



**3<sup>rd</sup> Congress of the World Conference on Constitutional Justice**  
**‘Constitutional Justice and Social Integration’**  
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**Questionnaire**

**Reply by the Constitutional Court of Montenegro**

Description of the Court

Description

## **B. Social Integration**

### **1. Challenges of social integration in a globalized world**

**1.1. What challenges has your Court encountered in the past, for example in the field of asylum law, taxation law or social security law?**

#### **Asylum seeker's Rights**

Article 44 of the Constitution of Montenegro<sup>1</sup>, Chapter II (INDIVIDUAL RIGHTS AND FREEDOMS) guarantees the right to asylum, which is implemented in the manner stipulated by law. The Law on Asylum<sup>2</sup> sets out the principles, conditions and procedure for granting asylum, refugee status recognition and approval of additional and temporary protection, state authorities responsible for decision-making, rights and obligations of asylum seekers, persons who are recognized as refugees and approved additional or temporary protection, and the reasons for termination and revocation of refugee status and subsidiary protection and termination of temporary protection in Montenegro. A person seeking asylum, according to the Act, is entitled to: An asylum seeker shall be entitled to: residence and freedom of movement; an identification document proving his or her identity, legal status, residence right and other rights stipulated by this Law; an aliens' travel document for the purpose of travelling abroad, pursuant to the regulations on the residence of aliens; free primary and secondary education in public schools; provision of accommodation if necessary, and appropriate living standards; health care, in accordance with separate regulations; family unity; legal aid; work within the Centre or other facility for collective accommodation; social

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<sup>1</sup>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.

<sup>2</sup>Official Gazette of the Republic of Montenegro No 45/06



welfare; freedom of religion; access to UNHCR and non-governmental organizations for the purpose of obtaining legal aid in the asylum procedure; humanitarian assistance.<sup>3</sup>Subsidiary protection, as supplemental protection of refugees in accordance with human rights instruments, shall be accorded to an alien who has not met the requirements for the recognition of refugee status but who would be subjected to torture or inhuman or degrading treatment or punishment, or whose life, safety or freedom would be threatened on account of generalized violence, foreign aggression, internal conflict, massive violations of human rights or other circumstances which seriously threaten life, safety or freedom, in case he or she is returned to his or her country of origin or another state. Temporary protection is an urgent and exceptional measure by which aliens shall be provided protection in the case of a mass, sudden or expected influx from a state where their life, safety or freedom is threatened on account of generalized violence, foreign aggression, internal conflict, massive violations of human rights or other circumstances which seriously threaten life, safety or freedom, where because of the mass influx there is no possibility to conduct individual procedures for refugee status determination. (Article 2, paragraph 4 of the Law).

Ministry of Interior affairs and Public Administration has the first instance jurisdiction to conduct the procedure in the field of asylum. According to the Law on Asylum, operations within the jurisdiction of Ministry are performed by the Asylum Office. The appellate procedure against decisions of the first instance authority is conducted by The State Commission that adjudicates appeals for asylum. All asylum seekers are allowed to apply for asylum, giving a statement of the facts and circumstances which are relevant for the decision, as well as the submission of written statements in language that they understand, in manner that Asylum Office provides an interpreter. Law on Asylum, met the standards of the Geneva Convention relating to the Status of Refugees, 1951 and the New York Protocol, 1967 and ensured the observance of principle of absolute ban on deportation.

The Constitutional Court in its case law has just several cases<sup>4</sup>in which Court considered alleged violations of human rights in proceedings conducted for the purpose of approving the application for asylum.

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<sup>3</sup> Article 29

<sup>4</sup> In its decision UŽ-III no. 487/11, from 10 November 2011, the Constitutional Court stated: "The decision of the High Court in Podgorica Kv.br.28 / 2011, dated 28 April 2011, that rejected the plea of the Republic of Turkey - Chief State Prosecutor Kliziltepe, of 21 October 2010 for the extradition of the accused C.A. (the applicant) in order to execute the sentence of imprisonment of six (6) years and three (3) months, which judgment that was delivered by the Seventh High criminal Court of Adana City. 2009/6, dated 21 September 2009 and he was convicted of the count of membership in an armed terrorist organization and advocating armed terrorist organization, which plea was rejected because the statutory requirements for extradition were not met. The Court, inter alia, stated: that the plea should be denied because the legal requirements for extradition of the accused C.A., according to Article 11, paragraph 1, item 1 of the Law on International Legal Assistance in



In relation to foreigners in Montenegro Constitutional Court considered a number of constitutional appeals<sup>5</sup> were related to the social and acquired rights in the field of retirement and disability pension ("vested" pension rights in connection with the amendments to the regulations on pension and disability insurance dr.), citizenship rights, property rights, criminal, civil and labor rights, etc..

## Tax Law

The Constitutional Court has assessed conformity with the Constitution of various tax laws and laws that establish taxes, levies and other revenues, and in these cases<sup>6</sup> Court generally found that it is not authorized to review the expediency and justification of the overall tax system, and particular models of collecting taxes and other revenues in Montenegro. The task of the Constitutional Court in the assessment of tax regulations is significantly different from the tasks of

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Criminal Matters, and the requirement of Article 6, paragraph 1, item a) of the European Convention on Extradition, had not been met; that the Panel Court finds that the criminal offense for which the defendant C.A. was found guilty, pursuant to Article 12 Paragraph 1 of the Law on International Legal Assistance represents a political offence, given the factual description of the actions of the criminal acts and established facts. The Appellate Court of Montenegro in its decision KŽ.br.384 / 11 dated 16 June 2011, confirmed the decision of the High Court in Podgorica Kv.br.28 / 2011, dated 28 April 2011. (...) Provisions of the Law on Asylum, prescribe the obligations of asylum seekers, among others the obligation to stay in Montenegro and not to leave Montenegro without authorization, during the pendency of the application for asylum. In contrast to this obligation, the constitutional applicant had left Montenegro without the permission and is now located in a third country, which clearly shows that the applicant is no longer interested in the outcome of a decision on his request for asylum in Montenegro, and therefore procedural requirements for the conduct of the proceedings and decision-making, no longer exist . "

<sup>5</sup>Uz-III no. 83/09., 10 December 2009; Uz-III no. 96/09., 11 February 2010; Uz-III no. 101/09., 25 March 2010; Uz-III no. 127/09., Dated 14 October 2010; Uz-III no. 44/09., Dated April 21, 2010; year; Uz-III no. 20/10., 21 April 2010; year; Uz-III no. 64/09., Dated 20 May 2010; Uz-III no. 134/09., 8 July 2010; Uz-III no. 12/09., Dated 30 September 2010; Uz-III no. 127/09., Dated 14 October 2010; Uz-III no. 47/09., Dated 14 October 2010; Uz-III no. 464/11., Dated 10 October 2011; Uz- III no. 275/10., 28 October 2010; Uz-III no. 277/11., 19 January 2012; Uz-III no. 416/10., Dated 1 March 2012; Uz-III no. 440/10., Dated 1 March 2012; Uz-III no. 442/10., Dated 1 March 2012; Uz-III no. 545/10., Dated 1 March 2012; Uz-III no. 562/10., Dated 1 March 2012; Uz-III no. 270/11., Dated 22 March 2012; Uz-III no. 563/10., Dated April 12, 2012; Uz-III no. 444/11., Dated 19 June 2012; Uz-III no. 250/11., Dated November 1, 2012; Uz-III no. 233/10., 27 November 2012; Uz-III no. 562/11., 27 November 2012; Uz-III no. 571/11., Dated 27 July 2012; Uz-III no. 196/12., 2 October 2012; Uz-III no. 318/10., 6 March 2013 (...).

<sup>6</sup> U. no. 104/07 dated 28 January 2010, Article 49, paragraph 6 of the Law on Personal Income Tax, ("Official Gazette of the Republic of Montenegro", no. 65/01., 37/04., 78/06. the "Official Gazette of Montenegro", no. 86/09); U. N ° 118/08., 14 June 2012; provisions of Article 23, paragraph 2, and Article 95, Paragraph 1 of the Law on Tax Administration (, Official Gazette of the Republic of Montenegro ", no. 65/01., and 80/04.,, the Official Gazette of Montenegro", br. 20/11. and 28/12.); U. no. 119/08., Dated 22 October 2009; provisions of Article 4, paragraph 3 of the Law on Personal Income Tax ("Official Gazette of the Republic of Montenegro", no. 69/03 and "Official Gazette of Montenegro", no. 17/07); The I-no. 2/10., Dated October 14, 2010, the provisions of Article 13, Paragraph 1 of the Law on Personal Income Tax ("Official Gazette of the Republic of Montenegro", no. 69/03., And "Official Gazette of Montenegro", No. .17 / 07); The I-no. 1/11., Dated 24 November 2011; provisions of section 3 of the Law on Court Fees ("Official Gazette of Montenegro", no. 76/05.), no UI. 8/11. from 22 March 2012 to review the constitutionality of the provisions of Article 4, Paragraph 1, Item 1 and paragraph 2 and Article 6 of the Law on the use of passenger motor vehicles, vessels and aircraft ("Official Gazette of Montenegro" br. 28/04., and 37/04., and "Official Gazette of Montenegro", no. 86/09.) and others.



state (legislative and executive) authorities, including the regular courts, political parties, legal experts, citizens and other subjects, dealing with taxes, tax policy and the tax system in Montenegro, whether they create or directly apply valid legal norms that regulate this area or legal norms apply to them.

### Example:

In the assessment of the constitutionality of several provisions of Law on taxes to access certain services of general interest and for the use of tobacco products and electro-acoustic devices („Official Gazette of Montenegro”, no. 28/12)<sup>7</sup>, the Constitutional Court rejected proposal of ten members of the Parliament of Montenegro as well as initiative which was supported by 11 785 citizens. During the review of the constitutionality of the assessed provisions of the Law, the Constitutional Court was guided by a comprehensive approach to the Constitution and the European Convention for the Protection of Human Rights and Fundamental Freedoms, and viewed provisions that relate to personal rights and liberties, and provisions that relate to principles of economic and social structure of the state, as a unified whole, in other words - equivalent by the Constitution. The Constitutional Court found:

- "Tax Authority of the State (Article 142 of the Constitution), assumes its right to introduce, impose and collect taxes and other public charges from natural and legal persons who are under its fiscal sovereignty. While exercising its authority, state must provide legal certainty and social justice (Article 1, paragraph 2 of the Constitution). Constitutional character of social rights, as fundamental rights guaranteed by the Constitution, refers to two basic requirements of the welfare state: - state and public authority is obliged to follow a policy of fair and equal redistribution of national resources in order to equalize the extreme inequality; - Legislative and executive authorities are legally obliged to achieve a balance between the limited resources of the state budget and social goals set out in the Constitution. The antipode of the tax authorities is the tax duty of citizens and legal persons, which makes possible that the state provides tax (fiscal) revenue, for the functioning of the state and the provision of public goods. Given that all persons in the State are entitled to use the public goods, they have a duty to, through payment of taxes and other fiscal duties, provide state funding so that the "offer" of these public goods by the state could be more efficient and of good quality, all in the interest of the people - the consumers of public goods. (...)

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<sup>7</sup>U I-no. 15/12. and 17/12., dated 2 October 2012.



Based on previously mentioned data, it comes that the disputed tax obligation, introduced by the Law on taxes to access certain services of general interest and for the use of tobacco products and electro-acoustic devices, as public revenue, apply to a large number of taxpayer and, the Constitutional Court found that, are allowed to use their property rights. However, although the payment of taxes and other duties reduces the economic strength of taxpayers, the Constitutional Court considered the legal obligation of the legislative and executive power to achieve "harmony" between the limited resources of the state budget and social goals set out in the Constitution.

The legislator, according to the Constitution and the European Convention, enjoys a wide margin of appreciation in the enactment of the tax system, because it is an important instrument of public policy. However, since the tax laws *prima facie* interfere with the basic constitutional rights; for their justification legislator must prove the existence of particularly important (qualified) public interest.

Given the fact, that the main reason for the adoption of the Law is (..), *the need of providing additional revenues in the budget (..) in order to preserve the financial stability of the Budget*, and the saving measures taken by the Government because of the budget deficit, the Constitutional Court found that assessed law has a legitimate purpose: to preserve the stability of national financial system in times of economic crisis, making impact on the revenue side of the state budget in a short period of time, in other words it was necessary in times of economic crisis, to make impact on the revenue side of the state budget in order to ensure smooth performance of state functions and tasks, and the functioning of the state. The Constitutional Court found that the Law contributes to the stabilization of the state financial system in times of financial crisis and represents one of many public policy measures that aim to achieve the same goal - ensuring the smooth and regular fulfillment of the obligations, for which the funds are already planed in the state budget, and in a sense, can be considered coherent and coordinated. (...).

