honour and reputation, clearly results from the provision entitled „Freedom of press“, which guarantees *the right to compensation for damage caused by publishing*

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83 Council of Europe Office in Podgorica published the Montenegrin edition of this guide upon the initiative of HRA.

84 ICCPR, Article 19, paragraph 2. ECHR is somewhat more concise than the Covenant: „This right includes freedom to hold one’s own opinion, receive and impart information and ideas without interference by public authority and regardless of frontiers.“ (Article 10, para. 1).

85 The Venice Commission in its comment of the Articles 47 and 49 also realizes that these articles „emphasize the protection of „dignity, reputation and honour“ and the provision related to the legal remedy for the publishing of untrue, incomplete or inaccurately imparted information, and it points out to the fact that „it does not necessarily represent an approach in which the Court in Strasbourg interprets the Article 10 of the European Convention“ (item 41, Opinion of the VC on the Constitution of Montenegro, December 2007).

*untrue information*, beside the right to reply and correction of untrue, incomplete or inaccurately imparted information (Article 49, para. 3). At that, one should note that the Constitution does not guarantee the right to damage compensation due to torture, inhumane or degrading treatment<sup>86</sup>, or in general, because of the damage caused by the violation of human rights by public authorities.

The constitutional guarantee of the right to compensation for damages incurred due to the publishing of untrue information is not in accordance with the Article 198, paragraph 2 and the Article 199 of the Law on Obligations, is not recognized by any international treaty and it is not in line with the freedom of expression standard from the jurisprudence of the European Court. In case when one behaves conscientiously and does everything reasonably possible prior to the publishing of information of public interest to check its accuracy, and if there is a justified reason to believe in its truthfulness, then the judgment for damage compensation shall represent the violation of freedom of expression right (see for example judgments *Bladet Tromso v. Norway*, 1999 (para. 68-73), *Lombardo and others v. Malta*, 2007, para. 60 and *Thoma v. Luxembourg*, 2001, para. 64, *Radio France and Others v. France*, 2004, para. 37). Also, the corresponding provisions of the former and new Law on Obligations read: „But, he/she shall not be liable for the damage caused by untrue information on another person not knowing that the same was untrue, in case he/she or the one whom the information was imparted had serious interest in it (Article 205, para. 2 of the Law on Obligations)“. Also, the Law on Obligations envisages softer measures at the expense of an offender - publishing of the judgment, or of the correction, withdrawal of the statement by means of which the violation of the right was made or else, which can lead to the achievement of the purpose achieved by the compensation (Law on Obligations, Article 206).<sup>87</sup>

Having in mind such a firm constitutional guarantee in relation to damage compensation, the question is raised, *stricto sensu*, on the constitutionality of the provisions of the Law on obligations which make it relative. HRA suggested for this provision to be eliminated from the text of the Constitution, and in light of the case law of national courts that still does not follow international standards, the non-existence of the restriction of the

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86 In accordance with the Article 15 of the Convention against torture, inhuman and degrading treatment or punishment.

87 In this sense, even the opinion of the non-governmental organization Article XIX from London, dated 10<sup>th</sup> May 2007 „Montenegro: new Constitution weak in relation to freedom of expression“, which apart from the right to damage compensation, also criticizes the constitutional rank of the right to the publishing of correction and the reply from the same article. <http://www.article19.org/pdfs/press/montenegro-constitution-pr.pdf>.



amount of damage compensation in the national law and numerous ongoing proceedings for defamation and insult, this is confirmed as necessary. At that, one should have in mind that, because of the above stated case *Bladet Tromsø*, the Government of the Kingdom of Norway suggested amendments of the Constitution from 1814.<sup>88</sup> There are no justified reasons because of which public authorities of Montenegro would have to learn at their own and not at other people's mistakes.

A similar situation exists with the constitutional guarantee of the right to reply and to correction of untrue, incomplete or incorrectly transmitted information. Although the right to reply and correction is recommendable<sup>89</sup>, especially as a mechanism for reduction of court proceedings due to defamation, this right is not absolute, as has been represented by the Constitution, for in such a case it may be susceptible to abuse to the detriment of media and the freedom of information. The Media Law<sup>90</sup> provides for appropriate limitation of the right to reply and correction, but, as the constitutional provision of Art. 49, para. 3 does not allow for a legal limitation of that guarantee, one could question the constitutionality of Media Law in that regard.

The best solution would be to remove the third paragraph of Art. 49 from the Constitution and to allow laws to regulate the rights to correction, reply and damage compensation, as was the case so far.

## *Property*

The objection to this article is of terminological nature. Contrary to the Constitution which guarantees the right to „ownership” (pravo svojine) (Art. 58), the Article 1 of the Protocol 1 of the ECHR protects the right to peaceful enjoyment of „property“, which is the term used in the official translation of this Convention in the Law on its ratification.<sup>91</sup> The Small

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88 *Information provided by the Government of Norway during the examination of the Bladet Tromsø A/S and Pål Stensås case by the Committee of Ministers*, Appendix to Resolution ResDH(2002)70: “In addition, the Government wishes to point out that in September 1999, a Governmental Commission, appointed by Royal Decree of 23 August 1996, delivered a proposal for a revised Article 100 of the Norwegian Constitution, with a view to strengthening the protection of the right to freedom of expression. The Commission proposed *inter alia*, the following amendment: “no person may be held liable in law for the reason that a statement is untrue if it was uttered in non-negligent good faith” ...”

89 See the Recommendations of the Committee of Ministers of the Council of Europe: Recommendation Rec (2004)16 of the Committee of Ministers to member states on the right of reply in the new media environment; Resolution (74) 26 on the right of reply.

90 See Chapter VI, Media Law, Official Gazette of the Republic of Montenegro, No. 51/2002.

91 “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.” The Article 1 of the Protocol 1 of the European Convention entitled „Protection of Property“, the Law on ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette of Serbia and Montenegro -International treaties, no. 9/2003.)

Charter guaranteed the right to „property“ (Article 23), although in the text of the provision itself the right to „ownership (*pravo svojine*)“ is guaranteed. However, it is true that there is general confusion in relation to domestic use of these terms, because the European Convention on Human Rights protects an autonomous concept of „property“, wider than the notion of „ownership“, since it covers not only various „possession rights“, but also „economic interests“, like, for example, clientele of a company, right to perform an activity, building permit, license for selling alcoholic beverages and so on.

We were recommending that the constitutional term should refer to as wide as possible notion of „property“, in order to get closer to this special concept from the ECHR. A good solution was provided by the Constitution of the Republic of Serbia, which guarantees the right to “peaceful enjoyment of the right of ownership and other property rights“ (Art. 58), also because the European Court does not understand obligations as “property”, but only rights.<sup>92</sup> In any case, on the occasion of the interpretation of the constitutional guarantee of the right to „ownership“ one should have in mind broader area of protection secured by the Article 1, Protocol 1 of the European Convention.<sup>93</sup>

### *Derogation of Human Rights - Temporary Restriction of Rights and Freedoms*

The constitutional provision entitled *temporary restriction of rights and freedoms* (Article 25), regulating derogation of human rights at times of war or other emergencies, is not sufficiently precise and complete in relation to the international commitments of Montenegro under the ICCPR and ECHR, i.e. the UN and the Council of Europe, the Secretaries General of which, as well as other high contracting parties, must be informed on every case of derogation of rights stemming from these international treaties.

The paragraph 1 allows the restriction of human rights „during the state of war or emergency situations“, „to the extent necessary“, whilst the ECHR (Art. 15) and the ICCPR (Art. 4) allow deviations in emergency situations „which threaten the survival of the nation“, and allow restrictions „to the

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92 Hence the recommendation of use of the new -old term *imanje*, see “Medjunarodno pravo ljudskih prava”, Dimitrijević-Popović-Papić-Petrović, Belgrade Centre for Human Rights, Belgrade, 2006, p. 267.

93 See, for example, „Kompatibilnost crnogorskog prava sa odredbama Evropske konvencije o ljudskim pravima“ (*Compatibility of the Montenegrin law with the Provisions of the ECHR*, Council of Europe, Podgorica, 2004, and „Pravo na imovinu -vodič za primjenu člana 1 Protokola 1 Evropske konvencije o ljudskim pravima“, Monica Carss-Frisk, Serbian edition, Council of Europe, Belgrade, 2004.

most necessary extent required by the urgency of a given situation“, which are both stricter conditions than the ones provided for in the Constitution of Montenegro.<sup>94</sup>

Regarding prohibition of derogation of basic, fundamental rights, provided in the paragraph 4 of Art. 25, in contravention of international standards the following prohibitions were omitted: *prohibition to abolish the prohibition of slavery* (from Article 4, paragraph 1 of the ECHR and Article 4, paragraph 2 of the ICCPR), *prohibition to detain solely for failure to discharge contractual obligation* (Article 4 and Article 11 of the ICCPR) and the *prohibition to abolish everybody's right to be recognized as a person before law* (Article 16 of the ICCPR).

The Constitution anyhow lacks the *prohibition to detain for failure to discharge contractual obligation*, contrary to the international commitments of Montenegro on the basis of the Article 11 of the ICCPR. This right was explicitly guaranteed by the Small Charter in its Article 14, paragraph 4.

Strangely, this article of the Constitution envisages the prohibition to restrict the *right to life*, although this right is nowhere mentioned as such in the Constitution.

Contrary to the Constitution of Montenegro, the Small Charter prohibited derogation from the guarantees of the right to freedom and personal security (Art. 14), which only partly coincide with the constitutional guarantees entitled *Deprivation of Liberty* (Art. 29), as well as of the right to citizenship, which exists in the Constitution of Montenegro as the *prohibition of exile and extradition to another country* (Art. 12), thus the Constitution here offers lower level of protection than the Small Charter, as well.

As opposed to the Small Charter, where the deviation from human and minority rights is exhaustively regulated in Article 6, envisaging also the competence for the adoption of such measures and the period of validity of

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94 The European Commission for Human Rights defined the meaning of the criterion of „public danger which threatens the survival of the nation“, as a direct danger which threatens the entire country, endangers the organized life of the community and has got an exceptional character so that the objective cannot be reached by means of the ordinarily permitted restrictions of rights. The Government must prove the actual existence of such danger -the report of the European Commission for Human Rights dated 5<sup>th</sup> November 1969 in the so called *Greek case*, which appeared when in 1967 by means of the coup d'état “Colonel's Government” came to power, which then made ineffective part of the guarantees from the Constitution invoking the Article 15 of the ECHR. See also the recommendation of the Venice Commission, Preliminary opinion on the Draft Constitution of Montenegro, item 34:” This provision should envisage that the derogation of human rights and freedoms may be done solely on the basis of an „official proclamation“ (see articles 121 and 122 of the Draft Constitution) of the state of war or other public danger „which endangers the survival of the nation“. Derogation is possible only “to the extent required by the urgency of the situation“ (the expression “within the necessary limits” is not sufficiently clear). This provision should also state the articles of the Constitution not affected by war, and emergency situation.“

the same, there are no such prescriptions in the Article 25 of the Constitution, but only the wording that „restriction measures cannot last longer than the emergency situation or the state of war“.<sup>95</sup>

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<sup>95</sup> Although the Constitution does not mention it anywhere, the Parliament should be competent for human rights restriction measures. The Parliament is competent to adopt laws and proclaim the state of war and emergency situations, except in cases when it cannot meet, in which case the Government passes the decrees that have the effect of laws (Art. 82, Art. 91, Art. 101). The Constitution also does not regulate which body in what procedure should determine that the circumstances invoking the state of emergency have ceased to exist (see Art. 133)

## Open Issues



## **Date of Application of the European Convention on Human Rights to Montenegro and the Competence of the European Court of Human Rights**

**Mrs. Vesna Čejovic**, LL.M., Attorney at Law from the town of Bar:

*It would be necessary to clarify whether there is incoherence between the stand of the Venice Commission and the decision of the Committee of Ministers of the CoE on the legal continuity of implementation of international human rights treaties and agreements after proclamation of independence of Montenegro.*

Recalling that the establishment of legal continuity in implementation of international treaties and agreements on human rights following proclamation of independence of Montenegro has been one of the *main conditions* that the Parliamentary Assembly of the Council of Europe (PACE) set for Montenegro, the Venice Commission has provided comments on the Constitutional Act's provisions that did not with sufficient clarity define that such treaties should be applied to legal relations established *also before proclamation of independence*, from the date when the international treaties were ratified by the State union of Serbia and Montenegro and had therefore become binding for Montenegro.

The Venice Commission considers that the provision of Art. 5 of the Constitutional Act providing for application of the international treaties to „legal relations arising after their signing“ is insufficiently clear.

Therefore, the Venice Commission advises that it should be clearly defined that international human rights treaties to which Montenegro has become a state party (as member state of the former state union of Serbia and Montenegro) before 3 June 2006, should apply to legal relations originating after the date of ratification of those agreements by the state union. It has been advised that the interpretation of this provision be brought to the knowledge of the Montenegrin courts and public.

According to my opinion the point made by the Venice Commission is legally correct.

Montenegro has adhered to the European Convention of Human Rights in December 2003, and the state union of Serbia and Montenegro ratified the Convention on 3 March 2004 and hence it should be correct to define, in the new Constitution and the Constitutional Act that this Convention

and other treaties from this field *should apply from the moment when they had become obligatory for Montenegro - by the fact of their ratification within the former state union.*

It would be necessary, however, to clarify whether there has been incoherence in views of the two bodies of the Venice Commission, the Committee of Ministers and Council of Europe on the issue of the application of the European Convention on Human Rights to Montenegro.

Namely, one may conclude from the document sent by the European Court for Human Rights (ECtHR) to the citizens of Montenegro who had filed applications to that Court, that there has been a decision of the Committee of Ministers of the Council of Europe that is *not in accordance with the conclusion of the Venice Commission, or has not been adequately interpreted by the Registry of the ECtHR in their communication to the applicants from Montenegro.*

This should be clarified by all means and to that end I have already asked the ECtHR that the Grand Chamber of the Court take a stand regarding this issue. Also, I am using this opportunity to ask the representatives of the Venice Commission to undertake measures towards reaching an understanding on the issue with the Committee of Ministers. I will be forwarding the opinion of the Venice Commission to the ECtHR to take it into account, as well.

Namely, the Registry of the ECtHR states that the Committee of Ministers of the Council of Europe in its decision of 14 May 2007 decided that the European Convention on Human Rights, as well as its protocols, apply with regard to Montenegro *retroactively from 6 June 2006*, and not, as the Venice Commission concludes in accordance with the requests of the Parliamentary Assembly of the Council of Europe, from the moment the Convention became obligatory for Montenegro by ratification of the state union of Serbia and Montenegro, i.e. *as of 3 March 2004.*

I believe that the call for the retroactive application of the Convention is wrong. The Venice Commission has rightfully acknowledged that what is at stake here is not the retroactive application of the Convention and other international treaties, but the transitional provisions of the new Constitution.

Concretely, the ECtHR calls upon citizens who applied to that Court before 3 June 2006 to name the state against which they complain to the Court, with a clear implication that, according to the decision of the Committee of Ministers the Convention with regard to Montenegro applies from 6 June 2006.



Practically, if the decision of the Committee of Ministers would be applied literally, as interpreted by the ECtHR, the citizens of Montenegro who applied to the Court between 4 March 2004 to 6 June 2006 would be deprived from the Court's protection, only because their applications have not been resolved in due time, and that would, according to my understanding, be legally absurd.

For the citizens of Montenegro, as for the citizens of Serbia, the jurisdiction of the ECtHR is undisputable for the period between 4 March 2004 to 6 June 2006 and the one, according to my opinion, should not be lost due to such an unclear and incoherent decision of the Committee of Ministers.

I am also delivering a copy of the information supplied by the ECtHR, cleared from the reference no. of the particular case.

### **Anthony Bradley:**

I am not able to respond on behalf of the Venice Commission to all the points made by Ms Cejovic, and I need not repeat the view already expressed by the Commission on article 5 of the Constitution Implementation Act. However, I confirm that the Commission attaches importance to the principle that the independence of Montenegro should not have the effect of depriving the Strasbourg Court of jurisdiction in respect of breaches of the European Convention on Human Rights that may have occurred on the part of public authorities in Montenegro between 3 March 2004 and 3 June 2006.

### **Editor's Comment:**

Following the round table debate on the issue, HRA has prepared an analysis of the issue of temporal validity of ECHR in Montenegro and the jurisdiction of the ECtHR and delivered it to the Venice Commission and the ECtHR with the end to ensure acceptance of 3 March 2004 as the date when the Convention became applicable to Montenegro especially regarding jurisdiction of the ECtHR.

In addition to the arguments promoted by Mrs. Čejović, we have emphasized that both the National Assembly and the Government officially confirmed that all international agreements ratified by Serbia and Montenegro would continue to apply to Montenegro following the proclamation of independence, as well as the date 3 March 2004 has been interpreted as the date when Montenegro became bound by the ECHR, as evident from the

Law on Protection of the Right to a Trial within a Reasonable Time from November 2007.<sup>96</sup>

Additionally, we have emphasized that according to the rules applicable to succession of international treaties on human rights, as determined by the Human Rights Committee, these treaties should be interpreted so that they continue to provide protection to the people connected to the territory that once became bound by the treaty to respect human rights, notwithstanding the later unification, secession or disappearance of the state in question.<sup>97</sup>

We also emphasized the example of the former Czechoslovakia, where in spite of the decision of Czech and Slovak Republics to retroactively consider themselves bound by the Convention from 1 January 1993, when both republics declared independence, the ECtHR decided on the applications against Czech and Slovak republics, respectively, in relation to violations occurring since 18 March 1992, the date when Czechoslovakia ratified the Convention and accepted the jurisdiction of the ECtHR.<sup>98</sup>

We accept that the European Court of Human Rights would take the same stand as in the case of Czech and Slovak Republics, no matter the resolutions of the Committee of Ministers that considered the date of proclamation of independence of Montenegro as the date of ratification of the Convention. Finally, only the Court is competent to decide its jurisdiction and finally answer this question.

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96 Article 44 of the Law states that the Law would be applied retroactively to all procedures initiated after 3 March 2004 and that the courts should take into account the duration of the proceedings before 3 March 2004. Also, the Explanatory Memo of the Law by the Ministry of Justice explicitly refers to the fact that Montenegro has been bound by the Convention starting from that date.

97 “The Human Rights Committee has consistently taken the view, as evidenced by its long-standing practice, that once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party, including dismemberment in more than one State or State succession or any subsequent action of the State party designed to divest them of the rights guaranteed by the Covenant.” General Comment No. 26: Continuity of Obligations, 08/12/97, CCPR/C/21/Rev.1/Add.8/Rev.1, para. 4.

98 *Human Rights treaties and succession of states*, Menno T. Kamminga, UNIDEM “The Status of International Human Rights Treaties”, Portugal, 2005, available at: [http://www.venice.coe.int/docs/2005/CDL-UD\(2005\)013rep-e.asp](http://www.venice.coe.int/docs/2005/CDL-UD(2005)013rep-e.asp)

## Competence of the Constitutional Court of Montenegro

**Darka Kisjelica**, Attorney at Law from Herceg-Novi:

The Constitution of Montenegro, adopted on 19<sup>th</sup> October 2007, already needs to be amended, especially in the Section which guarantees the protection of human and minority rights, as well as in the part related to the Constitutional Court.

Knowing the former jurisprudence of the Constitutional Court, the provision of the Article 150, paragraph 1 of the Constitution<sup>99</sup> cannot and will not, contrary to the expressed expectation of the Venice Commission, be observed as „actio popularis“. The Court itself decides on the admissibility of each „initiative“ for the initiation of a proceedings, and if the initiative is not accepted, then the decision on its essence will also be absent, which is a good way to avoid the deliberation on „sensitive issues“.

Although the provision of the Article 150, paragraph 2 of the Constitution prescribes who is entitled to initiate a proceedings for the assessment of constitutionality and legality before the Constitutional Court, for all other proceedings before the Constitutional Court the Article 149 items 3, 4, 6, 7, 8, 9<sup>100</sup> does not prescribe who can initiate such proceedings, whether there is an initiative or right to the initiation of a proceedings, or the provisions

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**99 Article 150, Initiation of the procedure to review constitutionality and legality:**

Any person may file an initiative to start the procedure for the review of constitutionality and legality. The procedure before the Constitutional Court for the review of constitutionality and legality may be initiated by the court, other state authority, local self-government authority and five Members of the Parliament. The Constitutional Court itself may also initiate the procedure for the review of constitutionality and legality.

