



**4th Congress of the World Conference on Constitutional  
Justice  
THE RULE OF LAW AND CONSTITUTIONAL JUSTICE  
IN THE MODERN WORLD  
11–14 September 2017, Vilnius, Lithuania  
QUESTIONNAIRE**

**Answers to the questionnaire**

**Constitutional Court of Montenegro**

## 1. What are the relevant sources of law (e.g. the Constitution, case-law, etc.) which establish the principle of the rule of law in the legal system of your country?

1. The principle of the rule of law<sup>1</sup> is stated expressis verbis in Article 1 paragraph 2 of the Constitution, as the fundamental value of the constitutional order. The *Basic Provisions* of the Constitution<sup>2</sup> (Articles 1-16) set forth other basic principles – constituents of the character of the State of Montenegro and its organisation. They comprise a meaningful unity linking all provisions of the Constitution and permeating the contents of all of them. The motives of establishing fundamental principles and the elements of their explanations are also stated in the *Preamble* of the Constitution<sup>3</sup>, listing, in addition to the rule of law, the following: freedom, peace, tolerance, respect of human rights and freedoms, multiculturalism and democracy.

## 2. How is the principle of the rule of law interpreted in your country? Are there different concepts of the rule of law: formal, substantive or other?

2. In the Constitution of Montenegro, the principle of the rule of law<sup>4</sup> is stated as the fundamental value of the constitutional order, but is not closely defined. The contents of the concept of the rule of law are defined by the Constitutional Court in its case-law, based on the European concept of the rule of law. (see answer under 4)

The principle of the rule of law, as a highly general principle, includes: the principle of separation of powers<sup>5</sup>, sovereignty<sup>6</sup>, limits of liberties<sup>7</sup>, right to legal remedy<sup>8</sup>, limitations of human rights and freedoms (principle of proportionality)<sup>9</sup>, principle of equality<sup>10</sup>, prohibition of discrimination<sup>11</sup>, right to dignity and inviolability of personality<sup>12</sup>, right to personal freedom<sup>13</sup>, right to fair trial<sup>14</sup>, *Nullum crimen nulla poena sine lege*<sup>15</sup>, *ne bis in idem*<sup>16</sup>, more lenient law<sup>17</sup>, principle of conformity of legal regulations<sup>18</sup>, prohibition of retroactive effect<sup>19</sup>, independence of judiciary<sup>20</sup>, continuity of judicial office<sup>21</sup> etc.

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<sup>1</sup> Article 1 paragraph 2 of the Constitution of Montenegro "Montenegro is a civil, democratic, ecological state and state of social justice, based on the rule of law"

<sup>2</sup> Constitution of Montenegro (Official Gazette of Montenegro 1/07 and 38/13-1)

<sup>3</sup> Mijat Šuković, *Ustavno pravo* (Constitutional law), 2009, CID p. 175

<sup>4</sup> <http://www.skupstina.me/images/documents/constitution-of-montenegro.pdf>

<sup>5</sup> Article 11 of the Constitution

<sup>6</sup> Article 2 of the Constitution

<sup>7</sup> Article 10 of the Constitution

<sup>8</sup> Article 20 of the Constitution

<sup>9</sup> Article 24 of the Constitution

<sup>10</sup> Article 17 of the Constitution

<sup>11</sup> Article 8 of the Constitution

<sup>12</sup> Article 28 of the Constitution

<sup>13</sup> Article 29 of the Constitution

<sup>14</sup> Article 32 of the Constitution

<sup>15</sup> Article 33 of the Constitution

<sup>16</sup> Article 36 of the Constitution

<sup>17</sup> Article 34 of the Constitution

<sup>18</sup> Article 145 of the Constitution

<sup>19</sup> Article 147 of the Constitution

<sup>20</sup> Article 118 of the Constitution

<sup>21</sup> Article 121 of the Constitution

We cannot say that there are independent (formal, substantive, etc.) concepts of the rule of law. Having in mind that the principle of the rule of law is realized through application and protection of the principle of conformity of legal regulations, it is presumed that a law must be in conformity with the Constitution and the ratified and published international agreements, and other regulations with the Constitution and the law. At the same time, regularity is not required only in formal and legal, but also in substantive legal sense.

### **3. Are there specific fields of law in which your Court ensures respect for the rule of law (e.g. criminal law, electoral law, etc.)?**

The Constitutional Court<sup>22</sup> ensures observance and application of the Constitution of Montenegro<sup>23</sup>. The established jurisdiction of the Constitutional Court of Montenegro gives it a very important role in the processes of building Montenegro as an independent, democratic state and a state of social justice. Also, the jurisdiction of the Constitutional Court is reflected in the incorporation of European values into the national legal order, and above all in the tendency for the state to be founded and built on the principle of the rule of law. In a legal order based on the rule of law, the laws must be general and equal for everyone, and legal consequences should be certain for those to whom the law applies.

In the case-law of the Constitutional Court of Montenegro, in the field of abstract control of constitutionality and legality, when it comes to the rule of law, different areas of law are represented, but one cannot put special emphasis on one of them (see answer under 4). As regards the proceedings upon constitutional appeal, the analysis of the cases resolved on the merits in 2016 shows that in about 77% of the cases the procedures that preceded the proceedings before the Constitutional Court were in the field of civil law, 6% in the field of criminal law, 10% in the field of administrative dispute, and other cases in a small percentage were in the field of commercial dispute, misdemeanour and enforcement proceedings.

