



In line with Resolution II adopted by the Circle of the Presidents at its meeting held on 13 June 2018 in Prague, the theme of the XVIIIth Congress of the Conference of European Constitutional Courts to be held in Prague from 26 to 29 May 2020 will be:

**HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS:
THE RELATIONSHIP OF INTERNATIONAL, TRANSNATIONAL AND NATIONAL CATALOGUES IN THE
21ST CENTURY**

**ANSWER TO QUESTIONNAIRE FOR THE XVIIIth CONGRESS
OF THE CONFERENCE OF EUROPEAN CONSTITUTIONAL COURTS**

Constitutional Court of Montenegro

November 2019

I. GENERAL PART: CATALOGUES OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

I.I International catalogues of human rights (ECHR, UDHR and ICCPR)

- In your country, what is the constitutional position/characteristic/legal force of international treaties protecting human rights?

Formal incorporation of international treaties in Montenegro is achieved following the monist approach to relationship between international and national law, namely monism with primacy of international law, which is nowadays a generally accepted concept. International standards are considered higher than the national ones and apply directly when contradict the norms of national law. The primacy of international law is incorporated through the principles of constitutionality and legality establishing the hierarchy of legal Acts.¹ Therefore the Constitution renders all international treaties not only integral part of the domestic law, but it also gives them the additional value of “supremacy” over national laws. By doing so, the Montenegrin constitutional legislator

¹ “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.” Article 145 of the Constitution of Montenegro

wanted to stipulate the importance of the binding international texts that should apply first, since they are superior over national laws.

Given that Montenegro is a contracting party to a large number of international and regional agreements² in the field of human rights, Constitutional Court in all its jurisdictions directly applies international acts: Convention for the Protection of Human Rights and Fundamental Freedoms, Universal Declaration of Human Rights and International Covenant on Civil and Political Rights. Court in all jurisdictions, as already stated, most commonly applies European Convention and jurisprudence of the European Court of Human Rights.

The Constitution of Montenegro³, which was adopted 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.”* (Article 9 of the Constitution.)

The afore mentioned constitutional provision indicates that Montenegro, recognizing international agreements, as 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. 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.

The Constitutional Court of Montenegro aims to harmonize its case-law with the convention requirements, to achieve the purpose of the provision in order to protect the rights that are practical and effective (principle of effectiveness) rather than theoretical and illusory. In deciding, the Constitutional Court interprets the Constitution as a whole, having regard to international treaties and the generally accepted rules of international law.

- What mechanism is used to invoke the international treaties in national court decision-making?

Although Constitution stipulates the possibility of direct application of a signed and ratified international treaty not all norms can be applied without the intervention of the state. Namely, while some of them are self-executing, and could be applied directly, many others are incomplete in this regard because they require the state to concretize them by adopting its own regulations. Dualistic countries tend to incorporate through

² Universal Declaration of Human Rights 1948, 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 (...).

³ <http://www.skupstina.me/images/documents/constitution-of-montenegro.pdf>

statute, whereas monist States tend to do so through judicial decision. Clearly, a monistic constitutional structure can provide the judiciary with more leeway in the reception process.⁴ In practice, the effectiveness of the incorporation for individuals will turn much upon the particular variant of these approaches followed and the attitude of the judiciary.⁵ In Montenegro, being the country of monist approach, national courts either gravitate towards invoking Convention together with provisions of national law, or to direct application of the Convention, having in mind that the Convention – International treaty ratified by Montenegro – is considered inherent part of the national law. Application by national courts is in accordance with the principle of subsidiarity, by which the primary responsibility falls upon state parties.

- Is it possible to invoke the direct effect of the international catalogues of human rights? If so, please describe the mechanism.

Yes. As stated above, Constitution stipulates the possibility of direct application of a signed and ratified international treaty. Progress has been made with national courts in decision making process in terms of implementation of the Convention, in particular with regard to the reasoning of detention decisions, just satisfaction for unlawful detention, control requests for length of proceedings and in the domain of freedom of expression. Report on implementation of European Convention by Supreme Court of Montenegro indicated that, regarding detention cases, in most of the analyzed cases, the Court of Appeal of Montenegro invokes standards of European Convention, and to some lesser extent the High Court in Podgorica, while in the case-law of the Basic Courts, in relevant period of reporting, there were no such references noted. This leads to the conclusion that there is a positive trend in this area, especially in higher instance courts. When it comes to length of proceeding, just satisfaction for unlawful detention and freedom of expression these are the cases in which the courts very often invoke standards of the ECHR. References to judgments of the European Court are not only significant because they give legitimacy to the decisions but also set the guidance for domestic court to assess whether violation of the right to a trial within a reasonable time (or any other right), has occurred especially cases that have already been resolved and are factually and legally same or similar.⁶

I.II Transnational catalogues of human rights (the Charter)

- Is the Charter a point of reference to review the constitutionality of legal rules and/or decisions of public authorities, be it directly (a formal point of reference in some EU member states) or indirectly by “radiating” through the national catalogues (a substantive point of reference in other states)?

Charter only applies to Member States when they implement EU law (Article 51 of the Treaty on European Union) and Montenegro is not a member state and is acting outside

⁴ H. KELLER, A. STONE SWEET (eds.), “A Europe of Rights: The Impact of the ECHR on National Legal Systems”, Oxford University Press, Oxford, 2009, 685–686.