The Constitutional Court finds that, undoubtedly, any new legislative or administrative measures, in addition to existing ones, obtained characteristic of ("almost intolerable") burden and impact on private-property sphere of majority of Montenegrin citizens. The Constitutional Court does not exclude possible existence of excessive burden on taxpayers, in specific cases, but this excess can only be examined in its application, under the particular circumstances of each case. Application of the Law, namely, assumes a concretization of legal provisions in each case through a special legal procedure for each taxpayer. Measure of "interfering" in the private property sphere of the taxpayer can be estimated only through specific "life circumstances" of each individual and is not suitable for generalization. Protection of individual human rights in those proceedings would involve the application of criteria, which are established by the European Court in its jurisprudence, in terms of protection of human rights, and these criteria are binding to the Constitutional Court as well, in proceedings initiated by constitutional appeal.

Therefore, the disputed taxes - cannot be considered arbitrary to the extent to which disputed legal provision, in relation to different "life circumstances" would no longer be compatible with the public interest, as it is not inconsistent with the provisions of Article 24 of the Constitution, as they are imposed in the extent necessary to fulfill the purpose for which it was introduced. Determined boundary, in fact, is also the boundary of permissible constitutional review of the law, which is subject of the constitutional review process. (...).

Accordingly, the Constitutional Court, remained in the "boundaries" of its jurisdiction in these proceedings, when the Court found that extraordinary and disputed tax obligation is constitutionally acceptable, and have legal basis, that are imposed in the public interest - *to protect the fiscal interests of the state and maintain budget stability* and did not violate the principle of proportionality between the employed means and the pursued aim. The fact that the law is enacted solely for the purpose of overcoming the current economic



crisis, as well as its relatively short period of application (less than 18 months), is also consistent with the Court's assessment.

The Constitutional Court, pursuant to the provisions of Article 149 of the Constitution, in terms of abstract review of constitutionality, is not competent to assess the height of the disputed taxes, and in that respect, even if the legislator determine the appropriate amount of the tax (1 €) for access to the disputed services of general interest .. (...), and the extent to which the taxpayer was "hit" with the amount of the tax . In fact, until the Montenegrin Constitution contains a different provision of the tax or stamp duty system, the Constitutional Court has a constitutional obligation to refrain of assessing the constitutionality of these issues. "

## **1.2. How were issues of social integration or conflict transformed into legal issues?**

The Constitution of Montenegro's most relevant legal Act for the inclusion in social processes in the country, and also determines the conditions and limits of that involvement. The Constitution established the legal framework, general principles and guaranteed human (constitutional) rights that are essential for social integration that allows the transformation of life issues of social integration into the (constitutional) legal issues, to be decided by the Constitutional Court within its jurisdiction stipulated by Constitution.

Furthermore, the Constitution guarantees many ECONOMIC, SOCIAL AND CULTURAL RIGHTS AND FREEDOMS: right to work, to free choice of occupation and employment, to fair and human working conditions and to protection during unemployment. (Article 61), Right of employees to adequate salary, right to limited working hours and paid vacation, right to occupational health and safety (protection at work), special protection at work for youth, women and the disabled. (Article 64), right to social insurance, material security to the person that is unable to work and has no funds for life. (Article 67) right to special protection of the persons with disability (Article 68), right to health care (Article 69), right special protection of the family (Article 72), right to education under same conditions, right to obligatory and free of charge elementary education (article 75 . the Constitution).

Constitutional and legal framework for social integration in Montenegro, is concretized in a number of laws: Law on Health Protection ("Official Gazette of Montenegro", no. 39/2004., And Official Gazette of Montenegro ", no. 14/10.), Health Insurance Law ("Official Gazette of Montenegro", no. 39/04 and 23/05., and "Official Gazette of Montenegro", no. 14/12.), Law on Social and Child Protection ("Official Gazette of Montenegro", no. 27 / 13), Law Against discrimination ("Official



Gazette of Montenegro", no. 14/10., and 18/14.), Law on Prohibition of discrimination against persons with disabilities ("Official Gazette of Montenegro", no. 39/11 .), Law on the Protection of the rights of mentally ill persons ("Official Gazette of Montenegro", no. 32/05 and "Official Gazette of Montenegro", no. 27/13.), The Pension and disability insurance Law ("Official Gazette of Montenegro ", no. 54/03., 39/04., 61/04., 79/04., 14/07., and 47/07., and" Official Gazette of Montenegro ", no. 79/08., 14 / 10., 78/10., 34/11., 66/12., and 38/13.), Law on Persons with disabilities accompanied by a guide dog ("Official Gazette of Montenegro", no. 76/09.), Law on Social Council ("Official Gazette of Montenegro", no. 16/07., And 20/11.), The Law on Vocational Rehabilitation and Employment of Persons with Disabilities ("Official Gazette of Montenegro", no. 49/08., 73/10., and 39/11.), the Law on Patients' Rights ("Official Gazette of Montenegro", no. 40/10.), the Labor Law ("Official Gazette of Montenegro", No. 49 / 08 and 59/11., and 66/12.), Law on Employment and right to unemployment insurance ("Official Gazette of Montenegro", no. 14/10., 39/11., 40/11. 45 / 12 and 61/13.), (...).

Legal recognition of the rights of "social integration" is determination of goals that oblige authority (not) to act in order to ensure the fulfillment of these rights, including the recognition of the right of citizens to seek a certain actions of authority to turn formally recognized legal right of equality into *de facto* equality. Issues of social integration are related to rights of socio-economic nature in the field of health, education, labor, social security and so on. The Constitutional Court encounters these issues, mostly through violation of certain individual social rights, the right to equality and non-discrimination and other rights arising under the Constitution, international law and / or legislation. The Constitutional Court in such cases, depending on the infringement or protection the rights, determines in this case, the state's obligation to the applicant who initiated the constitutional process.

**1.3. Is there a trend towards an increase in cases on legal issues relating to social integration? If so, what were the dominant questions before your Court in the past and what are they at present?**

Number of cases involving issues of social integration is constant, and usually refers to the rights to labor, social and pension insurance.



### Example 1.

Decision U. no. 86/08., 43/09., 103/09. and 108/09. - Abstract review of the constitutionality of the provisions of Article 12., 13, 14, 15, 16, 17, 18 and 19 Law on wages and other incomes of state and public officials ("Official Gazette of Montenegro", no. 33/08.). The Constitutional Court found that the assessed provisions are not inconsistent with the Constitution:

- "Determination of right to pension is one of citizens' legal rights. In this regard, the legislature is empowered to stipulate the right, and therefore, to change it, amend it and repeal it depending on various circumstances, such as financial power of the state, the implementation of social policies and so on. However, while regulating these relations, legislator has to accept the boundaries set by the Constitution, and in particular those deriving from the principle of rule of law and social justice, and those that protect certain constitutional goods and values.

Disputed Law provisions, stipulate government officials and their family members a special legal status in terms of entitlement to pension. In addition to the rights that belong to state officials under the general regulations on pension and disability insurance, disputed Law provisions stipulate supplementary pension rights, which are financed from the budget of Montenegro, in relation to general conditions regarding entitlement to pension (ie. General conditions according to regulations of pension and disability Insurance), disputed provisions stipulate privileged conditions or privileged pensions.

According to Article 1, paragraph 2 of the Law, the government official, in terms of this law, shall be the President of Montenegro, the President of the Parliament, the Prime Minister of Montenegro, Deputy President of the Parliament, the Deputy Prime Minister, member of the Parliament and Minister. It is therefore, the circle of entities that perform highest state functions in the legislative and executive state power. These are political positions, to which, public officials are being elected or appointed for a term of several years and may be re-elected or appointed to those positions.

The question is whether the assessed Law provisions, that stipulate the right of privileged pensions to all former and current state political officials as of 27 December 1990, achieve a fair balance between the interests of the community and the individual rights of acting state officials, in other words the proportionality of impugned legislative measure.

The Constitutional Court, in this regard found, that the legal status of state officials previously mentioned in Article 1, paragraph 2 of the Law, has its own peculiarities arising from the Constitution, and the regulation of their pensions, in a way that is different from the general pension system, is based on their particular legal position, the legal nature of mandated political functions arising from the Constitution, increased accountability in the exercise of those functions, transparency, limited mandate, the incompatibility of other jobs during the mandate, quitting previous occupation or profession for a certain period of time, etc.. Privileged pensions of state officials, because of the nature of their constitutional duties and responsibilities, may, therefore, be a legal expression of the specifics, but it must always be proportionate to the overall social and economic situation in the country.



If the average pension is objective indicator of general social and economic situation in the country, then the amount of privileged pensions of state officials should not be disproportionate from the average pension. Privileged pensions stipulated by provisions of the articles 12 - 19 are extremely disproportionate to average pensions in the country, and are therefore incompatible with Article 1 of the Constitution, which defined Montenegro as a civil state based on the principles of democracy, rule of law and social justice.

According to the Article 17 of assessed Law, state official who were state officials in the state authorities of Montenegro, Federal Republic of Yugoslavia and the State Union of Serbia and Montenegro in the period from 27 December 1990, are entitled to a pension.

The Court found that, the right to privileged pensions is regulated by law retroactively. Specifically, according to the Article 147 paragraph 1 and 2 of the Constitution, law or the other regulation may not have retroactive effect. Only in exceptional cases, certain provisions of laws, if required by the public interest that is determined in the legislative process, may have a retroactive effect.

Proponents of the Law explained his retroactive effect, claiming following reasons: "Having in mind legal solutions of this issue in countries in the region, considering the complexity and importance of the work carried out by state officials, as well as the specificity of the type and level of responsibility, new law have proposed changes in the conditions and methods of acquiring pension rights of state officials, retroactively until the first multi-party elections, on December 1, 1990."

Such reasoning cannot be considered as constitutionally acceptable evidence - that constitutional requirement, that certain provisions of the law may have retroactive effect only in exceptional cases, if required in the public interest, as determined in the legislative process, has been met. Quoted reasoning does not explain the content of the public interest that could justify the retroactive extension of 19 years back in time."

## Example 2.

Decision U – I no. 27/11, dated April 19, 2013 - abstract review of the constitutionality of the provision of Article 2 of Chapter XXI. Communal activity, paragraph 1 of the Rules on determining jobs positions or jobs, for which the years of insurance coverage count at an accelerated rate and the procedure and method for their determination ("Official Gazette of Montenegro", no. 71/10.), The Constitutional Court found that the assessed provisions are inconsistent with the Constitution:

- "1.8. The Constitutional Court found that, in this case, the assessed provision of the Rules, regulates the matter that is already regulated by the Law on Protection and Rescue, in a manner contrary to mentioned law. Determining legal relations, which is legal matter and cannot be regulated by acts of lower legal power than law, the Constitutional Court found that, among other things, enacting authority violated principle of legality, both in terms of formal legality (legal document of lower legal power must be consistent the legal acts of higher legal power), and in terms of the material legality (contents of the disputed act). It is



inconsistent with the basic principle stipulated in the provisions of Article 145 of the Constitution, which established a hierarchy of rules, based on which laws must be consistent with the Constitution and other regulations with the Constitution and with the law, - to diminish rights, stipulated by law, that belong to a certain group of insured persons, through the act of lower legal power than the law.

1.9. The Constitutional Court found, that the explanation of Rules given by enacting authority, which indicates that counting years of insurance at an accelerated rate is regulated by the Pension and disability insurance Law, and cannot be regulated by other laws, is not relevant to the assessment of constitutionality and legality of the assessed provisions of the Rules. Namely, the Pension and disability insurance Law regulates the system of pension and disability insurance in a general way, so that a special law is allowed to deviate from its general rules (lex specialis derogate legi generali). System law, in this case still applies, it is not abolished, except for the exception, which is regulated by a special law, as it is in this particular case stipulated by Article 18, paragraph 2 of the Law on Protection and Rescue. The Law on Protection and Rescue, which is in accordance with the legal principle of lex posterior derogate legi priori "later law" in relation to the Pension and disability insurance Law, and that determines counting of years of insurance in a different manner, at an accelerated rate for professional rescuers, according to the Constitutional Court has "priority" application to "previous" law. "

### Example 3.

Decision U-I no. 7/09, dated 28 January 2010 - abstract review of the constitutionality of the provisions of Article 20 and 28 of the Pension and disability insurance Law ("Official Gazette of the Republic of Montenegro", no. 54/03, 39/04, 79/04 47/07 and "Official Gazette of Montenegro", no. 79/08). The Constitutional Court found the assessed provisions are not inconsistent with the Constitution:

- "Article 1 of Protocol no. 1 to the European Convention on Human Rights and Fundamental Freedoms provides that 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 preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties. International Covenant on Economic, Social and Cultural Rights ("Official Gazette of SFRY", no. 7/71) stipulates that the States Parties to the present Covenant recognize the right of everyone to social security, including social insurance (Article 9) and The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.(Article 11, item 1).