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<sup>22</sup> Jurisdiction of the Constitutional Court is set forth in Article 149 of the Constitution of Montenegro

“Constitutional Court shall decide on the following:

- 1) conformity of laws with the Constitution and ratified and published international agreements;
- 2) conformity of other regulations and general acts with the Constitution and the law;
- 3) constitutional appeal on the account of violation of human rights and freedoms guaranteed by the Constitution, after all 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 government authorities, and between local government authorities;
- 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) and shall perform other tasks stipulated by the Constitution.

If a regulation ceased to be valid during the procedure for the assessment of constitutionality and legality thereof, and the consequences of enforcement thereof 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.

<sup>23</sup> Article 1 of the Law on the Constitutional Court of Montenegro (Official Gazette of Montenegro 11/15)

**4. Is there case-law on the content of the principle of the rule of law? What are the core elements of this principle according to the case-law? Please provide relevant examples from case-law.**

The Constitutional Court of Montenegro has an important role in the defining of the constitutional principles. Through a series of decisions in the area of abstract control of constitutionality and legality, the Constitutional Court deliberated on the conformity of the contested provisions with the principle of the rule of law referred to in Article 1 paragraph 2 of the Constitution.

- ❖ *Decision of the Constitutional Court of Montenegro U-I br. 6/14 and 9/ of 17 April 2014 Law on Protection of State Interest in the Mining and Metallurgy Sector (Official Gazette of Montenegro 58/13)*

12. The principle of the rule of law, as the highest value of the constitutional order of Montenegro, is realized through application and protection of the principle of conformity of legal regulations. It implies that the law must be in conformity with the Constitution and the ratified and published international agreements, and other regulation with the Constitution and law. Regularity is thereby required not only in the formal-legal, but also in the substantive-legal sense. The law must be clear and precise in line with the specific character of the matter that is regulated, which prevents any arbitrariness in the interpretation and application of the law, i.e. eliminates any uncertainties of the addressees of the legal norm in terms of the final effect of the legal provisions directly applicable to them. In a legal order based on the rule of law, laws must be general and equal for everyone, and legal consequences should be certain for those to whom the law applies.

13. In that sense, the European Court in the case of *Sunday Times (No.1) v. the United Kingdom*<sup>24</sup> established the standard of legality for the first time, which must be met for the term “law” in the phrase “prescribed by law” to be considered a law:

“49. In the Court’s opinion, the following are two of the requirements that flow from the expression “prescribed by law”. Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.”

13.1. In the case of *Huvig v. France*<sup>25</sup>, the European Court took the stance that the term “law” should be understood in its substantive sense, not its formal one:

“26. The expression ‘in accordance with the law’, within the meaning of Article 8 § 2 (art. 8-2), requires firstly that the impugned measure should have some basis in

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<sup>24</sup> Judgment, of 26 April 1979, application no. 6538/74.

<sup>25</sup> Judgment, of 24 April 1990, application no. 1110/84.

domestic law; it also refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him, and compatible with the rule of law.”

13.2. The above positions of the European Court indicate that, for any restrictive measure of the state to be regarded as “legal”, in the sense of the European Convention, the standard of legality must be met, which requires four conditions to be fulfilled: legal basis in the domestic law, quality of law, requirement of accessibility of the domestic law, requirement of foreseeability of domestic law and requirement of measure of legal protection in domestic law against arbitrary interferences with a protected convention right.

13.3. The Constitutional Court considers it unquestionable that the addressees of the legal norm cannot actually and specifically know their rights and duties and foresee the consequences of their conduct, if the legal norm is not sufficiently specific and precise. Contrary to the aforementioned requirements of the European Court, when it comes to the quality of the law or the standard of legality, the contested provisions of Article 2 paragraph 2 and Article 3 paragraphs 1 and 3 of the Law, according to the Constitutional Court’s finding, contain a series of ambiguities and inaccuracies combined with internal collision. Namely, the following is not clear from the contents of the provisions of Article 2 paragraph 2 and Article 3 paragraphs 1 and 3 of the Law:

whether companies (in mining and metallurgical sector) are to be sold following the method of selling the whole property (Article 2 paragraph 2) or selling a legal entity (Article 3 paragraphs 1 and 3 of the Law), or if on the basis of contested provisions of the Law it is possible to use both methods;

whether the selling of companies as legal entities (Article 3 of the Law) would be in conflict with the provision of Article 142 paragraph 1 of the Bankruptcy Law<sup>26</sup>, without the approval of the creditors’ committee;

whether the contested provisions of Article 3 paragraph 1 of the Law eliminate possibility of selling company by means of public auctioning as prescribed in Article 134 paragraph 3 of the Bankruptcy Law<sup>27</sup>;

which criteria apply to assessing compliance with the conditions referred to in the contested provisions of Article 3 paragraph 3 indents 2, 3 and 4 of the Law – “operates a higher technological level of mining-metallurgical operation than the company that is given for sale” - “has good reputation and has a clean track record when it comes to privatisation of companies” and - “(...), dynamic and long-term plan is provided by potential bidder”;

which body is to assess if the selling terms referred to in the contested provisions of Article 3 paragraph 3 indents 2, 3 and 4 have been met – bankruptcy judge who decides about selling the property of bankruptcy debtor (property or legal entity) or the Parliament of Montenegro which gives approval of the sale;

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<sup>26</sup> “The subject of sale can be bankruptcy debtor as a legal entity provided it is approved by the creditors’ committee.”