⁵ Law on the European Convention on Human rights, Harris, O’Boyle, Bates and Buckley, European Convention of Human rights in Contexts, page 30

⁶ Report on implementation of European Convention for protection of human rights and fundamentals freedom in the case-law of the Supreme court of Montenegro (January 2015 - July 2017), Published by Supreme Court of Montenegro, with cooperation of AIRE center and COE

the framework of EU law. Still Montenegro respects the same values on which the EU is founded. The EU Charter has imported a large number of the rights contained in the European Convention and its Protocols, which are directly applicable in our legal system. In doing so, the Charter stated in its Article 52(3) that those rights will have “the same meaning and scope” under EU law as they have under the Convention. However, national courts, are in principle not referring to the Charter in their decisions and are not entitled to ask the European Court of Justice for guidance.

- Does the human rights case law of the Court of Justice of the European Union serve as guidance for the interpretation and application of the national catalogues in your country by general courts, or as a source for judicial law-making?

Yes. Notwithstanding the fact that The Court of Justice of the European Union, primarily interprets EU law and settles legal disputes between national governments and EU institutions, and the fact that case-law of the CJEU is not formally binding to the Constitutional Court of Montenegro, it is however referred to if relevant principles are applicable. There has generally been a marked growth in referring to CJEU in abstract review before the Constitutional Court of Montenegro, especially in domain of tax law. Furthermore, Constitutional Court of Montenegro closely monitors developments in the Human rights case law of CJEU. Precisely, Constitutional Court of Montenegro finds important to understand interaction between Convention, EU and national law. Nonetheless, Constitutional Court of Montenegro is aware of the fact that all Member States of the EU are parties to the Convention and the ECHR must comply with the Convention when applying EU law (in accordance with the principle of the presumption of equivalent protection, [Bosphorus](#)). In addition, even if there is not direct obligation to implement EU law, comparing ECHR case-law, that we apply already and the EU Directives in certain fields (for example on Access to a Lawyer [Simeonovi v. Bulgaria](#)) provides guidance, which is of value for the interpretation and application of catalogues of Human rights.

- Is the national impact of the Charter conditioned, in constitutional terms, by its essentially equivalent degree of protection afforded, or as the case may be in the EU member states, by making a request for preliminary ruling with the Court of Justice of the EU?

Not applicable.

I.III National human rights catalogues

- Is the catalogue of human rights part of the constitution of your country? If so, how is it incorporated (a separate constitutional charter, a part of the Constitution, a part of the constitutional order)? What is its structure?

The catalogue on human rights is integral part of Constitution of Montenegro. It is placed immediately after the Basic provisions, and before provisions on state structure, Parliament, Government, Constitutional Court, courts and other authorities. The meaning behind this order is to give primacy and emphasize importance of human rights. Part II of the Constitution “Human rights and liberties” begins with article 17 and ends

with article 80, and represents core of the Constitution.⁷ It is divided in five subcategories of rights, with addition to sixth category related to Protector of human rights (Ombudsman). Structure of the catalogue of human rights consists of:

1. Common provisions
 - a. Grounds and equality Article 17
 - b. Gender equality Article 18
 - c. Protection Article
 - d. Legal remedy Article 20
 - e. Legal aid Article 21
 - f. Right to local self-government Article 22
 - g. Environment Article 23
 - h. Limitation of human rights and liberties Article 24
 - i. Temporary limitation of rights and liberties Article 25
2. Personal rights and liberties
 - a. Prohibition of death penalty Article 26
 - b. Biomedicine Article 27
 - c. Dignity and inviolability of persona Article 28
 - d. Deprivation of liberty Article 29
 - e. Detention Article 30
 - f. Respect for person Article 31
 - g. Fair and public trial Article 32
 - h. Principle of legality Article 33
 - i. More lenient law Article 34
 - j. Presumption of innocence Article 35
 - k. Ne bis in idem Article 36
 - l. Right to defense Article 37
 - m. Compensation of damage for illegal action Article 38
 - n. Movement and residence Article 39
 - o. Right to privacy Article 40
 - p. Inviolability of home Article 41
 - q. Confidentiality of correspondence Article 42
 - r. Personal data Article 43
 - s. Right to asylum Article 44
3. Political rights and liberties
 - a. Electoral right Article 45
 - b. Freedom of thought, conscience and religion Article 46
 - c. Freedom of expression Article 47
 - d. Objection of conscience Article 48
 - e. Freedom of press Article 49
 - f. Prohibition of censorship Article 50
 - g. Access to information Article 51
 - h. Freedom of assembly Article 52
 - i. Freedom of association Article 53
 - j. Prohibition of organizing Article 54
 - k. Prohibition of operation and establishment Article 55
 - l. Right of recourse to international organizations Article 56
 - m. Right of recourse Article 57
4. Economic, social and cultural rights and liberties
 - a. Property Article 58
 - b. Entrepreneurship Article 59

⁷ Mijat Šuković, Ustavno pravo, page 262, CID 2009

- c. Right to succession Article 60
 - d. Rights of foreign nationals Article 61
 - e. Right to work Article 62
 - f. Prohibition of forced labour Article 65
 - g. Rights of the employed Article 64
 - h. Social council Article 65
 - i. Strike Article 66
 - j. Social insurance Article 67
 - k. Protection of the persons with disability Article 68
 - l. Health protection Article 69
 - m. Consumer protection Article 70
 - n. Marriage Article 71
 - o. Family Article 72
 - p. protection of mother and the child Article 73
 - q. Rights of a child Article 74
 - r. Education Article 75
 - s. Freedom of creation Article 76
 - t. Science, culture and arts Article 77
 - u. Protection of natural and cultural heritage Article 78
 - 5. Special – minority rights
 - a. Protection of identity Article 79
 - b. Prohibition of assimilation Article 80
 - 6. Protector of human rights and liberties
 - a. The protector of human rights and liberties Article 81
- What is the historical background of the creation of the national catalogue of human rights in your country? Is the respective legislation in your country based on other legislation (previous or foreign), or is it original?