During the procedure, the Constitutional Court may order to stop the enforcement of an individual act or actions that have been taken on the basis of the law, other regulation or general act, the constitutionality, i.e. legality of which is being assessed, if the enforcement thereof could cause irreparable damage.

**100 Article 149, para. 1, Responsibility:**

The Constitutional Court shall decide on the following:

- 1) Conformity of laws with the Constitution and confirmed and published international agreements;
- 2) Conformity of other regulations and general acts with the Constitution and the law;
- 3) Constitutional appeal due to the violation of human rights and liberties granted by the Constitution, after all other efficient legal remedies have been exhausted;
- 4) Whether the President of Montenegro has violated the Constitution;
- 5) The conflict of responsibilities between courts and other state authorities, between state authorities and local self-government authorities, and between the authorities of the local self-government units;
- 6) Prohibition of work of a political party or a non-governmental organization;
- 7) Electoral disputes and disputes related to the referendum, which are not the responsibility of other courts;
- 8) Conformity with the Constitution of the measures and actions of state authorities taken during the state of war or the state of emergency;
- 9) Performs other tasks stipulated by the Constitution.

of the Article 150, paragraph 1 and 2 of the Constitution are valid even for those proceedings. In that case, again, the constitutional complaint would not have any practical value.

In the context of the previous statements, one should also note the fact that both judges and the President of the Constitutional Court are elected upon the proposal of the President of the Republic by a simple Parliamentary majority, by which the exclusive influence of politics on the composition of the Constitutional Court was allowed, thus the ultimate conclusion being that the abovementioned shortcomings related to the right to the initiation of proceedings will probably not be applied in favour of Montenegrin citizens, but of the ruling political coalition.

Particularly disturbing are the recently adopted views of the Constitutional Court on the review of constitutionality and legality in relation to legal security and protection of citizens' rights, following the proclamation of the Constitution:<sup>101</sup>

„The Constitutional Court of Montenegro, at the meeting held on 29<sup>th</sup> January 2008 established:

## **VIEWS ON THE REVIEW OF CONSTITUTIONALITY AND LEGALITY FOLLOWING THE PROCLAMATION OF THE CONSTITUTION OF MONTENEGRO AND THE CONSTITUTIONAL LAW FOR THE IMPLEMENTATION OF THE CONSTITUTION OF MONTENEGRO**

1. The Constitutional Court cannot decide upon the compliance of laws and other regulations, prior to the expiration of the deadline for the harmonization of these laws and other regulations with the Constitution of Montenegro, established by the Constitutional law for the implementation of the Constitution of Montenegro.

2. The Constitutional Court can decide upon the compliance of laws and other regulations as a whole, even prior to the expiration of the deadline for the harmonization of laws and other regulations with the Constitution of Montenegro, established by the Constitutional law for the implementation of the Constitution of Montenegro, in case certain provisions of these laws and regulations have been amended as of the day of their coming into effect.

3. The Constitutional Court can deliberate on constitutionality and legality of the regulations for the application of laws following the expiry of the deadline for the harmonization of these regulations, established by the law for the application of which the same acts were enacted.

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<sup>101</sup> The views have been published on the Internet site of the Constitutional Court of Montenegro: [www.ustavnisudcg.yu](http://www.ustavnisudcg.yu)

4. The Constitutional Court cannot deliberate on the compliance of the regulations of Local self-government unit Council with the Constitution until the expiry of the deadline for their harmonization, established by the Law for the implementation of the Constitution of Montenegro.

5. The Constitutional Court of Montenegro, following the proclamation of the Constitution of Montenegro, cannot assess whether a law or another regulation or general act had been in compliance with the Constitution of the Republic of Montenegro, at the time when that Constitution was effective.“

In this way, since the Constitutional law for the implementation of the Constitution of Montenegro envisages three months, six months and one year deadline for the harmonization of laws and other regulations, and for the majority of laws even a two year deadline, the Constitutional Court suspended its activity for the following two years. By doing that, the legal order in Montenegro has been seriously endangered. The Constitutional Court, had it not self-restricted its activity, should:

- Protect human rights and fundamental freedoms on the basis of constitutional complaint;
- Direct the way laws should be harmonized with the Constitution within the coming two years;
- Give explanations which would serve the Committee for legislation as a platform for the enactment of laws;
- In the explanations of its decisions, give an example to the Supreme Court and other courts with regards to the interpretation of the laws enacted on the basis of the new Constitution.

As in the jurisprudence of other countries, the decisions and the case law of the Constitutional Court are widely quoted and serve as a model and basis for deliberation and making of other judicial decisions, efforts should be made for such good practice to be developed in Montenegro, as well, and therefore, the Constitutional Court is invited to change its views.

**Svetlana Budisavljević**, Attorney at Law from Podgorica:

At today's meeting, a frequently asked question was whether the new Constitution guaranteed human rights and freedoms to the extent they have been defined by the European Convention on Human Rights and Fundamental Freedoms. In that context the role and the obligation have been emphasized of the Constitutional Court to remedy through creative interpretation, and especially through the interpretation of the provisions

related to human rights, the shortcomings of the constitutional norm, which all the presenters have pointed out to.

The Constitutional Court in the new, as well as in the previous Constitution, is set as the highest instance for the protection of constitutionality and human rights and freedoms. The significance of its work, the establishing of respect and trust, does not depend solely on its constitutional position, but in the first place on the work of the very Court which is achieved through legal proceedings and substantiated and proper decisions, which is the only way to protect Constitutional values.

The competence of the Court comprises, as it did before, acting upon the constitutional complaint, with this institute set normatively now, as a potentially effective legal remedy. The Constitution guarantees the protection of human rights to the extent established in its provisions, as of the day of its enactment. This obligation, which is implied, ratifies international documents, which Montenegro is a signatory of.

A question is raised whether this obligation is just «a dead letter» with the fact that the Constitutional Court has taken an attitude (the above mentioned views, editor's remark) that it would not assess constitutionality and legality of acts within the deadline envisaged for their harmonization (two years as of the adoption of the Constitution). Whether citizens have thus their rights guaranteed by the Constitution deprived of during the coming two years? Whether for the Constitutional Court the principle of reasonable time trial applies? Whether the matter of deliberation upon constitutional complaints will become an issue, since due to the principle of connectivity in certain cases, the examination is spread onto the assessment of the general act on the basis of which individual act was adopted which violates human rights?

In the case law of the Constitutional Courts, and in the theory of law, there are similar views, with regards to the assessment of constitutionality and legality of acts during the harmonization period. However, one should have in mind that these views get changed through practice and theory of law, especially when human rights are at stake. Their protection is set as priority, thus the assessment of the legality of the acts which violate human rights and fundamental freedoms is not postponed!

**Anthony W. Bradley:**

The issues raised by Darka Kisieljica and Svetlana Budisavljević are important to an assessment of the competence of the Constitutional Court. I limit my comments to two matters, and I make those comments in my personal capacity; they are not necessarily the views of the Venice Commission.

First, Darka Kisieljica draws attention to the potential difficulty of interpreting Article 150 of the Constitution that arises from paragraph (1): this states that ‘any person’ may file an initiative to start proceedings for the assessment of constitutionality and legality, but paragraph (2) states in some detail who may initiate such proceedings. The Venice Commission stated in its Opinion of 14 December 2007 that paragraph (1) must be interpreted as the basis for an ‘*actio popularis*’. It would be unfortunate if the Constitutional Court were to take a view that issues of constitutionality and legality could not be raised by any citizen, group or entity with a definite interest in those issues. This would deprive Article 150 (1) of its meaning. The Court is the last resort for determining issues of constitutional law that may be important to all or some of the people of Montenegro. It should not be reluctant to determine these issues, especially where no other efficient remedy exists. It is for the Constitutional Court to fulfil the role assigned to it by the Constitution. It is difficult to see what harm is caused to Montenegro if the Court deals with the merits of a constitutional issue, rather than rejecting a claim on a preliminary or other procedural point, such as the view that proceedings were initiated by someone with insufficient interest. This does not, however, mean that the Court should allow its procedure to be abused - as it might be if someone with no conceivable interest in raising an obscure issue of constitutionality or legality comes to the Court, and the public interest will gain nothing from the decision of that issue. The experience of other countries is that this is a rare occurrence: the issues raised by such attempts can generally be disposed of in a definite way without elaborate legal reasoning being necessary. Courts in other countries have had to become aware of what is more common, namely that the state authorities sometimes prefer to defend their actions by relying on procedural points, especially when the authorities do not wish the courts to deal with the constitutional issues on their merits.

The second issue, also raised by Darka Kisieljica, relates to the decision of the Court on 29 January 2008 to the effect that the Court cannot decide on the compliance of laws and other regulations with the Constitution before the expiration of the period of time provided by the Constitutional Law for the



harmonization of laws. The Constitutional Law was authorised in general terms by article 158 of the Constitution (Constitutional law for the enforcement of the Constitution). The periods of time allowed for harmonization may at first sight appear to justify the course of action taken by the Court; certainly, it can be understood that some areas of public administration may need to be revised to take account of new constitutional provisions. However, the Court's recent decision has the potential danger of setting aside provisions of the Constitution for up to two years, as Svetlana Budisavljević has indicated. In particular, in considering the protection of human rights guaranteed by international conventions, these laws already applied to Montenegro (as a member state of the State Union) between 2003 and independence in June 2006. It must be very doubtful whether the Constitutional Law in October 2007 could properly remove or reduce the level of protection that existed between 2003 and 2006. An indication to the contrary is found in Article 5 of the Constitutional Law itself. Moreover, one principle that governed preparation of the Constitution of Montenegro was the guarantee that 'the efficient constitutional protection of human rights must be ensured'. The Court's recent ruling must be read against this background. If necessary, it must be read as being subject to exceptions to enable the Court to continue giving protection to human rights.

An applicant to the Court must be free to argue (if the case so requires) that circumstances exist which would make a two year delay harsh and unjust, particularly when a law or regulation, directly or indirectly, violates a fundamental right guaranteed by international law.

*Editor's supplement:*

A judge of the Constitutional Court of Montenegro, who was present at the meeting at the moment when the issue of the stated views of the Constitutional Court and the competence of this court with regards to the protection of human rights was raised, refrained from commenting on the views.

From the discussion at the end of February 2008 until the end of July 2008, when this book was submitted for printing, the Constitutional Court of Montenegro has proclaimed itself incompetent for the assessment of constitutionality and legality on several occasions, due to the fact that the proposals for the assessment of constitutionality were submitted on the basis of the provisions of the former Constitution which became ineffective in



October 2007 with the adoption of the new Constitution.<sup>102</sup>

Analyzing the Court proceedings, especially through two rejected initiatives<sup>103</sup>, the cause for concern is that the Constitutional Court declared itself incompetent and refused to examine the compliance of laws not only with the new Constitution, but also with already ratified international treaties, which it is expressly competent for according to the new Constitution, although these international treaties continuously obliged Montenegro even during the period of effectiveness of the former Constitution, just as they do nowadays.

Namely, the rights to a peaceful enjoyment of property and to the protection from discrimination, upon which the criticism of the laws is based in the rejected initiatives, apart from the fact that these are protected by the ratified international human rights treaties, which have been obliging Montenegro for quite some time, are also protected by the new, as well as the former Constitution. Therefore, it has been justified to expect from the Constitutional Court to provide protection in accordance with the continuity of the effectiveness of human rights in Montenegro, on the basis of the submitted proposals. Unfortunately, the decisions on the refusal of competence do not instil hope that the Constitutional Court will provide an effective legal remedy for the protection of human rights, on which the European Court of Human Rights will then be giving its ultimate judgement.

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102 "They cannot decide on the basis of the former Constitution -Constitutional Court rejected or stopped proceedings regarding 18 proposals and initiatives", daily Vijesti, 4 July 2008; "Uskoković: we will complain to the Strasbourg Court -Montenegrin Constitutional Court stopped the procedure of the constitutional review of the new Law on Restitution", Vijesti, 18 July 2008.

103 Decision of the Constitutional Court U.No.101/07, from 20 May 2008, stopping the procedure for the constitutional review of the provisions of arts. 1, 3 and 31 of the Law on the amendments of the Law on restitution of the removed property rights and compensation (Official Gazette of the Republic of Montenegro, No. 49/07) and the Decision U. No. 127/06 of 3 July 2008, stopping the procedure initiated by the proposal of the Ombudsman for constitutional review of the Article 572 of the Code of Criminal Procedure, that provides for discrimination of persons regarding enjoyment of the right to a limited duration of detention, depending on whether the detention had been determined at the time of enforcement of the old or the new Code of Criminal Procedure.



# Comparative analysis



# Human Rights Provisions of the Constitution of Montenegro with Comments by the Venice Commission and the Human Rights Action<sup>104</sup>

## **The State, Article 1**

Montenegro is an independent and sovereign state, with the republican form of government.

Montenegro is a civil, democratic, ecological and the state of social justice, based on the rule of law.

### HUMAN RIGHTS ACTION:

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, Articles 1 and 3).<sup>105</sup>

## **Human rights and liberties, Article 6**

Montenegro shall guarantee and protect rights and liberties.

The rights and liberties shall be inviolable.

Everyone shall be obliged to respect the rights and liberties of others.

### HUMAN RIGHTS ACTION:

Although the title of Article 6 is „Human Rights and Freedoms“, 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

<sup>104</sup> The comments have been presented in the following order: Opinion of the Venice Commission on the Constitution of Montenegro, Strasbourg, 20 December 2007 (occasionally supplemented by the Interim Opinion of the Venice Commission on the Draft Constitution of Montenegro, Strasbourg, 5 June 2007), followed by the opinion of the Human Rights Action working group, Podgorica, 12 November 2007. If the Venice Commission or the Human Rights Action did not comment on a particular article, their comments to the article had been omitted.

<sup>105</sup> *“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).

rights differ from all other “rights and freedoms” also laid down and protected by the state. Specifically, in Article 17, para. 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)<sup>106</sup>, 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”.

#### **Prohibition of discrimination, Article 8**

Direct or indirect discrimination on any grounds shall be prohibited.

Regulations and introduction of special measures aimed at creating the conditions for the exercise of national, gender and overall equality and protection of persons who are in an unequal position on any grounds shall not be considered discrimination.

Special measures may only be applied until the achievement of the aims for which they were undertaken.

#### VENICE COMMISSION:

1. The text of this general clause on prohibition of discrimination has been amended to reflect the concern previously expressed by the Venice Commission that special measures, such as those set out in Article 4 of the Framework Convention for the Protection of National Minorities, should not be seen as discrimination. The text is therefore now in conformity with the Framework Convention. It is also in conformity with ECRI Recommendation 7 (2002).

#### HUMAN RIGHTS ACTION:

It would have been logical that the clause relating to the prohibition

<sup>106</sup> Official Gazette of SCG, International Treaties, 9/2003.

of discrimination had commenced with the paragraph setting forth that “Everyone shall be equal before the law“, inserted in Article 17, par. 2, thus it should be transferred to Article 8, par 1.

### **Legal order, Article 9**

The ratified and published international agreements and generally accepted rules of international law shall make an integral part of the internal legal order, shall have the supremacy over the national legislation and shall be directly applicable when they regulate the relations differently from the internal legislation.

### VENICE COMMISSION:

2. Article 9 provides that international treaties and agreements shall form an integral part of the internal legal order, have supremacy in case of conflict with domestic law, and be directly applicable in case of conflict with domestic law. This provision, which is line with one of the relevant commitments which Montenegro undertook vis-à-vis PACE (point V), is to be welcome. It is of importance also for minority protection and for the status of the Framework Convention for the Protection of National Minorities. As was previously said (Interim opinion on the draft constitution of Montenegro, CDL-AD(2007)017, § 17, hereinafter “the interim opinion”), the words “when they regulate the relations differently from the internal legislation” were unnecessary. A reference to the need to implement human rights treaties in the light of the practice of the respective monitoring bodies would have been welcome.

### HUMAN RIGHTS ACTION:

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 9, 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 provided that international standards should be applied directly, without any restrictions (see Article 10 of the Constitutional Charter of SCG).

**Montenegrin citizenship, Article 12**

In Montenegro there shall be a Montenegrin citizenship.

Montenegro shall protect the rights and interests of the Montenegrin citizens.

Montenegrin citizen shall not be expelled or extradited to other state, except in accordance with the international obligations of Montenegro.

VENICE COMMISSION:

3. Paragraph 3 of this provision provides for the possibility of extraditing Montenegrin citizens “in conformity with international obligations”, which is an important clause, for example for co-operation with the International Criminal Court.

HUMAN RIGHTS ACTION:

The sentence contained in Article 12, par. 2: “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).

**Grounds and equality, Article 17**

Rights and liberties shall be exercised on the basis of the Constitution and the confirmed international agreements.

All shall be deemed equal before the law, regardless of any particularity or personal feature.

VENICE COMMISSION:

4. This provision has been duly supplemented, as recommended by the Venice Commission, and now includes a reference to the applicable international treaties. It would have been preferable that it also mentions the “generally accepted principles of international law”.

HUMAN RIGHTS ACTION:

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 Freedoms<sup>107</sup> 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 understand appropriately without any knowledge of their interpretation in the practice of such international bodies. It is by inserting this reference

<sup>107</sup> *Official Gazette of SCG, No. 6/03.*

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.

**Protection, Article 19**

Everyone shall have the right to equal protection of the rights and liberties thereof.

HUMAN RIGHTS ACTION:

The text of this Article should be supplemented 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.

**Legal remedy, Article 20**

Everyone shall have the right to legal remedy against the decision ruling on the right or legally based interest thereof.

VENICE COMMISSION:

5. Unfortunately, this provision has remained unchanged since the previous Article 18 of the draft Constitution. The Venice Commission had indicated (interim opinion, § 29) that it did not correspond fully to Article 13 ECHR, nor to the opinion of the Parliamentary Assembly on Accession

of the Republic of Montenegro to the Council of Europe (No. 261(2007)) (“PACE opinion”), 19.2.2.2. If breaches of Article 13 ECHR are to be avoided, it is essential that this provision be interpreted by the Montenegrin courts in a manner that gives full effect to the Convention requirement.

#### HUMAN RIGHTS ACTION:

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”.

#### **Environment, Article 23**

Everyone shall have the right to a sound environment.

Everyone shall have the right to receive timely and full information about the status of the environment, to influence the decision-making regarding the issues of importance for the environment, and to legal protection of these rights.

Everyone, the state in particular, shall be bound to preserve and improve the Environment.

#### **Right to work, Article 62**

Everyone shall have the right to work, to free choice of occupation and employment, to fair and human working conditions and to protection during unemployment.

#### **Consumer protection, Article 70**

The state shall protect the consumer.

Actions that harm the health, security and privacy of consumers shall be prohibited.

#### VENICE COMMISSION:

6. The Venice Commission had expressed the view that it would have been preferable to avoid that the Constitution contain merely programmatic rules, so that certain individual rights should instead be formulated as state objectives (interim opinion, §§ 20, 83, 87).

7. The Montenegrin authorities have chosen to maintain the formulation they had put in the draft Constitution.

### **Limitation of human rights and liberties, Article 24**

Guaranteed human rights and freedoms may be limited only by the law, within the scope permitted by the Constitution and to such an extent which is necessary to meet the purpose for which the limitation is allowed, in an open and democratic society.

Limitations shall not be introduced for other purposes except for those for which they have been provided for.

#### VENICE COMMISSION:

8. This provision on the conditions for restricting the exercise of fundamental rights and freedoms has been drastically improved in respect of the draft constitution, and now contains the necessary elements of legality, legitimate aims and proportionality in a democratic society, thus reflecting correctly the European Convention on Human Rights. It meets the recommendations of the Venice Commission (interim opinion, § 32).

9. This general clause applies to all articles of the Constitution concerning fundamental rights and freedoms. This makes it unnecessary to repeat the three conditions in all subsequent articles.