<sup>27</sup> “(3) Selling of property is made by public auction, by public collecting of bids or direct negotiation in compliance with this Law.”

who are parties to the contract and what is the subject of contract as referred to in the contested provisions of Article 4 of the Law if the state takes over a company having in mind the fact that Bankruptcy Law stipulates the “selling” of company as legal entity and not company “takeover”.

13.4. The Constitutional Court found that the contested provisions of Article 2 paragraph 2 and Article 3 paragraphs 1 and 3 of the Law do not meet the standard of legality, in line with the above positions of the European Court. The law that allows uncertainty in view of the final effect of its provisions, according to the Constitutional Court’s finding, may not be considered to be a law which is based on the rule of law or a law that establishes the principle of legal certainty and foreseeability. Therefore, the contested provisions of Article 2 paragraph 2 and Article 3 paragraphs 1 and 3 of the Law contravene the principle of the rule of law as the supreme principle of the constitutional order (Article 1 paragraph 2 and Article 145 of the Constitution).

❖ *Decision of the Constitutional Court of Montenegro U-I 13/14 of 30 May 2014 the Law on Political Party Funding (Official Gazette of Montenegro 10/14)*

16. The Constitutional Court also found that by way of the contested provision of Article 13 paragraph 1 (21a paragraph 1) of the Law, stipulating that all decisions taken contrary to Articles 16, 16a, 17, 18, 19, 19a, 19b, 19c, 20 and 21 of this Law are legally null and void, the legislator violated the principle of legal certainty, which together with the principle of supremacy of the law implies that the law is applicable in practice and foreseeable in terms of its effect, in order to ensure legal certainty for all persons to whom it applies. The principle of legal certainty stems from the principle of the rule of law, which is enshrined in the totality of the Convention law and implies that the legal basis for any interference with the Convention rights must be proportionally determined. According to the European Court, the rule of law, among other, implies that any interference of the authorities with the rights of individuals is subject to actual control which should be provided by judicial authorities, in each area of the law.

16.1. In this respect, the European Court examines all elements of the principle of legal certainty and whether the manner in which domestic law is interpreted and applied is in conformity with the Convention. In the case of *Brumarescu v. Romania*<sup>28</sup> the European Court stated the following position:

“61. The right to a fair hearing before a tribunal as guaranteed by Article 6 § 1 of the Convention must be interpreted in the light of the Preamble to the Convention, which declares, among other things, the rule of law to be part of the common heritage of the Contracting States. One of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, inter alia, that where the courts have finally determined an issue, their ruling should not be called into question.

62. In the present case the Court notes that at the material time the Procurator-General of Romania – who was not a party to the proceedings – had a power under Article 330 of the Code of Civil Procedure to apply for a final judgment to be quashed. The Court notes that the exercise of that power by the Procurator-General was not subject to any time-limit, so that judgments were liable to challenge indefinitely.

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<sup>28</sup> Judgment (VV), of 23 January 2001, application no. 28342/95.

The Court observes that, by allowing the application lodged under that power, the Supreme Court of Justice set at naught an entire judicial process which had ended in – to use the Supreme Court of Justice’s words – a judicial decision that was ‘irreversible’ and thus *res judicata* – and which had, moreover, been executed.

In applying the provisions of Article 330 in that manner, the Supreme Court of Justice infringed the principle of legal certainty. On the facts of the present case, that action breached the applicant’s right to a fair hearing under Article 6 § 1 of the Convention.”

16.1.1. In the case of *Hornsby v. Greece*<sup>29</sup>, the European Court took the stance that the principle of the rule of law obligates not only judicial authorities but also administrative ones in the states parties:

“The above principles” (of execution of a judgment as an integral part of the trial) “are of even greater importance in the context of administrative proceedings concerning a dispute whose outcome is decisive for a litigant’s civil rights. By lodging an application for judicial review with the State’s highest administrative court the litigant seeks not only annulment of the impugned decision but also and above all the removal of its effects. The effective protection of a party to such proceedings and the restoration of legality presuppose an obligation on the administrative authorities’ part to comply with a judgment of that court. The Court observes in this connection that the administrative authorities form one element of a State subject to the rule of law and their interests accordingly coincide with the need for the proper administration of justice. Where administrative authorities refuse or fail to comply, or even delay doing so, the guarantees under Article 6 (...) enjoyed by a litigant during the judicial phase of the proceedings are rendered devoid of purpose.”

16.2. Based on the contested provision of Article 13 paragraph 1 (Article 21a paragraph 1) of the Law, according to the Constitutional Court’s finding, it can be concluded that the nullity of the decisions taken contrary to the provisions of Articles 16, 16a, 17, 18, 19, 19a, 19b, 19c, 20 and 21 of the Law *ex lege* was determined in advance, in a general manner, and that the procedure of their legal nullity is, subsequently, in accordance with the provisions of Article 15 (Article 29h) of the Law, determined in a special procedure initiated by the State Election Commission before the competent state authority, in order to institute the proceedings to determine their nullity before the competent court. The legislator did not specify the competent state authority before which the proceedings to determine nullity of the acts is instituted. The purpose of every law regulating jurisdiction and work of any state authority, according to the Constitutional Court’s finding, is to determine its scope of work and the limits of its powers, the procedure according to which it performs its duties, as well as supervision over its work. As the contested provision of Article 13 paragraph 1 of the Law did not specify the scope of discretionary power entrusted to the authorized bodies, or the competent authorities, nor did it formulate with sufficient precision the manner of using such discretionary right in order to provide adequate protection to citizens from arbitrary decision-making, the Constitutional Court found that it is not in conformity with the principle of the rule of law referred to in Article 1 paragraph 2 of the Constitution.