Regarding historical background, Constitution of Principality of Montenegro, dating from 1905, was the first Constitution of Montenegro. List of “constitutional rights of Montenegrin citizens”, that was then incorporated in Constitution was consistent, in scope and content, with catalogues of guaranteed rights of citizens of other European democratic states. The importance of creating of the national catalogue of human rights with the first Constitution of Montenegrin state was indicated in many historical documents, but particularly in a Decree by Ministry of interior published in December 1905, to order local administration “to explain to citizens importance of gaining constitutional rights”.⁸ All Montenegrin citizens were guaranteed: equality before the law (article 196); personal liberty (article 197 and 199); right to defense and hearing (article 200); right to competent tribunal (article 201); abolishment of death penalty for political crimes (article 203); right to domicile of Montenegrin citizens (article 204); right to property and prohibition of confiscation of property (article 205 and 206); Liberty of conscience (article 208); freedom of religious confessions, right manifest his ideas by speech and writing and freedom of press (article 209 and 210);. right to assemble (article 213) etc. Rights of foreigners domiciled on Montenegrin territory, were also guaranteed as they enjoyed the protection of the Montenegrin laws in what concerns their individuality and their property. As many others constitutions in relevant period, it contained no guaranties of social, economic or cultural rights.

⁸ Mijat Šuković, Ustavno pravo, page 144, CID 2009

The Constitution of Montenegro, at force since 2007, was greatly influenced by international law, particularly because it was adopted little over a decade ago, which is especially evident in parts relating to human rights. Scope of the human rights guaranteed by the Constitution is consistent with the one guaranteed by the international treaties. Constitution protects economic, social and cultural rights as well⁹, whereas Council of Europe's Social Charter, although lacking the stronger legal enforcement mechanisms of the ECHR, has been important in the field of social and economic rights, complementing the focus on civil and political rights in the ECHR.¹⁰

- What has been the development of your national catalogue of human rights over time? Is it undergoing a change? Are new rights included? Is there a constitutional procedure for its modification or amendment?

The Constitution of Montenegro, since it was adopted on October 22, 2007 was only amended once in 2013¹¹. No amendments we related to catalogue of human rights. Procedure for amending Constitution is prescribed by article 155-157. The proposal to change the Constitution may be submitted by the President of Montenegro, the Government or minimum 25 Members of the Parliament. The Law on the change of the Constitution shall be adopted in the Parliament if two thirds of all the Members of the Parliament vote in favor of it. For the amendment of the article 45 of the Constitution / Electoral right, to be final it is required that minimum three fifths of the total number of voters supports the change in the national referendum.

I.IV The mutual relationship between different catalogues of human rights

- Can you give examples from the case law of your court related to the use of any of the international catalogues?

Constitutional Court of Montenegro, in all its jurisdictions invokes national and many international catalogues of human rights, referring to correspondent rights if possible. For example, while assessing constitutionality of provisions of Law on elections of members of Parliament and local parliaments, Constitutional Court referred to provisions of Article 45 of the Constitution, Article 3 of Protocol No. 1. to the European Convention and Article 25 para. a) and b) of the International Covenant on Civil and Political Rights.

Relevant paragraph of Decision U-I br. 48/14, 31 March 2016:

"10. According to the Constitutional Court, the characteristics of the electoral system prescribed by the Montenegrin legislature (proportional electoral system with closed candidate lists), in normative terms, are within the constitutionally acceptable limits, due to the fact that citizens-voters, as holders of the state Sovereignty, have equal and direct legal status in the process of electing their representatives to representative bodies of government at national and local level. The abstract control of the constitutionality of the laws that constitute the electoral system is an objective constitutional dispute in which

⁹ Constitution of Montenegro articles 58-78

¹⁰ Eu Law, Texts, cases and materials, P. Craig and G. de Burca, 2011, page 4

¹¹

http://www.skupstina.me/images/documents/constitution/amendments_I_to_XVI_to_the_constitution_of_montenegro.pdf

Constitutional Court does not assess the model of the electoral system, nor does it deny existence of other solutions in the regulation of electoral law in Montenegro. The matter of this dispute is to protect objective law, which in relation to elections implies an assessment of the exercise of that right as an equal and universal right in which its holders should be equal before the law, as is the case in this particular issue. The Constitutional Court therefore found that the disputed provision of Article 82, paragraph 1 of the Law, was not inconsistent with the provisions of Article 45 of the Constitution, Article 3 of Protocol No. 1. to the European Convention and Article 25 para. a) and b) of the International Covenant on Civil and Political Rights, which set out the principles of elections and the right to free elections.”

- Has your court considered the relationship/hierarchy/competition of the catalogues of human rights in light of the protection afforded?