#### HUMAN RIGHTS ACTION:

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.

Regarding universal application of this clause, there are absolute human rights the restriction of which is absolutely prohibited, such as the prohibition of torture, slavery etc., and with respect to such distinctions, all doubts should have been avoided.

### **Temporary limitation of rights and liberties, Article 25**

During the proclaimed state of war or emergency, the exercise of certain human rights and freedoms may be limited, to the necessary extent.

The limitations shall not be introduced on the grounds of sex, nationality, race, religion, language, ethnic or social origin, political or other beliefs, financial standing or any other personal feature.

There shall be no limitations imposed on the rights to: life, legal remedy and legal aid; dignity and respect of a person; fair and public trial and the principle of legality; presumption of innocence; defense; compensation of damage for illegal or ungrounded deprivation of liberty and ungrounded conviction; freedom of thought, conscience and religion; entry into marriage.

There shall be no abolishment of the prohibition of: inflicting or encouraging hatred or intolerance; discrimination; trial and conviction twice for one and the same criminal offence (*ne bis in idem*); forced assimilation.

Measures of limitation may be in effect at the most for the duration of the state of war or emergency.

#### VENICE COMMISSION:

10. The term “proclaimed” has been added in the first paragraph, to meet the recommendation of the Venice Commission in this respect (interim opinion, § 34). The other recommendations of the Venice Commission have not been taken onboard.

#### HUMAN RIGHTS ACTION:

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 Rights<sup>5</sup> (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.

**Prohibition of death penalty, Article 26**

The death penalty shall be prohibited in Montenegro.

VENICE COMMISSION:

11. This provision only prohibits the death penalty. However, it does not state the right to life set out in Article 2 ECHR, a right which imposes a weighty obligation on state authorities to inquire into the reasons for the loss of life. Nor does this Article mention the possibility, preserved by Article 2 ECHR, of depriving of life as a consequence of use of force when absolutely necessary in defence 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.

HUMAN RIGHTS ACTION:

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.

#### **Bio-medicine, Article 27**

The right of a person and dignity of a human being with regard to the application of biology and medicine shall be guaranteed.

Any intervention aimed at creating a human being that is genetically identical to another human being, living or dead shall be prohibited.

It is prohibited to perform medical and other experiments on human beings, without their permission.

#### VENICE COMMISSION:

12. This provision reflects most of the relevant recommendations of the Venice Commission.

## HUMAN RIGHTS ACTION:

Paragraph 1 is unnecessary as it is not concrete enough. In para. 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).

### **Dignity and inviolability of person, Article 28**

The dignity and security of a man shall be guaranteed.

The inviolability of the physical and mental integrity of a man, and privacy and individual rights thereof shall be guaranteed.

No one can be subjected to torture or inhuman or degrading treatment.

No one can be kept in slavery or servile position.

## VENICE COMMISSION:

13. The provision certainly goes further than previously in meeting the Commission’s recommendations (interim opinion, § 39). It now sets out the prohibition of torture and inhuman and degrading treatment, but not the prohibition of inhuman and degrading punishment, as well as the prohibition of slavery and servitude. Forced labour is prohibited by article 63 (interim opinion, §§ 93 and 94).

## HUMAN RIGHTS ACTION:

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.

### **Deprivation of liberty, Article 29**

Everyone shall have the right to personal liberty.

Deprivation of liberty is allowed only for reasons and in the procedure provided for by law.

Person deprived of liberty shall be notified immediately of the reasons for the arrest thereof, in own language or in the language he/she understands.

Concurrently, person deprived of liberty shall be informed that he/she is not obliged to give any statement.

At the request of the person deprived of his/her liberty, the authority shall immediately inform about the deprivation of liberty the person of own choosing of the person deprived of his/her liberty.

The person deprived of his/her liberty shall have the right to the defense counsel of his/her own choosing present at his interrogation.

Unlawful deprivation of liberty shall be punishable.

### VENICE COMMISSION:

14. This provision now duly refers to the need for any deprivation of liberty to be in accordance with a procedure prescribed by law; instead of stating the only permissible grounds for deprivation of liberty, as stated in article 5 ECHR paragraph 1, it refers to “reasons provided for by law”. Thanks to the direct applicability of the ECHR, the law will have to conform to Article 5 § 1 ECHR, but it would have been preferable to state such grounds in the constitution.

15. Article 29 § 7 states that “Unlawful deprivation of liberty is punishable”. It is unclear whether it is intended to make all breaches of article 26 a criminal offence. If it is so, would it have that effect without further legislation? The immediate consequence of unlawful deprivation of liberty must be release, and this should have been stated explicitly.

## HUMAN RIGHTS ACTION:

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).

### **Detention, Article 30**

Person suspected with reasonable doubt to have committed a crime may, on the basis of the decision of the competent court, be detained and kept in confinement only if this is necessary for the pre-trial procedure.

Detainee shall be given the explained decision of detention at the time of being placed in detention or at the latest 24 hours from being put in detention.

Detainee shall have the right of appeal against the decision of detention, upon which the court shall decide within 48 hours.

The duration of detention shall be reduced to the shortest possible period of time.

Detention by the decision of first-instance court may last up to three months from the day of detention, and by the decision of a higher court, the detention may be extended for additional three months.

If no indictment is raised by that time, the detainee shall be released.

Detention of minors may not exceed 60 days.

## VENICE COMMISSION:

16. This provision has not been modified since the draft constitution. The Venice Commission had recommended to make provision for the possibility of seeking more frequent review of the detaining decisions and to insert an express reference to the right of detainees to be released on bail (this is only implicit in the first paragraph).

## HUMAN RIGHTS ACTION:

Lacking is 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).

### **Fair and public trial, Article 32**

Everyone shall have the right to fair and public trial within reasonable time before an independent and impartial court established by the law.

## VENICE COMMISSION:

17. As recommended by the Venice Commission, the guarantee of an “independent and impartial tribunal established by law” has been added.

## HUMAN RIGHTS ACTION:

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”*.

### **Right to defense, Article 37**

Every one shall be guaranteed the right to defense, and especially: to be informed in the language he/she understands about the charges against thereof; to have sufficient time to prepare defense and to be defended personally or through a defense attorney of his/her own choosing.

#### VENICE COMMISSION:

18. This provision has been modified following the remarks of the Venice Commission (interim opinion, §§ 55 and 56). Two fundamental aspects of the right of defence have been added (the right to be informed promptly, in a language which one understands and in detail, of the accusation and the right to have adequate time and facilities for the preparation of the defence. However, the text omits some important rights of defence specified in Article 6 § 3 ECHR, in particular rights in respect of the attendance and examination of witnesses and the right to have the free assistance of an interpreter.

#### HUMAN RIGHTS ACTION:

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).

#### **Compensation of damage for illegal action, Article 38**

Person deprived of liberty in an illegal or ungrounded manner or convicted without grounds shall have the right to the compensation of damage from the state.

#### VENICE COMMISSION:

19. This provision rightly secures the rights stated in paragraph 5 of Article 5 ECHR and in Article 3 of Protocol no. 7.

#### HUMAN RIGHTS ACTION:

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 *Thoma 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.

**Electoral right, Article 45**

The right to elect and stand for elections shall be granted to every citizen of Montenegro of 18 years of age and above with at least a two-year residence in Montenegro.

The electoral right shall be exercised in elections.

The electoral right shall be general and equal.

**VENICE COMMISSION:**

20. It would have been preferable to add a formula setting out in general terms the necessity of ensuring effective participation of minorities in public life (Interim opinion, § 65).

**Freedom of expression, Article 47**

Everyone shall have the right to freedom of expression by speech, writing, picture or in some other manner.

The right to freedom of expression may be limited only by the right of others to dignity, reputation and honor and if it threatens public morality or the security of Montenegro.

**Freedom of press, Article 49**

Freedom of press and other forms of public information shall be guaranteed.

The right to establish newspapers and other public information media, without approval, by registration with the competent authority, shall be guaranteed.

The right to a response and the right to a correction of any untrue, incomplete or incorrectly conveyed information that violates a person's right or interest and the right to compensation of damage caused by the publication of untruthful data or information shall be guaranteed.

**VENICE COMMISSION:**

21. While these two Articles give effect to many aspects of Article 10 ECHR, it would have been preferable if they could have been drafted in a way more closely corresponded to the Convention. The Articles give emphasis to the protection of "dignity, reputation and honour" and the provision of a remedy for the publication of untrue, incomplete or incorrectly conveyed information that does not necessarily represent the Strasbourg Court's approach to Article 10 ECHR.

## HUMAN RIGHTS ACTION:

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.

### **Prohibition of organizing, Article 54**

Political organizing in public bodies shall be prohibited.

A judge of the Constitutional Court, a judge, a state prosecutor and his deputy, an Ombudsman, a member of the Council of the Central Bank, a member of the Senate of the State Audit Institution, a professional member of the Army, Police and other security services shall not be a member of any political organization.

Political organizing and actions of foreign nationals and political organizations with the seat outside of Montenegro shall be prohibited.

## VENICE COMMISSION:

22. The Venice Commission’s previous remarks concerning this provision were regrettably not taken into consideration, with the exception of the lifting of the prohibition for the listed categories of civil servants to express their political beliefs publicly (Interim opinion, §§ 77-79).

## HUMAN RIGHTS ACTION:

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).

**Right to address international organisations, Article 56**

Everyone shall have the right of recourse to international institutions for the protection of own rights and freedoms guaranteed by the Constitution.

VENICE COMMISSION:

23. The title of this provision has been duly clarified.

HUMAN RIGHTS ACTION:

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).

**Right of recourse, Article 57**

Everyone shall have the right of recourse, individually or collectively with others, to the state authority or the organisation exercising public powers and receive a response.

No one shall be held responsible, or suffer other harmful consequences due to the views expressed in the recourse, unless having committed a crime in doing so.

VENICE COMMISSION:

24. This provision has been duly complemented by the words "individually or collectively". However, it would have been preferable if the statement of the right of recourse had not been qualified by the potentially intimidating phrase "unless having committed a crime in doing so".



**Property<sup>108</sup>, Article 58**

Property rights shall be guaranteed.

No one shall be deprived of or restricted in property rights, unless when so required by the public interest, with rightful compensation.

Natural wealth and goods in general use shall be owned by the state.

**VENICE COMMISSION:**

25. The right to property has duly been moved to the chapter on human rights. The possibility of regulating the use of property has been duly added. “Fair” compensation has duly replaced the previously foreseen compensation “at market value”. There is no more clause on general state property of “assets of special historical importance”, which is to be welcomed (Interim opinion, §§ 107-110).

**HUMAN RIGHTS ACTION:**

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

**Protection of mother and child, Article 73**

Mother and child shall enjoy special protection.

The state shall create the conditions that encourage childbirth

**HUMAN RIGHTS ACTION:**

A definition of the child is lacking. 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.

<sup>108</sup> The term “*svojina*” used in the Constitution, does not correspond to a wider term “*imovina*” of the official translation of the ECHR Art. 1 of the Protocol 1 (*Official Gazette of SCG, International Treaties, 9/2003*), nor with the meaning of “property” as defined by the jurisprudence of the ECtHR, encompassing not only ownership rights over objects, but also property rights, such as the right of use, detention, *usus fructus*, proprietary claims, etc.

**Right to Schooling (and not to “education” as has been translated for the Commission), Article 75, para. 1**

The right to schooling under same conditions shall be guaranteed.

**HUMAN RIGHTS ACTION:**

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”.

**Proposing laws and other acts, Article 93, paras. 1 and 2**

The right to propose laws and other acts shall be granted to the Government and the Member of the Parliament.

The right to propose laws shall also be granted to six thousand voters, through the Member of the Parliament they authorized.

**HUMAN RIGHTS ACTION:**

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. SPECIAL - MINORITY RIGHTS**

### **Protection of identity, Article 79**

Persons belonging to minority nations and other minority national communities shall be guaranteed the rights and liberties, which they can exercise individually or collectively with others, as follows:

- 1) the right to exercise, protect, develop and publicly express national, ethnic, cultural and religious particularities;
- 2) the right to choose, use and publicly post national symbols and to celebrate national holidays;
- 3) the right to use their own language and alphabet in private, public and official use;
- 4) the right to education in their own language and alphabet in public institutions and  
the right to have included in the curricula the history and culture of the persons belonging to minority nations and other minority national communities;
- 5) the right, in the areas with significant share in the total population, to have the local self-government authorities, state and court authorities carry out the proceedings in the language of minority nations and other minority national communities;
- 6) the right to establish educational, cultural and religious associations, with the material support of the state;
- 7) the right to write and use their own name and surname also in their own language and alphabet in the official documents;
- 8) the right, in the areas with significant share in total population, to have traditional local terms, names of streets and settlements, as well as topographic signs written in the language of minority nations and other minority national communities;
- 9) the right to authentic representation in the Parliament of the Republic of Montenegro and in the assemblies of the local self-government units in which they represent a significant share in the population, according to the principle of affirmative action;
- 10) the right to proportionate representation in public services, state authorities and local self-government bodies;
- 11) the right to information in their own language;
- 12) the right to establish and maintain contacts with the citizens and associations outside of Montenegro, with whom they have common national and ethnic background, cultural and historic heritage, as well as religious beliefs;
- 13) the right to establish councils for the protection and improvement of special rights.

### **Prohibition of assimilation, Article 80**

Forceful assimilation of the persons belonging to minority nations and other minority national communities shall be prohibited.

The state shall protect the persons belonging to minority nations and other minority national communities from all forms of forceful assimilation.

#### VENICE COMMISSION:

26. It would have been preferable not to use the word “special” in the title.

27. Articles 79 and 80 of the adopted constitution are rather comprehensive; together, they appear to cover the main minority rights as contained in the European Framework convention.

28. It would have been preferable to replace the term “proportional” in paragraph 10 (“proportional” representation of minorities was already foreseen by the 1992 Constitution of the Republic of Montenegro) by “fair” or “adequate”.

29. There is no definition of a minority nation or community in the Constitution. The Commission in this connection notes, as it has previously done, that, unlike the Constitution, the Law on Minority Rights adopted in 2006 contains a citizenship-based definition of national minority in spite of the criticism expressed in this regard by the Venice Commission (CDL-AD(2004)026, §§ 31-36)<sup>109</sup>. The law should be amended and the word “citizen” taken out of the definition. Indeed, the scope of the minority rights should be understood in an inclusive manner and these rights should be restricted to citizens only to the extent necessary.

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<sup>109</sup> See also the Venice Commission’s Report on non-citizens and minority rights, CDL-AD(2007)001.

## Table A:

### *Comparative Table of European Convention on Human Rights and Montenegro Constitution*

These tables have been prepared to help in linking human rights provisions in the Constitution to related rights in the European Convention on Human Rights. The texts often differ in the way in which they approach a particular right. Since the Convention has direct effect in the law of Montenegro, it is desirable that where possible the Constitution should be interpreted in a manner that is consistent with the case-law of the European Court of Human Rights. These tables do not cover international documents apart from the European Convention on Human Rights.

<b>ECHR Article</b>	<b>Title of right</b>	<b>Montenegro Constitution Article</b>	<b>Montenegro Constitution Title</b>
2	Right to life	26 28	Prohibition of death penalty Dignity and inviolability of persona
3	Prohibition of torture	[27] 28 31 [44]	Bio-medicine] <sup>110</sup> Dignity and inviolability of persona Respect for person [Right to asylum] <sup>111</sup>
4	Prohibition of slavery and forced labour	28 63	Dignity and inviolability of persona Prohibition of forced labour
5	Right to liberty and security	29 30 31 38	Deprivation of liberty Detention Respect for person Compensation of damage for illegal action

6	Right to a fair trial	21 32 35 36	Legal aid Fair and public trial Presumption of innocence Ne bis in idem
	Protocol 7, Art 4 Right not to be tried or punished twice	37 118 120	Right to defence Principles of the judiciary Publicity of trial
7	No punishment without law	33 34 147	Principle of legality More lenient law Prohibition of ex post facto effect (retroactive effect)
8	Right to respect for private and family life	40 41 42 43	Right to privacy Inviolability of home Confidentiality of correspondence Personal data
9	Freedom of thought, conscience and religion	14 46 48	Separation of the religious communities from the State Freedom of thought, conscience and religion Objection of conscience
10	Freedom of expression	47 49 50 51 76	Freedom of expression Freedom of press Prohibition of censorship Access to information Freedom of creation
11	Freedom of assembly and association	52 53 54 55 66	Freedom of assembly Freedom of association Prohibition of organizing Prohibition of operation and establishment Strike

12	Right to marry	71	Marriage
13	Right to an effective remedy	20 [57]	Legal remedy Right of recourse] <sup>112</sup>
14	Prohibition of discrimination	8	Prohibition of discrimination
Protocol 12, Art. 1	General prohibition of discrimination	17	Grounds and equality
Protocol 7, Art. 5	Equality between spouses	18 19	Gender equality Protection
15	Derogation in time of emergency	25	Temporary limitation of rights and liberties
Protocol 1, Art 1	Protection of property	58 60 139	Property Right to succession Principles
Protocol 1, Art 2	Right to education	75	Schooling
Protocol 1, Art 3	Right to free elections	45	Electoral right
Protocol 4, Art. 1	Prohibition of imprisonment for debt		
Protocol 4, Art 2	Freedom of movement	39	Movement and residence
Protocol 4, Art 3	Prohibition of expulsion of nationals	12	Montenegrin citizenship
Protocol 4, Art 4	Prohibition of collective expulsion of aliens	44	Right to asylum
Protocol 7, Art. 1	Procedural safeguard relating to expulsion of aliens		
Protocol 6, Art. 1	Abolition of the death penalty	26	Prohibition of death penalty
Protocol 7, Art. 2	Right to appeal in criminal matters	20	Legal remedy

Protocol 7, Art. 3	Compensation for wrongful conviction	38	Compensation of damage for illegal action
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110 Provisions in brackets are indirectly related to particular Human Right guaranteed by the Convention.

111 Art. 44, para. 3 contains an important procedural safeguard against expulsion that may constitute torture.

112 Right of recourse may facilitate the enjoyment of the right to effective remedy. It also contains in para. 2 an important safeguard specifying that complaint of a breach of rights should not lead to punitive action.



## Table B:

### *Comparative Table of guarantees of the Montenegro Constitution and European Convention on Human Rights*

These tables have been prepared to help in linking human rights provisions in the Constitution to related rights in the European Convention on Human Rights. The texts often differ in the way in which they approach a particular right. Since the Convention has direct effect in the law of Montenegro, it is desirable that where possible the Constitution should be interpreted in a manner that is consistent with the case-law of the European Court of Human Rights. These tables do not cover international documents apart from the European Convention on Human Rights.