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<sup>29</sup> Judgment, of 19 March 1997, application no. 18357/91.

- ❖ *Decision of the Constitutional Court of Montenegro U-I 25/12 of 31 March 2015 Law on Public Broadcasting Services of Montenegro (Official Gazette of Montenegro 79/08 and 45/12)*

7. The Constitutional Court found that the contested provisions of Article 19 paragraph 4 in the part which reads: “and part of the costs of transmission and broadcasting of their programs through terrestrial systems of broadcasting transmitters not included in the budget of the Ministry” and Article 63a of the Law violated the constitutional principles of the rule of law and of the conformity of legal regulations, referred to in Article 1 paragraph 2 and Article 145 of the Constitution.

7.1. The principle of the rule of law, as the highest value of the constitutional order or Montenegro, is realized through application and protection of the principle of conformity of legal regulations. It implies that a law must be in conformity with the Constitution and the ratified and published international agreements, and other regulation with the Constitution and law. Regularity is thereby required not only in the formal-legal, but also in the substantive-legal sense. The law must be clear and precise in line with the specific character of the matter that is regulated, which prevents any arbitrariness in the interpretation and application of the law, i.e. eliminates any uncertainties of the addressees of the legal norm in terms of the final effect of the legal provisions directly applicable to them. In a legal order based on the rule of law, laws must be general and equal for everyone, and legal consequences should be certain for those to whom the law applies. The requirements of legal certainty and the rule of law, referred to in Article 1 paragraph 2 of the Constitution, require the legal norm to be available to the addressees and to be foreseeable for them, i.e. such that they can really and specifically know their rights and duties in order to be able to act accordingly. Addressees of the legal norm cannot really and specifically know their rights and duties, and foresee the consequences of their behaviour if the legal norm is not sufficiently specific and precise. The requirements for specificity and precision of the legal norm must be considered an integral part of the principle of the rule of law in the areas of all branches of the law, and therefore also in the field of public service funding. The rule of law, as the highest value of the constitutional order, contains the general characteristics that laws must have in order to comply with the principle of the rule of law (Article 1 paragraph 2 and Article 145 of the Constitution).

7.1.1 In that regard, the European Court, in the case of *Sunday Times (No.1) v. the United Kingdom*<sup>30</sup>, established the standard of legality for the first time, which must be met for the term “law” in the phrase “prescribed by law” to be considered a law:

“49. In the Court’s opinion, the following are two of the requirements that flow from the expression ‘prescribed by law’. Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a ‘law’ unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to

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<sup>30</sup> Judgment, of 26 April 1979, application no. 6538/74, § 49.

foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. (...).”

7.1.2. In the case of *Malone v. the United Kingdom*<sup>31</sup> the European Court further elaborated the notion of “legality” linking it with the prohibition of abuse of powers:

„68. (...) It would be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference.”

7.1.3. In the case of *Huvig v. France*<sup>32</sup>, the European Court took the stance that the term “law” should be understood in its substantive sense, not its formal one:

“26. The expression ‘in accordance with the law’, within the meaning of Article 8 § 2, requires firstly that the impugned measure should have some basis in domestic law; it also refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him, and compatible with the rule of law.”

7.2. The above positions of the European Court indicate that the law must be sufficiently clear to point out to the scope of discretionary powers entrusted to the competent authorities, and to the manner of exercising such right. As per understanding of the European Court, the law must point out to the scope of discretionary right entrusted to the competent authorities and must regulate with sufficient precision the exercise of such discretionary right, in order to provide adequate protection from arbitrary decision-making. The addressee of the law must be in position to foresee to a degree which is reasonable under the given circumstances, the consequences that his actions or conduct might cause. The purpose of any law regulating jurisdiction and work of any state authority, in that regard, as understood by the European Court, is to determine its scope of work and restrictions of its powers, the procedure according to which it performs its tasks, and supervision over its work.

7.2.1. In this specific case, the contested part of the provision of Article 19 paragraph 4 of the Law, according to the Constitutional Court’s finding, implies that, in addition to the costs of transmission and broadcasting of its program via satellite systems, RTCG will also bear part of the costs of transmission and broadcasting of its programs via terrestrial systems of broadcasting transmitters which are not included in the budget of the Ministry. The Constitutional Court found that the contested provision of Article 19 paragraph 4 of the Law, in the part which reads:

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<sup>31</sup> Judgment of 2 August 1984 application no. 8691/79.

<sup>32</sup> Judgment, of 24 April 1990, application no. 1110/84.