No.

- Is there an established procedure for choosing a specific catalogue of human rights in cases where the right is protected under more catalogues (NB: The application of the Charter is binding in EU member states subject to compliance with Article 51(1), i.e. its application is not discretionary.)

No. No such procedure is prescribed in legal system of Montenegro.

II. SPECIAL PART – SPECIFIC ISSUES RELATED TO SELECTED FUNDAMENTAL RIGHTS

II.I Right to life

- What is the original wording of the provision protecting this right in your national catalogue?

Right to life is stipulated by article 26 of the Constitution by prohibition of capital (death) penalty. “There shall be no death penalty in Montenegro.”

In addition right to life it is indirectly guaranteed by the article 28 of the Constitution that stipulates “The dignity and security of a man shall be guaranteed. The inviolability of the physical and mental integrity of a man, and privacy and individual rights thereof shall be guaranteed. No person shall be subject to torture or inhumane or degrading treatment. No person shall be held as a slave or in a position of slavery.”

- Is it possible to restrict the right? If so, how and under what conditions?

No, the article 25 of the Constitution explicitly states that there shall be no limitations imposed on the right to life.

- Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.

Yes. Constitutional Court of Montenegro found violation of procedural aspect of article 2. of the European Convention due to ineffective investigation, and awarded the applicant with the just satisfaction.

Relevant paragraphs of the Judgement U-III br. 6/16, 29 November 2017

„8.3. (...) Following what has been stated the above, the Constitutional Court considers that the investigation (investigation) of the Basic State Prosecutor's Office in Berane and the Higher State Prosecutor's Office in Bijelo Polje did not meet the standards of thoroughness, urgency (efficiency) and transparency and did not lead to the identification and eventual punishment of persons for whom there was reasonable doubt that, they committed the crime of attempted murder of the applicant. It is in these omissions that the Constitutional Court finds a failure to fulfill the positive obligation of the competent state bodies to respect and protect the procedural aspect referred to in Article 2 of the European Convention.

Fair satisfaction

9. (...) The just satisfaction to the applicant shall be paid from the budget of Montenegro, upon his previous request, which shall be submitted to the Government in accordance with the provision of Article 76, paragraph 3, within three months from the date of delivery of the decision of the Constitutional Court.

Notwithstanding the Constitutional Court's judgment, the competent state bodies of Montenegro remain obliged to make an effort to fully investigate the event in question and to detect and prosecute the perpetrators of the attack on the applicant, all in accordance with the relevant case law of the European Court of human rights.”

☐ Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?

No. European Court of Human rights, in cases against Montenegro found violation of procedural aspect of right to life, article 2 of the European Convention, in case of Randelović and others v. Montenegro (*application no. 66641/10*), 19 December 2017. In this case the applicants did not file constitutional appeal before Constitutional Court of Montenegro.

- Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?

No. European Court of Human rights, in cases against Montenegro found violation of procedural aspect of right to life, article 2 of the European Convention, in case of Randelović and others v. Montenegro (*application no. 66641/10*), 19 December 2017. In this case the applicants did not file constitutional appeal before Constitutional Court of Montenegro.

II.II Freedom of expression

- What is the original wording of the provision protecting this right in your national catalogue?

“Everyone shall have the right to freedom of expression by speech, writing, picture or in some other manner. The right to freedom of expression may be limited only by the right of others to dignity, reputation and honor and if it threatens public morality or the security of Montenegro.” Article 47 of the Constitution.

- Is it possible to restrict the right? If so, how and under what conditions?

Yes. General provision related to limitations of human rights and liberties, prescribed by Article 24 of the Constitution, apply to the freedom of expression as well. Therefore freedom of expression may be limited only by the law, within the scope permitted by the Constitution, to the extent necessary in an open and democratic society in order to satisfy the purpose for which the limitation has been permitted. Limitations shall not be introduced for purposes other than the ones for which they were prescribed.

- Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.

Yes. Constitutional Court of Montenegro, in many cases found violation right to freedom of expression, Article 47 of the Constitution and Article 10 of the European Convention. The example below is a landmark Judgment of Constitutional Court of Montenegro, that came rather early in development of case-law upon constitutional appeals, and set a guideline for national courts in application of *The three-part test*.

Relevant paragraphs of the Judgement Už-III br. 87/09, 19 January 2012:

“Constitutional Court found, in this particular case, that it is obvious that the two constitutionally guaranteed rights, the right to freedom of expression, and the right to privacy, that is, honor and reputation, are in conflict. In this case, the lower instance courts were in a delicate situation to determine which of these rights should, in the present case, be protected.

However, it is obvious that the High Court and the Supreme Court not only did not established this, but they completely overlooked the fact that, in the present case, the applicants exercised their constitutionally guaranteed right to freedom of thought and expression. By failing to take into consideration significance, content and limits of the right to freedom of expression, relying solely on establishing the "character" - "truthfulness" of the claims made in the disputed text, the High and Supreme Courts in their judgments violated a constitutionally guaranteed right, which has a far-reaching importance to the democratic order. Notwithstanding the essential importance of this right to the rule of law principle, the courts have overlooked the legitimate right of journalists to publicly and polemically respond to statements in the context of dealing with the past of certain public figures during the breakup of the former SFRY. In a substantive sense, this means that even those statements published in the media that are objectively harmful to an individual cannot be the basis for establishing the legal responsibility of journalists, since the limits of acceptable criticism are always wider when criticism related to the work or behavior of a public figure. The applicants' arguments in this regard, however, were not taken into consideration by the courts, that found quite the opposite.