The right to social security in its broadest sense includes the right to social security and right to social assistance. Generally speaking, social insurance is when workers set aside a certain portion of their salaries so that they and their family members are later entitled to a compensation, for example in the case of illness, injuries or retirement. Social assistance includes compensation that individuals get based on its status (eg. Unemployed, the disabled, etc.), and their source are public funds which are collected from taxes and fees. The right to social security is part of the Universal Declaration of Human Rights (Article 22). It is guaranteed by the International Covenant on Economic, Social and Cultural Rights, which in a general way, provides that everyone has the right to social security, including social insurance (Article 9).

Convention no 102 of the International Labor Organization established very precise minimal standards in the areas of social security: medical care; benefits in case of illness; unemployment benefits; benefits for old age; compensation for injuries at work; family support; benefits in case of maternity; disability; benefits to family members in case of death of the breadwinner.

According to the European Social Charter, states have an obligation to create and maintain a system of social protection. Minimum level of social protection system should provide is determined by the standards already mentioned in ILO Conventions on minimum standards of social security. However, it should be noted that States have an obligation to gradually improve the level of social protection, so that minimum standards are only a starting point (Article 12).

Quoted Constitution provisions indicate that the law regulates the exercise of rights if it is necessary for their implementation, as well as other issues of interest for Montenegro. Accordingly, the Pension and disability insurance Law regulated a system of pension and disability insurance rights and obligations under this basis, conditions and manner of exercise of rights from pension and disability insurance, financing and other issues of importance for the regulation of this area. Accordingly, the provisions of Article 4 of the Pension and disability insurance Law, stipulates that mandatory pension and disability insurance based on generational solidarity (hereinafter: pension and disability insurance), founded on the principles of reciprocity and solidarity, shall secure rights for Participants based on work, time period for which contributions were paid and the amount of the base on which contributions were paid for pension and disability insurance, in the event of retirement, disability and physical impairment, and rights to members of their families in the event of a Participant's or Beneficiary's death. The previously quoted provision indicates that the rights from pension and disability insurance are acquired and realized depending on the length and scope of contribution in funds for this insurance, and realized to the extent that depends on time period and the amount of the base for which contributions paid, applying the principles of reciprocity and solidarity. Principles of reciprocity and solidarity in the pension and disability insurance mean that all participants invest the funds for pension and disability insurance, and that those rights are exercised by people who are eligible for their acquisition.

The Court found that, enacting disputed provisions of the Law, that the retirement pension amount shall be calculated by multiplying the Participant's personal points by the pension value of one personal point on the day of the entitlement realization and the maximum amount of retirement pension shall be determined in the manner stipulated in Section 20 of the Law, provided that the personal coefficient may not exceed 4, is not inconsistent with the Constitution. Institute of a maximum pension, limits the amount of pension of each user to a certain amount, which is defined by law as the largest amount of pension, regardless of the fact that the amount of pension of certain participants, according to actual earnings or actual insurance basis and length of service, would be more. This way, the amount of the pension is limited to an amount less than the paid contributions for pension and disability insurance, which is consistent to the principles of reciprocity and solidarity. The institute applies to all categories of participants in the same manner and under the same



conditions, and is therefore not infringing the principle of equality under Article 17 of the Constitution. The constitutional principle of equality does not mean equality of citizens in an absolute sense, but it guarantees equality of citizens who are in the identical legal situations. "

#### **Example 4.**

Decision U-I no. 18/06., 23/06., 26/06. and 31/06., dated 6 December 2006 - an abstract review of the constitutionality of the provisions of Article 30, paragraph 2, art. 108 and 193 of the Pension and disability insurance Law ("Official Gazette of the Republic of Montenegro", no. 54/03., 39/04., And 79/04.). The Constitutional Court has instituted proceedings to review the constitutionality of the provisions of Article 30, paragraph 2 of the Law, in part which reads as follows: "employee" and said, however that the assessed provisions of Art. 108 and 193 of the same Law, are not inconsistent with the Constitution:

- "The disputed provision of Article 30, paragraph 2 of the Law provides that a disability shall also be deemed to exist when an employee, due to health changes that cannot be eliminated by treatment or medical rehabilitation, suffers a partial loss of working capacity of 75%. Pursuant to the quoted constitutional provisions, the Law established mandatory pension and disability insurance, and the rights and obligations under this insurance. Mandatory pension and disability insurance, stipulated by Law, among other things, gives rights in the event of old age, reduction and loss of the working ability and the death of the insured, in order to ensure social security of the insured persons and their family members. Provisions of article 9 of the Law determined circle of persons who are compulsorily insured in the pension and disability insurance, besides employees those participants are persons performing independent activities and agricultural producers. The law in the event of disability provides the right to a full disability pension (if the disability caused complete loss of working ability) and the right to a partial disability pension (partial loss of working ability). Complete loss of working capacity is assessed in all three categories of beneficiaries of the mandatory pension and disability insurance (employees, self-employed and agricultural producers). According to the disputed provisions, partial loss of working ability is evaluated only at the insured employee, but not in the insured self-employed and farmers. Therefore, the insured self-employed and farmers are not entitled to a partial disability pension. That is why, the Constitutional Court found that by assessed enactment, put in an unequal position insured self-employed and agricultural producers, in relation to the insured employees, because they are in the same legal situation, which led to the violation of the principle of equality of citizens under Article 15 of the Constitution. Given that, according to the Court, it is reasonable to question compliance with the Constitution of the assessed provisions of Article 30, paragraph 2 of the Law, which reads as follows: "employee". Right to a family pension is right to pension and disability insurance, which is realized under the conditions and in the manner established by law, and shall be acquired in the event of death of the insured or



beneficiary of retirement. Legislator in Article 44 prescribes the conditions under which a widower or a widow may be eligible for a beneficiary pension. Entitlements to pension and disability insurance shall expire when, in the course of their exercise, the conditions for accruing and exercising those rights cease to exist (Article 110 of the Law), and pursuant to the provisions of Article 8, paragraph 2 of the Law vested rights from pension and disability insurance may be terminated only in cases specified by this law.

The Constitutional Court found that the content of the disputed provision of Article 108 that the widower or widow lose the right to a beneficiary's pension, if you get married before the age of 50, and the determination of the conditions under which this right can be used in addition to a certain age, is not incompatible with constitutional provisions on the rights and freedoms of citizens under Article 14 of the Constitution. So when circumstances arise that allow the person to be materially taken care of, on other grounds, forfeit the right to the use of family pension, persons that have working ability and are under the age of 50 years. In this case, the Law contains a safeguard clause, according to which a beneficiary's pension is reserved for the widow or widower with that are completely enable to work, and if during the term of the rights attained the age of 50 years (Article 44 of the Law), which indicates that established right to social security is not violated. Otherwise, the determination of the conditions and circumstances that affect the use of the right to a beneficiary's pension is exclusively in the domain of legislative policy and a matter of expediency of legal solutions, which comes within the jurisdiction of the Constitutional Court.

The disputed provision of Article 193 of the Law provides that beneficiaries of the right to retirement pension, disability pension, survivor's pension, the minimum pension, the maximum pension, subsidy for physical impairment, allowance on the basis of the remaining working ability, i.e. aid and care allowance, who acquired that right according to regulations from pension and disability insurance that were applied until the beginning of implementation of the present Law, shall be provided with these rights in the same volume even after the specified date.

Assessed provisions provide protection of acquired rights, and to those that have been achieved by the pension and disability insurance until the entry into force of this Law, including those which are not determined by this law. Specifically, it is about the rights of disabled workers on the basis of the remaining work capacity that users of these rights continue to use to the extent and in the manner determined by the previous regulations (disabled employees category III - users rights to compensation due to lower earnings in other related job, and unemployed disabled of II and III category that are on the list of Employment Bureau - temporary fee users). This way, participants of rights to pension and disability insurance are not deprived, not even partially, of acquired rights, thereby ensuring continuity in the use of these rights, without discrimination between the insured themselves - the disabled, but the disputed provision of all policyholders ensures equality in the exercise of rights to pension and disability insurance, in accordance with the provisions of Article 15 of the Constitution. "

#### **Example 5.**

Decision U. no. 180/08.of February 26, 2009 - abstract review of the constitutionality and legality of the provisions of paragraph 5 of the Decision on extraordinary adjustment of pensions and fees



dated 1 December 2008 ("Official Gazette of Montenegro", no. 72/08). The Constitutional Court found:

- "The decision, whose provisions are disputed, was enacted in the process of executing legal rights of pension and disability insurance. The legal basis for compensation to those rights for the period July 2002 - December 2003 was agreement signed between the Federation of Associations of Pensioners of Montenegro, Ministry of Health, Labor and Social Welfare, the Ministry of Finance and the Republic Fund for Pension and Disability Insurance dated 10 December 2007. Pursuant to Article 12 of the Law, an extraordinary pension adjustment, monetary compensation for bodily injury, supplements for help and care and cash benefits in respect of the remaining work capacity, are made from 1 December 2007 for 10% and from 1 December 2008 for 10% in the process led by Fund, that adopted legislation on the harmonization of those rights with the specific percentage.

Disputed provision in Section 5 of the Decision, stipulated that the adjustment of pensions and cash benefits under this decision will be made ex officio, without issuance of the decision, and the Constitutional Court found that it does not question the exercise of the right to legal remedy in administrative or judicial proceedings, an extraordinary adjustment regarding pension and other financial benefits.

Extraordinary adjustment of pensions and other benefits shall be made in such a way as regular pension adjustments. In fact, in all of these proceedings, applying the Pension and disability insurance Law, a separate decisions are not issued. There are no legal obstacles to the unsatisfied party, if it considers that pension or other compensation is not determined in accordance with the regulations, takes an appropriate action, demands issuance of the decision in this proceeding, and exercise their right to appeal and judicial review. According to the Article 75, paragraph 2 of the Pension and disability insurance Law, in the proceedings pending before the Fund for Pension and Disability Insurance applies the law governing general administrative procedure. In the grounds of the proceedings, the Law on Administrative Procedure, Article 113 prescribes the principle of ex officio and the principle that administrative procedure shall be instituted on request of a party. The Fund, as authority competent for decision-making shall issue a decision on administrative matter that is subject of the procedure based on decisive facts determined in course of the procedure (Article 196, paragraph 1 of LAP), which, among other parts, contain information on legal remedies. "

## **2. International standards for social integration**

### **2.1. What are the international influences on the Constitution regarding issues of social integration/social issues?**



In the Decision and declaration<sup>8</sup> of independence, Montenegro has committed to apply and accept international treaties and agreements<sup>9</sup> concluded and ratified by the states (State union Serbia and Montenegro), which is related to Montenegro and are in compliance with its legal system.

In the process of reviewing the national legislation in relation to international standards on the protection of human rights, the Government has initiated a process to review legislation for its harmonization with international standards on the protection of human rights and modernization in the field of human rights in accordance with the latest developments in international standards of human rights and freedoms. For this purpose has been adopted a large number of amendments to existing laws, especially in the area of criminal law and procedure, enforcement of criminal sanctions, gender equality, rights of children, protection of missing persons and refugees, women, including victims of domestic violence, the elderly, persons with disabilities, members of minorities and others. In these areas, the executive authority has adopted specific action and strategic documents, which ensures that legal mechanisms are continuously improving to protect human rights and freedoms.

The Constitution of Montenegro<sup>10</sup> in the Preamble stipulates to detail, basic normative principle "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." In its basic provisions of the Constitution stipulates that Montenegro is a civil, democratic, ecological and the state of social justice, based on the rule of law. In the Article 6, paragraph 1 of the Constitution, Montenegro shall guarantee and protect rights and liberties, and Article 8, paragraph 1, stipulates that direct or indirect discrimination on any grounds shall be prohibited.<sup>11</sup> More than a third of the constitutional text refers to the guarantee of rights and freedoms of man and citizen. In the chapter "Human rights and freedoms" are more precisely defined individual human rights and certain principles and mechanisms for their protection. The Constitution guaranteed that all persons shall be deemed equal before the law, regardless of any

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<sup>8</sup>"Official Gazette of the Republic of Montenegro", no. 36/06.

<sup>9</sup>Montenegro has, in this sense, taken the international instruments of the predecessor State in its legislation, as follows: 35 Conventions and Protocols of the United Nations; Conventions and the Protocols to the Hague Convention on Private International Plan (HCCH); 68 Conventions of the International Labor Organization (ILO) and the 20 Council of Europe Convention.