<b>Montenegro Constitution Article</b>	<b>Montenegro Constitution Title</b>	<b>ECHR Article</b>	<b>ECHR Title of right</b>
8	Prohibition of discrimination	14 Protocol 12, Art. 1 Protocol 7, Art. 5	Prohibition of discrimination General prohibition of discrimination Equality between spouses
12	Montenegrin citizenship	Protocol 4, Art 3	Prohibition of expulsion of nationals
14	Separation of the religious communities from the State	9	Freedom of thought, conscience and religion
17	Grounds and equality	14 Protocol 12, Art. 1	Prohibition of discrimination General prohibition of discrimination
18	Gender equality	14 Protocol 7, Art. 5	Prohibition of discrimination Equality between spouses

19	Protection	13 14	Right to effective remedy Prohibition of discrimination
20	Legal remedy	13 Protocol 7, Art. 2	Right to effective remedy Right to appeal in criminal cases
21	Legal aid	6	Right to a fair trial
25	Temporary limitation of rights and liberties	15	Derogation in time of emergency
26	Prohibition of death penalty	2 Protocol 6, Art 1	Right to life Abolition of the death penalty
27	Bio-medicine	2 3	Right to life Prohibition of torture
28	Dignity and inviolability of persona	2 3 4	Right to life Prohibition of torture Prohibition of slavery and forced labour
29	Deprivation of liberty	5	Right to liberty and security
30	Detention	5	Right to liberty and security
31	Respect for person	3 5	Prohibition of torture Right to liberty and security
32	Fair and public trial	6	Right to a fair trial
33	Principle of legality	7	No punishment without law
34	More lenient law	7	No punishment without law
35	Presumption of innocence	6	Right to a fair trial

36	Ne bis in idem	6 Protocol 7, Art. 4	Right to a fair trial Right not to be tried or punished twice
37	Right to defence	6	Right to a fair trial
38	Compensation of damage for illegal action	5 Protocol 7, Art. 3	Right to liberty and security Compensation for wrongful conviction
39	Movement and residence	Protocol 4 Art 2	Freedom of movement
40	Right to privacy	8	Right to respect for private and family life
41	Inviolability of home	8	Right to respect for private and family life
42	Confidentiality of correspondence	8	Right to respect for private and family life
43	Personal data	8	Right to respect for private and family life
44	Right to asylum	Protocol 4, Art 4 Protocol 7, Art. 1  [3]	Prohibition of collective expulsion of aliens Procedural safeguard relating to expulsion of aliens [Prohibition of torture] <sup>113</sup>
45	Electoral right	Protocol 1, Art 3	Right to free elections
46	Freedom of thought, conscience and religion	9	Freedom of thought, conscience and religion
47	Freedom of expression	10	Freedom of expression
48	Objection of conscience	9	Freedom of thought, conscience and religion
49	Freedom of press	10	Freedom of expression

50	Prohibition of censorship	10	Freedom of expression
51	Access to information	10	Freedom of expression
52	Freedom of assembly	11	Freedom of assembly and association
53	Freedom of association	11	Freedom of assembly and association
54	Prohibition of organizing	11	Freedom of assembly and association
55	Prohibition of operation and establishment	11	Freedom of assembly and association
57	Right of recourse <sup>114</sup>	13	Right to an effective remedy
58	Property	Protocol 1, art. 1	Protection of property
60	Right to succession	Protocol 1, art. 1	Protection of property
63	Prohibition of forced labour	4	Prohibition of slavery and forced labour
66	Strike	11	Freedom of assembly and association
71	Marriage	12	Right to marry
75	Schooling	Protocol 1, Art 2	Right to education
76	Freedom of creation	10	Freedom of expression
118	Principles of the judiciary	6	Right to a fair trial
120	Publicity of trial	6	Right to a fair trial
139	Principles	Protocol 1, Art 1	Protection of property

147	Prohibition of ex post facto effect (retroactive effect)	7	No punishment without law
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113 Art. 44, para. 3 contains an important procedural safeguard against expulsion that may constitute torture.

114 Right of recourse may facilitate the enjoyment of the right to effective remedy. It also contains in para. 2 an important safeguard specifying that complaint of a breach of rights should not lead to punitive action.



## Conclusions





## Round table conclusions

1. The Constitution should be interpreted in accordance with the human rights standards from the international agreements and the practice of international bodies competent for the monitoring of their implementation, like the European Court of Human Rights, Human Rights Committee, Committee against Torture, in order to ensure the protection of human rights in Montenegro in accordance with the minimum international standards and in order to prevent the stated bodies from establishing the responsibility of Montenegro for the violation of rights from international agreements.
2. Seriously consider the adoption of special Constitutional law on the application of human rights, which would precisely state the obligations of the state in relation to the human rights, represent human rights comprehensively in an appropriately detailed manner and secure their effective protection in Montenegro – the law is to be adopted with the constitutional amendments, initiated by the Human Rights Action.
3. Judges and prosecutors should be ensured the access not only to computers but also to professional contents and Internet communication, as well as to professional literature in Montenegrin language, whilst for the general needs it is necessary to organize regular translation of important judgements of the European Court of Human Rights, at least on annual level, having in mind that these judgments also represent the source of law.
4. Legal remedies against the violations of human rights, for which the Constitutional Court is competent in the last instance in relation to the constitutional complaint, must be secured in such a way that they become accessible, efficient and effective, that they ensure the return to the previous condition, and the elimination of the consequences of the violation of rights, as well as the compensation of non-pecuniary and pecuniary damages. The Constitutional Court is especially responsible for securing the continuity of the protection of human rights in accordance with the continuity of the validity of rights from the international human rights treaties in Montenegro.
5. On the occasion of the adoption of new laws one should have in mind the rights that are missing in the Constitution: right to appeal in each case of the deprivation of liberty by public authorities (habeas corpus),

right to the prohibition of inhuman and degrading punishment, right to the compensation for damages incurred through the violation of human rights by public authorities (especially in the case of torture, inhuman and degrading treatment or punishment), prohibition of detention due to the failure to discharge contractual obligations, full guarantee of rights to defence and fair trial, full guarantee of the right to life in relation to the effective investigation of the cause of death, and incorporate them into the new laws.

6. Constitutional guarantees of the right to correction, reply, and compensation for damage due to the publication of false information should be excluded from the Constitution, and in the meantime they should be interpreted in accordance with their legal restrictions and the case law of the European Court of Human Rights.

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<sup>115</sup> Judge of the European Court of Human Rights as of April 2008

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# Addendum





Strasbourg, 20 December 2007  
Opinion no. 392 / 2006

CDL-AD(2007)047  
Or. Engl.

*EUROPEAN COMMISSION  
FOR DEMOCRACY THROUGH LAW  
(VENICE COMMISSION)*

**OPINION  
ON THE CONSTITUTION OF MONTENEGRO**

Adopted by the Venice Commission  
at its 73rd Plenary Session  
(Venice, 14-15 December 2007)

On the basis of comments by

Mr Anthony BRADLEY (substitute member, the United Kingdom)

Mr Asbjørn EIDE (expert, Norway)

Mr Guido NEPPI MODONA (substitute member, Italy)

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## *I. Introduction*

1. At its 71st Plenary Session (Venice, 1-2 June 2007), the Venice Commission adopted an Interim Opinion on the draft constitution of Montenegro (CDL-AD(2007)017), which was based on a draft text of the constitution which had been submitted to the Commission on 16 April 2007 (CDL(2007)053). This opinion was transmitted to the Parliament of Montenegro.
2. In August 2007, the speaker of the parliament of Montenegro submitted to the Commission a revised version of the draft constitution. The rapporteurs analysed this text and engaged in discussions with the parliament of Montenegro with a view to improving it.
3. On 19 October 2007, the parliament of Montenegro adopted the constitution (CDL(2007)105). It also adopted the Constitutional law for the implementation of the constitution of the Republic of Montenegro (CDL(2007)015, appendix).
4. It is recalled that in the process of accession to the Council of Europe, the Montenegrin authorities committed themselves to ensuring that the new Constitution would incorporate the following minimum seven principles:
  - A. the Constitution must stress that the Republic of Montenegro is a civic state, based on civic principles by which all persons are equal and not on the equality between constituent peoples;
  - B. the Constitution must provide for the independence of the judiciary and recognise the imperative of avoiding any decisive role of political institutions in the procedure of appointment and dismissal of judges and prosecutors;
  - C. in order to avoid conflict of interests, the role and tasks of the Public Prosecutor should not include, both the application of legal remedies for the protection of constitutionality and legality and the representation of the Republic in property and legal matters;
  - D. the efficient constitutional protection of human rights must be ensured. The Constitution should provide for the direct applicability of the human and minority rights, as was recognised in the Charter on Human and Minority rights of Serbia and Montenegro. The constitutional reform therefore needs to provide for at least the same level of protection of human rights and fundamental freedoms as the one provided for in the Charter, including the rights of minorities;
  - E. the Constitution should state that capital punishment is prohibited at all times;
  - F. the Constitution should include transitional provisions for the retrospective applicability of human rights protection to past events. It should also include

provisions on the retrospective applicability of the European Convention on the protection of Human Rights and Fundamental Freedoms and Protocols;

- G. the Constitution should regulate the status of the armed forces, security forces and intelligence services of Montenegro and the means of parliamentary supervision. It should provide that the position of the commander-in-chief be held by a civilian.

- 5. This opinion on the newly adopted constitution of Montenegro, prepared on the basis of the rapporteurs' comments, was discussed and adopted by the Commission at its 73rd Plenary Session (Venice, 14-15 December 2007).

## *II. Part One: Basic provisions*

### **Article 7 (prohibition of infliction of hatred)**

- 6. The prohibition of incitement of hatred on any ground is welcome.

### **Article 8 (prohibition of discrimination)**

- 7. The text of this general clause on prohibition of discrimination has been amended to reflect the concern previously expressed by the Venice Commission that special measures, such as those set out in Article 4 of the Framework Convention for the Protection of National Minorities, should not be seen as discrimination. The text is therefore now in conformity with the Framework Convention. It is also in conformity with ECRI Recommendation 7 (2002).

### **Article 9 (legal order)**

- 8. Article 9 provides that international treaties and agreements shall form an integral part of the internal legal order, have supremacy in case of conflict with domestic law, and be directly applicable in case of conflict with domestic law. This provision, which is line with one of the relevant commitments which Montenegro undertook vis-à-vis PACE (point V), is to be welcome. It is of importance also for minority protection and for the status of the Framework Convention for the Protection of National Minorities. As was previously said (Interim opinion on the draft constitution of Montenegro, CDL-AD(2007)017, § 17, hereinafter “the interim opinion”), the words “when they regulate the relations differently from the internal legislation” were unnecessary. A reference to the need to implement human rights treaties in the light of the practice of the respective monitoring bodies would have been welcome.

### **Article 11 (Division of powers)**

9. As previously said (Interim opinion, § 19), it would have been preferable in paragraph 3 of Article 11, to put “state” power.
10. In paragraph 4, the reference to checks and balances which the Commission found “is vague and possibly meaningless” (interim opinion, § 20), has now been replaced by the equivalent terms “balance and mutual control”.

### **Article 12 (Montenegrin citizenship)**

11. Paragraph 3 of this provision provides for the possibility of extraditing Montenegrin citizens “in conformity with international obligations”, which is an important clause, for example for co-operation with the International Criminal Court.

## *III. Part Two: Human Rights and liberties*

### **A. General observations**

12. The provisions of the draft Constitution of Montenegro on fundamental human rights and freedoms had been severely criticised by the Venice Commission on account of their technical flaws which resulted, notwithstanding the attempt to ensure the implementation of the Council of Europe founding principles, in an insufficient level of human rights protection.
13. The text of the Constitution which was adopted by the Montenegrin parliament on 19 October 2007 meets most of the recommendations made by the Venice Commission in its previous opinion and in the course of various meetings with the Montenegrin authorities. It does not meet all of these recommendations and it would have been preferable if these provisions of the Constitution had been prepared in a way that would have facilitated direct comparison with the provisions of the European Convention on Human Rights. However, the Constitution includes a general clause on “limitations of human rights and liberties” and it also contains provision for the direct applicability and supremacy of human rights treaties, including the European Convention on Human Rights.
14. The text of Part II of the Constitution deserves therefore a generally positive assessment although further improvements could have been made.

### **B. Fundamental Rights and Freedoms (Articles 17-78)**

#### **Article 17 (Grounds and equality)**

15. This provision has been duly supplemented, as recommended by the Venice Commission, and now includes a reference to the applicable international treaties. It would have been preferable that it also mentions the “generally accepted principles of international law”.

### **Article 18 (Gender equality)**

16. This new provision on gender equality is to be welcomed.

### **Article 20 (Legal remedy)**

17. Unfortunately, this provision has remained unchanged since the previous Article 18 of the draft Constitution. The Venice Commission had indicated (interim opinion, § 29) that it did not correspond fully to Article 13 ECHR, nor to the opinion of the Parliamentary Assembly on Accession of the Republic of Montenegro to the Council of Europe (No. 261(2007)) (“PACE opinion”), 19.2.2.2. If breaches of Article 13 ECHR are to be avoided, it is essential that this provision be interpreted by the Montenegrin courts in a manner that gives full effect to the Convention requirement.

### **Article 21 (Legal aid)**

18. The new formulation of paragraph 3 meets the previous recommendation of the Venice Commission (interim opinion, § 30).

### **Article 23 (Environment), and Articles 62 (Right to work) and 70 (consumers protection)**

19. The Venice Commission had expressed the view that it would have been preferable to avoid that the Constitution contain merely programmatic rules, so that certain individual rights should instead be formulated as state objectives (interim opinion, §§ 20, 83, 87).
20. The Montenegrin authorities have chosen to maintain the formulation they had put in the draft Constitution.

### **Article 24 (Limitation of human rights and liberties)**

21. This provision on the conditions for restricting the exercise of fundamental rights and freedoms has been drastically improved in respect of the draft constitution, and now contains the necessary elements of legality, legitimate aims and proportionality in a democratic society, thus reflecting correctly the European Convention on Human Rights. It meets the recommendations of the Venice Commission (interim opinion, § 32).
22. This general clause applies to all articles of the Constitution concerning fundamental rights and freedoms. This makes it unnecessary to repeat the three conditions in all subsequent articles.

### **Article 25 (Temporary limitation of rights and liberties)**

23. The term “proclaimed” has been added in the first paragraph, to meet the recommendation of the Venice Commission in this respect (interim opinion, § 34). The other recommendations of the Venice Commission have not been taken onboard.

### **Article 26 (Prohibition of the death penalty)**

24. This provision only prohibits the death penalty. However, it does not state the right to life set out in Article 2 ECHR, a right which imposes a weighty obligation on state authorities to inquire into the reasons for the loss of life. Nor does this Article mention the possibility, preserved by Article 2 ECHR, of depriving of life as a consequence of use of force when absolutely necessary in defence 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.

### **Article 27 (Bio-medicine)**

25. This provision reflects most of the relevant recommendations of the Venice Commission.

### **Article 28 (Dignity and Inviolability of persons)**

26. The provision certainly goes further than previously in meeting the Commission’s recommendations (interim opinion, § 39). It now sets out the prohibition of torture and inhuman and degrading treatment, but not the prohibition of inhuman and degrading punishment, as well as the prohibition of slavery and servitude. Forced labour is prohibited by article 63 (interim opinion, §§ 93 and 94).

### **Article 29 (Deprivation of liberty)**

27. This provision now duly refers to the need for any deprivation of liberty to be in accordance with a procedure prescribed by law; instead of stating the only permissible grounds for deprivation of liberty, as stated in article 5 ECHR paragraph 1, it refers to “reasons provided for by law”. Thanks to the direct applicability of the ECHR, the law will have to conform to Article 5 § 1 ECHR, but it would have been preferable to state such grounds in the constitution.
28. Article 29 § 7 states that “Unlawful deprivation of liberty is punishable”. It is unclear whether it is intended to make all breaches of article 26 a criminal offence. If it is so, would it have that effect without further legislation? The immediate consequence of unlawful deprivation of liberty must be release, and this should have been stated explicitly.

### **Article 30 (Detention)**

29. This provision has not been modified since the draft constitution. The Venice Commission had recommended to make provision for the possibility of seeking more frequent review of the detaining decisions and to insert an express reference to the right of detainees to be released on bail (this is only implicit in the first paragraph).

### **Article 31 (Respect for person)**

30. This provision refers specifically to the dignity of persons who are deprived of their liberty or whose liberty is restricted. It supplements Article 28.

### **Articles 32 (Fair and public trial)**

31. As recommended by the Venice Commission, the guarantee of an “independent and impartial tribunal established by law” has been added.

### **Articles 33 (Principle of legality) and 34 (More lenient law)**

32. These provisions rightly mirror Article 7 ECHR.

### **Article 36 (Ne bis in idem)**

33. This provision now correctly contains the right “not to be tried”, nor punished twice for the same offence.

### **Article 37 (Right to defence)**

34. This provision has been modified following the remarks of the Venice Commission (interim opinion, §§ 55 and 56). Two fundamental aspects of the right of defence have been added (the right to be informed promptly, in a language which one understands and in detail, of the accusation and the right to have adequate time and facilities for the preparation of the defence. However, the text omits some important rights of defence specified in Article 6 § 3 ECHR, in particular rights in respect of the attendance and examination of witnesses and the right to have the free assistance of an interpreter.

### **Article 38 (Compensation of damage for illegal action)**

35. This provision rightly secures the rights stated in paragraph 5 of Article 5 ECHR and in Article 3 of Protocol no. 7.



### **Article 39 (Movement and residence)**

36. This provision has been duly modified following the Venice Commission's previous remarks (interim opinion, §§ 58-61).

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

37. The right to respect for private and family life has been duly added following the Venice Commission's previous remarks (Interim opinion, § 96). This provision is to be read in conjunction with Article 24.

### **Articles 41 (Inviolability of home) and 42 (Confidentiality of correspondence)**

38. These provisions are now to be read in conjunction with Article 24.

### **Article 45 (Electoral right)**

39. It would have been preferable to add a formula setting out in general terms the necessity of ensuring effective participation of minorities in public life (Interim opinion, § 65).

### **Article 46 (Freedom of thought, conscience and religion)**

40. This provision has been duly modified according to the suggestions of the Venice Commission (Interim opinion, § 67). It is now to be read in conjunction with Article 24.

### **Article 47 (Freedom of expression) and Article 49 (Freedom of the press)**

41. While these two Articles give effect to many aspects of Article 10 ECHR, it would have been preferable if they could have been drafted in a way more closely corresponded to the Convention. The Articles give emphasis to the protection of "dignity, reputation and honour" and the provision of a remedy for the publication of untrue, incomplete or incorrectly conveyed information that does not necessarily represent the Strasbourg Court's approach to Article 10 ECHR.

### **Article 51 (Access to information)**

42. This new provision is to be welcomed (Interim opinion, § 97).

### **Article 53 (Freedom of association)**

43. This provision has been duly amended following the suggestions of the Venice Commission (Interim opinion, § 75).

#### **Article 54 (Prohibition of organizing)**

44. The Venice Commission's previous remarks concerning this provision were regrettably not taken into consideration, with the exception of the lifting of the prohibition for the listed categories of civil servants to express their political beliefs publicly (Interim opinion, §§ 77-79).

#### **Article 55 (Prohibition of operation and establishment)**

45. The meaning of the term "secret organisations" has now been clarified.

#### **Article 56 (Right to address international organisations)**

46. The title of this provision has been duly clarified.

#### **Article 57 (Right of recourse)**

47. This provision has been duly complemented by the words "individually or collectively". However, it would have been preferable if the statement of the right of recourse had not been qualified by the potentially intimidating phrase "unless having committed a crime in doing so".

#### **Article 58 (Property)**

48. The right to property has duly been moved to the chapter on human rights. The possibility of regulating the use of property has been duly added. "Fair" compensation has duly replaced the previously foreseen compensation "at market value". There is no more clause on general state property of "assets of special historical importance", which is to be welcomed (Interim opinion, §§ 107-110).

#### **Article 66 (Strike)**

49. This provision has been duly modified according to the Venice Commission's suggestions (interim opinion, §§ 85-86).

#### **Article 71 (Marriage)**

50. The principle of equality between spouses, foreseen in Article 5 of Protocol 7 to the ECHR and by Article 25 of the 2002 Charter of Human Rights has been duly added (interim opinion, § 88).

### **C. Special – Minority rights (Articles 79-80)**

51. It would have been preferable not to use the word “special” in the title.

#### **Articles 79 (Protection of identity) and 80 (Prohibition of assimilation).**

52. Articles 79 and 80 of the adopted constitution are rather comprehensive; together, they appear to cover the main minority rights as contained in the European Framework convention.
53. It would have been preferable to replace the term “proportional” in paragraph 10 (“proportional” representation of minorities was already foreseen by the 1992 Constitution of the Republic of Montenegro) by “fair” or “adequate”.
54. There is no definition of a minority nation or community in the Constitution. The Commission in this connection notes, as it has previously done, that, unlike the Constitution, the Law on Minority Rights adopted in 2006 contains a citizenship-based definition of national minority in spite of the criticism expressed in this regard by the Venice Commission (CDL-AD(2004)026, §§ 31-36). The law should be amended and the word “citizen” taken out of the definition. Indeed, the scope of the minority rights should be understood in an inclusive manner and these rights should be restricted to citizens only to the extent necessary.

### **D. Protector of Human Rights and liberties (Article 81)**

#### **Article 81**

55. Regrettably, of all suggestions made by the Venice Commission with a view to reinforcing the independence of this important institution (Interim opinion, § 103), only, and only in part, the one on the mandate has been followed.
56. Article 91 now provides that the ombudsman is elected by parliament with the majority vote of the total number of MPs: a qualified majority should have been provided instead.