“and part of the costs of transmission and broadcasting of its programs via terrestrial systems of broadcasting transmitters which are not included in the budget of the Ministry” does not meet the requirements of legal certainty and rule of law referred to in the Constitution, i.e. requirements of the European Court in terms of quality of law. Namely, according to the finding of the Constitutional Court, the contested provision of Article 19 paragraph 4 of the Law, in the contested part, is imprecise in nomotechnical and contentual sense, as it contains a series of ambiguities. Namely, the provision of Article 19 paragraph 4, or any other provisions of the Law do not stipulate the amount of the cost of transmission and broadcasting of its programs via satellite systems and terrestrial systems of broadcasting transmitters borne by the RTCG, or the manner and procedure for their determination, which allows unacceptable area of arbitrariness in the process of their determination. Bearing in mind that the provision of Article 63a of the Law, which specifies the date from which the provisions of Article 19 paragraph 4 of the Law will apply, is in direct correlation with that provision, the Constitutional Court found that the contested provisions of Article 19 paragraph 4 in the part which reads: “and part of the costs of transmission and broadcasting of its programs via terrestrial systems of broadcasting transmitters which are not covered by the budget of the Ministry” and Article 63a of the Law, are not in conformity with the Constitution. Therefore, the Constitutional Court abolished the contested provisions of the Law.

- ❖ *Decision of the Constitutional Court of Montenegro U br. 90-08 and 96-08, 18 July 2013 Criminal Procedure Code (Official Gazette of the Republic of Montenegro 71/03 and 47/06).*

The Constitutional Court found that the provisions of Article 230 paragraph 2 of the Code, in the part which reads: “to require from the legal entity providing telecommunications services to verify the identity of telecommunication addresses that established a connection at a certain time”, at the time of validity, was not in conformity with the Constitution of Montenegro:

1.14.3. Since 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 contested part of the provision of Article 230 paragraph 2 of the Code violates the inviolability of the confidentiality of telephone calls (without insight into their content), i.e. the secrecy of the means of communication of users of communication networks, guaranteed by the provision of Article 42 paragraph 1 of the Constitution and allows “arbitrary interference by public authorities” with the right to privacy, contrary to the provisions of Article 8 paragraph 2 of the European Convention.

1.15. In addition, the Constitutional Court found that the contested regulation violates the inviolability of the right to confidentiality of telephone conversations, not only for persons with “grounds of suspicion” (...), but indirectly for any third party (against

whom no measures of secret surveillance were imposed), with whom this person realizes contact by phone.

1.15.1. Before the European Court, special access to evidence obtained through the use of special investigative actions (telephone tapping) was adopted and specially elaborated, in the case of *Kruslin v. France*<sup>33</sup>. The Indictment Division of the Toulouse Court of Appeal (1985) convicted the applicant (for aiding and abetting a murder, aggravated theft and attempted aggravated theft)<sup>34</sup>, based on circumstantial evidence (recorded telephone conversations related to criminal proceedings against another person). The European Court found:

“26. Although it was Mr Terrieux’s line that they were tapping, the police in consequence intercepted and recorded several of the applicant’s conversations, and one of these led to proceedings being taken against him (see paragraphs 9-10 above). The telephone tapping therefore amounted to an ‘interference by a public authority’ with the exercise of the applicant’s right to respect for his ‘correspondence’ and his ‘private life’ (see the *Klass and Others* judgment of 8 September 1978, Series A no. 28, p. 21, § 41, and the *Malone* judgment of 2 August 1984, Series A no. 82, p. 30, § 64). The Government did not dispute this).

Such an interference contravenes Article 8 (art. 8) unless it is ‘in accordance with the law’, pursues one or more of the legitimate aims referred to in paragraph 2 and furthermore is ‘necessary in a democratic society’ in order to achieve them.

27. The expression ‘in accordance with the law’, within the meaning of Article 8 § 2, requires firstly that the impugned measure should have some basis in domestic law; it also refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him, and compatible with the rule of law.

33. Tapping and other forms of interception of telephone conversations represent a serious interference with private life and correspondence and must accordingly be based on a ‘law’ that is particularly precise. It is essential to have clear, detailed rules on the subject, especially as the technology available for use is continually becoming more sophisticated.

36. In short, French law, written and unwritten, does not indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities. This was truer still at the material time, so that Mr *Kruslin* did not enjoy the minimum degree of protection to which citizens are entitled under the rule of law in a democratic society (see the *Malone* judgment previously cited, Series A no. 82, p. 36, § 79). There has therefore been a breach of Article 8 of the Convention.”

1.16. On the basis of the above, the Constitutional Court found that the police, without the appropriate court decision, have no right to obtain data from the sphere of private communications, from telecommunication operators about users of their

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<sup>33</sup> Judgment of 24 April 1990

<sup>34</sup> One piece of evidence was a recording of a telephone conversation that the applicant had on a phone line belonging to a third person, and in connection with another proceeding. The European Court has held that such an action did not have an adequate legal basis in French criminal procedural law.

services – against whom no measures of secret surveillance were imposed (“third parties”), about communication and connection time, because these data are also an integral part of the protected secret of communication by telephone, which is why the contested provision of the Law is not in accordance with the provisions of Article 42 of the Constitution.

1.17. Accepting a dynamic and evolutive interpretation of the “criminal” provisions of the Constitution that take into account the changed living circumstances and the need to continuously improve Montenegrin criminal procedural law, in accordance with relevant European legal standards and modern state criminal policy, whose goals are constantly aligned with changes in national, regional and (European) global level, the Constitutional Court found that part of the contested provision of Article 230 paragraph 2 of the Code was not in compliance with the provision of Article 42 of the Constitution and the provisions of Article 8 of the European Convention.