<sup>10</sup>Article 1 of the Constitution

<sup>11</sup>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. (Article 8, paragraph 2 of the Constitution)



particularity or personal feature<sup>12</sup>, the state shall guarantee the equality of women and men and shall develop the policy of equal opportunities<sup>13</sup>, the right to an effective remedy<sup>14</sup>, the right to legal aid<sup>15</sup> and the right to a sound environment<sup>16</sup>.

In the following 53 provisions of the Constitution<sup>17</sup> are further elaborated: individual rights and freedoms; political rights and freedoms, as well as a range of economic, social and cultural rights and freedoms including the rights of the first, second and third generation. Chapter 5, "Special minority rights" stipulates that minority nations and other minority national communities guarantees the protection of the identity and the rights and freedoms which can be used individually or together with others<sup>18</sup> and the prohibition of all forms of forced assimilation<sup>19</sup>.

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<sup>12</sup>Article 17, paragraph 2 of the Constitution

<sup>13</sup>Article 18 of the Constitution

<sup>14</sup>Article 20 of the Constitution

<sup>15</sup>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. (Article 21 of the Constitution)

<sup>16</sup>Article 23, Paragraph 1 of the Constitution

<sup>17</sup>The Constitution guaranteed: Prohibition of the death penalty (Article 26); human rights and the dignity of the human being with regard to the Application of Biology and Medicine (Article 27); Dignity and inviolability of persona (Article 28); the right to personal liberty (Article 29); Respect for human personality and dignity in criminal or other proceedings in the case of deprivation or restriction of liberty and during the execution of the sentence (Article 29); right to a fair and public hearing within a reasonable time by an independent, impartial tribunal established by law (Article 32); application of a more lenient law (Article 34); the right to defense (Article 37); damages for unlawful conduct (Article 38); right to respect for private and family life (Article 40); secrecy of letters, telephone calls and other means of communication (Article 42); voting rights (Article 45); freedom of expression (Article 47); freedom of the press (Article 49); prohibition of censorship (Article 50); freedom of political, trade union and other association and action (Article 53); right to address international organizations (Article 56); property (Article 58); entrepreneurship (Article 59); The right of inheritance (Article 60); right to work (Article 62); prohibition of forced labor (Article 63); the right to strike (Article 66); protection of persons with disabilities (Article 68); health care (Article 69); consumer protection (Article 70); special protection of the family, mother and child (Art. 72, 73 and 74); right to education (član 75); freedom of creation (article 76); protection of natural and cultural heritage (Article 78);

<sup>18</sup>Article 79 of the Constitution stipulates the right to exercise, protect, develop and publicly express national, ethnic, cultural and religious particularities; the right to choose, use and publicly post national symbols and to celebrate national holidays; the right to use their own language and alphabet in private, public and official use; 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; Compilation of relevant legislation pertaining to the Constitutional Court of Montenegro; 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 also in the language of minority nations and other minority national communities; the right to establish educational, cultural and religious associations, with the material support of the state; the right to write and use their own name and surname in their own language and alphabet in the official documents; 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 also in the language of minority nations and other minority national communities; 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; the right to proportionate representation in public services, state authorities and local self-government bodies; the right to information in their own language; 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; the right to establish councils for the protection and improvement of special rights.

<sup>19</sup>Article 80 of the Constitution



List of constitutional guarantees of human rights and freedoms is not final and closed. This list is complemented by the provisions of international conventions to which Montenegro assesses, and that according to the Article 9 of the Constitution are part of the internal legal system and their legal power is above the law.

Improvement of the legislative framework in the field of individual human rights and freedoms in Montenegro is particularly evident in recent years that have innovated and adopted legal<sup>20</sup>solutions in many sectors, regardless of the difficulties in aligning legislation with international legal standards.

Montenegro is committed to, as part of its foreign policy, respect for human rights as an important determinant for the normalization of relations with countries in the region and beyond, and in the modern world affected by the globalization process, contributing to the development of Montenegrin democracy.

## **2.2. Does your Court apply specific provisions on social integration that have an international source or background?**

The Constitutional Court in all its jurisdictions directly applies international Acts. The Constitution of Montenegro<sup>21</sup> which was adopted and proclaimed on October 22, 2007, for the first time, explicitly stipulates that „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 apply directly when they regulate relations differently than the national legislation. ”<sup>22</sup>

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<sup>20</sup> Law on Protection of Personal Data ("Official Gazette of Montenegro", no.79 / 08 and 70/09); Law on Protection from Domestic Violence ("Official Gazette of Montenegro", No.46 / 10), Law on Prohibition of discrimination ("Official Gazette of Montenegro", No.46 / 10); Law on Free Legal Aid ("Official Gazette of Montenegro", n.20 / 11) ..etc..

<sup>21</sup>Official Gazette of Montenegro" 1.7.

<sup>22</sup>Article 9 of the Constitution.



The aforementioned constitutional provision indicates that Montenegro, recognizing international agreements, an integral part of its legal system, has joined the countries that have changed their attitude towards international law. Also part of the Constitution devoted to the constitutionality and legality stipulates that 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.<sup>23</sup> The jurisdiction of the Constitutional Court, in the abstract review was extended to the decision on conformity of laws with the Constitution and confirmed and published international agreements.<sup>24</sup>

Of all the international instruments, the Court in its jurisprudence (in all types of cases) most frequently applies the European Convention for the Protection of Human Rights and Fundamental Freedoms and decisions, judgments and legal positions of the European Court of Human Rights, as well as the practice of the Federal Constitutional Court of Germany. The Constitutional Court's decisions are modeled after the decisions and judgments of the European Court of Human Rights, and through constitutional interpretation, its practice models by applying Convention principles (the principle of proportionality, the principle of legality and legal certainty and others.), Which enables better protection of fundamental human rights and freedom. Montenegro became the 47th member state of the Council of Europe on 11 May 2007<sup>25</sup>.

According to the Resolution of the Committee of Ministers of the Council of Europe, from additional - 994th session, 9th of May 2007<sup>26</sup>, Montenegro is considered a member of the Convention, with effect from 6 June 2006 since independence. When presenting the documents of ratification of the Convention dated 3 March 2004, it is considered that Montenegro submitted a declaration in relation to Article 57 of the Convention and reserves in relation to the provisions of Art.5 and 6 of the Convention. However, the European Court of Human Rights has found different time constraints of applicability of the Convention in respect of Montenegro *ratione temporis* and *ratione*

<sup>23</sup> Article 145 of the Constitution.

<sup>24</sup> Article 149, Paragraph 1, Item 1 of the Constitution.

<sup>25</sup> Council of Europe, Members, <http://www.coe.int/portal/web/coe/montenegro?dynLink=true&layoutId=157&dlgroupId=10226&fromArticleId=> (access: 12. jun.2011.).

<sup>26</sup> The Resolution CM / Res (2007) 7 of 9 5th 2007 CoM stated: "Given the decision to proclaim the independence of the Republic of Montenegro, by letter of 6th of June 2006 relating to the Convention which the State Union of Serbia and Montenegro was a party or signatory, confirmed by letter dated 23 March 2007, and the decision of the Committee of Ministers under which Montenegro, with retroactive effect from 6 June 2006 (the decision on the proclamation of independence of the Republic of Montenegro), member European Convention for the Protection of Human rights and Fundamental Freedoms and its Protocol no. 1, 4, 6, 7, 12, 14 to the Convention (...). "



personae. Specifically in the Case of *Bijelic v. Montenegro and Serbia*<sup>27</sup>(judgment, 28/04/2009, application no. 11890/05), the European Court found that the applicability of the Convention in respect of Montenegro begins from 3 March. 2004,i.e. from the date of ratification of the Convention by the former State Union of Serbia and Montenegro. This way, the application of the Convention and therefore the jurisdiction of the European Court, in relation to Montenegro, extends retroactively to March 3, 2004, and not since its accession to the Council of Europe (11 May 2007), which placed great demand before the Constitutional Court –assessment of conformity of the legal system of Montenegro for that period. The European Convention, as ratified international agreement, together with the principle of democracy, rule of law and free elections, it is an integral part of the internal legal system, thus it is directly applicable and in accordance with the Constitution, hierarchically above other laws.

International sources are particularly important in situations where the Constitutional Court decides cases of significance to the public, when it need know more about a particular issue which has to decide, also to interpret the volume of a certain guaranteed human rights and when assessing whether his legal position meets the same standards and quality of work performed by other courts that have constitutional jurisdiction.

The Constitutional Court, in its practice applies all relevant sources of international law, as well as the overall regional (European) and overall (global) international law, including binding international instruments and jurisprudence of international tribunals or foreign law and practice, especially the practice of foreign constitutional courts and other courts with constitutional jurisdiction.

### **2.3. Does your Court directly apply international instruments in the field of social integration?**

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<sup>27</sup>69. (...), given the practical requirements of Article 46 of the Convention, as well as the principle that fundamental rights protected by international human rights treaties should indeed belong to individuals living in the territory of the State party concerned, notwithstanding its subsequent dissolution or succession (see, mutatis mutandis, paragraph 58 above), the Court considers that both the Convention and Protocol No. 1 should be deemed as having continuously been in force in respect of Montenegro as of 3 March 2004, between 3 March 2004 and 5 June 2006 as well as thereafter (see paragraphs 53-56 above).

70. (...) given the fact that the impugned proceedings have been solely within the competence of the Montenegrin authorities, the Court, without prejudging the merits of the case, finds the applicants' complaints in respect of Montenegro compatible *ratione personae* with the provisions of the Convention and Protocol No. 1 thereto. For the same reason, however, their complaints in respect of Serbia are incompatible *ratione personae*, within the meaning of Article 35 § 3, and must be rejected pursuant to Article 35 § 4 of the Convention.



Yes, because Montenegro is a signatory of a large number of general international and regional agreements in the field of human rights. The Constitutional Court directly applies various international instruments<sup>28</sup> in the field of social integration. The Constitutional Court applies regional instruments: Convention for the Protection of Human Rights and Fundamental Freedoms, the European Social Charter, the Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages. Of all the international instruments, the Court in its jurisprudence in all types of cases, as already stated usually applies the European Convention and the decisions, judgments and legal positions of the European Court of Human Rights.

### Example 1.

Decision Uz-III no. 188/12 dated 2 October 2012 - constitutional appeal (suspended payment of retirement pensions, a recognized and stipulated by decision of the same section number. 02-31637, dated February 6, 1995, for the conducting advocacy practice. Disposition of the decision determined that Service shall conduct the proceeding of compensation of damage caused to the Pension Fund of Montenegro, and that this decision shall replace the decision of the National pension Fund, which recognizes the right to retirement pension to participant. The Constitutional Court found:

- "The right to property is under protection of the constitutional system of Montenegro and corresponds with the right to property under Article 1 of Protocol no. 1 to the European Convention. Article 58 paragraphs 1 and 2 of the Constitution guarantee the right to property, and constitutional limitations are conditioned by existence of public interest while respecting the principle of proportionality, with rightful compensation. In accordance with these constitutional provisions, the Constitutional Court is obliged to protect the ownership rights if state authorities, contrary to the law, deprive or limit anyone's right of property or interfere in other way with the enjoyment of this right. However, in case of invasion of property by other legal entities, whether it is a natural or legal persons, as a rule, it is the property dispute of private law. Considering the contents of this right, the European Court of Human Rights has explained that by recognizing that everyone has the right to the peaceful enjoyment of his possessions, in fact, guarantees the right of property, except it only protects the right of the existing property and does not 'guarantee right to

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<sup>28</sup>Universal Declaration of Human Rights of 1948, the International Covenant on Civil and Political Rights 1966, International Covenant on Economic, Social and Cultural Rights of 1966, the International Convention on the Elimination of All Forms of Racial Discrimination of 1966, the International Convention on Elimination of All Forms of Discrimination against Women of 1979 and the Convention against Torture and Other Cruel, Inhuman or degrading Treatment or Punishment of 1984, the Convention on the Rights of the Child of 1989, the Convention on the Protection of the Rights of All migrant Workers and Members of Their Families, 1990 the Convention on the Rights of Persons with Disabilities in 2006 (...).



acquire property (European Court, *Marckx v. Belgium*, judgment dated 13 June 1979, Series A no. 31). Article 1 of Protocol 1 to the European Convention protects the natural and legal persons from arbitrary state interference in their property and allows interference with property rights, if it is for general or public interest while respecting the principle of proportionality.