## *IV. Part three: Organization of powers*

### **A. General comments on the provisions on the state organs**

57. The text of the Constitution provides for a clearly parliamentary system of government. This is a welcome choice which should prevent authoritarian tendencies and power struggles between President and Prime Minister. Compared to the draft Constitution, the text was improved in many places and in particular an effort was made to provide for more stable institutions. The text deserves therefore a generally positive assessment although further improvements could have been made.

## **B. Parliament of Montenegro (Articles 82-94)**

### **Article 82 (Responsibility)**

58. The list of responsibilities of parliament appearing in this article corresponds to a large extent to the list in the draft constitution. Some provisions were amended as recommended in the Interim Opinion, in particular it is welcome that parliament may no longer provide an authentic interpretation of laws. A number of items nevertheless remain problematic.
59. Point 1, giving to parliament the responsibility to adopt the Constitution, is to be interpreted in a declaratory way, that is, as not founding any new competences in addition to those established under Part VII. Nevertheless, its wording is inappropriate: it should refer to “change” and not “adopt” the constitution.
60. Points 13 and 14 give to parliament the power to elect/ appoint and dismiss to a number of independent positions, such as the presidency of the Supreme Court, the Constitutional Court or the position of Prosecutor General. This will be examined in more detail below with respect to the individual positions. The parallelism made between appointments and dismissals is, however, inappropriate in general since parliament should not have the power to dismiss holders of independent offices before the end of their term unless for specific grounds defined by law or preferably the Constitution. This is made clear by Article 154 for the members of the Constitutional Court. The holders of the other positions do, however, not have such a guarantee and their independence, although enshrined in the Constitution, is therefore compromised.
61. As regards point 15, while parliaments do indeed often decide on the waiving of the immunity of their members, there is no reason to involve parliament in decisions on the immunity of other office holders.

### **Article 83 (Composition of the Parliament)**

62. This article seems not sufficient as the only article on parliamentary elections. It would be desirable to have rules in the Constitution on the proclamation of election results and on the Central Election Commission.

### **Article 86 (Immunity)**

63. Insofar as this Article protects the free expression by deputies of opinions expressed as members of parliament, it is desirable and necessary. The broader immunity of Deputies for any act committed is traditional in many democracies and has been regarded by the Venice Commission as still pertinent for new democracies where there may be a risk of unwarranted prosecution of opposition members. In Montenegro this risk seems at present remote. The recent case law of the European Court of Human Rights tends to consider such wide immunity as an obstacle to the right of access to the courts.

64. It seems not justified to regulate immunity for the President, members of government and especially judges in the same manner as immunity of members of parliament. Immunity of the Head of State should be regulated separately, having regard to the impeachment procedure. Judges should not enjoy general immunity and there is no justification for involving parliament in waiving their immunity.

#### **Article 87 (Cessation of the mandate of the Member of Parliament)**

65. The third alternative is unclear at least in the English translation, although it may be that it is intended to refer to a situation in which a Member of Parliament is incapacitated on medical grounds from continuing to act.

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

66. It would be prudent to provide for an alternative manner of convocation in case the previous Speaker does not act. Convocation is made dependent on the publication of the election results. The Constitution does, however, fail to regulate the procedure for this publication. Surprisingly, it does not even mention the Central Election Commission.

#### **Article 92 (Dissolution of the Parliament)**

67. The new wording of paragraph 2 of this article makes it, compared to the draft Constitution, far more difficult to dissolve parliament. This is a welcome contribution to political stability since the possibility remains that parliament may reduce its mandate according to Article 84.4. To be compatible with the following paragraph, the paragraph should read “the Government may propose to the President to dissolve...”

#### **Article 93 (Proposing laws and other acts)**

68. The third paragraph on the referendum should probably be understood as leaving the decision on whether to call or not to call the referendum to parliament (cf. Art.81.11). Other issues, such as the matters which may not be submitted to referendum will have to be regulated by law. It would have been advisable to introduce a reference to regulation by law into this paragraph.

### **C. President of Montenegro (Articles 95-99)**

#### **Article 95 (Responsibility of the President)**

69. As regards point 5, it seems questionable whether the President should have the power to propose the Ombudsman as well as, in particular, all members of the Constitutional Court (see also below).

70. Since the granting of amnesty is a power of parliament under Article 81.16, the President should have the power to grant pardons but not an amnesty.

#### **Article 98 (Cessation of mandate)**

71. While the text is not extremely clear, it would seem that parliament is under an obligation to start an impeachment procedure and submit the issue of violation of the Constitution to the Constitutional Court if 25 MPs request this. This threshold seems quite low. There is the risk of the Court deciding that the President has violated the Constitution and Parliament voting against dismissal. The authority of the President would be greatly weakened in such cases.

### **D. Government of Montenegro (Articles 100-112)**

#### **Article 100 (Responsibility)**

72. This Article has been amended as suggested in the Interim Opinion.

#### **Article 102 (Composition of the government)**

73. Paragraph 2 is not explicit with respect to the distribution of tasks between the Prime Minister and individual ministers.

#### **Article 107 (Issue of no confidence)**

74. It is welcome that the threshold for introducing a motion of no confidence has been raised to one third of the members of parliament.

#### **Article 111 (Civil service)**

75. The establishment of a professional civil service is a key challenge for all post-socialist countries. The draft Constitution unfortunately does not contain any indication as to the status of civil servants.

### **E. Local self-government (Articles 113-117)**

#### **a. General comment**

76. This Chapter is substantially improved with respect to the draft constitution.

## **b. Article-by-article analysis**

### **Article 113 (Manner of decision-making)**

77. The newly introduced paragraph 2 is a substantial improvement of the text. The express mention of “citizens”, however, should not be interpreted as preventing the extension of the vote to non-citizen residents.

### **Article 116 (Property-related powers and financing)**

78. It is welcome that, contrary to the draft Constitution, municipalities will have the right to own property.

## **F. The courts (articles 118-128)**

### **a. General observations**

79. The provisions on the judiciary in the newly-adopted constitution reflect in several respects the previous suggestions of the Venice Commission. The appointment and dismissal of judges has been duly removed from the hands of the parliament. The Judicial Council has a balanced composition.
80. The parliament has however retained some influence, notably through the appointment of the President of the Supreme Court and of the Public Prosecutors. These solutions are problematic in the light of the European standards.
81. The Commission is however cognizant that Montenegro has experienced very acute problems relating to the effectiveness and impartiality of the judiciary. The Montenegrin political class is firmly convinced that these difficulties can be overcome only through oversight of the judiciary by parliament. This certainly helps explain why the new Constitution has given such role to parliament through the power to elect the President of the Supreme Court and the Public Prosecutors.
82. The Commission, while welcoming the steps forward already taken by Montenegro towards the independence of the judiciary, hopes that in the near future the effectiveness and impartiality of the judiciary will improve so as to enable Montenegro to complete the reform fully guaranteeing its independence.

## **b. Article-by-article analysis**

### **Article 120 (Publicity of trial)**

83. In conformity with the recommendations of the Venice Commission (Interim opinion, §154), the exceptions to the principle of the publicity of trial are now enumerated exhaustively, similarly to Article 6 ECHR.

### **Article 121 (Standing duty)**

84. This article should have set out that decisions on release from duty of a judge must in any case, including in the cases foreseen in the third paragraph, be taken by the Judicial Council. This principle will have to be stated in the law.
85. As suggested by the Venice Commission in its previous Interim opinion (§155), Article 121 now sets out that the transfer of a judge against his or her will is only possible by decision of the Judicial Council in case of restructuring of the courts.

### **Article 123 (Incompatibility of duties)**

86. The Venice Commission had previously pointed out (Interim opinion, § 156) that it is common in other European countries to allow judges to perform certain activities such as teaching. Article 123 of the Constitution, instead, does not allow judges to perform any other professional activity.

### **Article 124 (Supreme Court)**

87. According to article 124, the President of the Supreme Court is elected “by the Parliament at the joint proposal of the President of Montenegro, the Speaker of the Parliament and the Prime Minister”.
88. The legislative power (Parliament and its Speaker), the President of Montenegro and the executive power in person of the Prime Minister are thus involved in this appointment, while the judiciary is completely excluded. This solution is problematic: it gives the impression that the whole judiciary is under the control of the majority of the Parliament, and that the President of Montenegro, the Speaker of the Parliament, and the Prime Minister take part in the political control of the judges: it therefore risks undermining the public confidence in the independence and autonomy of the whole judiciary, no matter if all the other judges are appointed by an independent Judicial Council.
89. In addition, it might happen that the President of Montenegro, the Speaker of the Parliament and the Prime Minister do not reach an agreement for a joint proposal; it follows that, in this case, it would be the “responsible working body of the Parliament”, that is to say the parliamentary commission on the judiciary, to elect by itself the President of the Supreme Court, as provided for by the last paragraph of article 124.
90. The Commission considers that it would have been more appropriate to provide that the President of the Supreme Court should be appointed by the Judicial Council with the qualified majority of two thirds, and not only with the absolute majority of its members as for the appointment of other judges. The Commission understands however that this political election of the President of the Supreme Court reflects the will of the Montenegrin political class to ensure the accountability of the judiciary. The Commission hopes that the system currently envisaged by the Constitution will



help Montenegro overcome its difficulties in achieving an effective and impartial judiciary; the constitutional provisions under consideration will then need to be amended in order to guarantee the full independence of the judiciary. Pending this reform, the Commission encourages the Montenegrin authorities to ensure that the election of the President of the Supreme Court and the State Prosecutors be carried out with the highest possible majority.

91. On the other hand, as long as the Constitution provides that the election of the President of the Supreme Court is a purely political act, it is preferable that the Judicial Council should not be involved in the election procedure at all, in order to avoid potentially serious conflicts between the judiciary and the other State powers.
92. As concerns the other judges of the Supreme Court, it is worth underlying that they are appointed and dismissed by the Judicial Council, which is welcome (see comments below). However, the President of the Supreme Court is *ex officio* chairman of the Judicial Council, a provision which in itself is not the best solution (see para. 96 below).

#### **Articles 125 (Election of judges), 126 (Judicial Council) and 127 (Composition of the Judicial Council)**

93. Under the new constitution, judges and presidents of the courts are no more elected by the Parliament, but they are appointed by the Judicial Council, whose composition and system of appointment are now suitable for preserving, as stipulated in article 126, the autonomy and independence of the courts and the judges.
94. Following closely the remarks and the suggestions of the Venice Commission's interim opinion, article 127 now provides that the Judicial Council has ten members: the minister of justice and the President of the Supreme Court are *ex officio* members; four members are judges elected by the Conference of Judges; two are members of the Parliament elected by the Parliament itself (it would have been preferable that they be elected among lawyers and law professors), one by the majority and one by the opposition; two by the President of the Republic among "renowned lawyers". President of the Judicial Council is the President of the Supreme Court.
95. The composition of the Judicial Council ensures a good balance among the judiciary (five judges out of ten members) and the political power (two members elected by the Parliament, two by the President of the Republic, and the minister of justice, member *ex officio* but with no voting rights in respect of disciplinary proceedings – see article 128, last paragraph).
96. In the Venice Commission's view, however, it would have been preferable, instead of entrusting *ex officio* the President of the Supreme Court with the chairmanship of the Judicial Council, to provide that the President be elected by the Judicial Council among the lay members, in order to ensure the necessary links between the judiciary and the society, and to avoid the risk of an "autocratic management" of the judiciary.

97. The reason for the provision, in paragraph 3 of article 125, that the presidents of the courts cannot be appointed as members of the Judicial Council is unclear.

### **G. Army of Montenegro (Article 129)**

98. Taken together, the constitutional provision on the army comply with the commitment to the Council of Europe to “regulate the status of the armed forces, security forces and intelligence services of Montenegro and the means of parliamentary supervision” and to “provide that the position of the commander-in-chief be held by a civilian”.
99. It is welcome that the Constitution now explicitly provides that the army defends the country in accordance with the applicable rules of international law.
100. The principle of civilian control of the armed forces is provided with more substance by other provisions of the Constitution, in particular the subsequent articles on the Defence and Security Council and Article 81, which entrusts to parliament the adoption of the national security and defence strategy (point 6) and the decision on including army units in international forces (point 8).

### **H. Defence and Security Council (Articles 130-133)**

#### **Articles 130 (Responsibility) and 131 (Composition)**

101. The Defence and Security Council, which includes the Speaker of Parliament, ensures civilian control of the armed forces.

#### **Article 133 (Proclamation of the state of emergency)**

102. According to the last paragraph of this Article, the state of emergency shall last until the circumstances that have caused it have ceased to exist. The issue which organ, and in which procedure, determines whether these circumstances continue to apply is not addressed.

### **I. State Prosecution (Articles 134-138)**

#### **a. General observations**

103. Unlike in the previous draft, a separate chapter is now devoted to the State prosecution.
104. All prosecutors, and all members of the prosecutorial council, are appointed and dismissed by parliament with no qualified majority. The prosecutorial system provided by the Constitution is therefore totally under the control of the ruling party or parties: This is not in conformity with European standards.

## **b. Article-by-article analysis**

### **Article 134 (Status and responsibility)**

105. The protection of state interests has been appropriately removed from the tasks of the prosecutor (see PACE opinion, 19.2.1.3); the law will have to foresee the manner in which these interests will be protected otherwise, normally through public defence attorneys. It would be interesting to know what are the “other punishable acts” prosecuted by the State Prosecutor.
106. The provision of the duty of prosecutors to perform “other duties stipulated by the law” has equally been removed, which is to be welcome in the absence of a clear indication that these duties cannot comprise any duties on behalf of the Government or any public authority that would involve an actual or potential conflict with his duties as State Prosecutor.

### **Article 135 (Appointment and mandate)**

107. Art. 135 provides that the Supreme State Prosecutor and state prosecutors are “appointed and dismissed from duty by the Parliament”. They are appointed for a period of five years; it is not said if the term of office is renewable. The prosecution therefore appears to be clearly subjected to political power; in particular, to the relative majority of the Parliament, since no qualified or absolute majority is required for the appointment.
108. By itself, the system of subjecting the prosecution to political control is not in contrast with European standards. In the present case, the appointment of the Supreme State Prosecutor by parliament can be deemed acceptable, but it would have been necessary to require a qualified majority. Moreover, the Constitution does not limit in any way the grounds upon which the Supreme State Prosecutor and the other prosecutors may be removed from office.
109. It is instead not acceptable to have entrusted the Parliament with the power to appoint all the other state prosecutors. Presumably, these are lawyers who must be selected in view of their technical expertise, and who perform their tasks under the direction of the Supreme State Prosecutor. In fact, they are civil servants, who do not need to be elected and who need to perform their duties without a fixed term.

### **Article 136 (Prosecutorial Council)**

110. The Prosecutorial Council is now regulated by Article 136 of the Constitution, which states that its function is “to ensure the independence of state prosecutorial service and state prosecutors”. Its function should also be to oversee that prosecutorial activity be performed according to the principle of legality.
111. Paragraph 3 provides that all members of the prosecutorial council will be elected and dismissed by the parliament. No qualified majority is required. This solution

leaves the Council in the hands of the parliament majority; this, coupled with the appointment and dismissal of all prosecutors by parliament with no qualified majority, makes the prosecutorial system of Montenegro too vulnerable to political pressure and jeopardises the possibility for the prosecutorial functions to be carried out in an independent manner according to the principle of legality.

## *V. Part four: Economic system*

### **A. General comment**

112. It is welcome that this Chapter has been shortened compared to the draft Constitution.

### **B. Article-by-article analysis**

#### **Article 143 (Central Bank of Montenegro)**

113. It is welcome that the National Bank is to be an independent institution. Such independence will however be meaningful only if it is reflected in safeguards for the position of the Governor and the members of the Council such as a fixed term of office. The unqualified provision in Art. 81.14 that parliament shall appoint and dismiss the Governor of the Central Bank is therefore problematic. There is a need for a law on the National Bank to govern these matters in detail and the Constitution should make reference to such a law.

#### **Article 144 (National Audit Institution)**

114. The same considerations apply to the National Audit Institution and the terms of office of the members of the Senate of this Institution. It would seem useful to provide for an Annual Report of this Institution to be submitted to the Government and the Parliament.

## *VI. Part five: Constitutionality and legality (articles 145-148)*

115. In Article 145, it would have been useful to define the various normative acts below the level of a law in the formal sense (regulations, general acts, decrees) as well as their hierarchy (see Interim opinion, § 172).

## *VII. Part six: Constitutional Court of Montenegro*

### **A. General comment**

116. The rephrasing of the requirement for the introduction of the constitutional appeal in cases of violation of fundamental rights is very welcome. Otherwise this Chapter

retains a number of problematic provisions reflecting the regional legal tradition. The composition of the Constitutional Court is not balanced.

## **B. Article-by-article analysis**

### **Article 149 (Responsibility)**

117. The list of powers of the Court in the first paragraph of Article 149 is positive and provides a basis for a Constitutional Court with wide competencies. In particular, the constitutional appeal is now granted following the exhaustion of other remedies and no longer if no other remedy exists (i.e. in practice very rarely).
118. The second paragraph addresses a very specific issue which could better have been left to the law.

### **Article 150 (Initiation of the procedure to assess constitutionality and legality)**

119. While Article 149 enumerates a number of procedures before the Constitutional Court, Article 150 defines who has standing before the Court, without differentiating between the various procedures but as having the right to ask “for the assessment of constitutionality and legality”. This approach raises numerous problems of interpretation, e.g. the first paragraph of Article 150 could be interpreted- and on its own, would have to be interpreted- as the basis for an *actio popularis*. The persons or bodies enumerated should not have the right to launch all these procedures. It would be preferable to define with respect to each procedure who has the right to initiate it and under which conditions. The Commission made proposals in this respect in the Interim Opinion which were, however, not followed.
120. The possibility for the Constitutional Court to initiate *proprio motu* the assessment of the legality and constitutionality of laws is inappropriate since it unduly drags the Constitutional Court into the political arena.

### **Article 152 (Cessation of the validity of a regulation)**

121. This Article, in particular its paragraph 2, addresses the delicate issue of a possible *ex tunc* effect of Constitutional Court decisions. At least in the English translation the text is not entirely clear. Is an absolute ruling a final Court decision only or also an administrative act which may no longer be challenged? It would have been more prudent not to establish a rigid rule, especially not in the Constitution, and to leave some discretion to the Constitutional Court.

### **Article 153 (Composition and election)**

122. This article, together with Article 82.13 and Article 95.5, does not ensure a balanced composition of the Court. All judges of the Court are elected by parliament on

the proposal of the President. If the President is coming from one of the majority parties, it is therefore likely that all judges of the Court will be favourable to the majority. An election of all judges of the Court by parliament would at least require a qualified majority. Even so, however, it would not ensure the independence of the Constitutional Court from the political power, which is at variance with the role of guarantor which this Court must have in respect of the political majority. As the Venice Commission had previously stressed, the guarantees of neutrality and independence of the Constitutional Court would have been duly ensured only through a system of appointment whereby this responsibility is shared between different and autonomous powers and institutions of the State.

123. It would also have been preferable to leave the election of the President to the Court itself.

#### **Article 154 (Cessation of duty)**

124. It seems excessive to remove a judge from office if he or she publicly expresses his or her political convictions.

#### *VIII. Part seven: change to the constitution (articles 155-157)*

125. These articles have been left unchanged in respect of the draft constitution of August 2007. The Venice Commission had previously expressed the opinion that it was necessary to clarify whether the adoption of the Act on the Change of the Constitution is the final step or it has to be followed by the public hearing provided for in Art. 156. In this and other respects, Articles 155 and 156 overlap in a potentially confusing way.

126. Article 155 addresses the case of change of the constitution in both a narrow and a broad sense, thus including the adoption of a new constitution. It is inappropriate to give parliament the power to adopt an entirely new Constitution. This power risks undermining the stability of the constitutional system.

127. Article 157, read with earlier provisions, does not make clear the circumstances in which a referendum is required for the amendment of the constitution.