**5. Has the concept of the rule of law changed over time in case-law in your country? If so, please describe these changes referring to examples.**

5. Since the entry into force of the 2007 Constitution of Montenegro, the concept of the rule of law has not changed, but has been developed in practice. Analysis of the case-law of the Constitutional Court of Montenegro shows that in its decisions the Court referred to the principle of the rule of law in the sense of the fundamental value of the constitutional order. In previous years, the Constitutional Court increasingly called on and interpreted the meaning and content of the concept of the rule of law and brought it into line with other aspects of this one and other constitutional principles.

The Constitutional Charter of the State Union of Serbia and Montenegro<sup>35</sup> and the Constitution of the Federal Republic of Yugoslavia<sup>36</sup> stipulated that the state is based on the rule of law. In the previous Constitutions, this principle was not explicitly stated, although certain constitutional provisions contained some of the basic elements of this principle. Therefore, it follows that the principle of the rule of law has a long continuity in our case-law.

**6. Does international law have an impact on the interpretation of the principle of the rule of law in your country?**

Ratified and published international agreements and generally accepted rules of international law are an integral part of the internal legal order, they have primacy over domestic legislation and are directly applicable when relations are regulated differently from

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<sup>35</sup> The Constitutional Charter was published in “Official Gazette of Serbia and Montenegro”, no. [1/2003](#). See: [Amendments I](#) and II - OG SMN, 26/2005-1.

<sup>36</sup> The Constitution was published in “Official Gazette of FRY”, no. 1/92. [Amendment I](#) - OG FRY, 34/92-643. [Amendments II](#) to IX - OG FRY, 29/2000-1

internal legislation.<sup>37</sup> In addition to the direct application of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Constitutional Court has accepted in the past practice an interpretation of the content and scope of certain legal principles and institutes in the manner in which they were interpreted by the European Court of Human Rights in its case-law. The case-law of the European Court of Human Rights has served the Constitutional Court to use a constitutional interpretation through a series of decisions in the field of abstract control of constitutionality and legality and within it to form the practice of applying the convention principles (rule of law, proportionality, prohibition of discrimination, equality, fundamental human rights and freedoms, minority rights...).

## **7. Are there major threats to the rule of law at the national level or have there been such threats in your country (e.g. economic crises)?**

The Constitutional Court of Montenegro has exercised its role and jurisdiction in conditions of frequent constitutional changes and transition. The process of transition is associated with a number of negative effects such as a drop in employment, a decline in production, economic crisis, etc. In this regard, the consequences of the transition period were the greatest threat to the preservation and protection of the principle of the rule of law at the national level.

Constitutional courts in transition countries are recognized as silent constituents who need to compensate the weaknesses, lack of political culture, poor democratic potential of institutions in those countries. They have to resolve the difficult and complex constitutional conflicts arising from the deep discrepancies between the desired “society”, described in the new constitutions and real life that is marked by the rooted historical traditions, the people’s mentalities that are difficult to change, and the continuing conflicts of a large number of those having opposing interests. They are expected to achieve the position of the main symbol of the rule of law in conditions of multiple contradictions and still fragile democracy, as well as conditions of economic crisis.

In such circumstances, the strengthening of the rule of law is of paramount importance. Realization of the rule of law is a continuous process, realized through the active participation of all state authorities. The operation of judicial, executive and legislative power within the boundaries of the Constitution and the rule of law is one of the basic principles of constitutional democracy.

The Constitutional Court, as the guardian of the constitutional order and guarantor of the legal system, plays a key role in the development of the rule of law. By interpreting the true meaning of the constitutional text in the context of “checks and balances”, the special role of the constitutional judiciary is emphasized, as an instrument of constitutionalization in terms of restricting and controlling state power. The rule of law, however, does not exist without

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<sup>37</sup> Article 9 of the Constitution

the independence of the courts and the authority of law (*auctoritas iuris*), which is a normative expression of the boundaries of the political authority.

The role of the Constitutional Court of Montenegro, bearing in mind its competence, is extremely important and noticeable. In that sense, it is necessary to point out to some of the important decisions of the Constitutional Court that gave their contribution in strengthening the rule of law in Montenegro. (see answers to question 4)

**8. Have international events and developments had a repercussion on the interpretation of the rule of law in your country (e.g. migration, terrorism)?**

In the case-law to date, the Constitutional Court of Montenegro has not dealt with issues arising from the effects of the migration crisis or terrorism.

**9. Has your Court dealt with the collisions between national and international legal norms? Have there been cases of different interpretation of a certain right or freedom by your Court compared to regional/international courts (e.g. the African, Inter-American or European Courts) or international bodies (notably, the UN Human Rights Committee)? Are there related difficulties in implementing decisions of such courts/bodies? What is the essence of these difficulties? Please provide examples.**

The Constitutional Court of Montenegro today becomes recognizable as one of the constitutional courts with extensive and very heterogeneous jurisdiction (9 different procedures in the protection of constitutionality, legality and basic human rights).

Even the most general insight into the provisions of Article 149 of the 2007 Constitution shows that the constitution-maker extended the jurisdiction of the Constitutional Court to protect not only the Constitution, but also international legal norms.

The abstract control of constitutionality and legality has been extended in such a way that the Constitutional Court decides on the conformity of laws with the Constitution and ratified and published international agreements. In this way, in essence, the Court aligns and “harmonises” the legal order of the country, that is “ensures unity in the legal system of Montenegro”, which is made up of norms of national and international law. This is a crucial issue of the hierarchy of legal norms in the national constitutional-legal order of the state.