8 According to the European Court, the concept of property is interpreted differently. It is believed that Article 1 of Protocol No. 1 protects: movable and immovable property, shares, patents, pension rights, economic interests related to the conduct of a business and so on. Therefore, the principles generally applied in cases falling under Article 1 of Protocol No. 1, are equally important when it comes to pensions (see *Anrejeva v. against Latvia* (GC) br.37452 / 02, paragraph 82, dated 7/7/2011). Therefore, this provision does not guarantee the right to acquire property (*Van der Mussele v. Belgium*, judgment dated 23 November 1983, § 48, Series A, No. 70) nor it guarantees any right to pension by a certain amount (*Muller v. Austria* br.5849 / 72, Report of the Commission of 01 October 1975, Decisions and Reports (DR) 3, p.25, *T v Sweden* br.10671 / 83, Commission decision of 04/03/1985, p. 229; *Jankovic v. Croatia* br.43440 / 98 ECHR 2000-X, *Poulain v. France* br.52273 / 08/02/2011 and *Maggio and others v. Italy*, paragraph 55, judgment dated 31/05/2011).

However, when the State party has laws that stipulate payments such as pension rights-conditioned or not by previous payment of contributions, that law should be considered as one that creates an ownership interest, which falls under Article 1 of Protocol No. 1 for persons that meet its requirements (see *Carson and others v. United Kingdom* br.42184 / 05, § 64, ECHR 2010). Therefore, the reduction or discontinuity of pension may constitute an interference with the right to property, which must be justified (*Rasmussen v. Poland*, br.38886 / 05, paragraph 71 of 28/04/2009).

9 Based on the previously mentioned, and having in mind the requirements imposed by Article 58 of the Constitution and Article 1 of Protocol 1 to the European Convention, the Constitutional Court finds that in this case the complete suspension of pension payments to the applicant clearly corresponds to an interference with the peaceful enjoyment of his possessions, as though based on the relevant national legislation, these restrictive measures, in the opinion of the Constitutional Court, has not met the requirement of proportionality.

According to the case law of European Court of Human Rights, the permissibility of interference with the right to property, regardless whether it is a deprivation or restriction of right to property, must be fulfilled with more assumptions. Interference, regardless of nature of property, is permitted only in compliance with the relevant statutory presumptions. Article 1 of Protocol 1 to the European Convention states: "Interference with the right to property is allowed only under the conditions provided by law [...]". Mandatory legality, is therefore of central importance within the principles of the rule of law, to justify the intervention of any kind in the ownership of an individual. Besides legality, any interference with the right to peaceful enjoyment of property must be in the general (public) interest and must provide certain "fair balance" between the interests of the individual and the public interest, therefore, must be proportionate. Lack of one of these conditions, leads to a violation of the Constitutional and Conventional right to property.

Term "public interest" that is justifying interference with property, is necessarily broad term. The national authorities are the one to decide what "public interest" is and that decision must be respected, unless such decision is manifestly without reasonable foundation (see *Carson and others v. United Kingdom*, no. 42184/05, paragraph 61, dated 16 March 2010). In the field of social legislation, including in the field of pensions, the competent state authorities have broad discretion, in the interest of social justice and economic prosperity can legitimately adapt, limit or even reduce the amount of pension that pay normally to qualified population. Yet all these measures must be implemented on a non-discriminatory manner and



must be in accordance with the requirement of proportionality (see *Lakićević and others v. Montenegro and Serbia*).

- Any interference with the peaceful enjoyment of property must be reasonably proportionate to the aim sought to be achieved by interfering and, therefore, the necessary balance will not be established if one or more of them have to bear an individual and excessive obligations (see *James and Others v. the United Kingdom*, 21st February 1986, § 50, Series A, No. 98). In this regard, the European Court of Human Rights judgment in *Lakićević and others v. Serbia and Montenegro* on 13 December 2011, stated: "that in the present case was not achieved a fair balance between the demands of the general interest of the community and the requirements of the protection of fundamental rights of the applicants, who were forced to bear a disproportionate and excessive burden". Also, the Court did not accept explanation of the Government of Montenegro that deprivation of rights of the applicants to the full amount of the pension is actually a measure of legitimate public interest, emphasizing that "it could have been different if the applicants should submit reasonable and proportional reduction instead of complete suspension of their rights or if the legislature allowed them a transitional period to adjust to the new scheme."
- 10 In this case, the Constitutional Court, after conducted proceedings, found that the applicant was ceased the payoff of the retirement pension on the basis of the decision of the Republic Fund for Pension and Disability Insurance of Montenegro, due to conducting advocacy practice, which decision was issued on 29 July 2005, that is after ratification of Article 1 of Protocol 1 to the European Convention by the former state Union of Serbia and Montenegro (*ratione temporis*). Also, the applicant's Decision issued by Pension Fund of Montenegro on February 6, 1995, recognizes the right to retirement pension, which means that Pension Fund of Montenegro gave its approval that the applicant met the statutory requirements for entitlement to a pension. The suspension of pension payments was due to amendments to the Pension and disability insurance Law, which was considered to be applicable from January 1, 2004, while the applicant was required to refund damage to the service of Pension Fund.

Taking into account all the circumstances of this case, the Constitutional Court found that the interference with the applicant's right to peaceful enjoyment of the property was lawful, but not proportionate to the aim sought to be achieved by interfering, so that the reasons given by the Supreme Court in its decision cannot be considered relevant and sufficient to justify the interference.

The Supreme Court in the disputed judgment, which dismissed the request for extraordinary review of a court decision, applied the provision of Article 112 paragraph 1 of the then applicable The Pension and disability insurance Law ("Official Gazette of Montenegro", no. 60/03 ), which stipulated incompatibility between pension and paid employment or self-employment, which fulfilled the requirement of legality, as one of the assumptions and principles in evaluating the permissibility of interference with the right to peaceful enjoyment of possessions.

However, the Constitutional Court following the practice of the European Court of Human rights and international legal standards in the field of human rights and fundamental freedoms, concluded that, in this case, there has been a violation of the principle of proportionality between the public interest and of what is called the purpose and intent of provisions of Article 112, Paragraph 1 of the Pension and disability insurance Law, on the one hand and the interests of the applicant in respect of his property rights, on the other hand.

11 In manner previously described, the constitutional applicant, as the above-named applicants to the European Court in the case *Lakićević and others v. Serbia and Montenegro*, through the total suspension of pension payments and by the obligation to refund damage to Service of Pension Fund, was forced to bear an excessive and disproportionate burden. In this regard, a wide margin of appreciation to a state in the field



of social legislation and the impact of controversial legislation on property rights of the applicant, cannot be, in a particular case, justified by a legitimate public interest, because the individual was required to bear the "heavy burden" in the public interest, in a way that assessed decision violated fair balance, and hence the complainant violated the right to property guaranteed by Article 58 of the Constitution and Article 1 of Protocol 1 to the European Convention. "

**2.4. Does your Court implicitly take account of international instruments or expressly refer to them in the application of constitutional law?**

The Constitutional Court in its decisions, explicitly and regularly calls on all international laws that it considers relevant for the adoption of certain decisions.

**2.5. Has your Court ever encountered conflicts between the standards applicable on the national and on the international level? If so, how were these conflicts solved?**

It has not. The Constitutional Court, whenever possible, constitutionally interprets domestic law, in accordance with international obligations and standards. In the event of any conflict of standards at national and international level, the Court resolves the conflicts by the harmonization of national standards with international standards in procedures and in the manner stipulated by the Constitution and Constitutional law.

**3 Constitutional instruments to increase / engage in social integration**

**3.1. What type of constitutional rights, the court applied in the field of social integration - eg. fundamental rights, the principles of the Constitution (state social security), objective right?**

In cases of social integration, the Constitutional Court applies all kinds of constitutional rights or fundamental rights, the principles of the Constitution, case law and laws. (response under point 1.2.).



### **3.2. In cases where individuals have access to the Constitutional Court: the degree to which different areas of constitutional law can be initiated by individuals?**

Individuals, in practice, may call for all types of constitutional provisions<sup>29</sup>, including constitutional case law.

### **3.3. Does your court have direct jurisdiction to deal with conflicting social groups?**

Constitution Expressis verbis does not specify an explicit Constitutional Court's jurisdiction to deal with conflicting social groups. However, in assessing any constitutional issues there is some kind of conflict (or between political groups / individuals or between objective interests and / or protected human rights and the values of the constitutional order).

According to Article 149 of the Constitution, the Constitutional Court decides on the following:

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

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<sup>29</sup> Proposal or initiative to review the conformity of laws with the Constitution and confirmed and published international agreements or other regulations with the Constitution and laws contain the name of the law or other regulation, the designation provisions, the name and number of the Official Gazette in which it was published, the grounds on which the proposal or initiative was based, as well as other information relevant to the evaluation of constitutionality and legality.



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.

**3.4. How does your Court settle social conflicts, when such cases are brought before it (e.g. by annulling legal provisions or by not applying them when they contradict the principle of equality and non-discrimination)?**

The Constitutional Court in all cases conducted proceeding within its jurisdiction as defined by the Constitution. Ways of solving the case and the decision of the Constitutional Court shall depend on the type of constitutional process in which decisions are delivered.

The decision of the Constitutional Court of Montenegro has canceling (Cassation) effect. It terminates the constitutional dispute and from an unconstitutional regulation the legal system, removes violation of constitutional rights and freedoms of citizens, conflict of jurisdiction, determines whether the President has violated the state constitution, decided on the banning of political parties and non-governmental organizations, determines violations of law during the election process for the selection of the authorities and others.

From the temporal viewpoint of abolishing decision of the Constitutional Court has the effect *ex nunc*, exceptionally *ex tunc*, from the standpoint of the participants in the constitutional dispute-effect *erga omnes* or *inter partes*. In this sense, the effect of the Constitutional Court decision implies that it is prohibited to apply of the law that was repealed not only from now on but also to legal relations arising before the date of publication of the decision, unless they have been solved<sup>30</sup> by that date. In this way, the decision of the Constitutional Court has a limited *ex tunc* effect, but also preventative because the execution of final acts adopted on the basis of rules that no longer apply, cannot be allowed or implemented, and if the execution has started, shall be discontinued.

#### **Example 1.**

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<sup>30</sup>Article 46 of the Law on the Constitutional Court



Decision No. U-I.39/11.and 3/12., dated July 18, 2013 - abstract review of the constitutionality of the provisions of Article 11, paragraph 2 and 3 of the General Law on Education ("Official Gazette of the Republic of Montenegro", no. 64/02. 31/05., And 49/07., And "Official Gazette of Montenegro", no. 45/10. and 45/11.). The Constitutional Court in this case found a violation of the rule of law, non-discrimination and equality before the law, in the provisions of Article 1, paragraph 2, Article 8, paragraph 1, Article 17, paragraph 2, and Article 75, paragraph 1 of the Constitution of Montenegro:

- "The Constitutional Court found that the disputed provisions of Article 11 paragraph 2 and 3 of the General Law, violated the constitutional principles and the general prohibition of discrimination, direct or indirect, of any kind, and equality before the law regardless of any particularity or personal feature, referred to in Article 8, paragraph 1 of Article 17, paragraph 2 of the Constitution, Article 14 of the European Convention for the protection of Human rights and Fundamental freedoms and Article 1 of Protocol 12 to the European Convention.

10.1. The principle of equality and the principle of non-discrimination are considered so important for the protection of human rights that are enshrined in all basic international and regional human rights instruments<sup>31</sup>.

10.2. The European Convention for the Protection of Human Rights and Fundamental Freedoms contains accessory prohibition of discrimination (which applies only to the rights protected by the Convention) on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status (Article 14). Unlike Article 14 of the Convention, which prohibits discrimination in the enjoyment of rights and freedoms recognized in the Convention and Article 1 of Protocol no. 12 to the Convention "independent" is a provision ('free standing' provision), which prohibits public authorities discrimination against anyone "in the enjoyment of any right set forth by law" on any discriminatory basis. Article 14 of the Convention and Article 1 of Protocol no.12 ,thereto, represent mechanisms of convention protection in the field of non-discrimination which complement each other.

10.3. According to The European Court of Human Rights, discrimination means a different treatment of the same or similar circumstances, when there is no reasonable and objective justification, i.e., if it does not pursue legitimate objective, and there is no proportionality between the aim and the way in which that legitimate aim is to be achieved. According to the European Court, and the UN Commission on Human Rights, the analysis of the principle of equality and non-discrimination refers to the need to examine three conditions to determine whether this principle is violated. The first condition for the existence of discrimination is the existence of similar or comparable factual situations and of equal or different treatment. The second condition is that the differences in the legal treatment are arising from individual's status of

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<sup>31</sup>Universal Declaration of Human Rights UN (1948), the Convention of the International Labor Organization (ILO) Equal Remuneration for Work of Equal Value no. 100 (1951), the Convention on the Political Rights of Women, UN (1952), ILO Convention on Discrimination (Employment and Occupation) Convention no. 111 (1958), the Convention against Discrimination in Education of UNESCO (1960), the International Covenant on Civil, Social and Cultural Rights, the UN (1966), the International Covenant on Civil and Political Rights, the UN (1966) , International Convention on the Elimination of All forms of Racial Discrimination of the UN (1966), Convention on the Elimination of All Forms of Discrimination against Women and the UN (1979) and others.



particular belonging. The individual should be a victim of less favorable treatment because of their status of belonging. Third condition is whether the different legal treatment in similar factual circumstances and equal treatment in significantly different circumstances, is reasonable and justifiable.