#### *IX. Part eight: transitional and final provision*

128. The only transitional provision concerns the adoption of a constitutional law on the implementation of the constitution. Such law was indeed adopted at the same time as the Constitution.

129. Article 5 of the Constitutional law reads as follows: "Provisions on international agreements on human rights and freedoms, to which Montenegro acceded before 3 June 2006, shall be applied to legal relations that have arisen after the signature".

The wording of this provision is rather obscure. Given that this provision has been added at the request of the Council of Europe, it can be interpreted as meaning “Provisions of international agreements on human rights and freedoms to which Montenegro was a party (as a federated entity of the State Union) before 3 June 2006 shall be applied to legal relations that have arisen after the date of ratification of those treaties by the State Union”. Only in this case, does this article fulfil one of the principal commitments of Montenegro to the Parliamentary Assembly (PACE Opinion 19.2.1.6). The meaning of this provision should be clarified, and brought to the knowledge of the Montenegrin courts and public.

130. Article 6 of the Constitutional law provides, in conformity with the Venice Commission’s suggestion (Interim opinion, § 192), that existing laws and other regulations continue to be in force until (and unless) harmonised with the Constitution. This was a specific commitment undertaken by the Montenegrin authorities (PACE Opinion, 19.2.2.4).
131. However, Article 11 provides that laws and regulations of the State Union of Serbia and Montenegro will continue to be applied “provided that they are not contrary to the legal order and interests of Montenegro”. This formula was already contained in the Proclamation of Independence of Montenegro. The Eminent Lawyers had expressed their concern for this formula which raised issues of legal certainty “to the extent that it is impossible to define clearly and unequivocally what these interests are, with the result that the formula could prevent Montenegrin courts and authorities from applying the law and ensuring respect for international standards” (Eminent Lawyers’ Report on the conformity of the legal order of the Republic of Montenegro with Council of Europe standards, § 76). The Venice Commission confirms its criticism of the reference to the interests of Montenegro.
132. The constitutional law contains a long list of laws which must be harmonised with the newly-adopted constitution. The Venice Commission is ready to assist in this important task of ensuring that the laws of Montenegro give full effect to the principles declared in the Constitution.

## *X. Conclusions*

133. The Constitution of Montenegro as adopted by the Montenegrin authorities on 19 October 2007 deserves a generally positive assessment. Not all suggestions previously made by the Venice Commission have been followed, but the text has been substantially improved.
134. As concerns the reform of the judiciary, notably the manner of appointment and dismissal of judges and the composition and functions of the Judicial Council, Montenegro should be commended for its efforts to accept the Council of Europe indications and standards. This was particularly difficult to accept in the light of the Montenegrin current situation, and shows a real commitment towards the Council of Europe and its members. However, earlier paragraphs of this opinion have set out the matters concerning the President of the Supreme Court, the

Constitutional Court and State Prosecution which require further attention by the Council of Europe.

135. The implementation of the constitution has a crucial importance in ensuring a successful democratic consolidation of Montenegro. The Venice Commission stands ready to assist the Montenegrin authorities in this further stage. Moreover, every possible attempt will need to be made to enable the Montenegrin courts and legal profession to have a good understanding of the manner in which the Human Rights provisions must be read and applied if they are to comply with the standards set out by the ECHR.



Stemming from:

**The decision** of the citizens of Montenegro to live in an independent and sovereign state of Montenegro, made in the referendum held on May 21, 2006;

**The commitment** of the citizens of Montenegro to live in a state in which the basic values are freedom, peace, tolerance, respect for human rights and liberties, multiculturalism, democracy and the rule of law;

**The determination** that we, as free and equal citizens, members of peoples and national minorities who live in Montenegro: Montenegrins, Serbs, Bosniacs, Albanians, Muslims, Croats and the others, are committed to democratic and civic Montenegro;

**The conviction** that the state is responsible for the preservation of nature, sound environment, sustainable development, balanced development of all its regions and the establishment of social justice;

**The dedication** to cooperation on equal footing with other nations and states and to the European and Euro-Atlantic integrations,

the Constitutional assembly of the Republic of Montenegro, at its third sitting of the second regular session in 2007, held on 19 October 2007, adopts

## THE CONSTITUTION OF THE REPUBLIC OF MONTENEGRO<sup>116</sup>

### *PART ONE BASIC PROVISIONS*

#### **The State Article 1**

Montenegro is an independent and sovereign state, with the republican form of government.

Montenegro is a civil, democratic, ecological and the state of social justice, based on the rule of law.

#### **Sovereignty Article 2**

Bearer of sovereignty is the citizen with Montenegrin citizenship.

The citizen shall exercise power directly and through the freely elected representatives.

The power not stemming from the freely expressed will of the citizens in democratic election in accordance with the law, can neither be established nor recognised.

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<sup>116</sup> English translation published on the website of the Venice Commission [http://www.venice.coe.int/docs/2007/CDL\(2007\)105-e.asp#\\_ftn1](http://www.venice.coe.int/docs/2007/CDL(2007)105-e.asp#_ftn1)

**State territory**  
**Article 3**

The territory of Montenegro is unified and inalienable.

**State symbols**  
**Article 4**

Montenegro shall have a coat of arms, a flag and a national anthem.

The coat of arms of Montenegro shall be the golden double-headed eagle with lion on its chest.

The flag of Montenegro shall be red in color, with the coat of arms in the center and the golden brim.

The national anthem of Montenegro shall be “Oj svijetla majska zoro”.

**Capital and Old Royal Capital**  
**Article 5**

The capital of Montenegro shall be Podgorica,  
The Old Royal Capital of Montenegro shall be Cetinje.

**Human rights and liberties**  
**Article 6**

Montenegro shall guarantee and protect rights and liberties.

The rights and liberties shall be inviolable.

Everyone shall be obliged to respect the rights and liberties of others.

**Prohibition of infliction of hatred**  
**Article 7**

Infliction or encouragement of hatred or intolerance on any grounds shall be prohibited.

**Prohibition of discrimination**  
**Article 8**

Direct or indirect discrimination on any grounds shall be prohibited.

Regulations and introduction of special measures aimed at creating the conditions for the exercise of national, gender and overall equality and protection of persons who are in an unequal position on any grounds shall not be considered discrimination.

Special measures may only be applied until the achievement of the aims for which they were undertaken.

**Legal order**  
**Article 9**

The ratified and published international agreements and generally accepted rules of international law shall make an integral part of the internal legal order, shall

have the supremacy over the national legislation and shall be directly applicable when they regulate the relations differently from the internal legislation.

### **Limits of liberties**

#### **Article 10**

In Montenegro, anything not prohibited by the Constitution and the law shall be free.

Everybody is obliged to abide by the Constitution and the law.

### **Division of powers**

#### **Article 11**

The power shall be regulated following the principle of the division of powers into the legislative, executive and judicial.

The legislative power shall be exercised by the Parliament, the executive power by the Government and the judicial by courts.

The power is limited by the Constitution and the law.

The relationship between powers shall be based on balance and mutual control.

Montenegro shall be represented by the President of Montenegro.

Constitutionality and legality shall be protected by the Constitutional Court.

Army and security services shall be under democratic and civil control.

### **Montenegrin citizenship**

#### **Article 12**

In Montenegro there shall be a Montenegrin citizenship.

Montenegro shall protect the rights and interests of the Montenegrin citizens.

Montenegrin citizen shall not be expelled or extradited to other state, except in accordance with the international obligations of Montenegro.

### **Language and alphabet**

#### **Article 13**

The official language in Montenegro shall be Montenegrin.

Cyrillic and Latin alphabet shall be equal.

Serbian, Bosniac, Albanian and Croatian shall also be in the official use.

### **Separation of the religious communities from the State**

#### **Article 14**

Religious communities shall be separated from the state.

Religious communities shall be equal and free in the exercise of religious rites and religious affairs.

**Relations with other states and international organizations**  
**Article 15**

Montenegro shall cooperate and develop friendly relations with other states, regional and international organizations, based on the principles and rules of international law.

Montenegro may accede to international organizations.

The Parliament shall decide on the manner of accession to the European Union.

Montenegro shall not enter into a union with another state by which it loses its independence and full international personality.

**Legislation**  
**Article 16**

The law, in accordance with the Constitution, shall regulate:

- 1) the manner of exercise of human rights and liberties, when this is necessary for their exercise;
- 2) the manner of exercise of the special minority rights;
- 3) the manner of establishment, organization and competences of the authorities and the procedure before those authorities, if so required for their operation;
- 4) the system of local self-government;
- 5) other matters of interest for Montenegro.

*PART TWO*  
*HUMAN RIGHTS AND LIBERTIES*

1. COMMON PROVISIONS

**Grounds and equality**  
**Article 17**

Rights and liberties shall be exercised on the basis of the Constitution and the confirmed international agreements.

All shall be deemed equal before the law, regardless of any particularity or personal feature.

**Gender equality**  
**Article 18**

The state shall guarantee the equality of women and men and shall develop the policy of equal opportunities.

**Protection**  
**Article 19**

Everyone shall have the right to equal protection of the rights and liberties thereof.

**Legal remedy**  
**Article 20**

Everyone shall have the right to legal remedy against the decision ruling on the right or legally based interest thereof.

**Legal aid**  
**Article 21**

Everyone shall have the right to legal aid.  
Legal aid shall be provided by the bar, as an independent and autonomous profession, and by other services.  
Legal aid may be provided free of charge, in accordance with the law.

**Right to local self-government**  
**Article 22**

The right to local self-government shall be guaranteed.

**Environment**  
**Article 23**

Everyone shall have the right to a sound environment.  
Everyone shall have the right to receive timely and full information about the status of the environment, to influence the decision-making regarding the issues of importance for the environment, and to legal protection of these rights.  
Everyone, the state in particular, shall be bound to preserve and improve the environment

**Limitation of human rights and liberties**  
**Article 24**

Guaranteed human rights and freedoms may be limited only by the law, within the scope permitted by the Constitution and to such an extent which is necessary to meet the purpose for which the limitation is allowed, in an open and democratic society.  
Limitations shall not be introduced for other purposes except for those for which they have been provided for.

**Temporary limitation of rights and liberties**  
**Article 25**

During the proclaimed state of war or emergency, the exercise of certain human rights and freedoms may be limited, to the necessary extent.  
The limitations shall not be introduced on the grounds of sex, nationality, race, religion, language, ethnic or social origin, political or other beliefs, financial standing or any other personal feature.  
There shall be no limitations imposed on the rights to: life, legal remedy and legal aid; dignity and respect of a person; fair and public trial and the principle of

legality; presumption of innocence; defense; compensation of damage for illegal or ungrounded deprivation of liberty and ungrounded conviction; freedom of thought, conscience and religion; entry into marriage.

There shall be no abolishment of the prohibition of: inflicting or encouraging hatred or intolerance; discrimination; trial and conviction twice for one and the same criminal offence (ne bis in idem); forced assimilation.

Measures of limitation may be in effect at the most for the duration of the state of war or emergency.

## 2. PERSONAL RIGHTS AND LIBERTIES

### **Prohibition of death penalty**

#### **Article 26**

The death penalty shall be prohibited in Montenegro.

### **Bio-medicine**

#### **Article 27**

The right of a person and dignity of a human being with regard to the application of biology and medicine shall be guaranteed.

Any intervention aimed at creating a human being that is genetically identical to another human being, living or dead shall be prohibited.

It is prohibited to perform medical and other experiments on human beings, without their permission.

### **Dignity and inviolability of persona**

#### **Article 28**

The dignity and security of a man shall be guaranteed.

The inviolability of the physical and mental integrity of a man, and privacy and individual rights thereof shall be guaranteed.

No one can be subjected to torture or inhuman or degrading treatment.

No one can be kept in slavery or servile position.

### **Deprivation of liberty**

#### **Article 29**

Everyone shall have the right to personal liberty.

Deprivation of liberty is allowed only for reasons and in the procedure provided for by law.

Person deprived of liberty shall be notified immediately of the reasons for the arrest thereof, in own language or in the language he/she understands.

Concurrently, person deprived of liberty shall be informed that he/she is not obliged to give any statement.

At the request of the person deprived of his/her liberty, the authority shall immediately inform about the deprivation of liberty the person of own choosing of the person deprived of his/her liberty.

The person deprived of his/her liberty shall have the right to the defense

counsel of his/her own choosing present at his interrogation.  
Unlawful deprivation of liberty shall be punishable.

**Detention**  
**Article 30**

Person suspected with reasonable doubt to have committed a crime may, on the basis of the decision of the competent court, be detained and kept in confinement only if this is necessary for the pre-trial procedure.

Detainee shall be given the explained decision of detention at the time of being placed in detention or at the latest 24 hours from being put in detention.

Detainee shall have the right of appeal against the decision of detention, upon which the court shall decide within 48 hours.

The duration of detention shall be reduced to the shortest possible period of time.

Detention by the decision of first-instance court may last up to three months from the day of detention, and by the decision of a higher court, the detention may be extended for additional three months.

If no indictment is raised by that time, the detainee shall be released.

Detention of minors may not exceed 60 days.

**Respect for person**  
**Article 31**

The respect of human personality and dignity in the criminal or other procedure, in case of deprivation or limitation of liberty and during the execution of imprisonment sentence shall be guaranteed.

Any form of violence, inhuman or degrading behavior against a person deprived of liberty or whose liberty has been limited, and any extortion of confession and statement shall be prohibited and punishable.

**Fair and public trial**  
**Article 32**

Everyone shall have the right to fair and public trial within reasonable time before an independent and impartial court established by the law.

**Principle of legality**  
**Article 33**

No one may be punished for an act that, prior to being committed, was not stipulated by the law as punishable, nor may be pronounced a punishment which was not envisaged for that act.

**More lenient law**  
**Article 34**

Criminal and other punishable acts are stipulated and the punishments for them are pronounced in accordance with the law in force at the time when the act was committed, unless the new law is more favorable for the perpetrator.

**Presumption of innocence**  
**Article 35**

Every one shall be deemed innocent until the guilt thereof has been established by an enforceable court decision.

The accused shall not be obliged to prove the innocence thereof.  
The court shall interpret the doubt regarding the guilt to the benefit of the accused.

**Ne bis in idem**  
**Article 36**

No one may be trialed or convicted twice for one and the same punishable act.

**Right to defense**  
**Article 37**

Every one shall be guaranteed the right to defense, and especially: to be informed in the language he/she understands about the charges against thereof; to have sufficient time to prepare defense and to be defended personally or through a defense attorney of his/her own choosing.

**Compensation of damage for illegal action**  
**Article 38**

Person deprived of liberty in an illegal or ungrounded manner or convicted without grounds shall have the right to the compensation of damage from the state.

**Movement and residence**  
**Article 39**

The right to freedom of movement and residence shall be guaranteed, as well as the right to leave Montenegro.

Freedom of movement, residence and leaving Montenegro may be restricted if required so for conducting the criminal procedure, prevention of contagious diseases spreading or for the security of Montenegro.

Movement and residence of foreigner citizens shall be regulated by the law.

**Right to privacy**  
**Article 40**

Everybody shall have the right to respect for his/her private and family life.

**Inviolability of home**  
**Article 41**

Home shall be inviolable.

No one shall enter the dwelling place or other premises against the will of the possessor thereof and search them without a court warrant.

The search of premises shall be conducted in the presence of two witnesses.



A person in official capacity may enter other people's dwelling place or other premises without the court warrant and conduct the search without the presence of witnesses if so necessary for the prevention of execution of a criminal offence, immediate apprehension of a perpetrator or to save people and property.

**Confidentiality of correspondence**  
**Article 42**

Confidentiality of letters, telephone conversations and other means of communication shall be inviolable.

The principle of inviolability of confidentiality of letters, telephone calls and other means of communication shall be deviated from only on the basis of a court decision, if so required for the purposes of conducting criminal proceedings or for the security of Montenegro.

**Personal data**  
**Article 43**

The protection of personal data shall be guaranteed.

It is prohibited to use personal data for purposes other than those for which they were collected.

Everyone shall have the right to be informed about the personal data collected about him or her and the right to court protection in case of abuse.

**Right to asylum**  
**Article 44**

A foreign national reasonably fearing from persecution on the grounds of his/her race, language, religion or association with a nation or a group or due to own political beliefs may request asylum in Montenegro.

A foreign national shall not be expelled from Montenegro to where due to his race, religion, language or association with a nation he/she is threatened with death sentence, torture, inhuman degradation, persecution or serious violation of rights guaranteed by this Constitution.

A foreign national may be expelled from Montenegro solely on the basis of a court decision and in a procedure provided for by the law.

### 3. POLITICAL RIGHTS AND LIBERTIES

**Electoral right**  
**Article 45**

The right to elect and stand for elections shall be granted to every citizen of Montenegro of 18 years of age and above with at least a two-year residence in Montenegro.

The electoral right shall be exercised in elections.

The electoral right shall be general and equal.

Elections shall be free and direct, by secret ballot.

**Freedom of thought, conscience and religion**  
**Article 46**

Everyone shall be guaranteed the right to freedom of thought, conscience and religion, as well as the right to change the religion or belief and the freedom to, individually or collectively with others, publicly or privately, express the religion or belief by prayer, preaches, customs or rites.

No one shall be obliged to declare own religious and other beliefs.

Freedom to express religious beliefs may be restricted only if so required in order to protect life and health of the people, public peace and order, as well as other rights guaranteed by the Constitution.

**Freedom of expression**  
**Article 47**

Everyone shall have the right to freedom of expression by speech, writing, picture or in some other manner.

The right to freedom of expression may be limited only by the right of others to dignity, reputation and honor and if it threatens public morality or the security of Montenegro.

**Objection of conscience**  
**Article 48**

Everyone shall have the right to objection of conscience.

No one shall be obliged, contrary to own religion or conviction, to fulfill a military or other duty involving the use of arms.

**Freedom of press**  
**Article 49**

Freedom of press and other forms of public information shall be guaranteed.

The right to establish newspapers and other public information media, without approval, by registration with the competent authority, shall be guaranteed.

The right to a response and the right to a correction of any untrue, incomplete or incorrectly conveyed information that violates a person's right or interest and the right to compensation of damage caused by the publication of untruthful data or information shall be guaranteed.

**Prohibition of censorship**  
**Article 50**

There shall be no censorship in Montenegro.

The competent court may prevent dissemination of information and ideas via the public media if required so to: prevent invitation to forcible destruction of the order defined by the Constitution; preservation of territorial integrity of Montenegro; prevention of propagating war or incitement to violence or performance of criminal offences; prevention of propagating racial, national and religious hatred or discrimination.

**Access to information**  
**Article 51**

Everyone shall have the right to access information held by the state authorities and organizations exercising public authority.

The right to access to information may be limited if this is in the interest of: the protection of life; public health; morality and privacy; carrying of criminal proceedings; security and defense of Montenegro; foreign, monetary and economic policy.

**Freedom of assembly**  
**Article 52**

The freedom of peaceful assembly, without approval, with prior notification of the competent authority shall be guaranteed.

The freedom of assembly may be temporarily restricted by the decision of the competent authority in order to prevent disorder or execution of a criminal offence, threat to health, morality or security of people and property, in accordance with the law.

**Freedom of association**  
**Article 53**

The freedom of political, trade union and other association and action, without approval, by the registration with the competent authority, shall be guaranteed.

No one shall be forced to become a member of an association.

The state supports political and other associations, when there is a public interest to do so.

**Prohibition of organizing**  
**Article 54**

Political organizing in public bodies shall be prohibited.

A judge of the Constitutional Court, a judge, a state prosecutor and his deputy, an Ombudsman, a member of the Council of the Central Bank, a member of the Senate of the State Audit Institution, a professional member of the Army, Police and other security services shall not be a member of any political organization.

Political organizing and actions of foreign nationals and political organizations with the seat outside of Montenegro shall be prohibited.

**Prohibition of operation and establishment**  
**Article 55**

The operation of political and other organizations directed towards forceful destruction of the constitutional order, infringement of the territorial integrity of Montenegro, violation of guaranteed freedoms and rights or instigating national, racial, and religious and other hatred and intolerance shall be prohibited.

The establishment of secret subversive organizations and irregular armies shall be prohibited.