The Constitutional Court found that, even if it accepted that the judgments of the High Court and the Supreme Court were rendered in pursuit of a legitimate aim, "to protect the reputation of others", the question of whether they were "necessary in a democratic society" remained unanswered and unresolved. In other words, whether the compensation awarded to a person that sued the applicant pursued legitimate aim, and on the assumption that the interference in question is in accordance with the law and has been undertaken to achieve a legitimate aim - "to protect the reputation and rights of others", the court considers that it was not "necessary in a democratic society", that is, it was not proportionate to the legitimate aim it pursued.

Furthermore, Constitutional Court found that these courts were required to assess right to dignity and reputation of other person over the applicants' right to freedom of expression and, after such comparison and assessment, to determine whose right was more infringed by the allegations in the published article. In accordance with the provisions of Article 23, paragraph 2 of the Media Law, they were also required to assess whether the applicants (media founder and author) intended to offend the other person or intended, above all, to provide information and opinions on his value judgments in the context of a free debate on a matter of general interest for the democratic development of his region and the country as a whole. The aforementioned legal principle - defense on the basis of sincere intention, in the opinion of the Constitutional Court, is a sort of substitute for proving truthfulness. When a journalist has a legitimate aim, when it comes to something significant to the public and when reasonable efforts are made to confirm the facts, the media will not be held responsible, even if the facts turn out to be untrue. In any case, although the disputed journalist article contained criticism of the other person's value judgments, this was not, an arbitrary personal attack, since it was objectively focused on issues of public interest rather than on the private life of the public figure, as it follows from the content of the text and its overall context.

(...)

Finally, considering all the circumstances of the present case, the Constitutional Court found that interfering with the applicants' right to freedom of expression was not "necessary in a democratic society" and that the reasons given by the Supreme Court in its decision cannot be considered relevant and sufficient to justify the interference.

As the Supreme Court failed to carry out a proper proportionality analysis to assess the context in which the expressions were used, in the disputed article and their factual basis, for the purpose of assessing infringement to the rights, and provided protection to the right to dignity and reputation of the other person only, the Constitutional Court found that the applicants' right to freedom of expression had been violated under the provisions of Article 47 of the Constitution and Article 10 of the European Convention."

- Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?

Constitutional Court of Montenegro generally follows interpretation of standards adopted by European Court's jurisprudence, if same or similar legal issue has been ruled upon.

II.III Right to privacy/right to respect for private life/right to private life

- What is the original wording of the provision protecting this right in your national catalogue?

Right to privacy is stipulated by Article 40 of the Constitution “Every person shall have the right to respect for private and family life.” In addition, Article 42 of the Constitution stipulates that confidentiality of letters, telephone conversations and other means of communication shall be inviolable. The principle of inviolability of confidentiality of letters, telephone calls and other means of communication shall be deviated from only on the basis of a court decision, if so required for the purposes of conducting criminal proceedings or for the security of Montenegro.

- Is it possible to restrict the right? If so, how and under what conditions?

Yes. General provision related to limitations of human rights and liberties, prescribed by Article 24 of the Constitution, apply to the right to privacy as well. Therefore right to privacy may be limited only by the law, within the scope permitted by the Constitution, to the extent necessary in an open and democratic society in order to satisfy the purpose for which the limitation has been permitted. Limitations shall not be introduced for purposes other than the ones for which they were prescribed.

- Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.

Yes. Regarding the safeguards to protect individuals’ rights to respect for their private life and confidentiality of their correspondence, as guaranteed under Constitution of Montenegro in Article 42 and Article 8 of the European Convention on human rights, it is provided that confidentiality of correspondence, telephone conversations and other means of communication shall be inviolable. The principle of inviolability of confidentiality of correspondence, telephone conversations and other means of communication shall be deviated from only on the basis of a court decision, if so required for the purposes of conducting criminal proceedings or for the reasons of security of Montenegro. In the context of limitations to the right to privacy, case law of Constitutional Court of Montenegro establishes a balance between the security interests and the need to protect the individual from an unauthorized interference with his privacy.

Even though judicial authorization by itself could neither be necessary nor sufficient to ensure compliance with article 42 Paragraph 2 of the Constitution, in view of these requirements, the Constitutional Court of Montenegro, found that certain provision of Criminal procedure Code were contrary to Article 8 of the Convention and article 42 Paragraph 2 of the Constitution, on that account.

Relevant paragraphs of Judgment U-I 34/11, 23 July 2014:

“Disputed part of the provision of Article 230, paragraph 2 of the Code, provided the police with a discretionary assessment, without limitation, to obtain, from the operators of electronic communications networks and services, who keep official records on the identification of subscribers and registered users of land and mobile lines, data on the date, exact time of beginning and end of communication and duration of communication

of persons for whom there is reasonable suspicion of committing a criminal offense (...), i.e. to conduct secret electronic surveillance of telecommunications.