10.3.1. The European Court of Human Rights, in many cases in practice, expressed the meaning of the principle of non-discrimination under Article 14 of the European Convention and Article 1 of Protocol 12 to the European Convention. Rule on the specific autonomy of Article 14 of the European Convention was first established in the event of "certain aspects of the laws on the use of languages in education in Belgium" (so called Belgian linguistic case)<sup>32</sup>. The European Court in this case established examination of justification for different treatment, and stressed the importance to the overall aims and relation of proportionality:

"3. However, it cannot be concluded from this that the State has no positive obligation to ensure respect for such a right as is protected by Article 2 of the Protocol (P1-2). As a "right" does exist, it is secured, by virtue of Article 1 (art. 1) of the Convention, to everyone within the jurisdiction of a Contracting State.. (...)They have stated, on the other hand, their interpretation of Article 14 (art. 14) on several issues. In the first place they expressed the opinion that the word "secured" implies the existence of obligations upon the Contracting States to take action and not simply a duty to abstain from action.

10 (...)the Court, following the principles which may be extracted from the legal practice of a large number of democratic States, holds that the principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 (art. 14) is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.

(...) Although the right to education under Article 2 of Protocol no. 1 of the Convention is provided for all children in Belgium, prohibition to students who speak French to go to French school in a suburb of Brussels, on the basis of place of residence of their parents, while such prohibition did not exist for the children of the Flemish speaking community –which represents prohibited form of discrimination. "

In case *Abdulaziz, Cabales and Balkandali v. United Kingdom* (1985)<sup>33</sup>, The European Court reiterated the criteria to be applied for the assessment of whether the "difference in treatment" is justified or not in the sense of Article 14 of the Convention:

72. For the purposes of Article 14 (art. 14), a difference of treatment is discriminatory if it "has no objective and reasonable justification", that is, if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realized" (...).

(...) The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law (see the above-mentioned

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<sup>32</sup> CASE OF SEJDIĆ AND FINCI v. BOSNIA AND HERZEGOVINA 27996/06 34836/06 | Judgment (Merits and Just Satisfaction) | Court (Grand Chamber) | 22/12/2009

<sup>33</sup> CASE OF ABDULAZIZ, CABALES AND BALKANDALI v. THE UNITED KINGDOM 9214/80 9473/81 9474/81 | Judgment (Merits and Just Satisfaction) | Court (Plenary) | 28/05/198



Rasmussen judgment, *ibid.*, p. 15, paragraph 40), but it is for the Court to give the final ruling in this respect.

In *Case Sejdic and Finns v. Bosnia and Herzegovina*,<sup>34</sup> the European Court Found:

42 The Court reiterates that discrimination means treating differently, without an objective and reasonable justification, persons in similar situations. "No objective and reasonable justification" means that the distinction in issue does not pursue a "legitimate aim" or that there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realized" (see, among many authorities, *Andrejeva v. Latvia* [GC], no. [55707/00](#), § 81, ECHR 2009). The scope of a Contracting Party's margin of appreciation in this sphere will vary according to the circumstances, the subject matter and the background (*ibid.*, § 82).

44 In this context, where a difference in treatment is based on race or ethnicity, the notion of objective and reasonable justification must be interpreted as strictly as possible (see *D.H. and Others*, cited above, § 196). The Court has also held that no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures (*ibid.*, § 176). That being said, Article 14 does not prohibit Contracting Parties from treating groups differently in order to correct "factual inequalities" between them. Indeed, in certain circumstances a failure to attempt to correct inequality through different treatment may, without an objective and reasonable justification, give rise to a breach of that Article (see *Case "relating to certain aspects of the laws on the use of languages in education in Belgium"*, cited above, § 10; *Thlimmenos v. Greece* [GC], no. [34369/97](#), § 44, ECHR 2000-IV; and *D.H. and Others*, cited above, § 175).

53 The Court notes that whereas Article 14 of the Convention prohibits discrimination in the enjoyment of "the rights and freedoms set forth in [the] Convention", Article 1 of Protocol No. 12 extends the scope of protection to "any right set forth by law". It thus introduces a general prohibition of discrimination.

10.4. Prohibition of discrimination under the Constitution has a general meaning and is not limited only to the enjoyment of constitutional rights and freedoms, although discriminatory basis are not listed in the Constitution. Definition of discrimination, as well as other possible discriminatory basis, in Montenegrin law is contained in the Law against Discrimination ("Official Gazette of Montenegro", no. 46/10)<sup>35</sup> and include all

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<sup>34</sup>CASE OF ABDULAZIZ, CABALES AND BALKANDALI v. THE UNITED KINGDOM 9214/80 9473/81 9474/81 | Judgment (Merits and Just Satisfaction) | Court  
(Plenary) | 28/05/198

<sup>35</sup>Any form of discrimination, on any ground, shall be prohibited. Discrimination is any unjustified, legal or actual, direct or indirect distinction or unequal treatment, or failure to treat a person or a group of persons in comparison to other persons, as well as exclusion, restriction or preferential treatment of a person in comparison to other persons, based on race, color of skin, national affiliation, social or ethnic origin, affiliation to the minority nation or minority national community, language, religion or belief, political or other opinion, gender, gender identity, sexual orientation, health conditions, disability, age, material status, marital or family status, membership in a group or assumed membership in a group, political party or other organization as well as other personal characteristics. Direct discrimination exists if a person or a group of persons, in the same or similar situation in respect to other person or group of persons, is brought or were brought, or may be brought in an unequal position by an act, action or failure to act, on any ground referred to in paragraph 2 of this Article, unless the act, action or failure to act are objectively and reasonably justified by a legitimate purpose and achievable with the means appropriate and necessary to use for achieving that purpose, and when they are acceptable and proportionate in relation to the purpose to be achieved. Indirect discrimination exists if apparently neutral provision of a regulation or general act, criterion or practice is bringing or can bring a person or a group of persons into unequal position in respect to other person or group of persons, on any ground referred to in paragraph 2 of this Article, unless the provision, criterion or practice are objectively and reasonably justified by a legitimate purpose and achievable with the means appropriate and necessary to use for achieving that purpose, and when they are acceptable and proportionate in



discriminatory grounds listed in Article 14 of the European Convention and article first Protocol 12 to the European Convention, and other specific forms of discrimination.

10.4.1. The principle of prohibition of discrimination (non-discrimination), is also established by the Constitution, so it is prohibited to, without a reason, legally treated unequally what is the same or similar and totreated legally the same what is different. In other words, equal citizens should be treated equally, and different - differently, in the name of equality. The principle of non-discrimination (equality) applies only to the equal treatment of equal cases but also on substantive gender-unequal treatment of unequal cases in proportion to their inequality. To treat everyone equally means equal treatment of unequal (as well), which is just as harmful as unequally treated equal.

10.4.2. Assessed provision provisions of Article 11 paragraph 2 and 3 of the Law stipulate that: "in view of the same linguistic basis, teaching in the institution, conducted in Serbian language as well, as the language officially used, as in Bosnian, Albanian and Croatian, that are also the languages officially used , respecting the rights of minorities" legislator has, in the opinion of the Constitutional Court, derogated the constitutional principle of the Montenegrin language as the only official language in Montenegro (Article 13, paragraph 1) brought other people who speak one of the constitutionally established languages in the official use, inunequal position in the general education (Article 13, paragraph 3).

10.4.3. The establishment of a different, more favorable regime for persons who speak the Serbian language, and the obligation of teaching in Montenegrin and in that language, legislator discriminated people who speak Bosnian, Albanian and Croatian as the languages in officialuse. The guarantee of legal equality, stipulated in the provisions of Article 13, paragraph 3 of the Constitution and the same type of guarantees contained in the ratified international treaties, in the opinion of the Constitutional Court, obliges the legislator to stipulate equal conditions for exercising the right to use the language in the general education without discrimination on any grounds.

10.4.4. The Constitutional Court also finds, that the application of only constitutionally permissible basis for distinguishing in rights, can be justified by the measure called positive discrimination, stipulated by provision of Article 8, paragraph 2 of the Constitution (*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*), does not qualify because the establishment of this kind of privileges cannot be justified by "the same linguistic base" (with Montenegrin language), as well as "respect for the rights of minorities." Bosnian and Croatian language have the same linguistic basis with the Montenegrin language, and the right to education in their own language and alphabet in public institutions is guaranteed not only to members of minority groups, but also members of other minority groups (Article 79, item 4 of the Constitution ).

10.4.5. Since the Constitution does not recognize the differentiation of minority nations and other minority communities in any personal quality, nor on the basis of the language they speak, the Constitutional Court held that the disputed difference in the legal treatment of people who speak Serbian language is discriminatory, and it is not based on objective and reasonable justification (justification test) nor aimed to achieve a legitimate goal, in other words, that the law has not established a reasonable relation of proportionality between the means employed and the aim sought to be achieved.

10.4.6. The Constitutional Court concluded that in this, extremely important field, state has positive obligation to create a legal framework to ensure the effective exercise of constitutional rights by the provisions of Article 13, Article 75, paragraph 1, and 79, item 4 of the Constitution, in accordance with international

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relation to the purpose to be achieved. The incitement or giving instruction to discriminate against certain person or a group of persons on any ground referred to in paragraph 1 of this Article shall be deemed to be discrimination.



standards in the practice of the competent institutions that monitor the realization of human rights and freedoms. That, however, may not be done in a manner that is inconsistent with basic constitutional values, which in this case legislator did by establishing favorable conditions for persons who speak the Serbian language.

Constitutional Court found that it has resulted in a violation of the rule of law, non-discrimination and equality before the law, stipulated by the provisions of Article 1, paragraph 2, Article 8, paragraph 1, Article 17, paragraph 2, and Article 75, paragraph 1 of the Constitution Montenegro.

## Example 2.

Decision U-I no. 29/11. and 4/12. - Abstract review of the constitutionality of the provisions of Article 33 and Article 62, paragraph 1, paragraph 2, item 1 and Paragraph 3 of the Law on Amendments to the Law on the Election of Councilors and Members of Parliament (Official Gazette of Montenegro ", no. 46/11). The Constitutional Court found that the challenged provisions are not incompatible with the Constitution and the European Convention:

- "The disputed provisions of Article 33 of the Law, in essence, applied the principle of affirmative action from the provisions of Article 79 of the Constitution, in a way, to obtain exception to the general conditions stipulated for the other candidate lists, for the list for the election of councilors for political parties or civic groups that represent minority nation or minority ethnic community, to be considered established if it is supported by signatures of at least 200 voters for the election of members of Parliament if supported by the signatures of at least 1,000 voters, and exercise their right under Article 94, paragraph 2 of this law (paragraph 2) and the list of candidates of members of parliament that represent a minority or minority ethnic community with 2% participation in the total population of Montenegro, according to the latest census, is considered established if it is supported by signatures of at least 300 voters (paragraph 3).

The disputed provisions of Article 62 of the Law contain an exception to the general criteria for the allocation in such a way that the allocation of seats part of the electoral list for the election of members of certain minority groups or minority ethnic community.... (..) in the event that none of them meets the requirement of paragraph 1 of this Article ("*3% of the total votes cast in the constituency, .. and individually win at least 0.7% of valid votes*"), become eligible to participate in the allocation of seats, as one - cumulative selection list with total number of valid votes obtained, providing that for calculation of the mandate will be recognized summation that provides conquering the three terms and the right to use the electoral list of members of certain minority groups-the same, and certain - the same minority ethnic communities, with participation to 15% of the total population in the constituency, according to the last census. (...)

The Constitutional Court found that, the disputed provisions of the Law, cannot be questioned in relation to the general principle of non-discrimination, direct or indirect, of any kind, under the Article 8, paragraph 1 of



the Constitution, Article 14 of the European Convention for the Protection of Human Rights and fundamental Freedoms and Article 1 of Protocol 12 to the European Convention.

The European Convention for the Protection of Human Rights and Fundamental Freedoms contains accessory prohibition of discrimination (which applies only to the rights protected by the Convention) on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status (Article 14).

Article 1 of Protocol 12 to the European Convention prescribes general and autonomous prohibition of discriminatory conditions. The current level of protection, according to the provisions of the Convention, extends to the national laws. In fact, the wording of Article 1 indicates that the protection against discrimination extends to all the rights and freedoms defined in the Convention, but now extends to "all the rights provided by law".

The European Court of Human Rights Discrimination referred to discrimination as treating differently, without an objective and reasonable justification, which means that the distinction in issue does not pursue a "legitimate aim" or that there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realized".