**Right to address international organisation**  
**Article 56**

Everyone shall have the right of recourse to international institutions for the protection of own rights and freedoms guaranteed by the Constitution.

**Right of recourse**  
**Article 57**

Everyone shall have the right of recourse, individually or collectively with others, to the state authority or the organisation exercising public powers and receive a response.

No one shall be held responsible, or suffer other harmful consequences due to the views expressed in the recourse, unless having committed a crime in doing so.

**4. ECONOMIC, SOCIAL AND CULTURAL RIGHTS AND LIBERTIES**

**Property**  
**Article 58**

Property rights shall be guaranteed.

No one shall be deprived of or restricted in property rights, unless when so required by the public interest, with rightful compensation.

Natural wealth and goods in general use shall be owned by the state.

**Entrepreneurship**  
**Article 59**

Freedom of entrepreneurship shall be guaranteed.

Freedom of entrepreneurship may be limited only if so necessary in order to protect the health of the people, environment, natural resources, cultural heritage or security and defense of Montenegro.

**Right to succession**  
**Article 60**

The right to succession shall be guaranteed.

**Rights of foreign nationals**  
**Article 61**

A foreign national may be the holder of property rights (subjekat prava svojine) in accordance with the law.

**Right to work**  
**Article 62**

Everyone shall have the right to work, to free choice of occupation and employment, to fair and human working conditions and to protection during unemployment.

**Prohibition of forced labor**  
**Article 63**

Forced labor shall be prohibited.

The following shall not be considered forced labor: labor customary during the serving of sentence, deprivation of liberty; performance of duties of military nature or duties required instead of military service; work demanded in case of crisis or accident that threatens human lives or property.

**Rights of the employed**  
**Article 64**

The employed shall have the right to adequate salary.

The employed shall have the right to limited working hours and paid vacation.

The employed shall have the right to protection at work.

Youth, women and the disabled shall enjoy special protection at work.

**Social council**  
**Article 65**

Social position of the employed shall be adjusted in the Social council.

Social council shall consist of the representatives of the trade union, the employers and the Government.

**Strike**  
**Article 66**

The employed shall have the right to strike.

The right to strike may be limited to the employed in the Army, police, state bodies and public service with the aim to protect public interest, in accordance with the law.

**Social insurance**  
**Article 67**

Social insurance of the employed shall be mandatory.

The state shall provide material security to the person that is unable to work and has no funds for life.

**Protection of the persons with disability**  
**Article 68**

Special protection of the persons with disability shall be guaranteed.

**Health protection**  
**Article 69**

Everyone shall have the right to health protection.

A child, a pregnant woman, an elderly person and a person with disability

shall have the right to health protection from public revenues, if they do not exercise this right on some other grounds.

### **Consumer protection** **Article 70**

The state shall protect the consumer.

Actions that harm the health, security and privacy of consumers shall be prohibited.

### **Marriage** **Article 71**

Marriage may be entered into only on the basis of a free consent of a woman and a man.

Marriage shall be based on equality of spouses.

### **Family** **Article 72**

Family shall enjoy special protection.

Parents shall be obliged to take care of their children, to bring them up and educate them.

Children shall take care of their own parents in need of assistance.

Children born out of wedlock shall have the same rights and responsibilities as children born in marriage.

### **Protection of mother and child** **Article 73**

Mother and child shall enjoy special protection.

The state shall create the conditions that encourage childbirth.

### **Rights of a child** **Article 74**

A child shall enjoy rights and freedoms appropriate to his age and maturity.

A child shall be guaranteed special protection from psychological, physical, economic and any other exploitation or abuse.

### **Education** **Article 75**

The right to education under same conditions shall be guaranteed.

Elementary education shall be obligatory and free of charge.

The autonomy of universities, higher education and scientific institutions shall be guaranteed.

**Freedom of creation**  
**Article 76**

The freedom of scientific, cultural and artistic creation shall be guaranteed.

The freedom to publish works of science and arts, scientific discoveries and technical inventions shall be guaranteed, and their authors shall be guaranteed the moral and property rights.

**Science, culture and arts**  
**Article 77**

The state shall encourage and support the development of education, science, culture, arts, sport, physical and technical culture.

The state shall protect the scientific, cultural, artistic and historic values.

**Protection of natural and cultural heritage**  
**Article 78**

Everyone shall be obliged to preserve natural and cultural heritage of general interest.

The state shall protect the national and cultural heritage.

5. SPECIAL - MINORITY RIGHTS

**Protection of identity**  
**Article 79**

Persons belonging to minority nations and other minority national communities shall be guaranteed the rights and liberties, which they can exercise individually or collectively with others, as follows:

- 1) the right to exercise, protect, develop and publicly express national, ethnic, cultural and religious particularities;
- 2) the right to choose, use and publicly post national symbols and to celebrate national holidays;
- 3) the right to use their own language and alphabet in private, public and official use;
- 4) the right to education in their own language and alphabet in public institutions and the right to have included in the curricula the history and culture of the persons belonging to minority nations and other minority national communities;
- 5) the right, in the areas with significant share in the total population, to have the local self-government authorities, state and court authorities carry out the proceedings in the language of minority nations and other minority national communities;
- 6) the right to establish educational, cultural and religious associations, with the material support of the state;
- 7) the right to write and use their own name and surname also in their own language and alphabet in the official documents;

- 8) the right, in the areas with significant share in total population, to have traditional local terms, names of streets and settlements, as well as topographic signs written in the language of minority nations and other minority national communities;
- 9) the right to authentic representation in the Parliament of the Republic of Montenegro and in the assemblies of the local self-government units in which they represent a significant share in the population, according to the principle of affirmative action;
- 10) the right to proportionate representation in public services, state authorities and local self-government bodies;
- 11) the right to information in their own language;
- 12) the right to establish and maintain contacts with the citizens and associations outside of Montenegro, with whom they have common national and ethnic background, cultural and historic heritage, as well as religious beliefs;
- 13) the right to establish councils for the protection and improvement of special rights.

**Prohibition of assimilation**  
**Article 80**

Forceful assimilation of the persons belonging to minority nations and other minority national communities shall be prohibited.

The state shall protect the persons belonging to minority nations and other minority national communities from all forms of forceful assimilation.

6. PROTECTOR OF HUMAN RIGHTS AND LIBERTIES

**Article 81**

The protector of human rights and liberties of Montenegro shall be independent and autonomous authority that takes measures to protect human rights and liberties.

The protector of human rights and liberties shall exercise duties on the basis of the Constitution, the law and the confirmed international agreements, observing also the principles of justice and fairness.

The protector of human rights and liberties shall be appointed for the period of six years and can be dismissed in cases envisaged by the law.

PART THREE  
ORGANIZATION OF POWERS

1. PARLIAMENT OF MONTENEGRO

**Responsibility**  
**Article 82**

The Parliament shall:

- 1) Adopt the Constitution;
- 2) Adopt laws;



- 3) Adopt other regulations and general acts (decisions, conclusions, resolutions, declarations and recommendations);
- 4) Proclaim the state of war and the state of emergency;
- 5) Adopt the budget and the final statement of the budget;
- 6) Adopt the National security strategy and Defense strategy;
- 7) Adopt the Development plan and Spatial plan of Montenegro;
- 8) Decide on the use of units of the Army of Montenegro in the international forces;
- 9) Regulate the state administration system;
- 10) Perform supervision of the army and security services;
- 11) Call for the national referendum;
- 12) Elect and dismiss from duty the Prime Minister and members of the Government
- 13) Elect and dismiss from duty the President of the Supreme Court, the President and the judges of the Constitutional Court;
- 14) Appoint and dismiss from duty: the Supreme State Prosecutor and State Prosecutors, the Protector of human rights and liberties (Ombudsman), the Governor of the Central Bank and members of the Council of the Central Bank of Montenegro, the President and members of the Senate of the State Audit Institution, and other officials stipulated by the law;
- 15) Decide on immunity rights;
- 16) Grant amnesty;
- 17) Confirm international agreements;
- 18) Call for public loans and decide on credits of Montenegro;
- 19) Decide on the use of state property above the value stipulated by the law;
- 20) Perform other duties stipulated by the Constitution or the law.

### **Composition of the Parliament**

#### **Article 83**

The Parliament shall consist of the Members of the Parliament elected directly on the basis of the general and equal electoral right and by secret ballot.

The Parliament shall have 81 Members.

### **Mandate of the Parliament**

#### **Article 84**

The mandate of the Parliament shall last for four years.

The mandate of the parliament may cease prior to the expiry of the period for which it was elected by dissolving it or reducing the mandate of the Parliament.

If the mandate of the Parliament expires during the state of war or the state of emergency, the mandate shall be extended for the period of up to 90 days upon termination of the circumstances that have caused such state.

At the proposal of the President of Montenegro, the Government or minimum 25 MP's, the Parliament may reduce the duration of its mandate.

### **Rights and responsibilities of the Members of the Parliament** **Article 85**

Member of the Parliament shall decide and vote according to his/her own conviction.

Member of the Parliament shall have the right to perform the duty of an MP as an occupation.

### **Immunity** **Article 86**

Member of the Parliament shall enjoy immunity.

Member of the Parliament shall not be called to criminal or other account or detained because of the expressed opinion or vote in the performance of his/her duty as a Member of the Parliament.

No penal action shall be taken against and no detention shall be assigned to a Member of the Parliament, without the consent of the Parliament, unless the Member has been caught performing a criminal offense for which there is a prescribed sentence of over five years of imprisonment.

The President of Montenegro, the Prime Minister and members of the Government, the President of the Supreme Court, the President and the judges of the Constitutional Court, and the Supreme State Prosecutor shall enjoy the same immunity as the Member of the Parliament.

### **Cessation of mandate of the Member of the Parliament** **Article 87**

Mandate of a Member of the Parliament shall cease prior to the expiry of the period for which he/she was elected:

- 1) By resignation;
- 2) If he/she was convicted by an enforceable decision of the court to an imprisonment sentence of minimum six months;
- 3) If he/she was deprived of the ability to work by an enforceable decision;
- 4) Due to cessation of Montenegrin citizenship;

### **Constitution of the Parliament** **Article 88**

The first session of the newly elected composition of the Parliament shall be called for by the Speaker of the previous composition of the Parliament and it shall be held within 15 days from the date of publication of the final results of the elections.

### **Speaker and Deputy Speaker of the Parliament** **Article 89**

The Parliament shall have a Speaker and one or more Deputy Speakers,

elected from its own composition for the period of four years.

Speaker of the Parliament shall represent the Parliament, call for the sessions of the Parliament and chair them, take care of the enforcement of the Rules of Procedure of the Parliament, call for elections for the President of Montenegro and perform other affairs stipulated by the Constitution, the law and the Rules of Procedure of the Parliament.

The Deputy Speaker shall substitute the Speaker of the Parliament in the performance of affairs when the Speaker is prevented to do so or when the Speaker entrusts the Deputy Speaker the duty to substitute him.

## **Sessions of the Parliament**

### **Article 90**

The Parliament shall work in regular and extraordinary sessions.

Regular sessions shall be held twice a year.

The first regular session shall start on the first working day in March and shall last until the end of July, and the second one shall start on the first working day in October and shall last until the end of December.

Extraordinary session shall be called for at the request of the President of Montenegro, the Government or minimum one third of the total number of Members of the Parliament.

## **Decision-making**

### **Article 91**

The Parliament shall decide by majority vote of the present Members of the Parliament in the session attended by over one half of the total number of Members, unless otherwise regulated by the Constitution.

With the majority vote of the total number of Members the Parliament shall adopt the laws that regulate: manner of exercise of liberties and rights of the citizens, Montenegrin citizenship, electoral system, referendum, material responsibilities of the citizens, state symbols and use of state symbols, defense and security, the army, establishment, merger and abolition of municipalities; proclaim the state of war and state of emergency; adopt the spatial plan; adopt the Rules of Procedure of the Parliament; decide on calling for the state referendum; decide on the reduction of the mandate; decide on the removal of the President of the Republic from office; elect and dismiss the Prime Minister and members of the Government and decide on the trust in the Government; elect and dismiss the President of the Supreme court, presidents and judges of the Constitutional court; appoint and dismiss the Protector of human rights and liberties.

The Parliament shall decide by a two-third majority of the total number of the Members of Parliament on the laws regulating the electoral system and property rights of foreign nationals.

The Parliament shall decide by a two-third majority of the total number of the Members of Parliament in the first round of voting and by majority of the total number of the Members of Parliament in the second round of voting on the laws regulating the manner of exercising obtained minority rights and the use of Army units in the international forces.

## **Dissolution of Parliament**

### **Article 92**

The Parliament shall be dissolved if it fails to elect the Government within 90 days from the date when the President of Montenegro proposed for the first time the candidate for the position of the Prime Minister.

If the Parliament does not perform its duties established by the law for a longer period of time, the Government may dissolve the Parliament upon hearing the opinion of the Speaker of the Parliament and the presidents of the caucuses in the Parliament.

The Parliament shall be dissolved by the Ordinance of the President of Montenegro.

The Parliament shall not be dissolved during the state of war or state of emergency, if the ballot procedure of no confidence in the Government has been initiated, and in the first three months from its constitution and the three months prior to the expiry of its mandate.

The President of Montenegro shall call for the elections the first day after the dissolution of the Parliament.

## **Proposing laws and other acts**

### **Article 93**

The right to propose laws and other acts shall be granted to the Government and the Member of the Parliament.

The right to propose laws shall also be granted to six thousand voters, through the Member of the Parliament they authorized.

The proposal to call for the national referendum may be submitted by: at least 25 Members of the Parliament, the President of Montenegro, the Government or at least 10% of the citizens with the right to vote.

## **Proclamation of laws**

### **Article 94**

The President of Montenegro shall proclaim the law within seven days from the day of adoption of the law, that is, within three days if the law has been adopted under a speedy procedure or send the law back to the Parliament for new decision-making process.

The President of Montenegro shall proclaim the re-adopted law.

## **2. PRESIDENT OF MONTENEGRO**

### **Responsibility**

#### **Article 95**

The President of Montenegro:

- 1) Represents Montenegro in the country and abroad;
- 2) Commands over the Army on the basis of the decisions of the Defense and Security Council;

- 3) Proclaims laws by Ordinance;
- 4) Calls for the elections for the Parliament;
- 5) Proposes to the Parliament: candidate for the Prime Minister, after consultations with the representatives of the political parties represented in the Parliament; President and judges of the Constitutional Court; Protector of human rights and liberties;
- 6) Appoints and revokes ambassadors and heads of other diplomatic missions of Montenegro abroad, at the proposal of the Government and after obtaining the opinion of the Parliamentary Committee responsible for international relations;
- 7) Accepts letters of accreditation and revocation of the foreign diplomats;
- 8) Awards medals and honors of Montenegro;
- 9) Grants amnesty;
- 10) Performs other tasks stipulated by the Constitution or the law.

### **Election** **Article 96**

The President of Montenegro shall be elected on the basis of a general and equal electoral right, through direct and secret ballot.

A Montenegrin citizen residing in Montenegro for minimum 10 years in the past 15 years may be elected for the President of Montenegro.

The Speaker of the Parliament shall call for the elections for the President of Montenegro.

### **Mandate** **Article 97**

The President of Montenegro shall be elected for the period of five years.

The same person may be elected the President of Montenegro maximum two times.

The President of Montenegro shall assume the duty on the date of taking an oath before the Members of the Parliament.

If the mandate of the President expires during the state of war or the state of emergency, the mandate shall be extended for maximum 90 days after the end of circumstances that have caused that state.

The President of Montenegro shall not perform any other public duty.

### **Cessation of mandate** **Article 98**

The mandate of the President of Montenegro shall end with the expiry of time for which he/she was elected, by resignation, if he/she is permanently unable to perform the duty of the President and by impeachment.

The President shall be held responsible for the violation of the Constitution.

The procedure to determine whether the President of Montenegro has violated the Constitution shall be initiated by the Parliament, at the proposal of minimum 25 Members of the Parliament.

The Parliament shall submit the proposal to initiate the procedure to the President of Montenegro for plead.

The Constitutional Court shall decide on existence or non-existence of violation of the Constitution and shall publish the decision and submit it to the Parliament and the President of Montenegro without delay.

The Parliament may impeach the President of Montenegro when the Constitutional Court finds that he/she has violated the Constitution.

### **Discharge of duties in case of impediment or cessation of mandate Article 99**

In case of cessation of mandate of the President of Montenegro, until the election of the new President, as well as in the case of temporary impediment of the President to discharge his/her duties, the Speaker of the Parliament shall discharge this duty.

## **3. GOVERNMENT OF MONTENEGRO**

### **Responsibility Article 100**

The Government shall:

- 1) Manage internal and foreign policy of Montenegro;
- 2) Enforce laws, other regulations and general acts;
- 3) Adopt decrees, decisions and other acts for the enforcement of laws;
- 4) Sign international agreements;
- 5) Propose the Development plan and Spatial plan of Montenegro;
- 6) Propose the Budget and the Final Statement of the Budget;
- 7) Propose the National Security Strategy and Defense Strategy;
- 8) Decide on the recognition of states and establishment of diplomatic and consular relations with other states;
- 9) Nominate ambassadors and heads of diplomatic missions of Montenegro abroad;
- 10) Perform other tasks stipulated by the Constitution or the law.

### **Decrees with legal power Article 101**

During the state of war or the state of emergency, the Government may adopt decrees with legal power, if the Parliament is not able to meet.

The Government shall submit the decrees with legal power to the Parliament for confirmation as soon as the Parliament is able to meet.

### **Composition of the Government Article 102**

The Government shall consist of the Prime Minister, one or more Deputy Prime Ministers and the ministers.

The Prime Minister represents the Government and manages its work.

**Election**  
**Article 103**

The President of Montenegro proposes the mandator within 30 days from the day of constitution of the Parliament.

The candidate for the position of the Prime Minister presents to the Parliament his/her program and proposes composition of the Government.

The Parliament shall decide simultaneously on the program of the mandator and the proposal for the composition of the Government.

**Incompatibility of duties**  
**Article 104**

The Prime Minister and the member of the Government shall not discharge duties of a Member of the Parliament or other public duties or professionally perform some other activity.

**Resignation and impeachment**  
**Article 105**

The Government and the member of the Government may resign from duty. Resignation of the Prime Minister shall be considered the resignation of the Government.

The Prime Minister may propose to the Parliament to impeach a member of the Government.

**Issue of confidence**  
**Article 106**

The Government may raise the issue of confidence in it before the Parliament.

**Issue of no confidence**  
**Article 107**

The Parliament may vote no confidence in the Government.

The proposal for no confidence ballot regarding the Government may be submitted by minimum 27 Members of the Parliament.

If the Government gained confidence, the signatories of the proposal shall not submit a new proposal for no confidence ballot prior to the expiry of the 90 days deadline.

**Interpellation**  
**Article 108**

The interpellation to examine certain issues regarding the work of the Government may be submitted by minimum 27 Members of the Parliament.

The interpellation shall be submitted in written form and shall be justified.

The Government shall submit an answer within thirty days from the date of receipt of interpellation.

**Parliamentary investigation**  
**Article 109**

The Parliament may, at the proposal of minimum 27 Members of the Parliament, establish a Fact-finding Commission in order to collect information and facts about the events related to the work of the state authorities.

**Cessation of mandate**  
**Article 110**

The Government mandate shall cease: with the expiry of the Parliament mandate, by resignation, when it loses confidence and if it fails to propose the Budget by March 31 of the budgetary year.

The Government whose mandate has ceased shall continue with its work until the election of the new composition of the Government.

The Government whose mandate has ceased shall not dissolve the Parliament.

**Civil service**  
**Article 111**

The duties of the civil service shall be discharged by the ministries and other administrative authorities.

**Delegation and entrusting of duties**  
**Article 112**

Individual duties of the civil service may be delegated to the local self-government or other legal person by the law.

Individual duties of the civil service may be entrusted to the local self-government or some other legal entity by the regulation of the Government.

4. LOCAL SELF-GOVERNMENT

**Manner of decision-making**  
**Article 113**

In the local self-government the decisions shall be made directly and through the freely elected representatives.

The right to local self-government shall include the right of citizens and local self-government bodies to regulate and manage certain public and other affairs, in their own responsibility and in the interest of the local population.