Given that the police, as an administrative body, may carry out measures of conducting special investigative actions in pre-trial proceedings without a previously obtained court decision, the Constitutional Court found that the disputed part of the provision of Article 230, paragraph 2 of the Code violated the inviolability of the confidentiality of telephone conversation (without an insight into the content), i.e. confidentiality of communication of users of communication networks, for the purposes of Article 42, paragraph 1 of the Constitution and enables "arbitrary interference by public authorities" with the right to privacy contrary to the provisions of Article 8, paragraph 2 of the European Convention. In addition, the Constitutional Court found that the disputed regulation violates the inviolability of the confidentiality of telephone conversations, not only of persons for whom there is a "reasonable suspicion" (...), but indirectly, of any third party (against which certain measures of secret surveillance are not imposed) with whom this person realizes contact by phone.

Therefore, the Constitutional Court considers that the police, without an appropriate court decision, have no right to obtain data from the sphere of private communications, from telecommunications operators to users of their services - against which no certain measures of secret surveillance were imposed ("third parties"), on the communication and the timing of the connection, as these data are an integral element of the protected confidentiality of communication by telephone, which is why it does not meet the standard of the European Court, because it allows arbitrary actions of the police without a court authorization."

Relevant paragraphs of Judgment U-I 5/13, 26 February 2018:

"Constitutional Court held that recording a conversation with prior information and the consent of one of the participants", ordered by a state prosecutor upon the reasoned request of an authorized police officer, or ex officio, although it has a legitimate aim (prevention of disorder or crime) is contrary to the principle of judicial authorization prescribed by Article 42, paragraph 2 of the Constitution. Namely, aforementioned provision of Article 42, paragraph 2 of the Constitution, provides that the court is the only body that can allow deviations from the inviolability of the confidentiality of correspondence, telephone conversations and other means of communication, and not the State Prosecutor's Office, or any other state body (...)."

- Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?

II.IV Freedom of religion

- What is the original wording of the provision protecting this right in your national catalogue?

Freedom of thought, conscience and religion is stipulated by Article 46 of the Constitution. "Everyone shall be guaranteed the right to freedom of thought, conscience and religion, as well as the right to change the religion or belief and the freedom to, individually or collectively with others, publicly or privately, express the religion or belief by prayer, preaches, customs or rites. No one shall be obliged to declare own religious and other beliefs. Freedom to express religious beliefs may be restricted only if so required in order to protect life and health of the people, public peace and order, as well as other rights guaranteed by the Constitution."

- Is it possible to restrict the right? If so, how and under what conditions?

No. The article 25 of the Constitution explicitly states that there shall be no limitations imposed on the right to conscience and religion. Even the general limitations shall not be introduced on the grounds of religion. However, freedom to express religious beliefs may be restricted, but only if so required in order to protect life and health of the people, public peace and order, as well as other rights guaranteed by the Constitution.

- Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.

Constitutional Court of Montenegro, in relation to freedom of religion, ie. freedom to express religious beliefs, assessed *Article 14, paragraph 1 of a Agreement, which allowed a believer (a member of the Islamic Community in Montenegro) to publicly display their nationality, religion or custom by wearing a cap or scarf, as an integral part of the costume. (...)*, and found it to be in accordance with law, Constitution and article 9 of the Convention.

Relevant paragraphs of Judgment U-II br. 56/14, 24 February 2017:

“8.3. It follows from the Court's case-law, wearing a religious clothing and / or religious symbol is a form of public expression of religious belief and falls within the right protected by Art. 14 of the Convention, and that in most European countries this issue is not regulated at all or regulated in a different manner. According to the ECHR, the meaning or influence and regulation of this right differs according to time and context, depending on national traditions and requirements imposed by the need to protect the rights and freedoms of others and maintain public order. In this regard, the Court states that the scope and form of the regulation governing this right should be left to the State concerned, since it will depend on the domestic context. According to the case-law of the ECHR, the prohibition of wearing a headscarf in public institutions constitutes an act of discrimination unless there is "objective and reasonable justification", then if this different treatment does not have a "legitimate aim" and there is "proportionality to the legitimate aim pursued". The less favorable treatment of members of a religious minority shall not be considered contrary to Article 14 of the European Convention on Human Rights if the State presents important reasons which existed before the very Law of such prohibition. The application of the Margin of Appreciation Doctrine, according to the ECHR, allows a state to determine for itself the extent of the restriction on the right to express a religious belief in accordance with its own views, that is, to assess for itself in the context of that state the compatibility of its measures with its democratic system by expression of religious belief, which this court generally respects. In doing so, in determining the margin of appreciation, the Court in each case assesses whether the measures taken by the State were in principle justified and proportionate.

8.3.4. Constitutional Court found, that the disputed provision of Article 14, paragraph 1 of the Agreement, allows a believer (a member of the Islamic Community in Montenegro) if they wish, to publicly display their nationality, religion or custom by wearing a cap or scarf, as an integral part of the costume (...), in proceedings before state authorities, as well as in the education system, in the case of a student and university student. By doing so, Constitutional Court found, the challenged provisions of Article 14, paragraph 1 of the Agreement, enabled, in essence, members of the Islamic Community in Montenegro to express religious feelings (by wearing a cap or scarf) without restriction, that is, to express religious feelings without being directly and indirectly discriminated against in their

employment procedures, as employees, in proceedings before state bodies, and even in the education system, as students and university students, in accordance with the provisions of Article 8, paragraph 1 of the Law on the Legal Status of Religious Communities. The disputed provision of Article 14, paragraph 1 of the Agreement, in the opinion of the Constitutional Court, is in conformity with the provision of Article 8, paragraph 1 of the Law on Minority Rights and Freedoms, which stipulates that minorities and other minority national communities and their members have the right to express themselves, preserving, developing, transmitting and publicly displaying national, ethnic, cultural, religious and linguistic identities as part of their tradition. The Constitutional Court therefore considered that by regulating this issue with the provision of Article 14, paragraph 1, competent authority had not exceeded its constitutional and legal powers. Also, the disputed provision of Article 14, paragraph 1 of the Agreement, did not violate the principle of legality from the provision of Article 145 of the Constitution, both in terms of formal and substantive legality.”

- Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?

No. As indicated in the example, Constitutional Court of Montenegro generally follows interpretation of standards adopted by European Court’s jurisprudence.

II.V Prohibition of discrimination

- What is the original wording of the provision protecting this right in your national catalogue?

Prohibition of discrimination is stipulated in Article 8 of the Constitution. “Direct or indirect discrimination on any grounds shall be prohibited. Regulations and introduction of special measures aimed at creating the conditions for the exercise of national, gender and overall equality and protection of persons who are in an unequal position on any grounds shall not be considered discrimination. Special measures may only be applied until the achievement of the aims for which they were undertaken.”

Furthermore, Article 17 of the Constitution, stipulated equality as “Rights and liberties shall be exercised on the basis of the Constitution and the confirmed international agreements. All persons shall be deemed equal before the law, regardless of any particularity or personal feature.

In addition, gender equality, is guaranteed in Article 18 of the Constitution. “The state shall guarantee the equality of women and men and shall develop the policy of equal opportunities.”

Finally, “everyone shall have the right to equal protection of the rights and liberties thereof”, as stipulated by article 19 of the Constitution.

- Is it possible to restrict the right? If so, how and under what conditions?

No. The article 25 of the Constitution explicitly states that there shall be no abolishment of the prohibition of inflicting or encouraging discrimination.

- Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.

Constitutional Court found provisions of amended Law on Social and Child Protection to be contrary to prohibition of discrimination but also to principles of social justice and the rule of law, gender equality, protection of the family and protection of mother and child. In this landmark judgment, Constitutional Court referred to correspondent rights guaranteed by Constitution, European Convention, Convention on the Elimination of All Forms of Discrimination against Women and International Covenant on Civil and Political Rights. Court in all jurisdictions.

Relevant paragraphs of Judgment U-I br. 6/16, 19 April 2016:

7.8.2.2. The aforementioned case-law of the European Court is, as a whole, applicable to the constitutional dispute in this case, since the right to life long allowance from the disputed provisions of the Law is granted to mothers who have given birth to three or more children, but this right is not granted to the fathers of three or more children, from which, in the opinion of the Constitutional Court, it is clear that these provisions are not in conformity with the provision of Article 18 of the Constitution, which guarantees equality between women and men and the development of equal opportunities policy, nor with the aim sought to be achieved by the challenged legal solutions. In this sense, the provisions of Articles 2 and 4 of the Family Law, which is system-law in the field of family relations, stipulate that the family is the living community of parents, children and other relatives who, within the meaning of this law, have mutual rights and obligations, as well as another basic community in which children are nurtured and raised and that the relations between parents and children are based on mutual rights and duties, especially for parents to care for the protection of the interests and well-being of children and their responsibility for raising, educating and training for independent living (...). By adopting disputed provisions of the Law that stipulated right to allowance on the basis of birth of three or more children has only a mother, the legislator, discriminated the father as one of the parents without reasonable and objective justification.

7.9. The impugned allowance on the basis of the birth of three or more children, in the opinion of the Constitutional Court, does not pursue state objective prescribed by the provision of Article 72, paragraph 1 of the Constitution, which reads: "The family enjoys special protection." From a constitutional point of view, it is relevant that the lifetime allowance from the disputed provisions of the Law be granted exclusively to a woman who has given birth to three or more children after the application of the Law. This Law indicates the true nature namely that it is essentially a public-law monetary compensation for multiple deliveries that a woman / mother had, regardless of whether she actually performed her parental duties to the children she gave birth to. Therefore, in the Constitutional Court's view, the purpose of a lifetime allowance is not to maintain a family or to facilitate the conditions for raising children in the family, nor to encourage parenthood, since in that case the allowance would have to cover both parents, regardless of gender.

7.10. *The recognition of a lifetime allowance on the basis of the birth of three or more children prescribed by the disputed provisions of the Law, in the opinion of the Constitutional Court, cannot be considered as a special measure of positive discrimination within the meaning of the provisions of Article 8 para. 2 and 3 of the Constitution, which would be aimed at creating conditions for the realization of national, gender and overall equality and protection of persons who are in unequal position on any grounds. Compensation for the birth of three or more children, prescribed by the disputed provisions of the Law, is of a lasting nature and belongs to the woman for life, and therefore cannot be counted as special measures on that basis, within the meaning of Article 8 paragraph 3 of the Constitution, which provides that the special measures "can only be applied until the objectives pursued are achieved". The Constitutional Court assessed that the constitutional structure of the Montenegrin state of social justice should not be undermined by a legal measure that apparently only falls within social policy measures, since it is essentially not in function of the state social security objectives set out in the provisions of Article 67, paragraph 2 . Of the Constitution ("The state provides material security for a person who is incapable of work and has no means of subsistence"), and is not even in function of state aims in the field of family relations and their protection, with a rational and sustainable system of social benefits that will have clear legitimate goals, aligned with national social policy goals.*