According to the European Court, and the UN Commission on Human Rights, the analysis of the principle of equality and non-discrimination refers to the need to study three conditions to determine whether this principle is violated. The first condition for the existence of discrimination is the existence of similar or comparable factual situations and of equal or different treatment. The second condition is the difference in the legal treatment done on the basis of the status of individual's particular belonging. The individual should be a victim of less favorable treatment because of their status of belonging. Third condition makes testing whether the different legal treatment in similar factual circumstances and equal treatment in significantly different circumstances, is reasonable and justifiable.

The European Court holds that an objective and reasonable justification exists if there is a legitimate aim and proportionate relationship between the aim sought to be achieved and the means employed. Establishing the existence of a legitimate aim and proportionality gives a certain level of discretion and "appreciation" (*"Margin of Appreciation"*) to member states to regulate certain areas independently. The term "appreciation" is a term used in public international law and refers to the right of the state to assess the facts and to determine how it will apply international human rights law.

The assessed provisions of the Law, in the opinion of the Constitutional Court, do not contain discriminatory limitations specified in the constitution, nor in the sense in which the European Court of Human Rights interprets limitations, because they do not make any distinction between the personal characteristics of the person to whom the assessed provisions of the law apply, even on the basis of belonging to a minority people.

According to the provisions of Article 8, paragraph 2 of the Constitution, special measures taken to eliminate actual inequality are not considered to be discrimination because such measures place in a more favorable position persons or groups of persons who are in an unequal position compared to others. Given that minorities differ from the majority population, consistent application of the principle of equality, in this case, would lead them in a disadvantageous position. Exception of equality to achieve equality (affirmative action), stipulated by the assessed provisions of the Law, in the opinion of the Constitutional Court, provides representation of minority people, that if applied general criteria for the allocation of seats, would not be eligible to win a parliamentary mandate and in accordance with the provisions of Article 79th item 9 of the Constitution.



### Example 3.

Decision U-I no. 29/11. and 4/12. - Abstract review of the constitutionality of the provisions of Article 19 paragraph 6 and 7 and Article 32 of the Rules of addressing the housing needs of professional and non-academic staff at the University of Montenegro (Bulletin of the University of Montenegro, no. 250/10 and 253/10). The Constitutional Court found that the provisions of Article 32 paragraph 1, 2 and 3 of the Rules violated the constitutional principle of equality under Article 17, paragraph 2 of the Constitution and the provisions of Article 7, Paragraph 1, Item 2 of the Labor Law which, among other things, prohibits discrimination in relation to all employment rights:

- "From the content of the assessed provisions of Article 32, para. 1 and 2 of the Rules governing the evaluation of the case prior disposition, it comes that the housing situation of the employee (or a member of his family household), shall be evaluated according to the state before the estrangement of the apartment or the other appropriate right to the apartment or a family residential building, if the apartment or family residential building (awarded on the basis of employment) and the employee (who did not get the apartment from employment), if it is alienated after January 1, 2004.

The Constitutional Court found that the disputed provisions of the Rules violated the constitutional principle of equality under Article 17, paragraph 2 of the Constitution and the provisions of Article 7, paragraph 1, item 2 of the Labor Law which, among other things, prohibits discrimination in relation to all employment rights.

Constitutionally guaranteed equality before the law means equality of rights and obligations in an identical legal position, and the principle of non-discrimination have been established—that it is prohibited, without a reason, to treat unequally what is the same or similar legally, and to treat legally the same what is significantly different.

The principle of non-discrimination (equality) does not apply only to the equal treatment of equal cases but also on substantively unequal treatment of unequal cases in proportion to their inequality. In other words, employees of the identical legal situations should be treated equally, and employed in a variety of legal situations in the name of equality - differently. In this case by disputed, equal treatment of person-employee who got a flat in respect of employment and person-employee, who did not get the apartment from employment, enacting authority assessed equally a legal situation that was different, which violated the constitutional principle of equality and the principle of law prohibiting discrimination in the process of solving the housing issue as one of employment rights.

The Constitutional Court points out that the mentioned constitutional and statutory provisions should not be construed in such a way that the enacting authority required that all subjects are in the same position - employees who estranged the apartment, prescribe equal opportunities and how to assess their housing situation. However, when the enacting authority makes difference among subjects in the same legal



position, then it must be differences that are objectively established and acceptable from the standpoint of the Constitution. In this regard, the Constitutional Court found that the provisions of Article 32 para. 1, 2 and 3 of the employees who estranged the apartment after January 1, 2004, (which have not got from the employment) and in the name of compensation have to pay the price calculated at market prices on the date of the decision and the difference in quadrature of the apartment accrued under favorable conditions, brought in unequal position in relation to employees who estranged the apartment before that date, as well as in relation to employees (who get a flat on the basis of employment or adequate rights to the apartment or family residential building), for which there is no time limit in respect of compensation in case of alienation.

The Constitutional Court found that, equal regulation in significantly different circumstances and different regulation in similar factual circumstances, stipulated by assessed provisions of Article 32 of the Rules, is unacceptable from the standpoint of the constitutional and legal principles ."

### **3.5. Can your Court act preventively to avoid social conflict, e.g. by providing a specific interpretation, which has to be applied by all state bodies?**

The possibility of preventive action of Constitutional Court derives from the provisions of Article 150, paragraph 3 of the Constitution, according to which the Constitutional Court may initiate proceedings to review the constitutionality and legality. Initiating proceedings on its own initiative and removing regulations or a particular provision from the legal order, The Constitutional Court can prevent the occurrence of future consequences and potential tensions, as well as stop the execution of a single act or actions undertaken on the basis of the law, other regulation or general act whose constitutionality or legality is under review.

The Constitutional Court, also in accordance with the provisions of Article 149, paragraph 2 , shall monitor the enforcement of constitutionality and legality and shall inform the Parliament about the noted cases of unconstitutionality and illegality.

#### **Example 1.**

Decision U no. 50 / 1-2004, dated 20 May 2004 - abstract review of the constitutionality and legality of Article 1 of the Regulation amending Regulation on detailed criteria and methodology for determining the market value of real estate (Official Gazette of the Republic of Montenegro ", No. 26/04). The Constitutional Court found that the provision of Article 1 of the Regulation is inconsistent with the Constitution:



- "The Constitutional Court's decision U no 50/03, dated 26 December 2003, instituted the procedure for assessing the constitutionality and legality of Article 2 of the Regulation on detailed criteria and methodology for determining the market value of real estate (Official Gazette of the Republic of Montenegro 'No. 23/03). The provision of Article 1 of the Regulation stipulates: that the detailed criteria for determining the market value of real property are: a useful size, or the size of the real estate, the average price of a square meter of existing property in the municipality, the purpose of real estate and other elements that municipality determines with its own regulation.  
On this occasion, the Constitutional Court has considered the contents of Article 1 of the Regulation referred to in the operative part of the decision, which modified Article 2 of the Regulation, and found that it is reasonable, to initiate proceedings for the assessment of its constitutionality and legality, on its own initiative.  
Quoted provisions of Article 5 and 6 of the Law indicate that the tax base is the market value of the property and that the main criteria that determine it: the purpose and size of the property, where the property is located, the quality of real estate and other factors that may affect the market value of the property. In addition, the government is given the authority to prescribe the detailed criteria and methodology for determining the market value of property. Consequently, government has adopted the Regulations and the provisions of Article 1 established specific criteria for determining the market value of real estate, among others: a useful size, purpose and quality of the property, the criteria stipulated by law as basic and other elements that determine the municipality its regulation. Such regulation, in the opinion of the Constitutional Court, is contrary to the Law on Property Tax. The basis of property tax and the basic criteria that determine it, are stipulated by Law, and the Government is not entitled to stipulate the same by Regulation, nor, conversely, some other criteria. Also, the government using its legal authority, to establish detailed criteria for determining the market value of the property cannot transfer it to other legal entities, even to the municipality. Therefore, with these regulations, according to the Court, the government went beyond its constitutionally defined jurisdictions. "

### **3.6. Have you ever encountered problems in applying these competencies?**

Generally, we have not. Difficulties arise because of the lack of submission of responses and other documents, at the request of the court, that are necessary to decide the case, but if the given time, the Constitutional Court does not receive a response, opinion and other requested data and information referred to in paragraph 1 of this Article, the court may continue the proceedings in accordance with the provisions of Article 27, paragraph 2 of the Law on the Constitutional Court.

### **3.7. Are there any restrictions to access your court (eg. Only for state authorities), which prevent the resolution of social conflicts?**



There are not any. Any person (legal or natural) may file an initiative to start the procedure (abstract constitutional review), for the assessment of constitutionality and legality, according to the Constitution<sup>36</sup>, without having to prove legal interest of a violation of law (action popularis).

Proceedings before the Constitutional Court to review the constitutionality and legality may be instituted by the court, other state authority, local self-government and five members of Parliament<sup>37</sup>.

The Constitutional Court itself may also initiate the procedure for the assessment of constitutionality and legality.<sup>38</sup>

Constitutional complaints may be lodged by anyone who believes that his human right and freedom guaranteed by the Constitution was violated by an individual act of state authority, local self-government authority or legal person vested with public powers. Constitutional complaint may also be lodged by another person, on behalf of the person referred to on paragraph 1 of this article, based on his authorization. The Protector of human rights and freedoms may, concerning complaint he has in work, lodge constitutional complaint if the complainant agrees with that.<sup>39</sup>

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.<sup>40</sup>

The proposal to resolve a conflict of jurisdiction may be submitted by one or more conflicting authorities, as well as the person who is unable to exercise his rights due to acceptance or rejection of jurisdiction, within 15 days as of the day of rejection or acceptance of jurisdiction.<sup>41</sup>

The proceedings deciding to ban the work of a political party or of a non-governmental organization shall be initiated by a proposal which, within their competences, may be submitted by; the Protector of human rights and liberties; the Council of Defense and Security; state administration authority in charge of protection of human and minority rights; state administration authority in charge of entry of a political party or a non-governmental organization in the registry.<sup>42</sup>

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<sup>36</sup> Article 150 paragraph 5

<sup>37</sup> Article 150 paragraph 2

<sup>38</sup> Article 150 paragraph 3

<sup>39</sup> Article 49 of the Law on Constitutional Court

<sup>40</sup> Article 98 paragraph 3 of the Constitution

<sup>41</sup> Article 66 of the Law on Constitutional Court

<sup>42</sup> Article 72 of the Law on Constitutional Court



The proceeding of deciding on the violation of right during elections for the Members of Parliament and Municipal Delegates shall be initiated by filing an appeal against the ruling of the competent electoral commission dismissing or rejecting the complaint against the decision.<sup>43</sup>

The appeal initiating the proceeding for deciding on violation of right during referendum may be filed by a voter and authority calling the referendum.<sup>44</sup>

#### **4. The role of constitutional justice in social integration**

##### **4.1. Does your Constitution enable your Court to act effectively in settling or avoiding social conflict?**

Yes, it does, especially in cases that are submitted for protection of social and economic rights of employees.

##### **Example 1.**

The Decision no. 96/03. and 115/03 .., 8 September 2004 - abstract review of the constitutionality of the provisions of Article 1, paragraph 1, in the section 'in the scope of rights and obligations arising from the previously concluded collective agreements' provision of Article 10, paragraph 2 . the Strike Law (Official Gazette of the Republic of Montenegro ", no.43 / 03.). The Constitutional Court found that assessed provisions of the Law are inconsistent with the Constitution:

- "European Convention for the Protection of Human Rights and Fundamental Freedoms (which was ratified by the Law, which was passed by the Parliament of Serbia and Montenegro, at its session of December 26, 2003) states that: everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of their interests, and that the exercise of these rights shall not place any restrictions except those which are stipulated by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others; that this Article shall not prevent the lawful restrictions on the exercise of these rights by members of the armed forces, police and public administration (Article 11). (...).  
From the quoted provisions of the Constitution of the Republic of Montenegro comes that freedoms and rights are exercised on the basis of the Constitution, and that the manner in which the freedoms and rights

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<sup>43</sup> Article 76 paragraph 1 of the Law on Constitutional Court

<sup>44</sup> Article 84 paragraph 1 of the Law on the Constitutional Court



are exercised is determined by law, in accordance with the constitution, if it is necessary for their implementation. The Constitution allows, therefore, the intervention of the legislature in the field of rights and freedoms under certain conditions: the legislature can only edit the individual rights and freedoms; legislator can edit the freedoms and rights when necessary to achieve them, and the law may prescribe the manner in which the freedoms and rights are exercised.