**Form of local self-government**  
**Article 114**

The basic form of the local self-government shall be the municipality.  
It shall also be possible to establish other forms of local self-government.



**Municipality**  
**Article 115**

The municipality shall have the status of a legal entity.  
Municipality shall adopt the Statute and General Acts.  
Authorities of the municipality shall be the Assembly and the President.

**Property-related powers and financing**  
**Article 116**

The Municipality shall exercise certain property related powers over the state owned assets in accordance with the law.

The Municipality shall have property.

The Municipality shall be financed from its own resources and the assets of the state.

The Municipality shall have a budget.

**Autonomy**  
**Article 117**

The Municipality shall be autonomous in the performance of its duties.

The Government may dismiss the municipal Assembly, that is, discharge the President of the municipality from duty, only if the municipal assembly, that is, the President of the municipality, fails to perform the duties thereof for a period longer than six months.

5. THE COURT

**Principles of the judiciary**  
**Article 118**

The court is autonomous and independent.

The court shall rule on the basis of the Constitution, laws and confirmed and published international agreements.

Establishment of court marshal and extraordinary courts shall be prohibited.

**Panel of judges**  
**Article 119**

The court shall rule in panel, except when the law stipulates that an individual judge shall rule.

Lay-judges shall also participate in the trial in cases stipulated by the law.

**Publicity of trial**  
**Article 120**

The hearing before the court shall be public and judgments shall be pronounced publicly.

Exceptionally, the court may exclude the public from the hearing or one part of the hearing for the reasons necessary in a democratic society, only to the extent necessary: in the interest of morality; public order; when minors are trialed; in order to protect private life of the parties; in marital disputes; in the proceedings related to guardianship and adoption; in order to protect military, business or official secret; and for the protection of security and defense of Montenegro.

### **Standing duty** **Article 121**

The judicial duty shall be permanent.

The duty of a judge shall cease at his/her own request, when he/she fulfills the requirements for age pension and if the judge has been sentenced to an unconditional imprisonment sentence.

The judge shall be released from duty if he/she has been convicted for an act that makes him unworthy for the position of a judge; performs the judicial duty in an unprofessional or negligent manner or loses permanently the ability to perform the judicial duty.

The judge shall not be transferred or sent to another court against his/her will, except by the decision of the Judicial Council in case of reorganization of courts.

### **Functional immunity [1]** **Article 122**

The judge and the lay judge shall enjoy functional immunity.

The judge and the lay judge shall not be held responsible for the expressed opinion or vote at the time of adoption of the decision of the court, unless this represents a criminal offense.

In the proceedings initiated because of the criminal offense made in the performance of judicial duty, the judge shall not be detained without the approval of the Judicial Council.

### **Incompatibility of duties** **Article 123**

The judge shall not discharge duties of a Member of the Parliament or other public duties or professionally [2] perform some other activity.

### **Supreme Court** **Article 124**

The Supreme Court shall be the highest court in Montenegro.

The Supreme Court shall secure unified enforcement of laws by the courts.

The President of the Supreme Court shall be elected and dismissed from duty by the Parliament at the joint proposal of the President of Montenegro, the Speaker of the Parliament and the Prime Minister.

If the proposal for the election of the President of the Supreme Court fails to be submitted within 30 days, the President of the Supreme Court shall be elected at the proposal of the responsible working body of the Parliament.

**Election of judges**  
**Article 125**

A Judge and a president of the court shall be elected and dismissed from duty by the Judicial Council.

The President of the court shall be elected for the period of five years.

The President of the court shall not be a member of the Judicial Council.

**Judicial Council**  
**Article 126**

The Judicial Council shall be autonomous and independent authority that secures autonomy and independence of the courts and the judges.

**Composition of the Judicial Council**  
**Article 127**

The Judicial Council shall have the president and nine members.

The President of the Judicial Council shall be the President of the Supreme Court.

Members of the Judicial Council shall be as follows:

- 1) four judges elected and dismissed from duty by the Conference of Judges;
- 2) two Members of the Parliament elected and dismissed from duty by the Parliament from amongst the parliamentary majority and the opposition;
- 3) two renowned lawyers elected and dismissed from duty by the President of Montenegro;
- 4) the Minister of Justice.

The President of Montenegro shall proclaim the composition of the Judicial Council.

The mandate of the Judicial Council shall be four years.

**Responsibility of the Judicial Council**  
**Article 128**

The Judicial Council shall:

- 1) elect and dismiss from duty a judge, a president of a court and a lay judge;
- 2) establish the cessation of the judicial duty;
- 3) determine number of judges and lay judges in a court;
- 4) deliberate on the activity report of the court, applications and complaints regarding the work of court and take a standpoint with regard to them;
- 5) decide on the immunity of a judge;
- 6) propose to the Government the amount of funds for the work of courts;
- 7) perform other duties stipulated by the law.

The Judicial Council shall decide by majority vote of all the members.

The Minister of Justice shall not vote in disciplinary proceedings against judges.

## 6. ARMY OF MONTENEGRO

### **Principles** **Article 129**

The Army shall defend independence, sovereignty and state territory of Montenegro, in accordance with the principles of international law regarding the use of force.

The Army shall be subject to democratic and civil control.

The members of the Army may be part of the international forces.

## 7. DEFENSE AND SECURITY COUNCIL

### **Responsibility** **Article 130**

The Defense and Security Council shall:

- 1) Make decisions on commanding over the Army;
- 2) Analyze and assess the security situation in Montenegro and decide to take adequate measures;
- 3) Appoint, promote and discharge from duty the Army officers;
- 4) Propose to the Parliament proclamation of the state of war and state of emergency;
- 5) Propose the use of Army in international forces;
- 6) Perform other duties stipulated by the Constitution and the law.

### **Composition** **Article 131**

The Defense and Security Council of Montenegro shall consist of the President of Montenegro, the Speaker of the Parliament and the Prime Minister.

The President of Montenegro shall act as the President of the Defense and Security Council.

### **Proclamation of the state of war** **Article 132**

The state of war shall be proclaimed when there is direct danger of war for Montenegro, when Montenegro is attacked or war is declared against it.

If the Parliament is not able to meet, the Defense and Security Council shall adopt the decision to proclaim the state of war and submit it to the Parliament for confirmation as soon as the Parliament is able to meet.

**Proclamation of the state of emergency**  
**Article 133**

The state of emergency may be proclaimed in the territory or part of the territory of Montenegro in case of the following:

- 1) Big natural disasters;
- 2) Technical-technological and environmental disasters and epidemics;
- 3) Greater disruption of public peace and order;
- 4) Violation or attempt to abolish the constitutional order.

If the Parliament is not able to meet, the Defense and Security Council shall adopt the decision to proclaim the state of emergency and submit it to the Parliament for confirmation as soon as it is able to meet.

The state of emergency shall last until the circumstances that have caused it have ceased to exist.

**8. STATE PROSECUTION**

**Status and responsibility**  
**Article 134**

The State Prosecution shall be a unique and independent state authority that performs the affairs of prosecution of the perpetrators of criminal offenses and other punishable acts who are prosecuted ex officio.

**Appointment and mandate**  
**Article 135**

The affairs of the State Prosecution shall be preformed by the State Prosecutor. The State Prosecutor shall have one or more deputies.

The Supreme State Prosecutor and state prosecutors shall be appointed and dismissed from duty by the Parliament.

The Supreme State Prosecutor and state prosecutors shall be appointed for the period of five years.

**Prosecutorial Council**  
**Article 136**

The Prosecutorial Council shall ensure the independence of state prosecutorial service and state prosecutors.

The Prosecutorial Council shall be elected and dismissed by the Parliament.

The election, mandate, competencies, organisation and methods of work of the Prosecutorial Council shall be regulated by law.

**Functional immunity[3]**  
**Article 137**

State Prosecutor and Deputy State Prosecutor shall enjoy functional immunity and shall not be held responsible for the expressed opinion or decision made in the performance of the duties thereof, unless this represents a criminal offense.

**Incompatibility of duties**  
**Article 138**

State Prosecutor and Deputy State Prosecutor shall not discharge duties of a Member of the Parliament or other public duties or professionally [4] perform some other activity.

PART FOUR  
ECONOMIC SYSTEM

**Principles**  
**Article 139**

Economic system shall be based on a free and open market, freedom of entrepreneurship and competition, independence of the economic entities and their responsibility for the obligations accepted in the legal undertakings, protection and equality of all forms of property.

**Economic area and equality**  
**Article 140**

The territory of Montenegro shall represent a unique (unified) economic area. The State shall encourage even economic development of all its areas. It shall be prohibited to obstruct and limit free competition and to encourage unequal, monopolistic or dominant position in the market.

**State property**  
**Article 141**

Assets in state property shall belong to the state of Montenegro.

**Tax obligation**  
**Article 142**

The state shall be financed from taxes, duties and other revenues. Every one shall pay taxes and other duties. Taxes and other duties can be introduced only by law.

**Central Bank of Montenegro**  
**Article 143**

The Central Bank of Montenegro shall be an independent organization, responsible for monetary and financial stability and banking system operations. The Central Bank Council shall govern the Central Bank of Montenegro. The Central Bank Governor shall manage the Central Bank of Montenegro.

**National Audit Institution**  
**Article 144**

The National Audit Institution of Montenegro shall be an independent and supreme authority of the national audit.

The National Audit Institution shall audit the legality of and success in the management of state assets and liabilities, budgets and all the financial affairs of the entities whose sources of finance are public or created through the use of state property.

The National Audit Institution shall submit an annual report to the Parliament.

The Senate shall manage the National Audit Institution.

PART FIVE  
CONSTITUTIONALITY AND LEGALITY

**Conformity of legal regulations**  
**Article 145**

The law shall be in conformity with the Constitution and confirmed international agreements, and other regulations shall be in conformity with the Constitution and the law.

**Publication and coming into effect of the regulations**  
**Article 146**

The law and other regulation shall be published prior to coming into effect, and shall come into effect no sooner than the eighth day from the day of publication thereof.

Exceptionally, when the reasons for such action exist and have been established in the adoption procedure, law and other regulation may come into effect no sooner than the date of publication thereof.

**Prohibition of ex post facto effect (retroactive effect)**  
**Article 147**

Law and other regulation shall not have retroactive effect.

Exceptionally, if required so by the public interest established in the process of law adoption, individual provisions of the law may have retroactive effect.

Provision of the Criminal code may have retroactive effect only if it is more lenient for the perpetrator of a criminal offense.

**Legality of individual acts**  
**Article 148**

Individual legal act shall be in conformity with the law.

Final individual legal acts shall enjoy court protection.

PART SIX  
CONSTITUTIONAL COURT OF MONTENEGRO

**Responsibility**  
**Article 149**

The Constitutional Court shall decide on the following:

- 1) Conformity of laws with the Constitution and confirmed and published international agreements;
- 2) Conformity of other regulations and general acts with the Constitution and the law;
- 3) Constitutional appeal due to the violation of human rights and liberties granted by the Constitution, after all other efficient legal remedies have been exhausted;
- 4) Whether the President of Montenegro has violated the Constitution,
- 5) The conflict of responsibilities between courts and other state authorities, between state authorities and local self-government authorities, and between the authorities of the local self-government units;
- 6) Prohibition of work of a political party or a non-governmental organization;
- 7) Electoral disputes and disputes related to the referendum, which are not the responsibility of other courts;
- 8) Conformity with the Constitution of the measures and actions of state authorities taken during the state of war or the state of emergency;
- 9) Performs other tasks stipulated by the Constitution.

If the regulation ceased to be valid during the procedure for the assessment of constitutionality and legality, and the consequences of its enforcement have not been recovered, the Constitutional Court shall establish whether that regulation was in conformity with the Constitution, that is, with the law during its period of validity.

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

**Initiation of the procedure to assess constitutionality and legality**  
**Article 150**

Any person may file an initiative to start the procedure for the assessment of constitutionality and legality.

The procedure before the Constitutional Court for the assessment of constitutionality and legality may be initiated by the court, other state authority, local self-government authority and five Members of the Parliament.

The Constitutional Court itself may also initiate the procedure for the assessment of constitutionality and legality.

During the procedure, the Constitutional Court may order to stop the enforcement of an individual act or actions that have been taken on the basis of the law, other regulation or general act, the constitutionality, i.e. legality of which is being assessed, if the enforcement thereof could cause irreparable damage.



## **Decision of the Constitutional Court**

### **Article 151**

The Constitutional Court shall decide by majority vote of all judges.

The decision of the Constitutional Court shall be published.

The decision of the Constitutional Court shall be generally binding and enforceable.

When necessary, the Government shall secure the enforcement of the decision of the Constitutional Court.

## **Cessation of validity of a regulation**

### **Article 152**

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

The law or other regulation, i.e. their individual provisions that were found inconsistent with the Constitution or the law by the decision of the Constitutional Court, shall not be applied to the relations that have occurred prior to the publication of the Constitutional Court decision, if they have not been solved by an absolute ruling by that date.

## **Composition and election**

### **Article 153**

The Constitutional Court shall have seven judges.

The Constitutional Court judge shall be elected for the period of nine years.

The President of the Constitutional Court shall be elected for amongst the judges for the period of three years.

The person enjoying reputation of a renowned legal expert, with minimum 15 years of experience in this profession may be elected to the position of the Constitutional Court judge.

The President and the judge of the Constitutional Court shall not discharge duties of a Member of the Parliament or other public duties or professionally perform some other activity.

## **Cessation of duty**

### **Article 154**

The duty of the President and the judge of the Constitutional Court shall cease prior to the expiry of the period for which he/she was elected, at his/her own request, when he/she fulfills the requirements for age pension or if he/she was sentenced to an unconditional imprisonment sentence.

The President and the judge of the Constitutional Court shall be released from duty if he/she has been found guilty of an offense that makes him/her unworthy of the duty, if he/she permanently loses the ability to perform the duty or if he/she expresses publicly his/her political convictions.

The Constitutional Court shall establish the emergence of reasons for cessation of duty or release from duty, in its session and shall inform the Parliament of that case.

The Constitutional Court may decide that the President or the judge of the Constitutional Court that penal action has been initiated against shall not perform the duty for the period of duration of that action.

## PART SEVEN CHANGE OF THE CONSTITUTION

### **Proposal for the change of the constitution Article 155**

he proposal to change the Constitution may be submitted by the President of Montenegro, the Government or minimum 25 Members of the Parliament.

With the Proposal to change the Constitution it may be proposed to change or amend individual provisions of the Constitution or to adopt the new Constitution.

The Proposal to change individual provisions of the Constitution shall contain the indication of the provisions for which change is demanded and the justification.

The Proposal to change the Constitution shall be adopted in the Parliament if two thirds of the total number of Members of the Parliament vote in favor of it.

If the proposal to change the Constitution has not been adopted, the same proposal shall not be repeated prior to the expiry of one year from the day when the proposal was rejected.

### **Act on the change of the Constitution Article 156**

Change of the individual provisions of the Constitution shall be made through amendments.

Draft act on the change of the Constitution shall be prepared by the responsible working body of the Parliament.

Draft act on the change of the Constitution shall be adopted in the Parliament if two thirds of all the Members of the Parliaments vote in favor of it.

The Parliament shall submit the adopted Draft act on the change of the Constitution for public hearing, which shall not last less than one month.

After the end of the public hearing, the responsible working body of the Parliament shall define the Proposal of the act on the change of the Constitution<.

The act on the change of the Constitution shall be adopted in the Parliament if two thirds of all the Members of the Parliament vote in favor of it.

Change of the Constitution shall not take place during the state of war and the state of emergency.

### **Confirmation in the referendum Article 157**

Change of Articles 1, 2, 3, 4, 12, 13, 15, 45 and 157 shall be final if minimum three fifths of all the voters support the change in the national referendum.

PART EIGHT  
TRANSITIONAL AND FINAL PROVISION

**Constitutional law for the enforcement of the Constitution**  
**Article 158**

The Constitutional Law shall be adopted for the enforcement of the Constitution.

The Constitutional Law for the enforcement of the Constitution shall be adopted by the Parliament with a majority vote of all the Members of the Parliament.

The Constitutional Law shall be proclaimed and come into effect concurrently with the Constitution.

SU-SK No. 01-514/21  
Podgorica, 19 October 2007

*CONSTITUTIONAL PARLIAMENT OF THE REPUBLIC OF MONTENEGRO*  
Ranko Krivokapic

[1] Functional immunity is the immunity based on the performance of duty (note by interpreter)

[2] Professionally means in this case as a paid job

[3] Functional immunity means immunity on the basis of the position/duty.

[4] Professionally means in this case as a paid job



# CONSTITUTIONAL LAW FOR THE IMPLEMENTATION OF THE CONSTITUTION OF THE REPUBLIC OF MONTENEGRO

## Article 1

Constitution of Montenegro (hereinafter: Constitution) shall enter into force on the day of its promulgation by the Constitutional Parliament of the Republic of Montenegro, unless this Law provides differently with regard to the implementation of certain regulations in the Constitution.

## Article 2

Authorities in Montenegro and other state bodies, organizations and departments and bodies of the local self-government shall continue to work until the end of the period for which they have been elected, within the rights and duties stipulated by the Constitution, unless this Law provides differently.

## Article 3

The State Prosecutor shall continue to work as the State Prosecution until the Law that shall stipulate the position, organisation and work of the State Prosecution, is adopted.

## Article 4

The Defence and Security Council shall be constituted within 10 days as of the day when this Law enters into force.

## Article 5

Provisions of international agreements on human rights and freedoms, to which Montenegro acceded before 3 June 2006, shall be applied to legal relations that have arisen after the signature.

## Article 6

Laws and other regulations shall remain into force until they have been harmonised with the Constitution within the periods of time stipulated by this Law.

## Article 7

The following laws shall be adopted within two months as of the day when this Law entered into force:

- 1) Law on Montenegrin citizenship;

- 2) Law on travel documents of Montenegrin citizens;
- 3) Law on residence and abiding place of the citizens;
- 4) Law on identification card;
- 5) Law on Social Council.

The following laws shall be adopted within six months as of the day when this Law entered into force:

- 1) Law on Judicial Council and
- 2) Law on Territorial Organization of Montenegro.

### **Article 8**

The following shall be harmonised with the Constitution within three months as of the day when this Law entered into force:

- 1) Law on Election of MPs and deputies;
- 2) Law on the Election of the President of Montenegro;
- 3) Law on Electoral Rolls;
- 4) Law on Courts;
- 5) Law on State Prosecutor;
- 6) Law on State Administration;
- 7) Law on Property of the Republic of Montenegro;
- 8) Law on Expropriation;
- 9) Law on Minorities Rights and Freedoms.

### **Article 9**

Other laws and regulations shall be harmonised with the Constitution within two years as of the day when this Law entered into force, and regulations for the implementation of these laws within time periods stipulated in these laws.

### **Article 10**

Assemblies of local self-government units shall harmonise their regulations with the Constitution within one year as of the day when this Law entered into force at the latest.

### **Article 11**

Regulations of the State Union of Serbia and Montenegro shall be applied accordingly, providing they are not contrary to legal order and interests of Montenegro, until adequate regulations of Montenegro are adopted.

## **Article 12**

Every citizen of Montenegro who had a citizenship of some other State apart from the Montenegrin citizenship, on the day of 3 June 2006, shall have the right to keep the Montenegrin citizenship.

Citizen of Montenegro who obtained some other citizenship after 3 June 2006, shall have the right to keep the Montenegrin citizenship until a bilateral agreement is made with the State whose citizenship he obtained, but not longer than one year as of the day when the Constitution of Montenegro was adopted.

## **Article 13**

As of the day of the promulgation of the Constitution and this Law, the Constitutional Parliament of Montenegro shall continue to work as the Parliament of Montenegro, and the Constitutional Committee shall cease to work.

## **Article 14**

Elections for the Members of the Parliament of Montenegro shall be held at the latest by the end of 2009.

## **Article 15**

As of the day when this Law enters into force the name of the official gazette of the Republic of Montenegro shall change into "the Official Gazette of Montenegro".

## **Article 16**

This Law shall enter into force on the day of its promulgation.

SU-SK no. 01-523/7  
Podgorica, 19 October 2007