7.11. *Given that the legislative measure is governed by the disputed provisions of the Law referred to in paragraphs I and II of this decision, directly related to the achievement of the state-determined goals in the field of social and economic policy, but also to the realization of the basic principles and highest values of the constitutional order, the Constitutional Court, as the highest constitutional body, sui generis, in whose jurisdiction is the protection of supremacy of the Constitution or the constitutional-legal order, found that the disputed provisions of Article 4 (Article 54a, paragraph 2, 3 and 4 and Article 54b, paragraph 2) of the Law are not in accordance with the principles of social justice and the rule of law, on the prohibition of discrimination, gender equality, protection of the family and protection of mother and child, from the provisions of Article 1, paragraph 2, Art. 8 and 18, Article 72 para. 1 and 2, Article 73 of the Constitution, Article 14 of the European Convention and Article 1 of Protocol No. 12 to the European Convention, which are binding to all, including the legislator, and that the provisions of Article 4 (Article 54a, paragraph 1 and Article 54 (b) (1) of the same Law, for the same reasons, at the time it being into force, was not in conformity with the aforementioned provisions of the Constitution and the European Convention."*

- Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?

No. Constitutional Court of Montenegro generally follows interpretation of standards adopted by European Court's jurisprudence.

II.VI Right to liberty

- What is the original wording of the provision protecting this right in your national catalogue?

Right to liberty is stipulated by Article 29 of the Constitution. "Everyone shall have the right to personal liberty. Deprivation of liberty shall be permitted only for the reasons and in the procedure prescribed by the law. Person deprived of liberty shall be notified

immediately of the reasons for the arrest thereof, in own language or in the language he/she understands. Concurrently, person deprived of liberty shall be informed that he/she is not obliged to give any statement. At the request of the person deprived of his/her liberty, the authority shall immediately inform about the deprivation of liberty the person of own choosing of the person deprived of his/her liberty. The person deprived of his/her liberty shall have the right to the defense counsel of his/her own choosing present at his interrogation. Unlawful deprivation of liberty shall be punishable.”

- Is it possible to restrict the right? If so, how and under what conditions?

Yes. General provision related to limitations of human rights and liberties, prescribed by Article 24 of the Constitution, apply to the right to liberty as well, with the safeguards provided above. Therefore right to liberty may be limited only by the law, within the scope permitted by the Constitution, to the extent necessary in an open and democratic society in order to satisfy the purpose for which the limitation has been permitted. Limitations shall not be introduced for purposes other than the ones for which they were prescribed.

- Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.

Yes, Constitutional Court dealt with many detention cases. that have priority status in procedure before the Court, and applied relevant case-law of European Court on Article 5 of the European Convention on Human Rights - Right to liberty and security.

Relevant paragraphs of Judgment U-III br. 1474/19, 9 July 2019:

15.6. The case-law of the ECHR insists on the fact that the specific circumstances they represent grounds for detention order may change, and that, therefore, the initial reasons for ordering detention may become obsolete or non existant altogether. Therefore, there is a need for regular review of the grounds for detention (I.A. v France, ECtHR, 23 September 1998).

15.7. The Constitutional Court found that in deciding whether the conditions for applying the detention basis under Article 175, paragraph 1, item 3 of the Code of Criminal Procedure are met, only referring to an earlier conviction by a final judgment dating back to 2010 and stating facts such as “unemployment” and “poor financial situation” are not sufficient for the survival of a custodial measure. Instead as facts that make repeting crimes probable, at least some of the following must be established: a) belonging to an organized criminal group or organizing a group of people aimed at committing criminal offenses b) an earlier conviction or earlier conviction combined with "continuity and determination of intent in the offense" together with the parallel conduct of another criminal trial against the defendant, or an earlier conviction that "demonstrates disrespect for the laws and social norms of conduct", c) psychological lability (e.g., for a

defendant with alcohol abuse, substance abuse, e) a greater degree of persistence and particular recklessness in committing certain criminal acts, etc.

15.8. In view of the stated above, and having regard to the circumstances of the case, the Constitutional Court found that the disputed decision did not set out "relevant" and "sufficient" reasons justifying the continued detention of the applicant, from the aspect of constitutional and convention rights guaranteeing the right to personal liberty, as the custody of this case has been running since 20 June 2018. In this sense, the possibility of a repeated offense, as one of the statutory grounds for ordering and extending detention, must be specific and such that it can reasonably be anticipated and expected, especially after such a long period of time, and in cases of prolonged detention, the reasons for extending custody must be qualitatively stronger as the time passes.

15.9. In view of the above, the Constitutional Court finds that the disputed decisions did not substantiate the justification that there are indications of an iterative danger, since the competent courts did not state any other fact, other than the applicant's previous conviction, and unemployment and poor financial situation, which in the circumstances of this case justifies the concern from the repetition of the same or a similar offense, which, in the opinion of the Constitutional Court, led to an arbitrariness in deciding the courts to extend the applicant's detention. (...)

- Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?

No. Constitutional Court, as indicated above, aims to apply relevant standards of the ECHR.

Explanatory notes:

ECHR	– European Convention on Human Rights
Charter	– Charter of Fundamental Rights of the EU
UDHR	– Universal Declaration of Human Rights
ICCPR	– International Covenant on Civil and Political Rights