In Montenegro, the system of incorporation and legal monism of legal norms has been accepted. According to Article 9 of the Montenegrin Constitution, ratified and published international treaties and generally accepted rules of international law are an integral part of the internal legal order, have a primacy over domestic legislation and directly apply when relations are regulated differently from the domestic legislation. The international agreements in force in Montenegro, therefore, have – in a formal sense – a supra-legal position, but in relation to the national constitution they retain the sub-constitutional position. In fact, in Montenegro, international agreements have a quasi-judicial position, as the constitution-maker allows the domestic laws passed by the national parliament to be controlled in relation to these. The Montenegrin constitution-maker does this explicitly, by

the provision of Article 145 of the Constitution, stipulating that “the law must be in conformity with the Constitution and ratified international agreements”.

The constitutional definition of the place of international treaties in the legal system of Montenegro, as the acts of supra-legal force, which are applied directly, left room for the Court to cross the traditional boundaries of interpretation of the national law. This is especially important for Montenegro as a member of the Council of Europe in terms of respecting and ensuring the protection of basic human rights and freedoms in accordance with standards built primarily through the case-law of the European Court of Human Rights in Strasbourg and the principles and solutions on which European Union law rests.

III The law and the state

**10. What is the impact of the case-law of your Court on guaranteeing that state powers act within the constitutional limits of their authority?**

The Constitution of Montenegro specifies the jurisdiction of the Constitutional Court of Montenegro in Article 149. *Inter alia*, the Constitutional Court of Montenegro also decides on the following: whether the President of Montenegro has violated the Constitution; whether there is a conflict of jurisdiction between the courts and other state authorities, between state authorities and local government authorities and between local government authorities; whether the measures and actions of state authorities, undertaken during the state of war and state of emergency, are in compliance with the Constitution. Also, the Court monitors the realization of constitutionality and legality and informs the Parliament on perceived occurrences of unconstitutionality and illegality.

Article 3 paragraph 2 of the Law on the Constitutional Court of Montenegro sets forth that the positions expressed in the decisions of the Constitutional Court are binding for all state authorities, state administration authorities, i.e. local government and local administration authorities, legal persons and other entities exercising public authority. Article 52 of the same Law stipulates that state authorities, state administration authorities, local government and local administration authorities, legal persons and other entities exercising public authority are obliged, within their competences, to enforce decisions of the Constitutional Court and their enforcement, when necessary, is to be ensured by the Government of Montenegro. In this sense, it is also necessary to mention Article 76 of the same Law stipulating, in paragraph 3, that in case of violation committed by an action or omission of a state authority, state administration authority, local government or local administration authority, legal person or other entity exercising public authority, the Constitutional Court is to prohibit, by way of a decision upholding the constitutional appeal, any further action i.e. to order the adoption of an act or undertaking of other appropriate measure or action to correct the already existing or eliminate any future detrimental consequences of the established violation of a human right or freedom guaranteed by the Constitution.

**11. Do the decisions of your Court have binding force on other courts? Do other / ordinary courts follow / respect the case-law of your Court in all cases? Are there conflicts between your Court and other (supreme) courts?**

Decisions of the Constitutional Court of Montenegro are binding on other courts. Paragraphs 2 and 3 of Article 151 of the Constitution of Montenegro stipulate that a decision of the Constitutional Court is to be published and that the decision is mandatory and enforceable. Article 76 paragraph 1 of the Law on the Constitutional Court stipulates that, when the Constitutional Court finds that a human right or freedom guaranteed by the Constitution has been violated by a contested individual act, the constitutional appeal will be upheld and the act will be abolished, in whole or in part, and the case remanded for retrial to the authority that had adopted the abolished act. Also, Article 77 of the same Law stipulates that, when the Constitutional Court abolishes an individual act and remands the case for retrial, the competent authority is obliged to take the case immediately or, at the latest, within 30 days from the day of receiving the decision of the Constitutional Court. In the retrial, the competent authority referred to in paragraph 1 of this Article is obliged to respect the legal reasons of the Constitutional Court stated in the decision and to decide in the retrial within a reasonable period of time.

**12. Has your Court developed/contributed to standards for law-making and application of law? (e.g. by developing concepts of independence, impartiality, acting in accordance with the law, *non bis in idem*, *nulla poena sine lege*, etc.).**

**13. Do you have case-law relating to respect for the rule of law by private actors in exercising public functions?**

So far, the Constitutional Court of Montenegro has had no case-law in this field.

**14. Are public officials accountable for their actions, both in law and in practice? Are there problems with the scope of immunity for some officials, e.g. by preventing an effective fight against corruption? Do you have case-law related to the accountability of public officials for their actions?**

Public officials are accountable for their actions, both in law and in practice. Article 82 point 15 of the Constitution of Montenegro stipulates that the Parliament of Montenegro decides on immunity rights. Article 86 of the Constitution stipulates that an MP enjoys immunity. An MP may not be held accountable criminally or otherwise or be detained on the account of an expressed opinion or vote in performing his or her function. At the same time, no criminal proceedings can be initiated against an MP, nor detention be ordered against him/her, without the approval of the Parliament, unless he or she is found in committing a criminal offence for which a sentence of more than 5 years in prison has been prescribed. Also, immunity is enjoyed by the President of Montenegro, the President and members of the Government, the President of the Supreme Court, the President and the judges of the Constitutional Court, the Supreme Public Prosecutor. The Law on Prevention of Corruption stipulates measures for the prevention of conflicts of public and private interest, regulates

restrictions in the exercise of public functions, submission of reports on the income and assets of a public official, protection of persons reporting a threat to the public interest implying the existence of corruption, as well as other issues of importance for the prevention and suppression of corruption. Article 4 paragraph 1 of this Law stipulates that the affairs of suppression of conflicts of public and private interest, restrictions in exercising public functions, verification of reports on the income and assets of a public official, undertaking actions based on whistleblowers' reports, protection of whistleblowers, as well as other affairs in accordance with this Law are performed by the Agency for Prevention of Corruption, as an autonomous and independent body, established by the Parliament of Montenegro, in accordance with this Law.