The Constitution of the Republic of Montenegro, in the part that guarantees economic, social and cultural rights and freedoms, guarantees employees the right to strike to protect their professional and economic interests as well. From these constitutional provisions derive two basic elements of the strike: The strike was organized interruption of work of employed and the aim of the strike is to achieve professional and economic interests on the basis of work. The right to strike is not absolute, because the Constitution has limited, that employees of state agencies and professional police officers have no right to strike.

The International Covenant on Economic, Social and Cultural Rights Convention indicates that the States Parties undertake to ensure the right to strike, provided that it is exercised in accordance with the laws of each country, as well as to the exercise of the right to strike may be set limits for members of the armed forces, police and civil administration.

The disputed provision of the Article 1, paragraph 1 of the Law stipulates strike outages that employees organize to protect their professional and economic interests in the rights and obligations arising from the previously concluded collective agreements.

Limitation of exercising the right to strike for the rights and obligations arising from the previously concluded collective agreements, according to the Court, is the condition and of its fulfillment depends exercise of that right, which can only be stipulated by the Constitution. Law, even the Law on strike, cannot stipulate solutions that prevent and restrict the exercise of rights and freedoms guaranteed by the Constitution, and one of those rights is the right to strike.

In addition, the Court finds that the phrase 'professional and economic interests' more comprehensive and broader term, because the professional and economic interests of employees can exercise only on the basis of collective agreements. The rights and obligations of employees on the basis of the work, the method and process of their implementation shall be governed by, among other things, the Labor Law, the collective agreement and international conventions.

From the above, according to the Court, it comes that the assessed provision of Article 1 of the Act, the part which provides, 'the scope of rights and obligations arises from the previously concluded collective agreements', is inconsistent with the Constitution.

The provision of Article 10, paragraph 2 of the Law provides that the minimum of work and the manner of its provision is determined act of the founder or director or chief executive of the employer, depending on the nature of the activity, degree of threat and health and other circumstances relevant to meeting the needs of citizens, employers and other entities.

This provision indicates that the employer or the founder is entitled to, in its general acts, independently determine minimum in the activities of public interest or in activities which cease of work, due to the nature of work, could endanger human life or health or to inflict large-scale damage, without criteria stipulated by law, without mandatory participation of trade unions and employees in making the decision, without the consent of the collective agreement. For the foregoing reasons, the Court found that the provision of Article 10 paragraph 2 of the Act is inconsistent with the Constitution and could lead to restrictions of the right to strike of employees in these sectors, and the abolition of the Constitution guaranteed the right to strike. Moreover because of the usual conflict of interests between the parties in the strike (the employer, the founder - staff and others.). "



## Example 2.

Decision U No.117 / 03 dated 1st December 2004 - abstract review of the constitutionality of the Regulation on the minimum of work and the manner of its provision of the institutions of public education (Official Gazette of the Republic of Montenegro ", No.55 / 03). The Constitutional Court found that the challenged regulation is inconsistent with the Constitution:

- "From the quoted provisions of the Constitution indicates that the freedoms and rights are exercised under the Constitution, and that the manner in which the freedoms and rights are exercised is determined by law, in accordance with the Constitution and the law must be in conformity with the Constitution and the Law on the strike stipulates that educational professional activity of public interest and that employed can begin a strike if they provide minimum service. The legal basis for the adoption of the disputed Regulation is the provision of Article 10 paragraph 2 Law of the strike. This provision of the Law stipulates that employer or the founder is entitled to, in its general acts, independently determine minimum in the activities of public interest or in activities which cease of work, due to the nature of work, could endanger human life or health or to inflict large-scale damage. However, the Constitutional Court, Decision No. 96/03 and 115/03 of September 8, 2004, held that the said provision of the Law is inconsistent with the Constitution and the same has ceased to be valid on the day of publication of the decision in the Official Gazette of the Republic of Montenegro. Constitution of the Republic of Montenegro stipulates that the Government makes regulations for the enforcement of laws, which means that the regulations are subservient legislative acts or executive, in other words by-laws enacted for the law enforcement. According to the principle of legality, the senior legal act determines a lower legal document, its form and content, the cessation of validity of these provisions of the Act, terminated the legal basis for the adoption of the disputed regulation. Therefore, the Constitutional Court found that the challenged regulation is inconsistent with the Constitution and the law. "

## 4.2. Does your Court *de facto* act as 'social mediator', or/and has such a role been attributed to it?

Constitutional Court's role of social intermediaries is not explicitly stipulated by the Constitution or by the law ( see response under point 3.3.), but the Court exercised that role *de facto* when deciding on matters within its jurisdiction. The jurisdiction of the Constitutional Court and its powers arise directly from the Constitution and make it the highest organ of constitutional guarantees. The Constitutional Court of Montenegro, in accordance with its responsibilities in the legal system eliminates any legal act inconsistent with the Constitution, ratified and published international



treaties protecting the fundamental rights of human in other words removes any legal act which is not in conformity with the essence, meaning and value of "rule of law". The Constitutional Court is not the only one, but it is one of the central authorities, which protects the Constitution, protect and contribute to the development of social integration in Montenegro.

**4.3. Have there been cases, when social actors, political parties could not find any agreement, they would 'send' the issue to your Court which had to find a 'legal' solution, which normally should have been found in the political arena?**

The Constitutional Court in such cases, the previous procedure to establish procedural requirements, decides whether it is a question of its competence or is it a matter within the jurisdiction of one of the three state governments (legislative, judicial or executive).

**Example 1.**

U. Decision no. 21/05., 28 February 2006 - abstract review of the constitutionality of the Law on Amendments to the Labor Law ("Official Gazette of Montenegro", no 79/04). The Constitutional Court found that the assessed law has not been adopted by a majority vote of all members of the parliament in the manner specified by Article 83, paragraph 2 of the Constitution, which makes it unconstitutional in its totality:

- "By the proposal of Socialist People's Party of Montenegro, in Podgorica, the proceedings have been instituted for the assessment of constitutionality of the Law designated in the statement, for the reason that it has not been adopted by majority vote of the total number of deputies in manner regulated by the provision of article 83 paragraph 2 of the Constitution of the Republic of Montenegro. The Parliament of the Republic of Montenegro, within the designated time limit, has not submitted the answer to the quotations contained in the proposal, but the Secretary General of the Parliament of the Republic of Montenegro has informed the Court that the Parliament has a total of 75 deputies and that in the procedure of voting on Draft of the denied Law 63 deputies have voted, 33 "for", 28 "against" and there were two "obtained".  
The Constitutional Court, after the deliberation of the procedure of adopting the denied Law, has established that it is not in conformity with the Constitution of the Republic of Montenegro. By the Constitution of the Republic of Montenegro it is regulated that by the law, in conformity with the Constitution, there are regulated the way of exercising the freedoms and rights if that is necessary for their exercise (article 12 paragraph 1 item 1); that the Parliament adopts laws, other regulations and general enactments (article 81 paragraph 1 item 2); that the Parliament shall decide if the session is attended by more than one half of the total number of deputies, and the decisions shall be made by a majority of votes of the deputies present, if



not otherwise prescribed by the Constitution, that the Parliament shall make decisions by a majority of votes of the total number of deputies on laws regulating the manner in which the freedoms and rights are exercised, regulating the electoral system, establishing material obligations of citizens, on the state symbols, on the dismissal of the President of the State, on electing the members of Government and on the vote of confidence to the Government, on announcing the referendum, on shortening the term of office and on its rules of procedure (article 83), and other regulation and general enactment with the Constitution and law (article 107).

By the denied law there has been prescribed, inter alia, the manner and procedure of exercising freedoms and rights of employed disabled person and employed disabled person who has been proclaimed for technological redundancy.

From the Constitution it comes out that the freedoms and rights of citizens are exercised directly on basis of the Constitution, and that by the law, in conformity with the Constitution the manner of exercising freedoms and rights is prescribed if that is necessary for their exercising. The right to work and rights of employees belong to a corpus of economic, social and cultural freedoms and rights established by the Constitution of the Republic of Montenegro. Starting from the fact that the denied law regulated the manner of exercising of freedoms and rights granted by the Constitution, the Parliament, in the procedure of adopting this law was bound to adopt it by a majority of votes of the total number of deputies. In the proceedings of examining of the majority by which the denied law was adopted, the Constitutional Court has established that that 33 out of 75 deputies of the Parliament of the Republic of Montenegro voted "for" on the Draft Law on Changes and Amendments of the labor Law, respectively that it has not been adopted by a majority of votes of the total number of deputies in manner prescribed by the provision of article 83 paragraph 2 of the Constitution, what makes it unconstitutional, in its totality. "

## Example 2.

Decision U no. 93/04., Dated November 10, 2004 - Constitutional appeal lodged against Decisions made by IV Special session of the Conference of the Liberal Alliance of Montenegro, 7 September 2004, that excluded applicant from the political party. The Constitutional Court has rejected the appeal for the following reasons:

- "From the quoted provisions of the constitution and the Law on the Constitutional Court of the Republic of Montenegro comes that any person who believes that an individual act or action of a judicial, administrative and other state agencies or companies and organizations exercising public authority, violated freedom or the right of individuals and citizens stipulated by the Constitution of the Republic of Montenegro, may lodge constitutional appeal.

The Constitutional Court, in this case, found that the appeal was lodged against the act of a political party that cannot be assessed in proceedings before the Constitutional Court.

The Constitution and the Law on Political Parties stipulates that citizens are guaranteed the right to political organizing and action that the political party is organization of freely and voluntarily organized citizens, in



order to achieve political goals by democratic and peaceful means, that establishes program objectives and organization of work of the Party, by statute and program. Starting from the principle of freedom and voluntary political association, mutual relationships within political parties, including the method of exclusion from membership of the party, are governed by acts of the organization. Given that political parties, including the Liberal Alliance of Montenegro, are not entrusted with public authority, that, in this case, Decision on exclusion from membership of the Liberal Party is not an act, against which constitutional appeal may be lodged, pursuant to Article 113, paragraph 1 item 4 of the constitution and article 32, paragraph 1 of the Law on the Constitutional court of the Republic of Montenegro, and does not represent an act of public authority against whom one can seek constitutional and legal protection. In fact, it is the decision, a single act of a political party that was made within the autonomous right to make its decision, and that authority is derived from voluntary political association and organization guaranteed by the Constitution and the law. Therefore, the Court found that, there were not fulfilled procedural requirements for the conduct of the proceedings and decision on a constitutional appeal and therefore had no jurisdiction to decide, which represents the reason for the rejection of appeal."

### Example 3.

Decision U no 109/06, dated 6 December 2006 - abstract review of the constitutionality and legality of the request to delete the Serbian Radical Party, "Dr. Vojislav Seselj" from the register of political parties, lodged by the Ministry of Justice of the Republic of Montenegro. The Constitutional Court has rejected a request for the following reasons:

- "From the quoted provisions of the Constitution of the Republic of Montenegro indicate that the Constitutional Court decides on the conformity of laws by political parties and citizens' associations and the banning of a political party or association of citizens, and not about the removal of political parties from the register of political parties. In this sense, the quoted provisions of the Law on political parties indicates that the clearing process of political parties from the register of political organizations, which do not re-register at a certain time under the provisions of this Law, performs ex officio Ministry responsible for the administration, under the conditions and in the manner stipulated the law.  
Starting from constitutionally established powers and the contents of mentioned request, the Constitutional Court found that, in this case, it is an administrative matter, on which, in Administrative Procedure, decides competent administrative authority determined by the Law, and not the Constitutional Court of the Republic of Montenegro."

### Example 4.



Decision 112/06, dated 6 December 2006 - abstract review of the constitutionality and legality of the request to delete the Serbian Radical Party, "Dr. Vojislav Seselj" from the register of political parties, submitted by Serbian Radical Party, in Podgorica, the Constitutional Court rejected the for the following reasons:

- "From the quoted provisions of the constitution comes that the Constitutional Court has the jurisdiction to decide on the conformity of laws by political parties and citizens' associations and the banning of a political party or association of citizens, and not on individual acts that are enacted or should be enacted by competent authorities ex officio, or on the similarity of name, abbreviated name or tag of parties entered in the register of political parties in relation to the name, abbreviated name or tag of previously registered parties.

From the quoted provisions of the Law on Political Parties comes, that the clearing process of political parties from the register of political organizations, which do not re-register at a certain time under the provisions of this Law, performs ex officio Ministry responsible for the administration, under the conditions and in the manner stipulated the law, that is, in this case, administrative matter, on which, in Administrative Procedure, decides competent administrative authority determined by the Law, against whose individual acts the stipulated legal remedies can be filed before the competent Basic court, pursuant to the Law on courts.

Therefore, the assessment of constitutionality and legality of individual acts of registration of political parties, as well as deciding on the similarity of name, abbreviated name or tag of the registered political parties, previously registered parties, is not under the jurisdiction of the Constitutional Court. "