### **III The law and the individual**

#### **15. Is there individual access to your Court (direct/indirect) against general acts/individual acts? Please briefly explain the modalities/procedures.**

Yes. The provision of Article 54 of the Law on the Constitutional Court of Montenegro stipulates that the motion for the conformity assessment of laws with the Constitution and ratified and published international agreements, or other regulations and general acts with the Constitution and the law may be filed by: 1) a court if, in the proceedings before that court, the issue is raised concerning the conformity of law, or other regulation or general act, which is to be applied in the proceedings before the court, with the Constitution and ratified and published international agreements, or with the Constitution and the law; 2) other state authority, if it concerns a law or other regulation or general act that the authority implements in its work; 3) a local government authority, if it concerns a law or other regulation or general act that regulates issues related to local government; 4) five MPs. In the case referred to in paragraph 1 point 1 of this Article, a judge or the president of the chamber of judges will stay the proceedings and initiate the procedure for the assessment of constitutionality, i.e. constitutionality and legality of that regulation before the Constitutional Court and inform the president of the court who is obliged to inform the president of the Supreme Court. Also, Article 55 of the same Law stipulates that the Constitutional Court itself may initiate a procedure for the assessment of the conformity of laws with the Constitution and ratified and published international agreements, other regulation or general act with the Constitution and the law, in particular when: - during the constitutional appeal procedure, the issue is raised concerning the conformity of laws with the Constitution and ratified and published international agreements or conformity of other regulation and general act with the Constitution and the law, on the basis of which an individual act, which is the subject of the constitutional appeal, is adopted; or – during the procedure for the conformity assessment of laws with the Constitution and ratified and published international agreements or other regulation and general act with the Constitution and the law, the issue is raised concerning constitutionality, or legality of other provisions or other regulations related to the provisions that are the subject to assessment, whereas Article 56 of that Law stipulates that the Initiative for the initiation of procedure for the conformity assessment of a law with the Constitution and ratified and published

international agreements, or other regulation or general act with the Constitution and the law may be filed by a natural and legal person, as well as an organization, settlement, group of persons and other forms of organization that have no status of a legal person, and that do not need to have a direct legal interest in filing the initiative.

The part of the Law that is also dedicated to the proceedings before the Constitutional Court and the legal effect of its decisions concerning the constitutional appeal procedure also specifies access to our court against individual acts. Namely, a constitutional appeal may be filed by any natural or legal person, organization, settlement, group of persons and other forms of organization that have no status of a legal person, if they consider that their human right or freedom guaranteed by the Constitution has been violated by an individual act, action or omission of a state authority, state administration authority, local government authority, local administration authority, legal person or other entity exercising public authority. A constitutional appeal may be filed after the exhaustion of effective remedies implying that the appellant has used all legal remedies in the proceedings to which he or she was entitled in accordance with the law, including effective and extraordinary legal remedies and other special legal remedies that may lead to the amendment of the individual act in favour of the appellant, or the termination or rectifying of the action, or termination of the omission of a state authority, state administration authority, local government or local administration authority, legal person or other entity exercising public authority. A constitutional appeal may also be filed before the exhaustion of effective legal remedies referred to in paragraph 2 of Article 68 of this Law, if the appellant proves that the legal remedy to which he or she is entitled in a particular case is not or would not be effective. Article 69 stipulates that a constitutional appeal is to be filed within 60 days from: - the day of submission of an individual act against which a constitutional appeal may be filed in accordance with this Law; - the day of the termination of the current action violating a human right or freedom guaranteed by the Constitution, if there is no effective legal remedy against that action; - the last day on which an omission violating a human right or freedom guaranteed by the Constitution could be avoided, if there is no effective legal remedy against that omission.

In the case of an action or omission which lasts continuously for an extended period of time, a constitutional appeal may also be filed even while that action or omission is ongoing, if the appellant explains why that action or omission leads to a permanent violation of his human right or freedom guaranteed by the Constitution and what the permanent violation of that right or freedom consists of and proves that there is no effective legal remedy against that action or omission. If the case referred to in paragraph 2 of this Article concerns a failure of a court to take action within a reasonable time, a constitutional appeal may be filed only if the legal remedies for protection of the right to trial within a reasonable time have previously been exhausted, in accordance with the law governing the protection of the right to trial within a reasonable time, or if the appellant proves that these remedies are not or would not be effective.

**17. Has your Court developed case-law on other individual rights related to the rule of law?**

See answer under 4.

**18. Is the rule of law used as a general concept in the absence of specific fundamental rights or guarantees in the text of the Constitution in your country?**

In the case-law of the Constitutional Court to date in the proceedings for the assessment of constitutionality and legality, the principle of the rule of law has been used as the basis and the general principle, and in the framework of protection of individual rights in the constitutional appeal procedure within some of the rights guaranteed by the Constitution and the European Convention.